

# Investigation Guidelines



## LEGISLATION ENFORCED BY THE COMMERCE COMMISSION

|   |  |
|---|--|
| <b>Commerce Act</b>                     | Commerce Act 1986                              |
| <b>CCCF Act</b>                         | Credit Contracts and Consumer Finance Act 2003 |
| <b>DIR Act</b>                          | Dairy Industry Restructuring Act 2001          |
| <b>Fair Trading Act</b>                 | Fair Trading Act 1986                          |
| <b>Fuel Industry Act</b>                | Fuel Industry Act 2020                         |
| <b>Grocery Industry Competition Act</b> | Grocery Industry Competition Act 2023          |
| <b>Retail Payment System Act</b>        | Retail Payment System Act 2022                 |
| <b>Telecommunications Act</b>           | Telecommunications Act 2001                    |

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## Purpose

**The purpose of these Investigation Guidelines is to help you understand how Te Komihana Tauhokohoko | the Commerce Commission investigates matters and what you can expect to happen during an investigation.**

**You should read these guidelines if:**

- You are being investigated by the Commission
- You have reported a concern to the Commission
- You are assisting the Commission with an investigation (eg, supplying information)
- You are an adviser to any of these people.

### Terms used in these guidelines

- 1 These guidelines feature some abbreviations and defined terms, each recorded in bold type when first used. Please refer to the glossary provided at **Attachment A** for the meaning of these terms.

## Scope

### When these guidelines apply

- 2 The Commerce Commission is responsible for enforcing New Zealand's competition, fair trading and consumer credit laws. We also have regulatory responsibilities in the electricity lines, gas pipelines, telecommunications, dairy, airport, fuel, retail payment and grocery sectors. These Investigation Guidelines apply when we are investigating or considering investigating a possible breach of the following Acts and any other Acts we administer:

- the Commerce Act 1986
- the Fair Trading Act 1986
- the Credit Contracts and Consumer Finance Act 2003
- the Telecommunications Act 2001
- the Dairy Industry Restructuring Act 2001
- the Fuel Industry Act 2020
- the Retail Payment System Act 2022
- the Grocery Industry Competition Act 2023

These guidelines do not apply to our clearance, authorisation and competition study work under the Commerce Act.<sup>1</sup>

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<sup>1</sup> See our published Mergers and Authorisation Guidelines, Authorisation Guidelines, Competitor Collaboration Guidelines and Competition Study Guidelines available at these pages <https://comcom.govt.nz/business/merging-or-acquiring-a-company/>; <https://comcom.govt.nz/business/merging-or-acquiring-a-company/authorising-anti-competitive-transactions-that-will-likely-benefit-new-zealand/>; <https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel?lang=mi> and <https://comcom.govt.nz/about-us/our-role/competition-studies>

## How we apply these guidelines

- 3 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.
- 4 When determining whether and how to investigate a particular matter, 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, including the attitude and responsiveness of the parties involved and the simplicity or complexity of the matter. We cannot investigate every possible breach of our laws, and not every situation requires investigation. Where we are concerned about a possible breach of the law, we are often able to achieve compliance or effective change without going to Court. Our available **enforcement responses** are referred to below.
- 5 These guidelines cannot be exhaustive and are necessarily general. They are not a statement of the law and are not intended to have legal effect. They are provided for public education purposes only. We may revise the guidelines from time to time in accordance with developments in our practices, and in our organisational objectives and priorities.
- 6 These guidelines also do not cover the legal tests that we apply in assessing potential breaches of the law. We have published fact sheets and other guidance on our website that explain the laws that we enforce.<sup>2</sup>

## Other guidelines and policies

The Investigation Guidelines should be read alongside other related Commission documents:

- 7 **Our Enforcement Criteria** – these **enforcement criteria** apply at every stage of an investigation and enforcement process.<sup>3</sup>
- 8 Our **Enforcement Response Guidelines** – these **enforcement response guidelines** outline our enforcement response model and the enforcement response options that apply following an investigation, and include our **Criminal Prosecution Guidelines**.<sup>4</sup>
- 9 Our **Cartel Leniency and Immunity Policy** – this policy explains how parties with information about possible cartel conduct can choose to assist the Commission and receive penalty discounts.<sup>5</sup>
- 10 Our **Model Litigant Policy** – this policy restates our commitment to behaving as a model litigant in the litigation to which we are a party.<sup>6</sup>

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2 See our cartel conduct fact sheet at <https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel?lang=mi>, the CCCF fact sheet at <https://comcom.govt.nz/consumers/dealing-with-typical-situations/borrowing-money-and-buying-on-credit/when-have-i-entered-into-a-consumer-credit-contract> and our consumer fact sheet at <https://comcom.govt.nz/consumers/your-rights-as-a-consumer>

3 See our Enforcement Criteria at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-criteria/>

4 See our Enforcement Response Guidelines at <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

5 See Cartel Leniency and Immunity Policy at <https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel/reporting-cartel-conduct>

6 See Model Litigant Policy at <https://comcom.govt.nz/about-us/our-policies-and-guidelines/model-litigant-policy>

## Commission independence, staffing, and structure

- 11** The Commerce Commission is an Independent Crown Entity established under the Commerce Act 1986.<sup>7</sup> This is a specific kind of organisation, operating within and funded by the Government of New Zealand but operationally independent of it. We are primarily accountable to the Minister of Commerce and Consumer Affairs and other Ministers who have responsibilities for legislation that is enforced by the Commission. We are not subject to direction from the Government in carrying out our enforcement and regulatory control activities. This independence requires us to be an impartial promoter and enforcer of the law. The Government may not direct the Commission to have regard to or give effect to Government policy, unless that is specifically provided for in legislation.<sup>8</sup>
- 12** Our role is to enforce various laws which together promote competition and fair trading, including in consumer credit, groceries, fuel and retail payment markets, and to regulate telecommunications, airports and infrastructure networks. Our organisational powers and functions are drawn from the laws we enforce, and from relevant case-law on those powers.
- 13** Our structure is organised to reflect that the Commission is the decision-making body, with staff (including management) having responsibility for the day to day investigations of the Commission. By 'the Commission' we are referring to Commission Members, Members and Associate Members.<sup>9</sup> The Commission can and does delegate specific responsibilities to staff.
- 14** Commission staff are paid employees of the Commission and carry out the Commission's investigative functions. Our staff (including managers) are responsible for conducting investigations and making recommendations to the Commission, as well as for carrying out the many other day to day functions of the agency.
- 15** The Commission usually sits as a group of members (known as a **Division**) that has been appointed by the Chair for that purpose.<sup>10</sup> Each Division is supported by a multi-disciplinary team of Commission staff, comprising investigators, economic, and legal staff. Where staff brief the Division during an investigation, the Division provides staff with guidance and direction. Each Division meets regularly.
- 16** We support the Crown in its relationships with Māori under Te Tiriti ō Waitangi | the Treaty of Waitangi and we are committed to improving how we work with, and for, Māori.

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<sup>7</sup> See sections 8 and 8A Commerce Act, and Crown Entities Act 2004.

<sup>8</sup> Section 105 Crown Entities Act 2004.

