

October 2013

# Enforcement Response Guidelines

This document should be read in view of amendments to the Commerce Act made in August 2017. The Commission will update the document in the near future to reflect changes made under the Act.

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## Purpose

1. The Commerce Commission has issued these Enforcement Response Guidelines (ERGs) to:
  - 1.1 describe our approach to enforcing breaches of Parts 2 and 3 of the Commerce Act 1986, the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act 2003 (CCCF Act)
  - 1.2 outline our enforcement response options; and
  - 1.3 make transparent the factors that we will take into account when deciding which response to use.

## Scope

2. We are responsible for enforcing New Zealand's competition, fair trading and credit contract laws. The ERGs relate to all enforcement action we take following investigation under Parts 2 or 3 of the Commerce Act, the Fair Trading Act and the CCCF Act. Enforcement may be civil, criminal, or both, and may be taken against individuals, companies and other entities.
3. The ERGs do not apply to enforcement action arising out of:
  - 3.1 Part 4 of the Commerce Act 1986 (which relates to regulated goods and services)
  - 3.2 the Dairy Industry Restructuring Act 2001; or
  - 3.3 the Telecommunications Act 2001.

## Background

4. Our purpose is to achieve the best possible outcomes in competitive and regulated markets for the long-term benefit of New Zealanders. We are committed to ensuring that New Zealand businesses and consumers understand our activities and the ways in which we exercise our powers and functions.
5. When determining the most appropriate enforcement response to a particular situation, we do not apply a rigid formula. Rather, we weigh all competing considerations and exercise our judgement. Much will depend on the circumstances of the case and the attitude and responsiveness of the parties involved. Not every breach requires litigation; nor can we accept every offer of settlement.
6. The ERGs are not exhaustive, and are not intended to be legally binding. We may revise the ERGs from time to time in accordance with our organisational objectives and priorities.
7. The ERGs should be read alongside three related Commission documents:<sup>1</sup>
  - 7.1 our *Enforcement Criteria* – these criteria apply at every stage of an investigation and enforcement process, and are referred to later in these guidelines
  - 7.2 our *Model Litigant Policy* – this policy expresses our commitment to enforcing the law in a principled and responsible way; and
  - 7.3 our *Criminal Prosecution Guidelines* (CPGs), which are attached as **Attachment A** to the ERGs – the CPGs provide further information about the principles and processes that apply when we are deciding whether to bring a criminal prosecution.

1. These are available on our website at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-criteria/> and <http://www.comcom.govt.nz/the-commission/commission-policies/model-litigant-policy/>

## Screening and investigation of complaints

8. We cannot give priority to all the complaints that we receive. While we consider all complaints carefully, some complaints:
  - 8.1 do not identify a breach of the law
  - 8.2 are factually or legally incorrect
  - 8.3 are outside our jurisdiction<sup>2</sup>
  - 8.4 are out of date for us to action<sup>3</sup>
  - 8.5 do not identify any real harm
  - 8.6 are not in the public interest to pursue
  - 8.7 may be more effectively dealt with by other agencies; or
  - 8.8 involve private parties who are able to try to resolve their own dispute.<sup>4</sup>
9. After an initial screening, some complaints will move to the investigation stage. During this stage, we gather and analyse evidence so that we can form a view on whether a breach of the law may have occurred. We assess the matter in light of our Enforcement Criteria in order to determine whether to take the complaint further and, if so, to identify the enforcement responses applicable to the circumstances.

## Enforcement Response Model

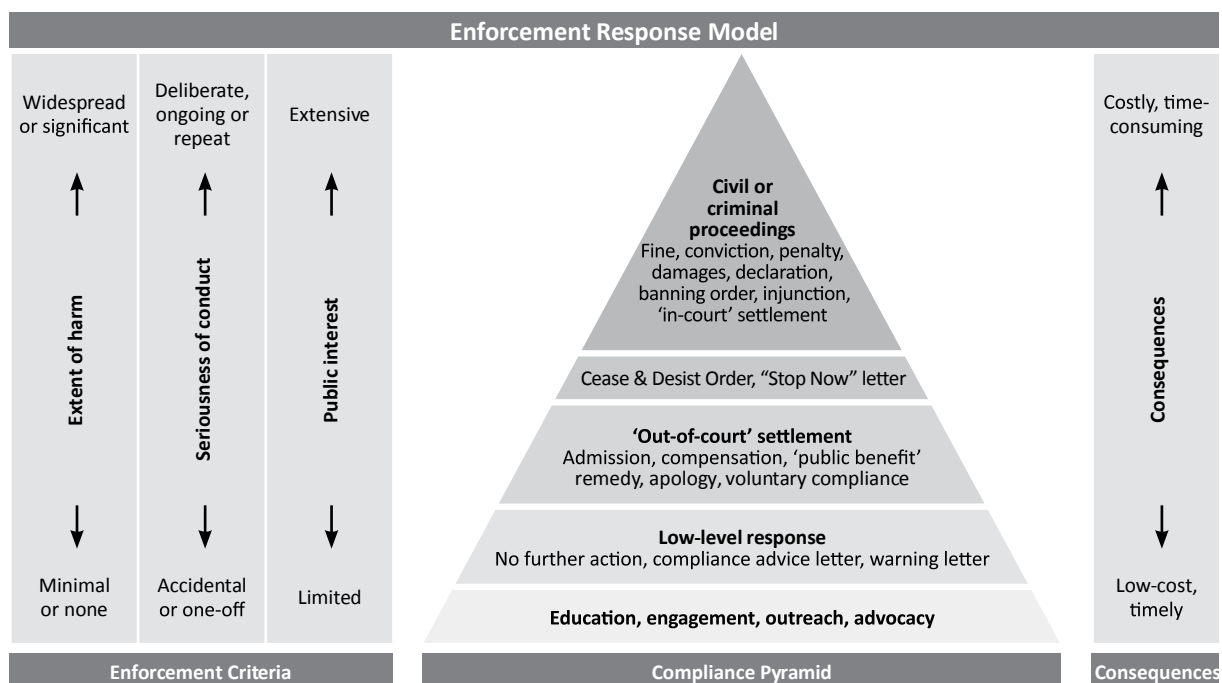
10. Wherever possible, we prefer to encourage compliance with the law through the use of non-enforcement options.
11. Most businesses and individuals want to comply with the law. To assist them to comply, we educate and engage with market participants. We aim to inform business and individual behaviour to encourage compliance with the law and to minimise the costs of compliance. We use a range of strategies including:
  - 11.1 issuing policies and guidance
  - 11.2 publicising the outcomes of our activities
  - 11.3 making comment to the media
  - 11.4 providing law reform recommendations; and
  - 11.5 working alongside other government agencies.
12. There will always be a minority of businesses and individuals who operate outside the law, whether intentionally or not. In such cases, we will select an enforcement response with one or more of the following aims:
  - 12.1 stopping the unlawful conduct
  - 12.2 deterring future unlawful conduct by that person or others

