

## Caption Summary – for plea

APPENDIX A  
The Warehouse Ltd  
CRI-2024-004-010305

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Commerce Commission v The Warehouse Limited  
(Prosecutor) (Defendant)

**Charges 1-9**      **Offence:**      Supplied, offered to supply and/or advertised to supply goods that did not comply with the prescribed product safety standard for those goods.  
**Act:**                Sections 30(1) and 40(1) of the Fair Trading Act 1986  
**Penalty:**          \$600,000 per charge  
  
(Representative charges)

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## Summary of Facts

### 1 Introduction

- 1.1 Between 17 March 2021 and 18 May 2023 (**Charge Period**), the defendant, The Warehouse Limited (**The Warehouse**), offered for supply (both in store and online via its website) a range of three toys that presented a choking risk to small children. As a result, it faces nine representative charges under the Fair Trading Act 1986 (**FTA**) for supplying, offering to supply and advertising to supply goods that did not comply with the prescribed product safety standard under the Product Safety Standards (Children’s Toys) Regulations 2005 (**Regulations**).
- 1.2 The toys The Warehouse offered for supply and supplied were three variants of the “Roo Crew Take-Apart-Vehicle” toy (**Toys**), namely the race car, train and plane variants. The Toys did not comply with the prescribed standard because:
- (a) they were each labelled and/or marketed for use by children aged 36 months and under (**the Labelling**); and
  - (b) contained between 9 and 16 small removable pieces that presented a choking hazard to children of that age.
- 1.3 The Warehouse sold 12,411 of the Toys at a typical sale price of \$5 per toy, generating \$49,122 of revenue.
- 1.4 The Warehouse stopped supplying or offering for supply the Toys with the Labelling on or around 18 May 2023, immediately after the Commission notified it that the Toys may breach the Regulations and issued a recall of the Toys with the Labelling in September 2023.
- 1.5 In all, the charges cover approximate 3-month charge periods, as further particularised in **Schedule One**.

## 2 Defendant

- 2.1 The Warehouse began operating in 1982. The Warehouse operates 85 retail stores across New Zealand as well as its website, [www.thewarehouse.co.nz](http://www.thewarehouse.co.nz). It is one of New Zealand's largest department type stores, and one of the largest toy retailers in the country. Toy sales made up between 6.7% and 7.5% of total sales between 2020 and 2023.
- 2.2 The Warehouse's turnover for the 2024 financial year was \$1.792 billion. Its turnover for the 2023 financial year was \$1.89 billion. The Warehouse Group (the listed company that owns The Warehouse) expects FY25 EBIT (pre-IFRS16) for the 53 weeks to 3 August 2025, to be in the range of a \$5 million loss to a \$5 million profit.

## 3 The legislative context

### Overview

- 3.1 The Regulations apply (with certain exceptions) to toys manufactured, designed, labelled, or marketed for use by children up to and including 36 months, whether or not the toys are also manufactured, designed, labelled, or marketed for use by children over that age.
- 3.2 Toys captured by the Regulations must meet the specifications set by the Australian/New Zealand Standard entitled 'AS/NZS ISO 8124.1:2002 Safety of toys—Part 1: Safety aspects related to mechanical and physical properties', which the Regulations adopt, with reference to specified subclauses as varied, as a product safety standard for toys (**Standard**).
- 3.3 It is a breach of s 30(1) of the FTA to supply, offer to supply or advertise to supply toys to which the Regulations apply and which do not meet the Standard. Breaching s 30(1) is an offence (via s 40(1) of the FTA) punishable on conviction of a body corporate to a maximum penalty of \$600,000 per charge.

### Reasonably foreseeable abuse and small parts tests

- 3.4 Relevant to this case is the reasonably foreseeable abuse tests set out in the Standard. These tests are designed to simulate situations in which possible damage can occur to a toy as a result of reasonably foreseeable abuse in the hands of a child. Any small parts liberated during that reasonably foreseeable abuse testing are tested further, as set out in the clauses of the Standard below:
- (a) Clause 4.4.1 stipulates that the removable components of toys, or components which are liberated during testing, must not fit entirely into a prescribed small parts cylinder:
- (b) Clause 5.2 stipulates how to apply the small parts test, specifically that the removable components of the toy or any component liberated after the reasonably foreseeable abuse testing should be fitted (or attempt to be fitted) into the small parts cylinder without compressing it and in any orientation.