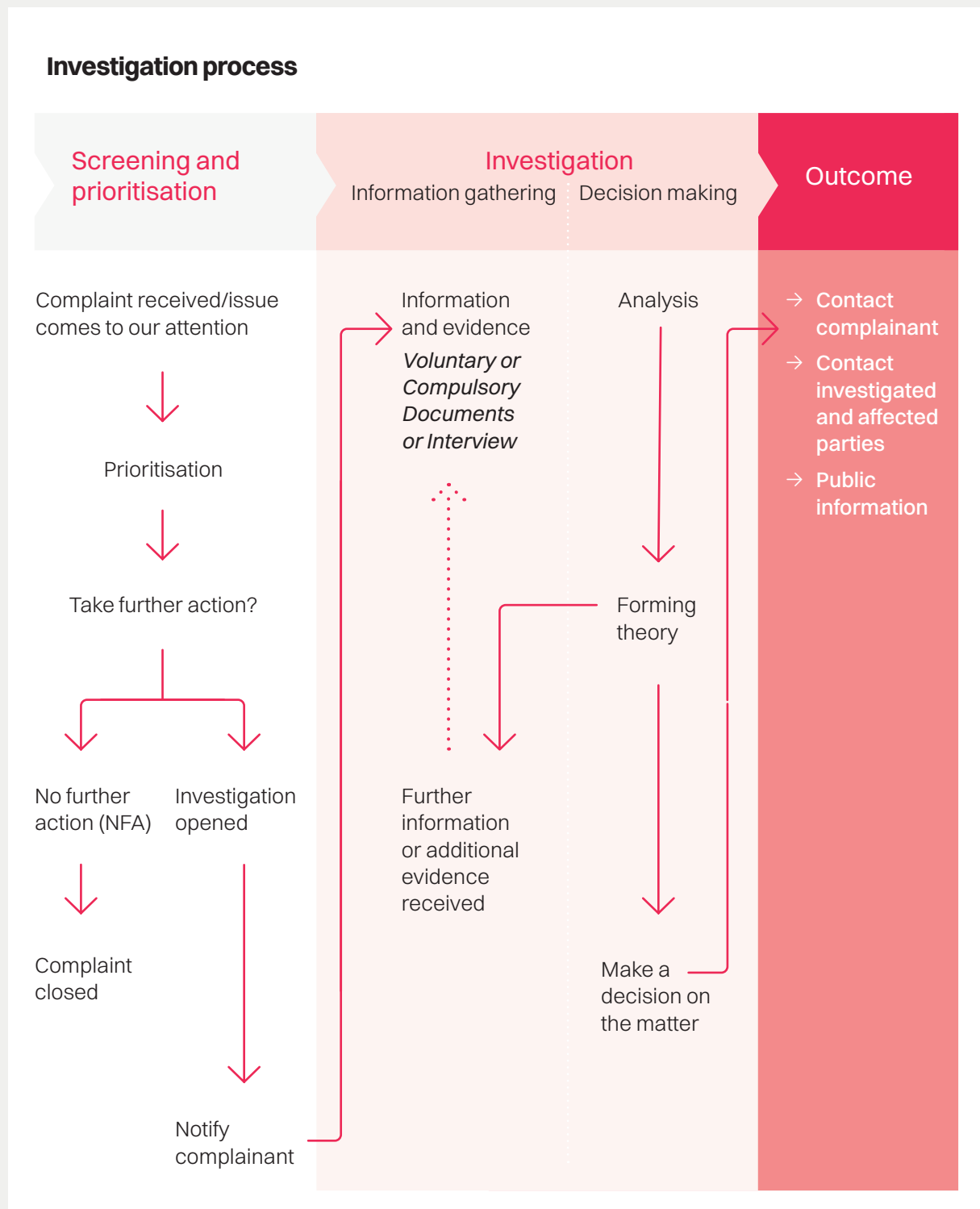
<sup>9</sup> Sections 9(2) and 11 of the Commerce Act.

<sup>10</sup> Section 16 Commerce Act.



## Investigation process roadmap

- 17 Our investigation process can be summarised as follows – noting that every investigation is different, and not every investigation will conform to what is depicted here. Below is a simplified diagram covering the key stages of the investigative process.



## Investigation principles

- 18** We aim to undertake all our investigation work in accordance with the following principles. The text below each principle is designed to assist you to understand what we mean by each principle.

### PRINCIPLE 1

#### **We are objective, fair, and impartial**

- 19** We approach every investigation in an objective, fair, and impartial way.
- 20** All Commission staff and members with duties or accountabilities for investigations will act fairly, promptly, and in accordance with the law.
- 21** We undertake our investigative duties, functions, and powers with integrity and professionalism.
- 22** We seek all reasonably available relevant information, and we base our decisions on the information before us. We have recourse to our compulsory powers where it is necessary or desirable that we use them to get information.
- 23** We recognise that our investigations can have important consequences for parties who are investigated by us or who are otherwise affected. We consider all information thoroughly, and with open-mindedness as to the outcome.
- 24** When making decisions we comply with the principles of natural justice and the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).
- 25** Our decisions relating to investigations will be made with reference to the considerations expressed in our published enforcement criteria and enforcement response guidelines.

## PRINCIPLE 2

### We aim to be as open and transparent as we can be

- 26 We aim to be as open and transparent as we can be. Where appropriate, we will report who we are investigating on our website. The Commission is a public agency and has a public education function.
- 27 There are limits to our ability to be open and transparent. In general, investigations are not conducted in the public eye and it may, in some cases, be necessary to investigate confidentially. We may not always be able to comment on a matter that we are investigating.
- 28 We make **investigated parties** aware, as soon as we are reasonably able to do so, of the nature of the concerns that we have about them, what is likely to be required of them during our investigation, and the timeframes that are likely to apply.
- 29 We take reasonable steps to provide investigated parties with a chance to comment during our investigation.
- 30 We take steps to ensure that **affected parties** also understand the investigation process where appropriate, and what is likely to be required of them during our investigation.
- 31 Generally all investigation outcomes are able to be made public shortly after completion of the investigation.
- 32 All information we receive is subject to the principle of availability under the Official Information Act 1982 (OIA).<sup>11</sup> Where appropriate, we take steps to protect certain information against disclosure – see [38].

## PRINCIPLE 3

### We investigate in a timely way

- 33 We conduct every investigation as efficiently as our resources permit, with the aim of avoiding unnecessary uncertainty and delay.
- 34 We aim to complete investigations in a timely way and to make decisions as promptly as possible.
- 35 We value the assistance of parties and members of the public in our investigations. External assistance, including with the supply of relevant and timely information, can enhance our ability to promptly complete investigations.
- 36 We publish our performance measures in our Statement of Intent and Statement of Performance Expectations<sup>12</sup> and we actively seek to meet those targets.

<sup>11</sup> Section 5 of the OIA, noting "the principle that the information shall be made available unless there is good reason for withholding it."

<sup>12</sup> See our public accountability documents at <http://www.comcom.govt.nz/the-commission/about-us/accountability/>

#### PRINCIPLE 4

### **We handle information responsibly**

- 37** We will only use information provided to us in a manner allowed by law.
- 38** We recognise that some of the information we receive is of a private, commercially sensitive, or confidential nature. Where appropriate, we take steps to preserve the confidentiality of such information and to provide the appropriate protections against disclosure.

#### PRINCIPLE 5

### **We are accountable for our decisions**

- 39** We are accountable for our performance and expenditure to Government, including to our responsible Ministers and to Select Committees.
- 40** Our decision-making takes place within appropriate governance processes, is undertaken or overseen by the Commission members or in some cases by staff, and is wherever possible publicly reported and disclosed.