2. Our jurisdiction can be limited by *subject matter* and by *geography*; for example, breaches occurring outside New Zealand are not always actionable by us. And some complaints relate to breaches of the law that we do not have authority to enforce.

3. By this we mean that the limitation periods for Commission action have expired or will shortly expire; these limitation periods are found in the relevant statutes.

4. On occasion, we may seek to intervene in private litigation if we consider that our involvement will assist the Court and otherwise promote the public interest.

- 12.3 remedying any harm caused by the unlawful conduct
  - 12.4 punishing the wrongdoer (where appropriate)
  - 12.5 encouraging businesses to comply; or
  - 12.6 providing informative public precedent.
13. We prioritise our limited enforcement resources to focus on matters where the greatest harm exists or may occur. ‘Harm’ is in this context a broad and flexible concept, and can include detriment to consumers, other businesses or the general public, or to the efficient functioning of markets. We will also try to respond promptly to changing or emerging market problems, so we will focus on making timely responses to problems as they arise.
14. The Enforcement Response Model shows the escalating enforcement options from which we can choose, and the rough proportion of activities that might take place at each level.



15. On the left of the compliance pyramid is a summary of our Enforcement Criteria – the main factors that we take into account when deciding whether to investigate and, if so, which enforcement response to use. The arrow on the right indicates that the consequences of breaking the law are greater the more serious the enforcement response; these consequences apply to us and to the parties involved.
16. We want to incentivise compliance with the law. To that end, at the broad base of the pyramid are our non-enforcement compliance tools: education, engagement, outreach and advocacy. We will reach for these tools first wherever we believe that we can share our knowledge to prevent non-compliance with the law.<sup>5</sup>

5. More information on these educative measures can be found on our website [www.comcom.govt.nz](http://www.comcom.govt.nz) and in our accountability and planning publications.

17. Low-level enforcement responses (no further action, compliance advice letter and warning letter), which are intended to educate businesses and persuade them to modify their behaviour, may be suitable in the following types of situation:

- |                 |   |
|-----------------|---|
| Harm            | <ul style="list-style-type: none"> <li>• there is minimal or no harm</li> <li>• harm is easily remedied</li> <li>• harm is restricted to a narrow and not vulnerable section of the community</li> </ul>  |
| Conduct         | <ul style="list-style-type: none"> <li>• it is a first-time offence or one-off behaviour that is unlikely to be repeated</li> <li>• the conduct is accidental or the result of a genuine mistake about the law</li> <li>• the offender is co-operative and willing to comply</li> <li>• mitigating factors exist</li> </ul> |
| Public interest | <ul style="list-style-type: none"> <li>• the public interest, on balance, does not favour litigation</li> <li>• the conduct occurred some time ago and ceased prior to investigation.</li> <li>• the legal principles involved are well established</li> </ul>  |

18. High-level enforcement responses are all of those above low-level responses in the compliance pyramid. These are more likely to be used where the harm is great, the conduct is serious, or there is a compelling public interest. In some cases a high-level enforcement response can follow a low-level response, if there is repeated or continued non-compliance.

19. We will generally take a high-level enforcement response in the following types of situation:

- |                 |  |
|-----------------|--|
| Harm            | <ul style="list-style-type: none"> <li>• there is significant or widespread harm</li> <li>• harm is caused to a vulnerable section of the community</li> <li>• there is harm to competition in a national, regional or local market</li> </ul>   |
| Conduct         | <ul style="list-style-type: none"> <li>• the behaviour is deliberate, reckless or very careless</li> <li>• the conduct is repeated, ongoing or industry-wide</li> <li>• there is a serious departure from expected lawful commercial behaviour</li> <li>• aggravating factors exist</li> </ul> |
| Public interest | <ul style="list-style-type: none"> <li>• a decision not to act would undermine public confidence</li> <li>• the conduct involves a new or significant product, service or market</li> <li>• action is needed to clarify or reinforce the law</li> </ul>  |

### **Enforcement against individuals**

20. Under the Commerce Act, Fair Trading Act and CCCF Act, we may take action against both companies and individuals.
21. Individuals may be primarily liable for breaching the law, or may have secondary liability for helping others (including companies) to breach the law.<sup>6</sup> As with action against any business, we may take civil or criminal (or both) proceedings against an individual.