## 4 The Toys

### Test purchase

- 4.1 On 18 May 2023, while undertaking product safety inspections, the Commission purchased six units of the Toys, comprising of two units of each variant (that is, two race cars, two trains and two planes) from The Warehouse's retail store on Lincoln Road, Henderson, Auckland.
- 4.2 The Toys were individually packaged in white netting. Each variant of the Toys can be seen inside packaging in **Schedule Two, Image two**.
- 4.3 As shown in Schedule Two, Image one, each variant bore an information tag on which there were various representations, relevantly including:
- (a) Details of the product itself, including that it was manufactured from "Ecowood" and that it was a "take-apart vehicle for ages 3+".
  - (b) A photograph of an adult woman and a baby or toddler (accepted to be under 36 months old) playing with the toys, with at least one of the toys partially dismantled with the tools that are part of the toy and small parts displayed next to it.
  - (c) A bold warning containing a triangle with an exclamation mark inside of it, with the words "WARNING: CHOKING HAZARD – Small parts. Not for children under 3 years."
- 4.4 Notwithstanding the warnings, the prominent photo of the baby playing with the toy, conveyed, the overall impression that the Toys were for use by children aged 36 months and under. Accordingly, the Toys were labelled and/or marketed for use by children aged 36 months and under.
- 4.5 The individually packaged Toys were presented for sale together, inside display boxes. The display boxes also showed an image of a baby playing with the Toys, along with the words "take-part vehicle for ages 3+". A display box containing individually packaged Toys is shown in **Schedule Two, Image three**.
- 4.6 The Toys were displayed in an aisle with other toys suitable for children aged 5 years old and under (i.e., which included toys suitable for children aged 36 months and under and toys for children aged 36 months and over).

### Testing for compliance with the Standard

- 4.7 During its investigation, the Commission sent a unit of each variant of the Toys to Choice Test Research (**Choice**) to test whether the Toys complied with the Standard for toys for children aged 36 months and under, which included an assessment for whether the Toys had small parts that made them unsuitable for children in that age group.
- 4.8 Choice determined that the Toys complied with the Standard based on the reasonably foreseeable abuse tests, as well as the drop test, the torque test, the tension test, and the compression test, but did not comply with the Standard because they failed the small parts test. Specifically, the Toys had wheels and screws and some variants had axles and a bumper that were removable components that fit entirely into the small parts cylinder:
- (a) **Train (10 small parts):** The 10 screws are removable components. These are shown in **Schedule Three, Image one**.

- (b) **Race car (16 small parts):** The 9 screws, 4 wheel axles, 2 front wheels and the rear bumper are removable components. These are shown in **Schedule Three, Image two.**
- (c) **Plane (9 small parts):** The 7 screws and 2 wheel axles are removable components. These are shown in **Schedule Three, Image three.**

4.9 A child aged under 36 months may have been able to remove at least some of the small parts by hand (ie, without using the tools) and therefore the Toys presented a choking risk.

## 5 The Warehouse's response to the Commission's investigation

### Events between the test purchase and product recall

- 5.1 On 18 May 2023 (the day of the test purchases), the Commission notified the store manager that the Toys appeared to contain small parts and that the label and display boxes showed a baby playing with the Toys.
- 5.2 The same day, the store manager alerted The Warehouse support office and immediate action was taken to remove the Toys from sale.
- 5.3 On 26 May 2023, the Commission notified The Warehouse of its view that the Toys "may breach" the Regulations and in particular its concern that the toys "appear to be marketed to children under the age of 36 months and may have small parts that could be a choking hazard".
- 5.4 A product recall was subsequently issued. As at 30 September 2024, a total of 52 Toys had been returned.

### Subsequent enquiries

- 5.5 In March 2024, The Warehouse elected not to attend a voluntary interview but instead provided written responses to a series of questions relating to The Warehouse's compliance systems and processes, in particular as they related to the Toys. The Warehouse advised:
  - (a) It has extensive internal guidelines to prevent any product safety issues, including dedicated Quality Assurance (QA) staff who ensure toy product safety standards are met.
  - (b) The supplier of the goods had the Toys tested by a reputable international testing agency (Intertek), which they supplied to The Warehouse. The QA team had reviewed the testing documentation for the Toys.
  - (c) The relevant buyer for The Warehouse inspected samples of the Vehicle Toys and evaluated the age appropriateness of them prior to ordering.
  - (d) Regarding the imagery of a baby in nappies playing with the Toys on the Labelling The Warehouse stated:
    - (i) The Labelling includes a large label which clearly states for ages 3+;
    - (ii) The Labelling also includes a large warning label stating 'WARNING: CHOKING HAZARD – Small parts Not for children under 3 years; and

- (iii) While the Labelling shows a child under the age of 36 months, he is under the direct supervision of a parent. Furthermore, the Standard makes no restriction on the use of imagery of children under 36 months.