## Observance of human rights

- 41 We acknowledge and comply with our obligations under the New Zealand Bill of Rights Act 1990.<sup>13</sup>
- 42 For example, as a public body we recognise and observe the principles of natural justice,<sup>14</sup> to the extent that the Commission may make decisions in respect of a person's rights, obligations, or interests.<sup>15</sup> We recognise that we may be judicially reviewed in respect of such decisions, or that we may be the subject of civil court proceedings.
- 43 We also expressly recognise:
- 43.1 that any person who is required to attend a **compulsory interview**, and in that manner has their freedom restricted, must be treated in a humane and respectful way<sup>16</sup>
  - 43.2 the right of persons, including corporations, to be protected from unreasonable search and seizure<sup>17</sup>
  - 43.3 the right to legal representation of persons investigated or appearing as witnesses.
- 44 What the New Zealand Bill of Rights Act requires of us in any given situation will differ: the application of rights is very context-specific. For example, where you are assisting us by providing information, your rights and our obligations differ depending upon whether we are compelling you to supply information or you are volunteering to do so.
- 45 Some of the powers given to us by statute expressly impinge on the rights that are otherwise codified in the New Zealand Bill of Rights Act, because those rights have been altered or reduced by Parliament so that we have effective tools to complete our investigations.<sup>18</sup> You can see these limitations on rights and freedoms below, in sections covering our use of compulsory powers, such as *Information requests* at [92]–[132], *Interviews* at [133–173] and *Search powers* at [178]–[213].
- 46 There are limits also on the uses to which we can put information that we acquire; see for example *Admissibility of information gathered through a compulsory notice* at [174]–[177].

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13 Available online at <http://www.legislation.govt.nz/>

14 Section 27 New Zealand Bill of Rights Act.

15 The Commission's investigations generally affect a person's rights, obligations or interests through the taking of proceedings in court. Nevertheless, the Commission recognises that the principles of natural justice inform best practice in investigations and decision-making.

16 Section 23(5) New Zealand Bill of Rights Act.

17 Section 21 New Zealand Bill of Rights Act.

18 See section 5 New Zealand Bill of Rights Act.

## How we investigate

- 47** Here we set out the typical process that we follow when deciding whether to investigate and when investigating. However, these steps will vary depending on the circumstances of the particular matter. For example, during the course of an investigation, we will assess considerations such as:
- 47.1** whether a breach of the laws we enforce may have occurred
  - 47.2** what further information is needed:
    - I to help us reach a view on whether or not a breach is likely to have occurred
    - II to determine the extent of any breach and to assess potential harm
    - III to help us assess any breach against the enforcement criteria to determine the right outcome
  - 47.3** whether further investigation is warranted
  - 47.4** whether new information has come to light that warrants a new line of inquiry or resolves a current line of enquiry.

### Stage 1 – Screening and prioritisation stage



- 48** We identify matters that may warrant investigation through various sources and methods, including:
- 48.1** concerns reported to us about possible breaches of a law that we enforce
  - 48.2** referrals from other agencies
  - 48.3** self-reports
  - 48.4** the media
  - 48.5** our own intelligence-gathering, research and analysis.
- 49** During the **screening and prioritisation stage** we consider whether a matter warrants investigation. This involves assessing the known nature of any matter and considering:
- 49.1** whether there is a reasonable basis for suspecting that a breach of the laws we enforce may have occurred or be occurring
  - 49.2** our enforcement criteria
  - 49.3** our competing priorities and any current enforcement focus areas.

- 50 We cannot investigate every matter or concern that we receive, so we must carefully consider our available resources when deciding which matters we investigate. Some concerns:
- 50.1 do not identify a potential breach of the law
  - 50.2 are factually or legally incorrect
  - 50.3 are outside our jurisdiction<sup>19</sup>
  - 50.4 are out of time for us to take legal action<sup>20</sup>
  - 50.5 do not identify any real harm
  - 50.6 are not in the public interest to pursue
  - 50.7 may be more effectively dealt with by other agencies
  - 50.8 involve private parties who are better able to try to resolve their own dispute.
- 51 In some cases, we will need to better understand the facts or to test further the information provided to us. To determine whether we should open an investigation we may undertake some preliminary information gathering. However, undertaking preliminary information gathering or testing information provided to us does not mean that we have decided to open an investigation.

## Stage 2 – Investigation stage

Screening and prioritisation

Investigation stage

- 52 In some cases, rather than open an investigation, the Commission may take steps to resolve the issues underlying a concern. These may include taking the opportunity to contact the person or business to assist them in better understanding and complying with the law or referring the complaint to another agency, a dispute resolution body, or the subject of the concern. Where appropriate, the Commission will obtain the permission of the **complainant** before passing on to another entity any identifying information about a complainant.

After initial screening and prioritisation, some matters will move to the **investigation stage**.

The investigation stage involves gathering and analysing relevant information so that we can form a view on:

- 52.1 what happened
- 52.2 whether what happened likely breaches the laws we enforce
- 52.3 if it does, what is the most appropriate enforcement response.
- 52.4 We are not restricted to looking at breaches that have already happened. We can take urgent action to prevent ongoing or threatened breaches, or breaches that we have good reason to think might happen.<sup>21</sup> For example, we may decide to apply to the Courts for an injunction to restrain a person from committing an actual or attempted breach of the legislation we enforce.

19 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 concerns relate to breaches of the law that we do not have authority to enforce.

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

21 For more information on what types of urgent action we may take, see the Injunctions and other urgent responses section of our Enforcement Response Guidelines.

- 52.5** To determine whether a breach of the law may have occurred, we gather information from a large variety of sources. Many different parties may hold the information we require, for example the investigated party, other market participants (including competitors, suppliers or customers), the public, experts, or third parties. We also use publicly available information.
- 52.6** We are able to seek and receive information voluntarily from persons or entities who are willing to assist us, or we can issue compulsory notices requiring interviews or the supply of information to us. We discuss our approach to gathering information further below at Information Requests at [92]-[132] and Interviews at [133-173].
- 52.7** At any stage during an investigation, we may:
- 52.7.1** gather more information as a result of new facts or issues that arise, or to cross check other information that has been provided
  - 52.7.2** revisit and change the scope and focus of the investigation
  - 52.7.3** conduct research or analysis, including legal, marketing, or economic research
  - 52.7.4** seek external expert opinion or assistance.
- 52.8** An investigation is not complete until staff or the relevant Division:
- 52.8.1** decide that the investigation can be closed without an enforcement response being made, or
  - 52.8.2** decide on an enforcement response.
- 52.9** These decisions can in some cases be staggered, so that one entity or individual investigation, or one avenue of investigation, is decided before others.



## How we make decisions

### Commission members and staff

- 53** Decisions made by the Commission before, during, and after an investigation are either made by staff or by the relevant Division, depending in each case on the significance and complexity of the decision.

### Decision-making before an investigation

- 54** Typically our staff (including managers) decide whether a matter will progress from the screening and prioritisation stage to the investigation stage.

### Decision-making during an investigation

- 55** There are usually multiple decision points during the life of an investigation. Whether to start, stop, or make an enforcement response are all decisions. There are also decisions made along the way as to the scope and focus of an investigation. Such decisions are often (but not always) taken by authorised staff at manager level. In appropriate cases, such decisions may be made by a Division.

