

JULY 2008

**ENFORCEMENT UNDER PART 4A OF THE
TELECOMMUNICATIONS ACT 2001**

GUIDELINES

1. PURPOSE OF THESE GUIDELINES

The 2006 amendments to the Telecommunications Act 2001 (**Act**) created a new enforcement regime under Part 4A. Part 4A provides new powers to enforce regulatory instruments, such as standard terms determinations or a separation undertaking.

These guidelines provide a general overview of:

- (i) the Commerce Commission's (**Commission**) enforcement powers and tools; and
- (ii) how complaints may be made to the Commission under the Act.

These guidelines are not a substitute for legal advice and any decision by the Commission to take enforcement action will be made on a case-by-case basis in accordance with the Act.

2. THE COMMERCE COMMISSION

The Commission's purpose is to promote dynamic and responsive markets so that New Zealanders benefit from competitive prices, better quality and greater choice.

The enforcement of statutory and regulatory provisions forms one component in the Commission's overall role in promoting competition for the long-term benefit of end-users of telecommunications services in New Zealand.

In particular, the Telecommunications Commissioner is empowered to take enforcement action under the Act. The Commission retains other enforcement powers under the Commerce Act 1986 that apply to telecommunications e.g. see the Commission's January 2008 guideline *The Interrelationship between Part 2 of the Commerce Act 1986 and the Telecommunications Act 2001*.¹

¹ Available at: <http://www.comcom.govt.nz/Publications/ContentFiles/Documents/Guidelines%20-%20Interationship%20between%20Commerce%20and%20Telco%20Act.pdf>

3. ENFORCEABLE OBLIGATIONS

The Act establishes two broad sets of obligations that can be enforced:

- those relating to specific provisions in the Act and regulations; and
- those relating to regulatory tools (determinations, approved codes, a separation undertaking and registered undertakings) under the Act.

Different enforcement actions exist for each set of the obligations above. These enforcement powers are outlined below and summarised in the flowcharts attached as Appendix 1.

The Telecom separation undertaking under Part 2A of the Act can be enforced via either set of enforcement powers.

4. SPECIFIC PROVISIONS

In section 156A, the Act lists 14 separate matters. Failure to comply with these matters can result in enforcement action being taken. For example, failure to comply with such matters might include:

- if a person knowingly submits a standard terms proposal that fails to comply with section 30G (s156A(c)); and
- if Telecom fails, without reasonable excuse, to comply with the information disclosure requirements of accounting separation (s156A(g))

If there is a *prima facie*² breach of one of the 14 matters listed in s156A, the Commission may decide to serve a civil infringement notice³ or apply to the High Court for a pecuniary (monetary) penalty (s156B). When making that choice, the Commission must take into account the following matters (s156C):

- the seriousness of the alleged breach;
- the circumstances in which the alleged breach took place;
- whether or not the person who is alleged to have committed the breach has previously committed a breach of that kind or has engaged in any similar conduct;
- the culpability of the person who is alleged to have committed the breach;
- the nature and extent of any commercial gain resulting from the alleged breach; and

² "Prima facie" means "on its first appearance", or "by first instance". It is used to signify that on first examination, a matter appears to be self-evident from the facts.

³ A civil infringement notice is a penalty imposed by administrative agencies - in this context the Commission. It does not include court imposed fines or reparations. An infringement system is considered to be an administratively efficient way of deterring (and penalising) "lower-end" offending.

- the nature and extent of any loss or damage suffered by any person as a result of the alleged breach.

(a) Civil Infringement Notice

In the event of a breach in s156A, the Commission may serve a civil infringement notice requiring a person (including a company) to pay a pecuniary penalty of \$2000⁴ by a specified date. A person may object to the notice (s156E) and may appeal to the District Court where the Commission refuses the objection. The Commission may also, subject to certain restrictions⁵ publish a notice with the name of the person who committed the breach.

If a person objects to the Notice, the Commission will not seek payment until it has considered the objection. If, following the Commission's refusal of an objection, a person appeals under s156I, the Commission will usually seek payment based on the refund notice under s156F(1)(c).⁶

(b) Pecuniary Penalty

Alternatively, in the event of a breach in s156A, the Commission may apply to the High Court for an order requiring that a person pays a pecuniary penalty (s156B(1)(b)). The Commission can also apply for a pecuniary penalty if a person has failed, without reasonable excuse, to comply with a separation undertaking.