5.6 On 26 June 2024, the Warehouse agreed to the buyer attending a voluntary interview with the Commission. He stated, in summary:

- (a) Although this was the first time that he had purchased toys from this particular manufacturer (Boley International), he had been buying toys for children aged 3 to 5 years for about 6 or 7 years, and in that time had read the applicable international standards and various articles and publications relating to age determinations for toys, but did not have clinical experience;
- (b) When he visits manufacturers' showrooms to inspect toys for potential purchase, his general practice is to only go to the part of the showroom for toys for children aged 3-5 years.
- (c) When he inspected samples of the Toys at the Boley showroom prior to ordering, he determined the Vehicle Toys required tools to undo and take apart and therefore in his view a child under 36 months would not be able to play with them;
- (d) he examined the Labelling, which already had the 3+ warning on it. He said that even though the Labelling had the picture of a small child on it, because that child was under supervision, that meant his assessment that the toy was designed for those over the age of three was appropriate;
- (e) The Warehouse obtained a report from a testing agency that the Toys complied with the Standard (as applicable for children aged 36 months and over) before The Warehouse purchased them; and
- (f) irrespective of the warning label specifically directing a purchaser to the fact that the Toys were made to be taken apart and contained small parts, he thought that the presence of the small parts and the lack of instructions on how to take the product apart and put it back together made it obvious upon picking up the toys in their packaging and that it would therefore be readily apparent to any buyer of the Toys that they were not suitable for children under 36 months of age.

5.7 There is no evidence to suggest that the Report referred to at [5.5](b) and [5.6](e) followed from an examination of the Toys with the Labelling.

## 6 Detriment and gain

- 6.1 As noted above, in the charge period, The Warehouse sold 12,411 units of the Toys, resulting in total gross sales of \$49,122.
- 6.2 Although it is not possible to determine whether the purchasers were buying the toys intending that they be used by children over or under 36 months of age, each of the toys posed a choking risk to children aged 36 months and under.
- 6.3 The Warehouse has not received any complaints about the Toys from consumers.
- 6.4 Although no known injuries have occurred as a result of the Toys being used by children aged 36 months and under, only a tiny fraction of the total products sold have thus far been returned (52), thus the risk of future harm remains live.

## **7 Cooperation**

- 7.1 The Warehouse cooperated with the Commission's investigation including through the voluntary provision of information and [REDACTED] attending a voluntary interview, although the Commission considers some of TWL's responses to the Commission's investigation were not as prompt and helpful as they could have been.

## **8 Defendant's history**

- 8.1 In the last 12 years The Warehouse has received 2 warnings, 16 compliance advice letters and 10 letters of an educative nature from the Commission. Of the letters sent to The Warehouse, 1 compliance letter and 5 letters of an educative nature related to product safety issues covering children's nightwear, sunscreen, and children's bikes. No product safety issues relating to toys have been recorded.
- 8.2 The Warehouse was prosecuted in 2009 and fined a total of \$209,600. The charges related to The Warehouse misleading consumers about the advertised price of goods, using bait advertising, making false claims that certain products were 'exclusive to The Warehouse' and false labelling on some of their duvets.

## Schedule One – charges

Charge No.	Charge Period
1	14 March 2021 to 30 June 2021
2	1 July 2021 to 30 September 2021
3	1 October 2021 to 31 December 2021
4	1 January 2022 to 31 March 2022
5	1 April 2022 to 30 June 2022
6	1 July 2022 to 30 September 2022
7	1 October 2022 to 31 December 2022
8	1 January 2023 to 31 March 2023
9	1 April 2023 to 26 May 2023

Schedule Two – Images showing labelling, packaging and display of the Vehicle Toys inside The Warehouse retail store on 18 May 2023

Image one: Label attached to individually packaged Vehicle Toys

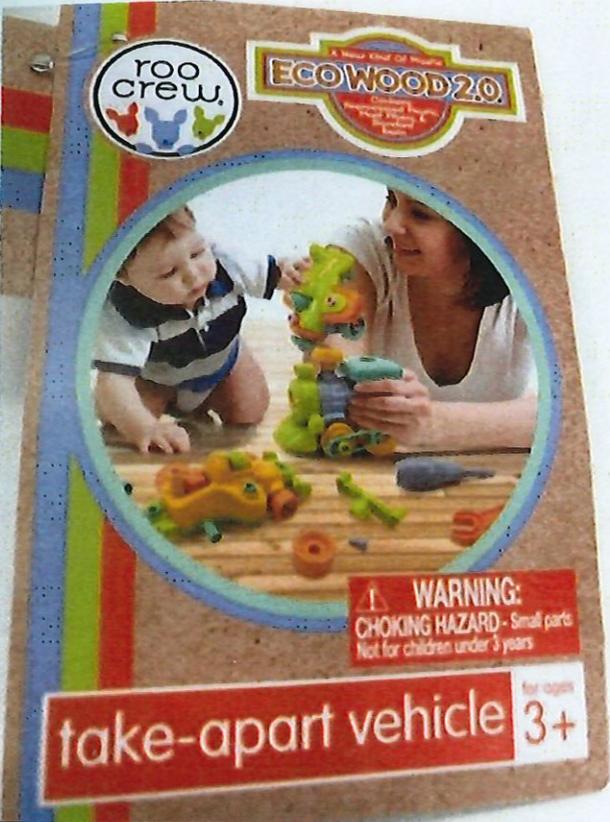


Image two: Individually packaged Vehicle Toys



Image Three: Display box containing individually packaged Vehicle Toys