### Decision-making after an investigation

- 56** Once the investigation team has completed its enquiries and assessed the available evidence, the investigation team presents to the relevant decision-maker:
- 56.1** the salient facts and a summary of the evidence and legal or economic issues arising,
  - 56.2** an assessment of whether or not there is likely to have been a breach of the law, and
  - 56.3** if so, a recommendation as to the enforcement options and the most suitable type of enforcement response.
- 57** The decision-maker may request that further information is gathered before a final decision is made. In some circumstances these enquiries may include approaching an investigated party to understand their willingness to change their behaviour or to compensate affected parties.
- 58** Decisions to take an **enforcement response**, such as issue a warning, infringement notice, compliance advice letter, or take court action, receive enforceable undertakings, or enter into a settlement may be taken by authorised staff at manager level or the relevant Division.
- 59** Details of the available enforcement responses, and the factors that we consider when choosing the most appropriate response, can be found in our Enforcement Response Guidelines.

## Timing

- 60** We aim to complete every investigation and make every decision as promptly as possible. Due to the varying nature and complexity of our investigations, and the competing demands on our resources, there is no uniform or typical investigation duration. Some relatively straightforward investigations can be resolved within months. Other more complex or large-scale investigations can take longer, such as investigations entailing:
- 60.1** novel or complex legal, economic or evidential matters
  - 60.2** expert evidence
  - 60.3** difficulties in accessing relevant information
  - 60.4** multiple or overseas parties
  - 60.5** a large volume of documents, data or witnesses.
- 61** We publish our performance measures in our Statement of Intent and Statement of Performance Expectations, and we actively seek to meet those timeliness targets.
- 62** If you wish to know more about the timing of an investigation, you should contact the relevant staff member working on the matter.

## Communication with parties during an investigation

- 63** Generally, our investigations are not conducted in the public eye. We need to balance the competing interests of open government, with the need to follow due process and ensure a fair trial and proper administration of justice. We may not always be able to communicate with persons, or publicly, on a matter that we are investigating.
- 64** In this section we describe our communications with parties on a one-to-one basis. We describe how we communicate publicly, including through the media, in the section *Publication and media comment by the Commission* [254]–[267] below.
- 65** What we are able to communicate and when will vary between investigations and may depend on the party we are communicating with. In deciding what to communicate to a particular party we will consider matters like:
- 65.1** the Investigation Principles (set out at [19] to [40] above)."
  - 65.2** whether the communication will assist or hinder our investigation, including the integrity of the information that may be gathered
  - 65.3** the need to give investigated parties information to enable them to participate in the investigation
  - 65.4** the interests of complainants, witnesses, or affected persons
  - 65.5** whether heightened confidentiality or commercial sensitivity attaches to the investigation
  - 65.6** what information is already publicly known, for example through disclosure by interested or affected parties.

## Communication with the investigated party

- 66** As soon as we are reasonably able to do so in the context of an investigation, a staff member will contact an investigated party to let them know that we have opened an investigation, the nature of the concerns that we are investigating, and an indicative timeframe for our investigation.
- 67** In some cases, we will not be able to communicate this information at an early stage, such as where contacting the investigated party would compromise the investigation, for example by making it harder to gather reliable evidence.
- 68** The exact time that an investigation takes varies considerably case-by-case, and depends on matters such as the complexity of the investigation, the discovery of new lines of enquiry, the number of investigated parties or investigated breaches, and the ease with which we can access evidence and information. More complex investigations take longer than straightforward investigations.
- 69** After the initial communication is made, we aim to provide an investigated party with regular progress updates during the investigation when we are able to do so, and upon request.
- 70** We will also, when we are reasonably able to do so, communicate any changes in the scope of our investigation. Routinely, new avenues of inquiry are opened during an investigation.
- 71** We will take reasonable steps to provide investigated parties with a chance to comment on or provide evidence about the concerns that we are investigating. This will generally take the form of an evidential interview, although in some cases the Commission may seek or agree to receive comment in other forms.
- 72** If we have taken an alternative course of action, such as referring a concern to another agency, we will generally advise an investigated party of that decision.

## Communication with complainants

- 73** We will take steps to communicate with a complainant when we open an investigation and during the investigation, when we are reasonably able to do so. Our communications with complainants will typically be limited to information about our progress and likely investigation timing.
- 74** There are likely to be stages during an investigation when we are able to communicate only quite limited information.
- 75** If we have taken an alternative course of action, such as referring a concern to another agency, we will generally advise the complainant of that decision.

## Communication with other affected parties

- 76** Where there are other affected parties, we will take steps to communicate with them during the investigation as regularly and fully as we are reasonably able. As with complainants, it may not be appropriate for us to communicate with affected parties at certain stages of an investigation; at other times we may only be able to provide limited information.
- 77** Communication with affected parties may take place by way of individual communications, or through public comment by the Commission. See below the section on *Publication and media comment by the Commission* at [254-267].

## Stop Now letter

- 78** During an investigation, an investigated party might receive a Stop Now letter from us in which we ask it to stop engaging in current conduct or business practices.
- 79** A Stop Now letter is issued where we *urgently* want conduct to stop that we see is likely to be harmful to the market, consumers or public safety, and which is a likely breach of one of the laws that we enforce. If the letter does not achieve a prompt end to the conduct, we are likely to seek a Court injunction, requiring a party to stop what they are doing.<sup>22</sup> Sometimes we publicise that we have issued a Stop Now letter, so that the public is warned about the conduct that concerns us.
- 80** If we issue a Stop Now letter, it is not a sign that our investigation has ended or that we will not still make an enforcement response. To the contrary, it means that our investigation has already turned up information that causes us real concern that the law is being breached in a way that is harmful to consumers or competitors. A Stop Now letter gives the recipient a chance to adjust their conduct for the better, which can meet our overall concerns or be a mitigating factor in the recipient's favour if enforcement steps are taken.
- 81** A recipient who receives a Stop Now letter should take it seriously and, if necessary, seek legal advice on how to respond.
- 82** Recipients can also contact the signatory to the letter, at our office, to discuss it.

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<sup>22</sup> For more on injunctions, see Enforcement Response Guidelines.

## Communication at the end of an investigation

- 83** At the end of an investigation, we will notify investigated parties of that fact and of any outcome such as the enforcement response that has been selected.
- 84** Where appropriate and practicable, we will also take reasonable steps to advise complainants and affected parties of the end of the investigation and of any outcome.
- 85** Where court proceedings are commenced, the Commission will provide complainants with information about the case that we have filed, and any major developments in the proceeding.<sup>23</sup> If there are a large number of complainants, we may communicate this information to the public generally or through the media. See below the section on *Publication and media comment by the Commission* at [254]-[267].
- 86** We will in appropriate cases also make public disclosure of the investigation outcome, either by media release, website content or otherwise. Our Enforcement Response Guidelines contain more information on when we publicise enforcement responses, such as warnings and compliance advice letters.<sup>24</sup>
- 87** In many cases we prepare an investigation report summarising key information like the evidence we found during the investigation and the conclusions we reached. Where such a report is prepared, any person may request a copy of that report under the OIA 1982. Whether we release a report (in whole or in part) will depend upon an application of the OIA provisions. Whether or not a report has been prepared, parties affected by the Commission's decision may request the Commission's reasons under the OIA.<sup>25</sup>
- 88** We are likely to proactively publish an investigation report where the investigation is a matter of considerable public interest, and we believe that the report will provide a useful educational resource for businesses and the public.<sup>26</sup> Such a report will contain only material that would be mandated for release under the OIA.