6. In some cases an individual may be liable both as a principal and secondary party.

22. In addition to our Enforcement Criteria and the factors described in paragraphs [12] to [19] above, the additional factors that we take into account when deciding whether to take enforcement action against an individual include:
- 22.1 the individual's role within the company (if applicable)
  - 22.2 whether the individual acted deliberately, recklessly or was a ringleader
  - 22.3 whether the individual has benefitted personally from the breach
  - 22.4 whether the individual has previously breached the legislation that we enforce
  - 22.5 whether the individual is likely to re-offend, perhaps through starting another company
  - 22.6 whether the individual has interfered or co-operated with our investigation, and the extent of that interference or co-operation and, in case of co-operation, the value of that co-operation (discussed further below); and
  - 22.7 whether action against the company alone is sufficient to achieve the objectives of the investigation.
23. Not all of these factors will be relevant in any particular case. Nor is any one of these factors determinative of whether or not we take action against an individual in any particular case. We will weigh all relevant factors in each case to determine whether to take action against an individual, and if so, what form that action will take.
24. If we decide to take court proceedings against an individual, these factors will remain relevant to the ultimate penalty or sentence (including any penalty or sentence discount) we seek from the Court. For example, as discussed in more detail below, while full co-operation with our investigation does not entitle an individual to immunity from civil or criminal proceedings, co-operation may, in appropriate cases, lead us to seek a discounted penalty or sentence from the Court.
25. Individuals may be liable to pay pecuniary penalties, or may be banned from company management or from acting as a creditor, depending in each occasion on the relevant statute. We will seek orders banning an individual from carrying on the same business where we consider it necessary to protect the public from harm.

### Low-level responses

26. The low-level responses described below are made in relation to a specific set of facts at a specific time. If we subsequently learn more, or if the problem conduct reoccurs, we will reconsider matters and may adopt a different response at that time.
27. In any court proceedings against a party we may also refer to the party having previously come to our attention, and may provide evidence of earlier low-level enforcement responses that were made.

### **No further action**

28. Where we determine that there has been no breach, we will take no further action. We may in some cases decide to take no further action where another consideration from paragraph 8 above applies.
29. In such cases, we will generally send a letter to the complainant and, where relevant, to the subject of the complaint (the investigated party), advising that no further action is being taken.

### **Compliance advice letter**

30. Following an investigation, we may issue a compliance advice letter where we consider that the conduct gives rise to a possible breach of the law, but in our judgement the matter is not a priority to take further.
31. We may issue a compliance advice letter where we recognise that legal proceedings would be unlikely to succeed, for example where we are out of time to take proceedings or where a defence might exist. Compliance advice letters are educative, and are issued in response to problematic conduct that we have identified. Accordingly, what the letter advises of is the risk of conduct breaching the law, and how to avoid a potential breach in future.
32. A compliance advice letter will:
  - 32.1 advise of our concerns about possible non-compliance with the law
  - 32.2 explain the applicable general principles that should guide the recipient's future conduct; and
  - 32.3 set out the penalties that can be imposed for breaches of the relevant law.
33. A compliance advice letter is not legal advice, and will record that if the recipient wants further information or guidance on the matter it should consult its own lawyer.
34. We will ordinarily not take steps to publicise in the media or in any public report the details of a compliance advice letter or the identity of a letter recipient. There are exceptions to this general approach:
  - 34.1 we may in rare cases determine that the public interest requires disclosure of a compliance advice letter or its contents
  - 34.2 we may in every case publicly discuss the subject matter giving rise to compliance advice if we consider it is in the public interest to do so, for example to provide guidance to a wider group or industry or to consumers; or
  - 34.3 we may be required to disclose information about the issuance of compliance advice letters, and copies of the letters, under the Official Information Act 1982.
35. We will not say in any compliance advice letter or media statement that we have made a 'finding' of non-compliance. Only the Courts can determine whether a breach of the law has occurred.



## Warning letter

36. Following an investigation, we may issue a warning letter as an alternative to litigation<sup>7</sup> where we consider that:
  - 36.1 the evidence that has been gathered is sufficiently strong to establish a *prima facie* case,<sup>8</sup> and
  - 36.2 there has therefore been a breach or likely breach of the law; but
  - 36.3 the matter can be satisfactorily resolved without legal proceedings.
37. The purpose of a warning letter is to inform the recipient of our view that there has been a likely breach of the law, to prompt a change in the recipient's behaviour, and to encourage future compliance.
38. Another benefit of using a warning letter is to educate other businesses and the public.
39. A warning letter will:
  - 39.1 advise the recipient that, in our opinion, it has or is likely to have breached the law and state the reasons
  - 39.2 explain what court penalties could be imposed for such a breach
  - 39.3 explain that, in this instance, we have exercised our discretion to issue a warning rather than to take legal proceedings
  - 39.4 if the conduct is ongoing, advise the recipient that it should cease, or the recipient will be at risk of further investigation and potential legal proceedings; and
  - 39.5 state that in cases of continued or repeated similar conduct we may rely in our enforcement decision-making on the fact of having already issued a warning letter. We may also draw that fact to the attention of a court in any subsequent proceedings brought by us against the recipient.
40. A warning letter is not intended to be a substitute for independent legal advice, and will record that if the recipient wants further information or guidance on the matter it should consult its own lawyer.
41. We will not say in any warning letter or media statement that we have made a 'finding' of non-compliance. Only the Courts can determine whether a breach of the law has occurred.
42. Except in instances where there is a special reason not to do so, we will:
  - 42.1 publish a copy of a warning letter on our website; and
  - 42.2 include the name of the recipient and the subject matter of the warning on a register of issued warnings on our website.