The amount of any pecuniary penalty for each act or omission must not exceed (s156L(3)):

- \$10 million for a breach of the separation undertaking under Part 2A (and \$500,000 per day (or part thereof) for a continuing breach)
- \$1 million for a breach of accounting separation requirements (and \$50,000 per day (or part thereof) for a continuing breach)⁷
- \$300,000 in any other case (and \$10,000 per day (or part thereof) for a continuing breach)

5 ENFORCEMENT OF DETERMINATIONS, APPROVED CODES AND REGISTERED UNDERTAKINGS.

The Act lists the following regulatory tools (s156N) as **enforceable matters** which are enforced in the second legislative pathway. For ease of reference, these enforceable matters are grouped as A and B to indicate the legislative pathway.

⁴ Clause 3, Telecommunications (Civil Infringement Notice) Regulations 2007.

⁵ Section 156K(2).

⁶ See also section 156I(3).

⁷ Section 156A(g) relates to accounting separation for s69ZB only.

Group A – Where the Commission must receive a complaint to take a High Court action

- a ‘bilateral’ determination under s27
- a standard terms determination under s30M
- a residual terms determination under s30ZB

Group B – Where the Commission can use its own initiative to seek High Court action whether or not it has received a complaint under s156O

- a designated multi network service determination under s39
- a separation undertaking under Part 2A
- an approved code under Schedule 2
- a registered undertaking under Schedule 3A

6 COMPLAINTS BY ACCESS SEEKERS/ACCESS PROVIDERS

Under s156O an access seeker or an access provider of a designated access service or specified service can make a formal written complaint to the Commission that an enforceable matter listed in either of groups A and B above has been breached. Appendix 3 of the guidelines sets out the information the complainant should provide and the process the Commission will generally follow.

Complaints in regard to any alleged breach of Telecom’s separation undertakings must be made to the Commission pursuant to the Commission’s Complaints (Operational Separation) Handling Guidelines. [*insert hyperlink*]

After the Commission has received a complaint it must consider it and then decide whether to:

- take no action;
- clarify the interpretation of the terms and conditions in dispute⁸ (with the exception of a separation undertaking); or
- take High Court action.

In making its decision, the Commission will consult with interested parties and consider the purpose of promoting competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand. Upon making a decision the Commission will promptly give notice to the complainant of the Commission’s decision on the complaint.

⁸ By way of a clarification under s58 if the complaint relates or appears to relate to a dispute over the interpretation of the terms or conditions of the enforceable matter and the dispute has not been previously submitted to any dispute resolutions procedure that is included in the enforceable matter. See s156O(2)(b)(ii), 156O(3) and 156(5). Section 156O is directed at the Commission’s action on receiving a complaint. Nothing in section 156O limits the Commission’s powers to amend or review any standard terms determination or residual terms determination pursuant to ss.30R or 30V.

