

Communique

The Commerce Commission's Enforcement Criteria

The Commerce Commission has used enforcement criteria in various modes for a number of years. The criteria assist the Commission in its discretionary activities when making decisions on whether to open an investigation, and what enforcement action it will take at the end of an investigation.

The Commission has recently reviewed its criteria to make it more relevant and consistent. The criteria are such that they can be applied across the Commission's range of enforcement responsibilities and at each stage of its enforcement process.

The courts recognise that the Commission must apply an administrative discretion. Two previous High Court judgments have said the Commission must exercise judgement about a wide range of matters including the strength of the Commission's case, the availability of funds, competing claims on those funds by other cases and assessments of the comparative importance of the various cases in which the Commission is involved.

The Commission gathers information from members of the public and industry, market and business specific monitoring. The Commission considers the available information for its relevance to the Commission's responsibilities and current work programme, the enforcement criteria and priority areas for new enforcement work.

The Commission decides whether to commence or continue enforcement action, the most appropriate type(s) of enforcement action and the most appropriate response in each case. To assist it in making these decisions, the Commission applies the following enforcement criteria:

- extent of detriment;
- seriousness of conduct;
- public interest.

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Extent of Detriment

Detriment is assessed by applying both quantitative and qualitative measures to determine the impact and consequences of the alleged contravention. The greater the likely level of detriment arising from the conduct in question, the more likely it is that the Commission will take or continue with enforcement action.

In assessing detriment, the Commission considers the following questions:

- Are consumers or businesses likely to suffer and to what extent:
 - physical harm?
 - increased costs?
 - loss of property?
 - impaired choice?
- Are the more vulnerable targeted by the behaviour?
- Are a wide range of consumers or businesses likely to be affected?
- Is competition in the relevant markets likely to be adversely affected?
- Are excess profits likely to be gained?
- Are emerging markets likely to be adversely affected?
- Is the behaviour likely to have significant adverse national or regional impact?

Seriousness of Conduct

The more serious the conduct, the more likely it is that the Commission will begin or continue enforcement action.

In assessing the conduct, the Commission considers the following questions:

- Is the conduct deliberate, reckless or very careless?
- Is the conduct repeat or ongoing behaviour?
- Is there a serious departure from expected lawful commercial behaviour?
- Is the conduct/information difficult to detect by businesses or consumers?
- Can the conduct be undone?
- Is there likely to be a contravention of a per se provision?

In the Public Interest

The Commission must have regard to a number of factors in the wider public interest. In assessing public interest the Commission considers the following questions:

- Is there likely to be widespread public interest in the issue?
- Would a decision not to commence or continue enforcement action likely undermine public confidence in the law?
- Is it more appropriate for the Commission, rather than another agency or an affected party, to address the issue?
- Are there any mitigating or aggravating features involved?
- Do the personal circumstances of the parties involved argue for or against enforcement action?
- Is there a significant need to clarify the law?
- Is it necessary to reinforce the application of the legislation?
- Are the issues timely?

The Commission considers the criteria together, weighing them against the available information and, standing back, deciding what action is required in the context of the Commission's overall activities. In applying the criteria, the Commission is also mindful of the changes it wishes to achieve from taking or continuing enforcement action in each matter. ■

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Enforcement Responses – Options

The Commission has identified a number of enforcement responses, set out below, as options for resolving investigations into, and prosecutions of, suspected breaches of the Commerce, Dairy Industry Restructuring, Electricity Industry Reform and Fair Trading Acts. In determining the preferred responses, the Commission considers the individual circumstances against its enforcement criteria.

Investigations on the basis of the evidence gathered over the course of an investigation, each response is taken when:

NO FURTHER ENFORCEMENT	there is no breach or possible or likely breach of the relevant legislation. This action required conclusion may include situations where the information received is incorrect, a business goes on to apply for an adjudication in respect of its activities, the behaviour is outside the jurisdiction of the Commission, or it is more appropriate for another agency to consider the matter.
COMPLIANCE ADVICE LETTER	there is a possible or likely, but not serious, breach of the relevant legislation. The aim of this option is to inform the person or business in question and deter future illegal behaviour.
WARNING LETTER	there is a likely breach of the relevant legislation. The aim of this option is to inform, stop the behaviour in question, and deter the business from repeat or new illegal behaviour.
SETTLEMENT	there is a likely and serious breach of the relevant legislation, which the business acknowledges. The aim of this option is to modify the behaviour of the business in question, inform others and, where appropriate, seek redress for affected parties through the terms and conditions of the settlement. Settlements are entered into in circumstances where the Commission holds the view that the benefits obtained through the terms of the settlement provide a more appropriate outcome.
DECISION TO PROSECUTE	<p>there is a likely and serious breach of the relevant legislation. The aim of this option is to modify or stop the behaviour of and penalise the business in question, inform and modify the behaviour of others and, where appropriate, seek redress for affected parties.</p> <p>The Commission may take criminal or civil action against the business in question.</p> <p>Civil action is taken in relation to:</p> <ul style="list-style-type: none"> – anti-competitive practices and prohibited business acquisitions and other ownership arrangements under the Commerce and EIR Acts; – declaratory orders and other relief for a variety of unfair trading practices under the Fair Trading Act; and – breaches of the conditions for the entry and exit of potential and existing farmer shareholders or any regulations made pursuant to the DIR Act. <p>Civil action may include the Commission seeking interim injunctions during the course of an investigation to prevent or stop unlawful activity. The Commission may seek permanent injunctions (or under the Commerce Act only, cease and desist orders) at the conclusion of an investigation.</p> <p>Criminal action is taken in relation to offences under the Fair Trading Act.</p>

Prosecutions – on the basis of the circumstances and progress of a prosecution, each response is appropriate when:

WITHDRAWAL/ DISCONTINUANCE	<p>it is no longer appropriate or necessary to continue, such as where a business goes into liquidation, an individual is no longer in New Zealand or where the Commission considers it has insufficient evidence to continue.</p> <p>Withdrawal or discontinuance can also occur when a party wishes to withdraw an appeal or judicial review proceeding against a Commission decision.</p>
SETTLEMENT	there is mutual agreement between the parties, any stage after a Commission decision to prosecute or to defend an appeal, where the Commission holds the view that the benefits obtained through the terms of the settlement provide a more appropriate outcome.
CONCLUDED	a final judgment on liability, including a business admitting liability, is obtained from, or a proceeding is dismissed by, the court. Final judgment is achieved after all appeals are exhausted.