7. The practice of issuing warnings was approved as an implied power of the Commission in *Commerce Commission v Telecom Corporation of New Zealand Ltd* [1994] 2 NZLR 421 (CA), 429 per Cooke P: "Short of taking proceedings, the Commission must have implied authority to mediate or negotiate a settlement, or warn those against whom complaints have been made".

8. The legal term *prima facie* case means that if the evidence is accepted as credible it could establish guilt.

43. Where special reasons exist we may decide not to publish a copy of a warning letter and/or decide to only include the subject-matter of the warning, without identifying details in the register of issued warnings. Special reasons may exist when, for example:
- 43.1 the likely effect of publication of the warning would be disproportionate for the recipient or a person close to them, when weighed against the seriousness of the likely breach and its consequences; or
  - 43.2 publication would otherwise be unduly harmful to the recipient or a person close to them.
44. We may also publish details about warning letters we issue in our Annual Report or other accountability publications.

### Urgent responses

45. In some cases, the public interest may require us to act urgently to restrain a person from conduct that breaches the law or is likely to do so. The provisions about urgent remedies are found in the Court rules and in the legislation that we enforce, but the basic options are summarised below.

### Injunction

46. An injunction is a Court order that a party must do – or stop doing – a certain act. We may apply to the Courts for injunctions under the Commerce Act,<sup>9</sup> the Fair Trading Act<sup>10</sup> and the CCCF Act.<sup>11</sup> In each case, an injunction can be obtained to restrain a person from committing an actual or attempted breach, or from assisting or conspiring with another person to breach. Injunctions may be interim (temporary) or permanent.

### Cease and Desist Order (Commerce Act only)

47. A Cease and Desist Commissioner appointed under the Commerce Act may make orders to restrain anti-competitive conduct or to require a person to do something to restore competition in a market.<sup>12</sup>
48. We must apply to a Cease and Desist Commissioner for an order, and must satisfy him or her that:
- 48.1 there is *prima facie* evidence of anti-competitive conduct that contravenes the Commerce Act; and
  - 48.2 it is necessary and in the public interest to act urgently to prevent serious harm to consumers or a particular person.
49. In addition to seeking such orders, we may apply to the Courts for other remedies.

9. Section 81 provides that injunctions may be granted by the High Court for breach of Part 2 (which relates to restrictive trade practices). Section 84 provides the same power in relation to Part 3 (which relates to business acquisitions).

10. Section 41.

11. Section 96.

12. Sections 74AA-D. Further guidance can be found on our website at <http://www.comcom.govt.nz/cease-and-desist-guidelines-2/>.

## Court proceedings

50. In some cases we will decide that the most appropriate way to achieve our compliance and enforcement objectives is to issue court proceedings.
51. Such cases may include those where:
  - 51.1 the conduct is of significant public interest or concern
  - 51.2 the conduct is deliberate, sophisticated, serious or repeated
  - 51.3 there has been a disregard for the law
  - 51.4 the harm is or was widespread or serious, or likely to spread if we do not intervene
  - 51.5 the victims include disadvantaged or vulnerable members of the community
  - 51.6 the breach is hard to detect
  - 51.7 the defendant's attitude is unco-operative or the defendant is a repeat offender
  - 51.8 we want to deter other businesses or people from the same type of conduct
  - 51.9 we want to recover compensation or obtain orders that only a court can make (for example, banning a person from operating a company); or
  - 51.10 we want a court to determine an important or uncertain question of law, for example, we may take 'grey area' cases in order to provide important public precedent.
52. In some cases we may be influenced by the fact that a whistle-blower has brought the matter to our attention. Where a person has gone to personal or professional risk to draw a breach to our attention we will weigh that in our decision-making.
53. The cases suited to court proceedings are not limited to the above types of situations. We will consider our Enforcement Criteria in deciding whether to issue legal proceedings.

## Civil or criminal

54. In some cases the legislation that we enforce will not provide a choice between civil and criminal proceedings, but will specify which type of proceeding may be brought.
55. Where a choice of proceeding exists, our decision whether to commence civil or criminal proceedings will depend on factors like:
  - 55.1 the seriousness of the conduct and its consequences
  - 55.2 whether the conduct was deliberate or blameworthy
  - 55.3 whether the law being enforced is long-standing and well understood
  - 55.4 whether and what time limitations apply (these can differ between criminal and civil cases)
  - 55.5 the sufficiency of the evidence, and the standard of proof required: civil cases must be proved on the 'balance of probabilities' standard, but criminal cases require proof 'beyond reasonable doubt'; and
  - 55.6 the remedies that are available.

## Civil proceedings

56. Civil proceedings may be issued:
  - 56.1 under Part 6 of the Commerce Act for breaches of Parts 2 and 3 (regarding anti-competitive practices and prohibited business acquisitions); and
  - 56.2 under the Fair Trading Act and the CCCF Act.
57. A wide range of remedies is available in a civil proceeding, including:
  - 57.1 monetary penalties (fines)
  - 57.2 statutory damages (which we can seek on behalf of affected parties)
  - 57.3 injunctions (interim and permanent)
  - 57.4 declarations of breach; and
  - 57.5 orders excluding persons from company management or from acting as a creditor
  - 57.6 orders directing persons to refund, compensate, or return property
  - 57.7 orders directing persons to repair goods or provide services
  - 57.8 orders to divest assets or shares
  - 57.9 orders requiring information disclosure or the publication of advertisements
  - 57.10 orders varying contracts or declaring them to be of no effect; and
  - 57.11 orders reopening credit contracts, consumer leases and land buy-back transactions.
58. The availability and suitability of each remedy will depend on the circumstances of the case.