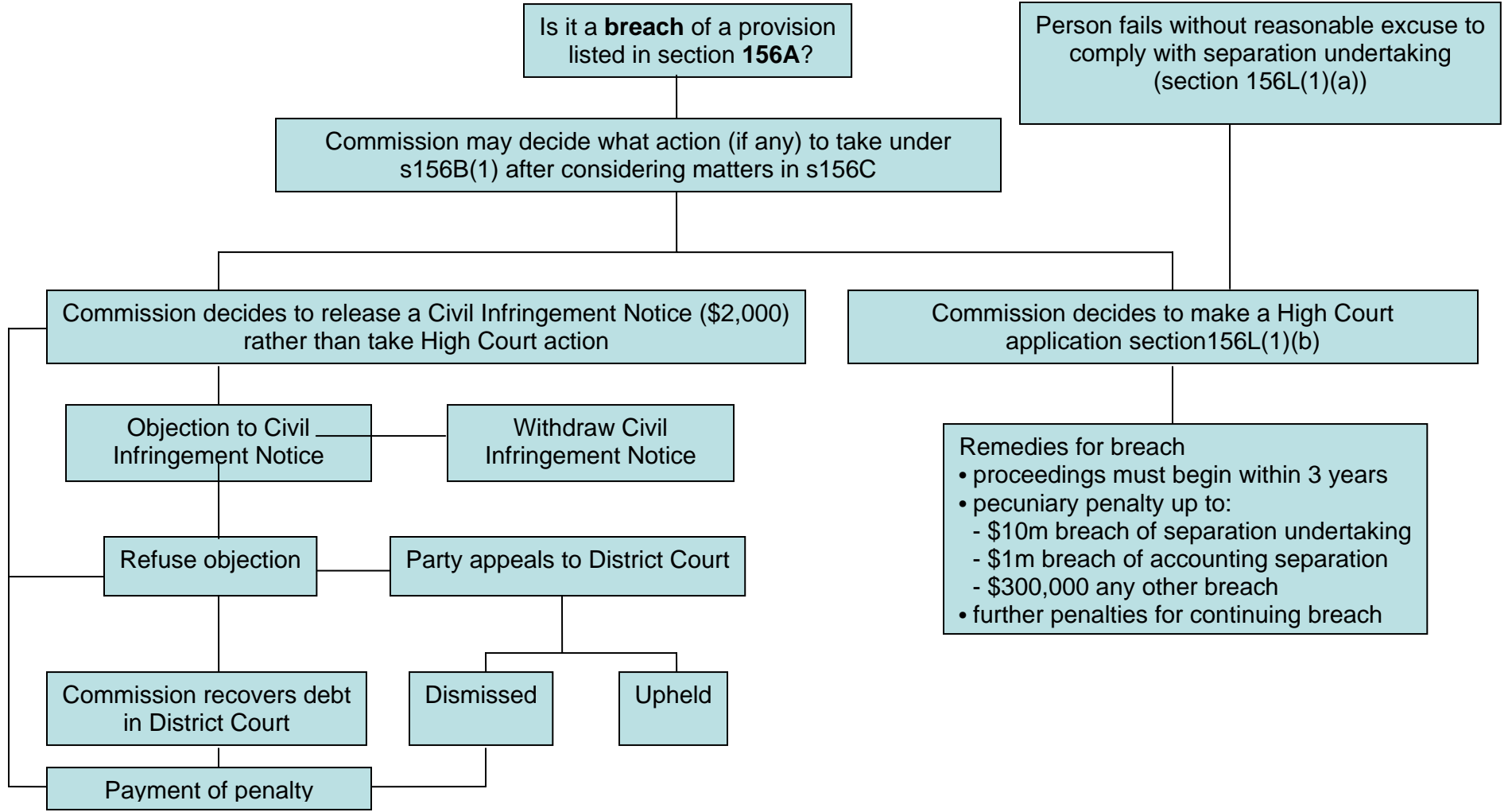
7 HIGH COURT ACTION

The Commission can take High Court action for Group A Enforceable Matters only if it has received a complaint. However, the Commission can take High Court action for Group B Enforceable Matters on its own initiative.

Any party to an enforceable matter, including any provider of telecommunications services that is affected by a breach of any separation undertaking,⁹ may take High Court action for any Enforceable Matter. Parties may apply to the High Court for compensatory damages, although only the Commission may apply for a pecuniary penalty under subpart 2.