## Information gathering

- 89** The investigation stage involves gathering and analysing information for the purpose of determining whether a breach of the law might have occurred.
- 90** We gather information from a variety of sources. Many different parties may hold the information we require, such as the investigated party, other market participants, the public, experts, and other third parties. Sometimes information is also available in the public domain.
- 91** We collect information by methods that include:
- 91.1** gathering publicly available information
  - 91.2** requesting or receiving information, including documents and data
  - 91.3** conducting interviews
  - 91.4** executing searches under warrant or otherwise.

<sup>23</sup> The Commission adheres to the Solicitor-General's Prosecution Guidelines and the Victims' Rights Act 2002.

<sup>24</sup> See especially Enforcement Response Guidelines at [16]-[22] for compliance advice letters and warning letters at [23]-[36].

<sup>25</sup> Section 23, Official Information Act 1982.

<sup>26</sup> The Commission is empowered to release information for public education purposes, see section 25 Commerce Act; section 6 Fair Trading Act, section 111(2)(d) CCCF Act and section 4(1)(d) of the Grocery Industry Competition Act. Section 25 of the Commerce Act also applies under the Fuel Industry Act: see section 45(d) and the Retail Payment System Act: see section 38(e).

## Information requests

- 92** We may ask persons (including companies and other entities) to supply us with information voluntarily, we may require that consumer lenders make certain records available to us on request,<sup>27</sup> or we may issue a compulsory notice requiring the supply of information if we consider it necessary or desirable to do so for the purposes of our investigation.<sup>28</sup>
- 93** By 'information' we mean documents, business records, explanations of conduct, witness evidence, and other matters of fact or impression that may be relevant to an investigation.

### Types of information request

#### Voluntary requests

- 94** In many situations where we need to gather information, we will first consider whether the holder of the information can or will reliably supply the information on a voluntary basis, without the need for compulsion under a formal notice.
- 95** Where we are content to request information on a voluntary basis, we may do so orally (in person, or by methods like telephone or email) or we may write to you briefly setting out our investigative concerns and specifying the information that we would like you to supply or explain.
- 96** If we make no reference to seeking the information under a specific statutory power, you can assume that the request is a voluntary request. This means that you can choose whether or not to supply the information. You may wish to seek legal advice about the benefits and consequences of doing so.
- 97** In particular, we may seek information on a voluntary basis because we have fewer restrictions on using that information as evidence in Court proceedings. See the section *Admissibility of information gathered through a compulsory notice* at [174]-[177] below.
- 98** There can be advantages to you as well as to us if information is supplied voluntarily:
- 98.1** it can help our investigation proceed more quickly
  - 98.2** it often seems less 'adversarial' than when we issue a formal notice. Sometimes people do not like being forced by us to do something
  - 98.3** you can often have more input into what is provided by helping us understand what information is available, how quickly it can be provided, whether we should ask for the information in tranches etc.
- 99** If you supply information voluntarily, it is still your legal duty to be complete, truthful, and accurate in what you provide; see at [107]-[108] below.
- 100** If we do not receive a sufficient response to our request for information, we may treat that as indicative of a lack of cooperation with our investigation, which may be a factor that influences our next steps, how we resolve the investigation, or the penalty that might apply.

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<sup>27</sup> Sections 9CA and 41A CCCF Act.

<sup>28</sup> Section 98 Commerce Act and section 47G Fair Trading Act. Section 98 Commerce Act also applies under CCCF Act (via section 113), Telecommunications Act (via section 15), Dairy Industry Restructuring Act (via section 150ZF), Fuel Industry Act (via section 13), Retail Payment System Act (via section 36), and Grocery Industry Competition Act (via section 180).

## Lenders must provide certain records on request

- 101** We may request that lenders under consumer credit contracts make certain records available to the Commission:
- 101.1** records about responsible lending enquiries made by the lender that demonstrate how the lender satisfied themselves that loans, guarantees and relevant insurances were suitable and/or affordable.<sup>29</sup>
  - 101.2** records about how the lender calculated each credit and default fee that demonstrate that the fee is not unreasonable at the time at which it was calculated or reviewed.<sup>30</sup>
- 102** Lenders must provide the records within 20 working days of receipt of the request or within any longer period of time specified by the Commission.<sup>31</sup>

## Compulsory notices

- 103** In some situations, supplying information voluntarily will not be possible or we will consider it necessary or desirable to issue a formal notice to compel production of the information. For example:
- 103.1** sometimes people are under a legal obligation, such as an obligation of confidence, in relation to the information and may be unable to assist us unless they are compelled
  - 103.2** sometimes people feel unable to supply information voluntarily, for other reasons, and feel more 'protected' by a formal compulsory notice from us – on the basis that they cannot be criticised (say by their employer, colleagues, customers or suppliers) if they are legally required to provide information to us
  - 103.3** sometimes a formal notice can assist in ensuring that information is provided by a particular deadline
  - 103.4** we will not seek information on a voluntary basis if we anticipate that there is a real risk of non-compliance or the supply of misleading or incomplete information.

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<sup>29</sup> Section 9CA(3) CCCF Act. The obligation to make records available also applies to a transferee under a buy-back transaction.

<sup>30</sup> Section 41A(4) CCCF Act.

<sup>31</sup> Sections 9CA(7) and 41A(6) CCCF Act.

## Comparison of voluntary and compulsory requests

- 104** You may wish to seek legal advice if you are asked or required to supply the Commission with information.
- 105** While there are many similarities between providing information on a compulsory basis and doing so voluntarily, there are some important differences that apply. For example, it is a specific criminal offence to refuse to comply with a compulsory notice without reasonable excuse.<sup>32</sup> We discuss the features of gathering information on a compulsory basis below at [109]-[132].
- 106** We are under greater restrictions in how we can use information supplied under a compulsory power. See the section *Admissibility of information gathered through a compulsory notice* at [174-177] below.
- 107** In whatever way information is provided to us – whether voluntarily or compulsorily – the provider has a legal duty to provide complete, truthful, and accurate responses. It is a criminal offence to attempt to knowingly mislead or deceive the Commission,<sup>33</sup> for example by supplying information to us knowing it to be false or misleading or by colluding with other people about answers to the Commission's requests. People who supply information to the Commission must use their best efforts to be accurate and complete in what they supply.
- 108** The Crimes Act also creates additional offences, punishable by imprisonment, that may apply.<sup>34</sup> If a party to an investigation deliberately attempts to frustrate or defeat a Commission investigation, or conspires with any person to do so, they may be committing the criminal offence of attempting or conspiring “to obstruct, prevent, pervert, or defeat the course of justice.”<sup>35</sup> For example, it is an offence to lie to the Commission, or to agree that another party should lie to the Commission, about conduct that we are investigating. This offence is punishable by up to seven years imprisonment.

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<sup>32</sup> Section 103(1) Commerce Act, section 47J(1) Fair Trading Act, section 42(4) Fuel Industry Act 2020 and section 183(1) Grocery Industry Competition Act. Section 103 Commerce Act also applies in relation to investigations under CCCF Act: see section 113(l), Telecommunications Act: see section 15(1)(l), Dairy Industry Restructuring Act: see section 150ZF(1)(p), and Retail Payment System Act 2022: see section 38(p).

<sup>33</sup> Section 103(2) Commerce Act, section 42(2) Fuel Industry Act and section 183(2) of the Grocery Competition Industry Act. Section 103(2) Commerce Act also applies in relation to investigations under CCCF Act: see section 113(l), the Telecommunications Act 2001: see section 15(1)(l), the Dairy Industry Restructuring Act: see section 150ZF(1)(p), and the Retail Payment System Act: see section 38(p).