## Criminal proceedings

59. We are empowered to bring criminal prosecutions under specific sections of the Commerce Act 1986, Fair Trading Act 1986, and CCCF Act 2003.<sup>13 14</sup>
60. If convicted, a defendant may be liable to fines and, in the case of individuals, imprisonment in very serious cases.<sup>15</sup>
61. In addition to the offences set out in the laws that we enforce, we can, in some cases, bring a criminal prosecution under the Crimes Act 1961.
62. Further information on the principles and process applicable to our criminal prosecutions is contained in our Criminal Prosecution Guidelines (**Attachment A**).<sup>16</sup>

13. You should consult each statute for up-to-date information on the specific sections of those Acts that may give rise to a criminal prosecution.

14. As noted in the Introduction, the ERGs do not apply to enforcement arising out of Part 4 of the Commerce Act, the Telecommunications Act 2001 or Dairy Industry Restructuring Act 2001.

15. A defendant may be liable on conviction to imprisonment for a breach of s 75 of the CCCF Act, or for a breach of a banning order made under s 108 of that Act. Parliament is currently considering imposing criminal liability (and imprisonment) for cartel conduct under the Commerce Act.

16. The Criminal Prosecution Guidelines apply to all criminal proceedings that we initiate including those arising out of enforcement of Part 4 of the Commerce Act, the Telecommunications Act 2001 or the Dairy Industry Restructuring Act 2001.

## Negotiated settlements

### The Commission's approach

63. We are receptive to resolving non-compliance by agreement where a remedy is possible and a negotiated settlement can be achieved that is prompt, easily implemented and in the public interest.
64. Negotiated settlements tend to have the following benefits:
  - 64.1 lower cost to the parties
  - 64.2 faster outcomes
  - 64.3 greater flexibility of terms and outcome; and
  - 64.4 greater control of the process, including timing.
65. Whether court proceedings are in contemplation or underway, we are receptive to requests to resolve matters early through negotiation and agreement.
66. Settlements can be 'out-of-court' or, if resolution requires the participation of the Court, 'in-court'.
  - 66.1 Out-of-court settlement may occur during an investigation or where proceedings have not been issued. This typically involves us and the party under investigation agreeing to terms that do not require the Court's approval to implement. These may include agreement to cease the conduct, admissions of likely breach of the law, compensation payments, costs paid to us, publicity and other terms. Such settlements (which are sometimes referred to as 'administrative settlements') will typically require the defendant to admit that it is likely to have breached the law.
  - 66.2 In-court settlement can occur once proceedings have commenced, or before that time, in matters where there are settlement terms that require the Court's involvement. The Court needs to be involved where it must set a penalty, impose a sentence or make other orders.
67. In some cases we will not consider ourselves able to negotiate a settlement, for example where:
  - 67.1 a Court judgment is needed to provide important public precedent
  - 67.2 the conduct is particularly serious or deserving of condemnation
  - 67.3 the defendant is a repeat offender, lacks contrition or actively resists compliance
  - 67.4 urgent remedies are sought and a delay while the parties try to negotiate an outcome would cause further harm; or
  - 67.5 no agreement can be reached.
68. An out-of-court settlement is an unusual outcome in cases where we have brought criminal proceedings. In most such cases, we will be willing to discuss likely penalty outcomes, but will expect the defendants to make in-court admissions of breaching the relevant Act.

## Process

69. Parties under investigation or named as defendants in proceedings by us may at any time approach us to make a settlement proposal or to initiate a plea discussion.
70. Such approaches may, in relation to civil proceedings, be made or accepted on a 'without prejudice' basis.<sup>17</sup> This means that any concessions or proposals that are discussed will not be used in Court if a negotiated settlement cannot be achieved.
71. We will consider any proposal that is well developed, principled and realistic. Proposals should be made, where possible, with reference to the relevant case law and applicable principles. Useful proposals will contain draft admissions and a detailed account of how any non-compliance has been or will be rectified.
72. We will not approach any settlement discussion as a commercial negotiation in which 'horse trading' is appropriate. Rather, we will strive to serve the public interest by agreeing terms that fairly represent the conduct and its consequences, and where any agreed facts and penalty are consistent with our view of the evidence.
73. Our staff will work with parties and their lawyers to develop a proposal that is suitable to be submitted to the Commission members for their consideration. Our staff do not make settlement decisions, except where authority to that effect has been expressly delegated.
74. Settlements are generally recorded in a formal settlement agreement or, rarely, by an exchange of correspondence. Where the settlement is 'in-court', the Commission and parties will give effect to the agreement by presenting the Judge with admissions and submissions that are in a form consistent with court procedure.
75. We regard settlements as outcomes that may be publicised unless there are legal or other compelling reasons not to do so. We reserve the right to issue a media release after a settlement is reached, unless we have agreed otherwise. This approach is intended to serve the public interest by:
  - 75.1 being transparent about our decisions
  - 75.2 maximising deterrence
  - 75.3 educating market participants about their obligations and the consequences of non-compliance; and
  - 75.4 being accountable to the New Zealand public.

## Available settlement outcomes

76. Many settlement outcomes and terms are possible. Common examples are set out below. A typical settlement will include a combination of the following options.

### *Ceasing conduct*

77. If non-compliance is continuing at the time of settlement discussions, the settling party will be expected to cease the unlawful behaviour and adopt compliance measures, including a formal compliance programme or compliance training.

17. In a criminal context we may not be at liberty to discuss settlement proposals on a without prejudice basis; see s 57 Evidence Act 2006.