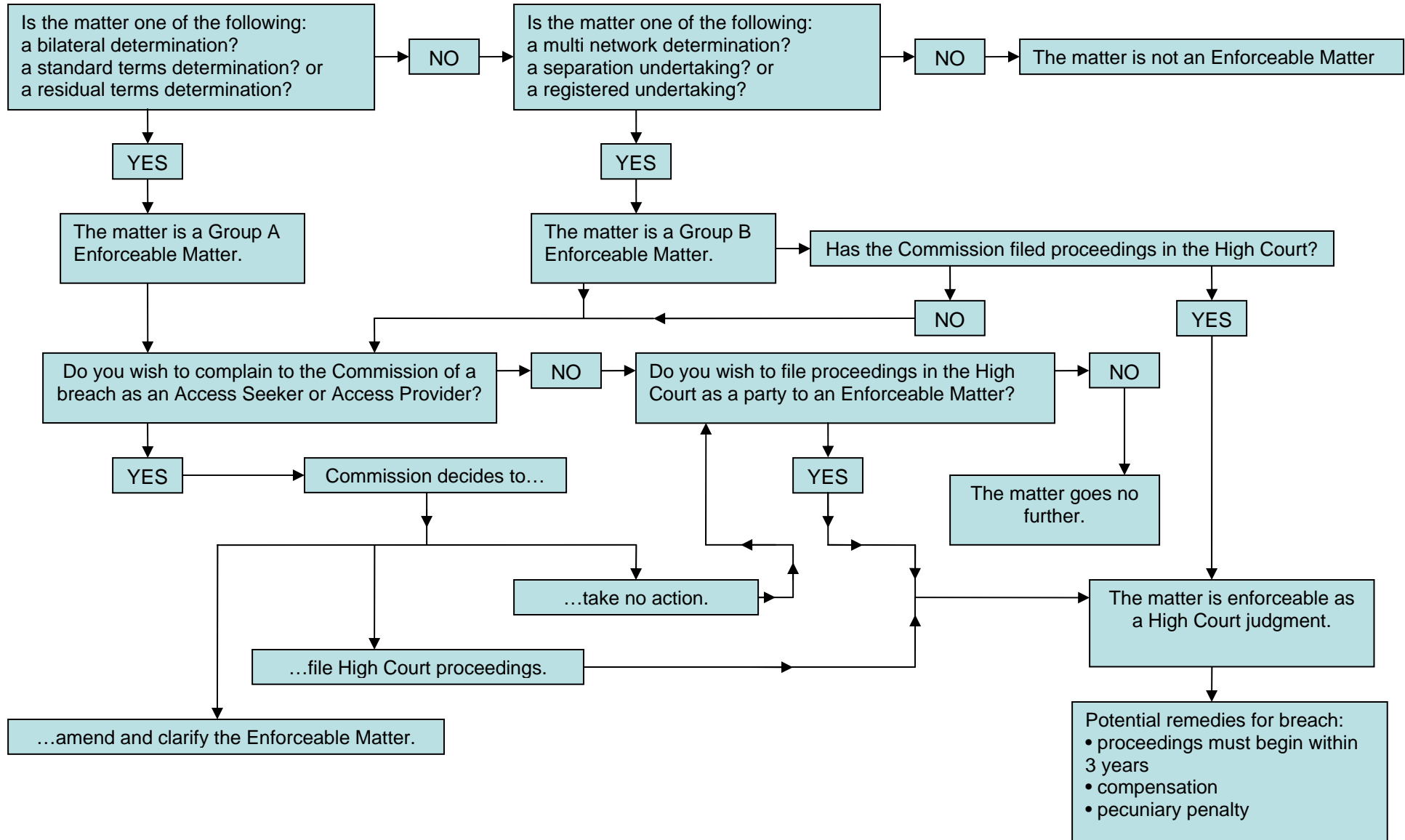
⁹ Section 156N.

Appendix 1
SPECIFIC PROVISIONS
 Subpart 1, Part 4A



Appendix 2

DETERMINATIONS, APPROVED CODES AND REGISTERED UNDERTAKINGS - SUBPART 2, PART 4A



Appendix 3

Complaint (Breach of Enforceable Matter) Form

Complaints regarding a breach of an enforceable matter under the Telecommunications Act 2001 (other than a breach of a separation undertaking) should be addressed to:

Director
Telecommunications Branch
Commerce Commission
44-52 The Terrace
P.O.Box 2351 Wellington

Should you need further assistance please contact the Commerce Commission on +64 4 924 3600.

If your submission contains confidential information, please identify the information in square brackets and provide a separate non-confidential version. This non-confidential version may be copied to the target of the complaint if the Commission considers that appropriate.

Preliminary Information		
Details of Complainant		
Legal name of company		
Business Address		
E-mail	Telephone Number	Fax Number
Details of person authorised to discuss complaint		
Name	Position in company	
Address		
Email	Telephone Number	Fax Number
Details of party against which the complaint is made		
Name of relevant Party		

Business Address		
E-mail	Telephone Number	Fax Number
List of supporting documents:		
Nature of Complaint		
<p>To satisfy the Commission that the complaint is about compliance with an enforceable matter, an explanation of the scope of the complaint must be provided. These would be expected to include:</p> <ul style="list-style-type: none"> • full details of services relevant to the complaint i.e. whether the business complainant is an access seeker or access provider of a designated access service or specified service? (see Schedule 1, Telecommunications Act 2001) For example, XX Ltd is an access seeker in respect of the Unbundled Bitstream Access Standard Terms Determination; • the party or parties who are the target of the complaint and their relationship to the complainant (including information on how they have attempted to resolve the dispute); • a summary of the complaint (background information leading up to the alleged breach, service, key dates, alleged infringement, harm done and relief sought where appropriate); • wherever possible, please identify which enforceable matter has been infringed and details of how that has occurred (including specific clauses or sections alleged to have been breached) and any supporting evidence. (if this is not possible, please provide a statement explaining why it cannot provide the evidence); • how the alleged infringement affects competition in telecommunications markets and the long term interests of end users of telecommunication services; and • details of losses suffered or about to be incurred as a result of the breach. 		
Signed by a Officer of Company		
<p>I hereby confirm that all information provided to the Commission as part of this notification is true and correct.</p> <p>Date Signature:..... Position:.....</p>		