<sup>34</sup> See sections 108 to 117 Crimes Act 1961.

<sup>35</sup> Section 117(e) Crimes Act 1961.



## Compulsory notice power

### Source and scope of the power

- 109** We can compel any person or company to supply information to us by serving on them a formal notice, signed by a Commission member or authorised delegate.<sup>36</sup>
- 110** This power exists under:
- 110.1** section 98 of the Commerce Act 1986;
  - 110.2** section 47G of the Fair Trading Act 1986;
  - 110.3** section 113 of the CCCF Act (via section 98 of the Commerce Act);
  - 110.4** section 15 of the Telecommunications Act 2001 (via section 98 of the Commerce Act);
  - 110.5** section 150ZF of the Dairy Industry Restructuring Act 2001 (via section 98 of the Commerce Act);
  - 110.6** section 33 of the Fuel Industry Act 2020 (via section 98 of the Commerce Act);
  - 110.7** section 36 of the Retail Payment System Act 2022 (via section 98 of the Commerce Act); and
  - 110.8** section 180 of the Grocery Industry Competition Act 2023 (via section 98 of the Commerce Act).
- 111** We can require you to provide to us:
- 111.1** any information or class of information specified in the notice; or
  - 111.2** any document or class of documents specified in the notice.
- 112** A request for information may require you to generate an answer or to create a new document that sets out the information requested in the notice. For example, a request for “information” may ask you to compile a list of your customers, or ask you to explain how data is stored or how a particular system works.

### “Documents” defined

- 113** “Documents” includes any writing on any material and can include any book, map, plan, graph or drawing.<sup>37</sup>
- 114** Documents also includes:
- 114.1** Any documents stored in electronic form such as emails, texts, web pages, notes, Word, PowerPoint or Excel documents stored on computer systems or mobile systems.
  - 114.2** Metadata associated with an electronic document. “Metadata” is the additional information about an electronic document, such as the document’s authorship, ownership, date of creation and editing or viewing history.

### When the power can be used

- 115** We can only issue a compulsory notice for information when we consider that it is necessary or desirable for the purposes of carrying out our functions and exercising our powers under the laws that we enforce.<sup>38</sup>
- 116** Recognising that this is a compulsory and extensive power, we take care when exercising the power and the decision to do so is made by a Commission member (or an authorised delegate) after receiving appropriate information.

<sup>36</sup> We note for completeness that we also have the power, not dependent on a formal notice, to require persons to furnish information in a product safety investigation: see section 47L Fair Trading Act; and have the power, pursuant to a formal notice, to require certain grocery retailers to supply us with information relating to certain grocery-related covenants: see section 28D Commerce Act.

<sup>37</sup> See the definition at section 2(1) Commerce Act and section 2(1) Fair Trading Act.

<sup>38</sup> Section 98 Commerce Act and section 47G Fair Trading Act. Section 98 Commerce Act also applies under CCCF Act (via section 113), Telecommunications Act (via section 15), Dairy Industry Restructuring Act (via section 150ZF), Fuel Industry Act (via section 13), Retail Payment System Act (via section 36), and Grocery Industry Competition Act (via section 180).

## The formal notice

- 117** We can seek under notice any information that we consider is relevant to an investigation<sup>39</sup> and where the conduct being investigated could, if proven, amount to a breach of the laws that we enforce.<sup>40</sup>
- 118** We must draft and serve each notice in accordance with the requirements of the law. Every compulsory notice will set out, amongst other information:
- 118.1** A brief summary of the matter under investigation.
  - 118.2** The information that you must provide to us.
  - 118.3** How you should provide the information to us, including guidance on how to supply electronically-stored information.
  - 118.4** A timeframe within which you must provide the information. The timeframe will differ depending on the circumstances, but is often between two to four weeks. In cases where a large volume of information is covered by the notice, or information that could be difficult to retrieve, we may ask for it in stages (sometimes called ‘tranches’), with each stage having its own applicable timeframe.
- 119** We will provide a cover letter with the statutory notice. The purpose of the cover letter is explanatory. We want to help you understand the notice power, and the information that we require.

## Complying with a notice

- 120** If you receive a statutory notice, you need to treat the notice seriously and act promptly upon receiving it. Upon receipt of a compulsory notice you are legally obligated to comply with it (including its specified timeframes), and it is a criminal offence to fail to do so without reasonable excuse.
- 121** The notice can be addressed to an individual or a company. Where the notice is addressed to a company, a person who is authorised to sign on behalf of the company should sign the response.
- 122** The recipient is not required to provide **privileged material** in response to a notice.
- 123** However, the recipient must provide all other information that is covered by the notice, even where that information is confidential or commercially sensitive. It is acceptable to indicate on your response that information is of this kind, so that we can be mindful of those sensitivities when we test or use the information.
- 124** The law does not excuse persons from furnishing documents or information, or giving evidence, on the basis that to do so might incriminate them.<sup>41</sup> There are, however, important limits on the uses that the Commission can make of statements provided in these circumstances:<sup>42</sup> see the section on *Admissibility of information gathered through a compulsory notice* at [174]–[177] below.

<sup>39</sup> See *Telecom Corp of New Zealand v Commerce Commission* (1991) 3 NZBLC 101,962 (Court of Appeal).

<sup>40</sup> See *AstraZeneca v Commerce Commission* [2010] 1 NZLR 297 (Supreme Court).

<sup>41</sup> Section 106(4) Commerce Act and section 47G(3) Fair Trading Act. Section 106 Commerce Act also applies under CCCF: see section 113(l), Telecommunications Act: see section 15(1)(o), Dairy Industry Restructuring Act: see section 150ZF(1)(r), Fuel Industry Act: see section 45(f), Retail Payment System Act: see section 36(e), and Grocery Industry Competition Act: see section 180(k).

<sup>42</sup> Section 106(5) Commerce Act and section 47G(4) Fair Trading Act. Section 106 Commerce Act also applies under CCCF: see section 113(l), Telecommunications Act: see section 15(1)(o), Dairy Industry Restructuring Act: see section 150ZF(1)(r), Fuel Industry Act: see section 45(f), Retail Payment System Act: see section 36(e), and Grocery Industry Competition Act: see section 180(k).

## Varying or extending a statutory notice

- 125** If you anticipate difficulty in responding to a notice within the specified timeframe, you should contact the staff member named in the letter as early as possible to explain and discuss the reasons for the difficulty. For example, it may be the case that:
- the information does not exist
  - the information is no longer in your possession or control
  - you are unavailable at the relevant time, but can provide the information shortly after the prescribed deadline
  - you do not understand your obligations under the notice, or wish to clarify its scope
  - you wish to raise for our consideration issues with the breadth of information that is covered by the notice, or to suggest that the information could be supplied in tranches.
- 126** When requesting a variation or extension to a notice, you must do so as early as possible, as it typically takes several days to formally decide and re-document changes to a notice.