***Admission of liability***

78. We will require an admission of liability or breach, or likely liability or breach, in most cases. The precise formulation will depend on the matter at hand.
79. Where a formal admission of breach is made in-court, it will ordinarily result in a discount on the penalty that would otherwise have been imposed after a full hearing. In such cases the admission will be recorded in an Agreed Summary of Facts, or such other document as court procedure requires.

***Penalty***

80. Where the settlement is in-court, the Court will set the appropriate penalty (or sentence) – not the parties. We may agree to recommend to the Court that a particular penalty should be imposed in respect of the admitted breaches.
81. Every penalty recommendation must be made on a principled basis, and must accord with legal precedent. Such recommendations will be made in accordance with the formal requirements of the Courts at the relevant time.
82. Every penalty recommendation is a recommendation only, and is subject to the overriding discretion of the Court as to whether it is acceptable.
83. In making an agreed penalty recommendation, the parties may also make an agreed submission to the Court as to the appropriate discounts to the penalty to reflect the making of admissions, co-operation, and evidence provided to us, and other relevant factors.
84. Where a party admits liability but no agreement is reached on a recommended penalty, the parties are free to make separate penalty submissions to the Court.

***Costs***

85. In most cases we will seek the payment of a portion of our costs in investigating the breach and taking legal steps. The amount will vary according to our actual costs, which typically depends on the scale and complexity of the investigation and legal proceedings.

***Compensation and public-benefit remedies***

86. In some cases, particularly in consumer cases, parties may agree to compensate consumers, businesses or other persons that have been harmed by the wrongful behaviour. Such compensation may be made instead of or as well as paying a penalty.
87. In some rare cases, we cannot readily identify the persons harmed by the conduct or the amounts of their losses. In such cases we may agree that compensation may be made to the public at large (or some section of the public) by way of donation to an appropriate cause, or by the funding of a project that in some way promotes statutory compliance.
88. We will rarely agree to administer such public-benefit remedies, but may insist on supervising or auditing their completion. We do not, in agreeing a public-benefit remedy, endorse, sponsor, approve or affiliate ourselves with the recipient of any such benefit.

***Immunity/Leniency (cartel cases)***

89. Conditional immunity from Commission-initiated proceedings may be available in relation to cartel conduct that breaches the Commerce Act.<sup>18</sup> Applicants for conditional immunity must:
- 89.1 be the first to alert us to a cartel
  - 89.2 admit their participation in the cartel; and
  - 89.3 provide full and continuing co-operation with us in our investigation of the cartel and any subsequent proceedings.

***Co-operation discount***

90. In some cases, an investigated party (whether an individual or a company) will agree to provide meaningful co-operation and assistance to us in our ongoing investigation or legal proceedings.<sup>19</sup>
91. Co-operation with our enforcement activities provides a valuable public benefit, through the savings to us in operational cost and time, and through assisting in the successful disposition of cases.
92. While co-operation will not, except in special circumstances, entitle any person (company or individual) to immunity, these public benefits of co-operation are commonly recognised by the Courts when imposing a penalty on the co-operating party for its unlawful conduct, and may result in a penalty discount.
93. Standard co-operation obligations include:
- 93.1 fully informing us about the relevant conduct
  - 93.2 fully co-operating with us during any subsequent investigation
  - 93.3 submitting to the jurisdiction of the New Zealand courts without contest
  - 93.4 paying compensation to injured parties where we consider that this is appropriate; and
  - 93.5 putting in place an effective compliance programme.

***Apology***

94. In some cases a party may agree to make a formal apology to affected consumers, to industry representatives, or to the general public.

***Media comment***

95. In some cases we will agree terms about the timing of media comment or to provide prior notice of our key media messages. We will only very rarely agree to provide parties with advance copies of our proposed media releases.

18. For further information on our current Cartel Leniency Policy and the full eligibility criteria for conditional immunity, see our website at <http://www.comcom.govt.nz/the-commission/commission-policies/cartel-leniency-policy/>.

19. For further information on our Co-operation Policy, see our website at <http://www.comcom.govt.nz/the-commission/commission-policies/cooperation-policy/>.



# Attachment A

## Criminal Prosecution Guidelines

Date: 1 October 2013

## Contents

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## Purpose

1. The Commerce Commission has issued these Criminal Prosecution Guidelines (CPGs) to provide greater public guidance as to the circumstances in which we will initiate a criminal prosecution, and the principles and practices applicable to a criminal prosecution.
2. The CPGs should be read alongside our published Enforcement Criteria, Model Litigant Policy, and Enforcement Response Guidelines (the ERGs)<sup>20</sup>. The CPGs are an attachment to the ERGs; where the ERGs are referenced in the CPGs, the relevant parts of the ERG are incorporated into the CPGs.
3. The CPGs are not exhaustive, and are not intended to be legally binding. We may revise the CPGs from time to time in accordance with our organisational objectives and priorities. The CPGs are also necessarily general, and for greater specificity readers should refer to the relevant offence statute under which a prosecution may be brought.

## Scope

4. The CPGs apply to all criminal prosecutions and potential criminal prosecutions arising from investigations by us under the laws we enforce.<sup>21 22</sup>
5. The CPGs apply to our decisions to initiate criminal proceedings and our decisions whether to appeal (or oppose an appeal) against a Court decision arising from a criminal prosecution. References in the CPGs to “prosecution” and “prosecution decisions” include appeal decisions.
6. The CPGs do not cover civil proceedings that we bring or other enforcement steps we may take.