## Non-compliance with a notice

- 127** It is a criminal offence to refuse or fail to comply with a statutory notice without a reasonable excuse.<sup>43</sup>
- 128** The penalty for non-compliance with a notice under the Commerce Act, CCCF Act, Telecommunications Act, Dairy Industry Restructuring Act, Fuel Industry Act, Retail Payment System Act and the Grocery Industry Competition Act is a fine of up to \$100,000 for an individual and \$300,000 for a company.<sup>44</sup> Under the Fair Trading Act, the fine is up to \$10,000 and \$30,000, respectively.<sup>45</sup>
- 129** A “reasonable excuse” for not complying with a notice will exist in only rare circumstances. We will consider all relevant facts as they apply in each case, to determine if there has been blameworthy non-compliance. Unless the recipient has suffered a genuine emergency, it will be difficult for them to argue that they had a reasonable excuse if they have not contacted us in advance to discuss the obstacles to supplying the information.
- 130** It will generally not be a sufficient excuse that the recipient has been unavailable, busy or unwell, where they have failed to contact our staff to seek a notice extension. It is also unlikely to be a reasonable excuse that the recipient has – even on legal advice – formed the view that our notice is invalid, irrelevant, out of time, too broad or has some other defect that the recipient identifies. In all such circumstances, or if they do not understand what is required, recipients should contact our staff at an early opportunity to discuss the matter.

## Compulsory notices after proceedings have begun

- 131** We can issue a compulsory notice to a person, even after we have begun proceedings against them for breaches of the laws that we enforce.<sup>46</sup>
- 132** The power to issue a compulsory notice depends upon whether we are continuing to investigate. Sometimes we continue to investigate after we have issued court proceedings.<sup>47</sup>

<sup>43</sup> In *Commerce Commission v Osmose New Zealand Ltd* DC Auckland CRI-2006-004-8264, 23 August 2006, Osmose pleaded guilty to a charge of failing to comply with a statutory notice and was fined. Osmose had not provided the Commission documents, and a particularly pertinent document, which should have been provided under the statutory notice. In *Commerce Commission v Aerolineas Argentinas* SA DC Auckland CRI-2008-004-011467, 21 January 2009, Aerolineas pleaded guilty to a charge of failing to comply with a statutory notice and was fined. Aerolineas had not provided the required information on the due date and provided the requested documents five months later.

<sup>44</sup> Section 103(4) Commerce Act, section 42(4) Fuel Industry Act 2020 and section 183(4) Grocery Industry Competition Act. Section 103 Commerce Act also applies to the CCCF Act: see section 113(i), the Telecommunications Act: see section 15(1)(l), the Dairy Industry Restructuring Act: see section 150ZF(1)(p), and the Retail Payment System Act 2022: see section 38(p).

<sup>45</sup> Section 47J Fair Trading Act 1986.

<sup>46</sup> Section 98G Commerce Act 1986. Section 98G Commerce Act also applies to the CCCF Act: see section 113(d), the Telecommunications Act: see section 15(1)(g), the Dairy Industry Restructuring Act: see section 150ZF(1)(k), the Fuel Industry Act: see section 33(g), the Retail Payment System Act 2022: see section 36(b) and the Grocery Industry Competition Act: see section 180(c).

<sup>47</sup> *Commerce Commission v Air New Zealand Ltd* [2011] 2 NZLR 194 (Court of Appeal.)

## Interviews

- 133** We may ask you to attend an interview voluntarily, or we may issue you with a compulsory notice<sup>48</sup> requiring you to attend an interview, if we consider it necessary or desirable to do so for the purposes of our investigation.
- 134** For the considerations that typically apply when we are deciding whether to seek information voluntarily or compulsorily, including by way of interview, see above at [97]–[98] and [103] and below at [137].
- 135** For the restrictions that apply to us when we compel information at an interview, see *Admissibility of information gathered through a compulsory notice* at [174]–[177] below.

### Compelling information or conducting an interview

- 136** When we are investigating, we regularly need to decide whether to seek information under a formal notice to supply information or whether to conduct an in-person interview with a witness.
- 137** Many factors are relevant, and in a typical investigation we may use both methods. Some investigations will be progressed by reviewing documentary records first, and then putting specific material and questions to a person in interview. Other investigations will proceed by conducting interviews first, to help narrow the range of enquiries, before reviewing large volumes of material. Decisions on which methods to use (and when) are case-specific.

### Voluntary interviews

- 138** An interview can take place in person, over the telephone or by video link, or otherwise.
- 139** Before the interview, we will provide you with an outline of our investigation so that you can understand the relevant context.
- 140** You may bring a lawyer or support person to your interview, and may request or bring a professional interpreter if you are not fluent in English.<sup>49</sup>
- 141** We cannot require you to answer any question that we put during a voluntary interview, if you do not wish to do so. It is your choice to assist our investigation voluntarily, and you can refuse to assist or can end your voluntary assistance at any time. You may request a break in the interview at any time, including to consult your lawyer.
- 142** However, if you do answer our questions or otherwise provide information voluntarily, we can use that in evidence against you and others. This means that you can decline to assist voluntarily on the grounds that you might incriminate yourself; but if you do assist, we can use what you say as evidence. Please compare this situation with the below section on *Admissibility of information gathered through a compulsory notice* at [174]–[177] below.
- 143** We will usually take notes during the interview and we often also ask to record interviews by video or audio. Recording interviews ensures that both parties have access to a complete record of what was discussed. Upon request we will provide you with a copy of the recording and any transcript that we make of it.
- 144** Where we have not recorded an interview, we may ask you to sign a written statement after the interview, confirming that the information contained in the statement accurately reflects what you have said to us. If a matter proceeds to Court, such notes, recordings, transcripts, or statements made during and after an interview may be used as evidence.

<sup>48</sup> Section 98 Commerce Act and section 47G Fair Trading Act. Section 98 of the Commerce Act also applies under the CCCF Act: see section 113(c), the Telecommunications Act; see section 15(f), the Dairy Industry Restructuring Act; see section 150ZF(l), the Fuel Industry Act; see section 33(f), the Retail Payment System Act; see section 36(a), and the Grocery Industry Competition Act: see section 180(a).

<sup>49</sup> Where an interpreter is used the Commission will need to ensure that the interpreter is able to appropriately carry out the task of interpreting. Any interpreter should be familiar with the Code of Ethics of the Australian Institute of Interpreters and Translators Inc available at <https://ausit.org/code-of-ethics/>

## Compulsory interviews

**145** We also have the power to require a person to attend a compulsory interview.

### Source of the power

**146** Under the laws we enforce, we have the power to compel a person to appear before the Commission to give evidence, either orally or in writing.<sup>50</sup>

### When the power can be used

- 147** We can only issue a compulsory notice for an interview when we consider that it is necessary or desirable for the purposes of carrying out our functions and exercising our powers under the Commerce Act, Fair Trading Act, CCCF Act, Telecommunications Act, Dairy Industry Restructuring Act, Fuel Industry Act, Retail Payment System Act or Grocery Industry Competition Act.
- 148** Recognising that this is a power to require a person to attend with us, we take care when exercising the power and the decision to do so is made by a Commission member or authorised delegate after receiving appropriate information.
- 149** There are a variety of investigative reasons why we may decide to compel a person to attend an interview, including where:
- 149.1** it can be a timely method of obtaining critical information
  - 149.2** a person has failed or refused to assist us voluntarily
  - 149.3** we have reason to doubt the truthfulness or accuracy of a person's voluntary assistance, and we want the person to give evidence on oath
  - 149.4** the person prefers not to assist us voluntarily, such as where they perceive that confidentiality or employment restrictions prevents it
  - 149.5** it can be necessary to concurrently interview several people and compelling the time and place of the interview allows this to happen.