## CPGs subject to Solicitor-General’s Prosecution Guidelines

7. The Solicitor-General’s Prosecution Guidelines<sup>23</sup> apply directly to public prosecutions undertaken by Crown agencies,<sup>24</sup> such as the Commission.
8. As such, we recognise that the CPGs are subject to the Solicitor-General’s Prosecution Guidelines. We adhere to the standards of good criminal prosecution practice expressed in the Solicitor-General’s Prosecution Guidelines, in addition to the principles expressed in the CPGs.
9. Our criminal prosecutions are conducted by Crown Solicitors throughout New Zealand, and sometimes by Queen’s Counsel, on our behalf. These lawyers are bound by the Solicitor-General’s Prosecution Guidelines when acting in that capacity, and we also expect them also to adhere to the practices and principles expressed in the CPGs.
10. The Solicitor-General’s Prosecution Guidelines are more specific and comprehensive than the CPGs, and should be read for greater detail on prosecutorial principles. Wherever possible, the CPGs should be read consistently with the Solicitor-General’s Prosecution Guidelines. In the event of a conflict between the CPGs and the Solicitor-General’s Prosecution Guidelines, the latter will prevail.

20. These are available on our website.

21. See the ERGs at [54]. The ERGs identify that not all breaches of the laws we enforce are criminal offences; many can only be the subject of civil proceedings.

22. As a result, the CPGs apply to a wider range of enforcement activities than the ERGs.

23. Solicitor-General’s Prosecution Guidelines 2013

24. See Attorney-General’s introduction at [2]-[3], and Solicitor-General’s Introduction at [3].

## When the Commission may prosecute

### Prosecutions under our principal statutes

11. We are empowered to bring criminal prosecutions under specific sections of the Commerce Act 1986, Fair Trading Act 1986, Credit Contracts and Consumer Finance Act 2003 (CCCF Act), Telecommunications Act 2001 and Dairy Industry Restructuring Act 2001.<sup>25</sup> Other criminal offences are likely to be added to this list by Parliament, from time to time.
12. In some cases, we have a choice between commencing a criminal prosecution or bringing civil proceedings for a penalty, compensation, declaration or other remedy. Considerations that are likely to influence our choice are listed in the ERGs at [55].

### Prosecutions under the Crimes Act 1961

13. We may bring a criminal prosecution under the Crimes Act 1961 where we consider that an offence under the Crimes Act has been committed in relation to one or more of our areas of responsibility. Such a criminal prosecution can be instead of or in addition to a prosecution under one of our principal statutes. Such criminal prosecutions could involve:<sup>26</sup>
  - 13.1 conduct that is in relation to one of our areas of responsibility and which is so serious it warrants special condemnation under the Crimes Act;<sup>27</sup> and
  - 13.2 conduct which interferes with our ability to perform our functions, for example:
    - 13.2.1 lying or knowingly providing information which is misleading or incorrect
    - 13.2.2 withholding, concealing or destroying documents.

## Decisions to prosecute

14. We recognise that the applicable test for whether we ought to initiate or continue a criminal prosecution is the Test for Prosecution in the Solicitor-General's Prosecution Guidelines, namely that:
  - 14.1 the evidence which can be adduced in court is sufficient to provide a "reasonable prospect of conviction": **the Evidential Test**; and
  - 14.2 criminal prosecution is required in the public interest: **the Public Interest Test**.
15. We must be satisfied that both limbs of the Test for Prosecution are satisfied before making a decision to commence criminal prosecution. In doing so we must first consider whether the Evidential Test is satisfied, before we then consider whether the Public Interest test is satisfied.<sup>28</sup>

25. Readers should consult each statute for up-to-date information on the specific sections of those Acts that may give rise to a criminal prosecution.

26. See ERGs at [59].

27. See, for example, the our criminal prosecution of company director Sonia Klair who pleaded guilty to 64 charges that we brought under the Crimes Act, in relation to her running a business which engaged in false billing practices, also known as pro-forma invoicing.

28. These tests apply to criminal prosecutions not to decisions whether to initiate civil proceedings.

## Evidential Test

16. If a matter does not pass the Evidential Test it will not proceed to criminal prosecution, no matter how important it may be.
17. In deciding whether the Evidential Test is met we must analyse and evaluate all of the evidence and information in a thorough, critical and impartial manner. A “reasonable prospect of conviction” exists if:<sup>29</sup>
  - ...in relation to an identifiable person (whether natural or legal), there is credible evidence which the Commission can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond a reasonable doubt that the individual who is prosecuted has committed a criminal offence.
18. When deciding whether there is sufficient evidence, we will consider whether the evidence gathered is admissible and reliable, and will consider factors that we are required or permitted to take into account by the Solicitor-General’s Prosecution Guidelines, including the following.<sup>30</sup>
  - 18.1 Does the evidence support the charges?
  - 18.2 Do the charges reflect the seriousness of the offending?
  - 18.3 Is it likely that the evidence will be excluded at court, for example because of how it was gathered? If so, is there sufficient other evidence for a realistic prospect of conviction?
  - 18.4 Is there evidence which might detract from the reliability of a confession, such as the defendant’s age, intelligence or level of understanding?
  - 18.5 What explanations has the defendant given? Is a court likely to find the explanations credible in the light of the evidence as a whole?
  - 18.6 Is the evidence credible (capable of belief)?
  - 18.7 Is there other evidence that we should seek out which may support or detract from the case?
19. We will continue to monitor whether the Evidential Test is met throughout the course of a criminal prosecution. If, as a result of continued investigation following the laying of charges we consider that:
  - 19.1 another charge is more suitable, we may amend the charge (or seek the leave of the Court to do so); or
  - 19.2 a charge should be withdrawn, withdraw the charge.

## Public Interest Test

20. Once we are satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, we must consider whether the public interest requires a criminal prosecution. We are not required to prosecute all offences for which there is sufficient evidence. We will exercise our prosecutorial discretion in each case as to whether a criminal prosecution is required in the public interest.

29. See Solicitor-General’s Prosecution Guidelines at 5.3.

30. See Solicitor-General’s Prosecution Guidelines at 5.4.

21. Common instances where we may exercise our discretion not to take a criminal prosecution are where the case is not serious, or where a lesser enforcement response is appropriate (as provided for in our ERGs).
22. Conversely, we may be influenced towards bringing a Crimes Act prosecution as opposed to a criminal prosecution under the Fair Trading or CCCF Act where a criminal conviction would provide the Court with a broader range of penalties or sentencing options, or where the conduct is deserving of special condemnation by way of a Crimes Act prosecution.
23. A non-exhaustive list of public interest considerations that may be relevant is provided in the Solicitor-General's Prosecution Guidelines,<sup>31</sup> and include matters such as the following.
  - 23.1 How serious is the offending?
  - 23.2 Is it likely to be continued or repeated?
  - 23.3 Does the defendant have relevant previous warnings or convictions?
  - 23.4 Has the offence resulted in serious financial loss to an individual, company or section of society?
  - 23.5 What penalty is the Court likely to impose?
  - 23.6 Do we accept that the defendant has rectified the loss or harm caused (although defendants should not be able to avoid prosecution simply through paying compensation or rectifying loss)?
  - 23.7 Are any proper alternatives to prosecution available?
24. Cost (including our resources and funding) weighed against the seriousness of the offending and any likely penalty or sentence is a relevant factor we will consider when making an overall assessment of the public interest<sup>32</sup>.

### **Other considerations**

25. In taking a decision whether to prosecute, we will also consider:
  - 25.1 our Enforcement Criteria, which guide our discretion as to what enforcement action we undertake
  - 25.2 our ERGs, and the alternatives to criminal prosecution that are provided in that document
  - 25.3 the purposes of the laws that we are seeking to enforce by a proposed criminal prosecution
  - 25.4 our stated objectives and any enforcement priorities; and
  - 25.5 whether another prosecuting agency has or may bring criminal proceedings in relation to the same subject-matter as our proposed prosecution.
26. If we decide that there is insufficient evidence, or that it is not in the public interest to prosecute or to continue with a criminal prosecution, we may take a lower-level enforcement response; this can include taking no prosecution. The ERGs provide more information on these alternatives to criminal prosecution.

31. See Solicitor-General's Prosecution Guidelines at 5.8-5.11.

32. See Solicitor-General's Prosecution Guidelines at 5.11 and 8.6

27. A decision not to prosecute does not preclude us from further considering the case if new and additional evidence becomes available, or if a review of the original decision is required (provided always that we are within the applicable limitation period for bringing a prosecution). Additional decisions to prosecute will be conducted in accordance with the CPGs.

### Decision procedure

28. Every decision to prosecute must be taken by the majority of Commission members sitting as the relevant Division.<sup>33</sup>

### Choice of charges

29. The nature and number of charges brought should adequately reflect the criminality of the defendant's conduct, as disclosed by the facts to be alleged at trial. The charges may be representative of the offending, when the criteria under section 20 of the Criminal Procedure Act 2011 are made out.
30. Under the laws that we enforce, we may bring a criminal prosecution against individuals, companies, businesses and other kinds of legal 'person'. The considerations governing prosecution against individuals are contained in the ERGs at [20]-[23] and the CPGs at [16]-[25]. (The ERGs at [20]-[23] discuss the factors the Commission will take into account when deciding on any enforcement action against individuals, the CPGs at [16]-[25] discuss the relevant considerations for all decisions on criminal prosecutions. Both sets of factors therefore apply to individuals when we are considering a criminal prosecution.)
31. We may choose to charge someone as a principal party, as a secondary party (someone who assisted in or facilitated another party to commit the offence) or, as the evidence allows, both.

### Appeals from a prosecution

32. Every decision to appeal against a criminal prosecution decision (including a sentencing decision) must be taken by the majority of Commission members sitting as the relevant Division.
33. The proposed appeal must also be referred by our instructed Crown Solicitor to the Solicitor-General for his consideration and approval, in accordance with the Criminal Procedure Act 2011.

### Impartiality of the decision-maker

34. All Commission staff and members with duties or accountabilities under the CPGs will act fairly, promptly, in accordance with the law, and without any actual or potential conflict of interest. In addition, those members of Commission staff who are admitted lawyers have additional responsibilities under the Lawyers and Conveyances Act (Lawyers: Conduct and Client Care) Rules 2008.

33. Commerce Act 1986, s16.

## Disclosure under the Criminal Disclosure Act 2008

35. Disclosure of evidence in a criminal prosecution is governed by the Criminal Disclosure Act 2008. Under the Act, the person in charge of the file is responsible for disclosure within the statutory timeframes. In Commission prosecutions, this will usually be the lead investigator assigned to the file.

## Investigations involving other agencies

36. It is not uncommon for more than one prosecution agency to investigate a particular matter where prosecution by any of those agencies could result.
37. Wherever possible, we will work collaboratively with those other agencies to ensure that investigations and criminal prosecutions are conducted effectively and efficiently. For example, in some cases it may be possible for agencies to share information, such as witness statements, to ensure that witnesses are not subjected to multiple interviews by different agencies.
38. Where reasonably practicable, we will consult with other relevant agencies before commencing a criminal prosecution, to satisfy ourselves that criminal prosecution by us is in the public interest.

## Amendments

39. We may amend the CPGs from time to time.