### The formal notice

- 150** We must draft and serve each notice in accordance with the requirements of the law. Every compulsory interview notice will set out, amongst other information:
- 150.1** a brief summary of the matter under investigation
  - 150.2** what topics we want to ask you about
  - 150.3** your rights (discussed below, and these rights will also be explained to you at the interview)
  - 150.4** the time and location of the interview, which may be held at our offices or elsewhere, as we decide is most appropriate.<sup>51</sup> We will try to set the interview at a location that is convenient to you, although this will not be possible in every case.
- 151** We will provide a cover letter with the statutory notice. The purpose of the cover letter is explanatory. We want to help you understand the interview power, and why we are issuing a notice to you in this instance.

<sup>50</sup> Section 98(1)(c) Commerce Act 1986 and section 47G(1)(c) Fair Trading Act 1986. Section 98 of the Commerce Act also applies under the CCCF Act: see section 113(c), the Telecommunications Act: see section 15(f), the Dairy Industry Restructuring Act: see section 150ZF(i), the Fuel Industry Act: see section 33(f), the Retail Payment System Act: see section 36(a), and the Grocery Industry Competition Act: see section 180(a).

<sup>51</sup> We will consider paying the actual and reasonable travel costs of interviewees where we consider that this is appropriate. We do not cover the costs of any legal representation, loss of income or other costs.

## Who can attend the interview

- 152** The Commission is responsible for the proper and fair conduct of the interview and will decide who is permitted to attend the interview.
- 153** You can bring a lawyer with you to the interview, or a support person if you prefer.
- 154** A director, executive, or employee of a company or other entity is entitled to be legally represented at an interview, but the company or entity has no right to attend or have its lawyer attend.
- 155** If your attending lawyer also acts for other investigated parties or persons of interest in the investigation, we may advise you that the lawyer could have a potential conflict of interest and be compromised in their ability to effectively represent your interests. It is your decision whether you continue with the same lawyer or opt to change.
- 156** If you require an interpreter because your ability to speak and understand English is poor, please let the relevant staff member know as early as possible. We will, where necessary, arrange for an interpreter to be present during the interview.
- 157** A Commission member or their authorised delegate may also be present at each compulsory interview, as will the relevant investigative staff. At some interviews an external advisor to the Commission, such as a lawyer advising the Commission, may be present.

## Changing the date of the interview

- 158** If you anticipate difficulty in attending the scheduled compulsory interview, you should contact the staff member named in the letter as early as possible and explain the reasons for the difficulty.
- 159** We will only change the date of an interview for good reason. You must not leave your request to change until close to the scheduled time for interview, as it typically takes several days to formally decide and re-document changes to a notice.

## Non-compliance with a notice

- 160** Unless you have a “reasonable excuse,” it is a criminal offence to fail to attend a compulsory interview.<sup>52</sup> A reasonable excuse for not attending a compulsory interview will exist in only rare circumstances. We will consider all relevant facts as they apply in each case, to determine if there has been blameworthy non-compliance. Unless you have suffered a genuine emergency, it will be difficult to argue that you had a reasonable excuse if you do not contact us in advance to discuss the obstacles to your attendance.
- 161** It is also a criminal offence to:
- 161.1** fail to answer all questions put to you during a compulsory interview.<sup>53</sup> See below under *Requirement to answer questions* at [163]-[165]
  - 161.2** furnish information knowing it to be misleading<sup>54</sup>
  - 161.3** deceive or otherwise knowingly mislead the Commission, or attempt to do so.<sup>55</sup>
- 162** The penalty for non-compliance under the Commerce Act, CCCF Act, Telecommunications Act, Dairy Industry Restructuring Act, Fuel Industry Act, Retail Payment System Act and Grocery Industry Competition Act is a fine of up to \$100,000 for an individual and \$300,000 for a company.<sup>56</sup> Under the Fair Trading Act, the fine is up to \$10,000 and \$30,000, respectively.<sup>57</sup>

## Requirement to answer questions

- 163** At a compulsory interview, the interviewee is required to answer our questions. No person is excused in a compulsory interview from answering our questions or from furnishing information, on the grounds that to do so might incriminate them.<sup>58</sup>
- 164** However, because the law requires interviewees to answer our questions, it also limits the use that we can make of the answers.
- 165** There are restrictions on the evidential use that we can make of the answers as against the interviewee who provided them; see the section below *Admissibility of information gathered through compulsory notice* at [174]-[177] below.

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<sup>52</sup> Section 103(1)(a) Commerce Act, section 47J(1) Fair Trading Act, section 42(1)(a) Fuel Industry Act 2020 and section 183(1)(a) Grocery Industry Competition Act. Section 103 Commerce Act also applies in relation to investigations under the CCCF Act: see section 113(i), the Telecommunications Act: see section 15(1)(l), the Dairy Industry Restructuring Act: see section 150ZF(1)(p), and the Retail Payment System Act 2022: see section 38(p).

<sup>53</sup> Section 106(4) Commerce Act and section 47G(3) Fair Trading Act. Section 106 of the Commerce Act also applies under the CCCF: see section 113(i), the Telecommunications Act: see section 15(1)(o), the Dairy Industry Restructuring Act: see section 150ZF(1)(r), the Fuel Industry Act: see section 45(f), the Retail Payment System Act: see section 36(e), and the Grocery Industry Competition Act: see section 180(k).

<sup>54</sup> Section 103(1)(b) Commerce Act 1986; section 47J(1)(b) Fair Trading Act 1986, section 42(4) Fuel Industry Act 2020 and section 183(1) Grocery Industry Competition Act. Section 103 Commerce Act also applies in relation to investigations under the CCCF Act: see section 113(i), the Telecommunications Act: see section 15(1)(l), the Dairy Industry Restructuring Act: see section 150ZF(1)(p), and the Retail Payment System Act 2022: see section 38(p).

<sup>55</sup> Section 103(2) Commerce Act, section 42(2) Fuel Industry Act and section 183(2) of the Grocery Industry Competition Act. Section 103(2) Commerce Act also applies in relation to investigations under the CCCF Act: see section 113(i), the Telecommunications Act 2001: see section 15(1)(l), the Dairy Industry Restructuring Act: see section 150ZF(1)(p), and the Retail Payment System Act: see section 38(p).

<sup>56</sup> Section 103(4) Commerce Act, section 42(4) Fuel Industry Act 2020 and section 183(4) Grocery Industry Competition Act. Section 103 Commerce Act also applies to the CCCF Act: see section 113(i), the Telecommunications Act: see section 15(1)(l), the Dairy Industry Restructuring Act: see section 150ZF(1)(p), and the Retail Payment System Act 2022: see section 38(p).

<sup>57</sup> Section 47J Fair Trading Act 1986.

<sup>58</sup> Section 106(4) Commerce Act and section 47G(3) Fair Trading Act. Section 106 of the Commerce Act also applies under the CCCF: see section 113(i), the Telecommunications Act: see section 15(1)(o), the Dairy Industry Restructuring Act: see section 150ZF(1)(r), the Fuel Industry Act: see section 45(f), the Retail Payment System Act: see section 36(e), and the Grocery Industry Competition Act: see section 180(k).



## At the compulsory interview

- 166** The compulsory interview power is to require a person “to appear before the Commission... to give evidence”.<sup>59</sup> In practice, this means that the interviewee is required to give evidence to a Commission member or their formally delegated staff representative. Staff from our investigation team will also be present at the interview and will lead the questioning.
- 167** The role of the Commission member or delegate is to:
- 167.1** Supervise the conduct of the interview, and ensure its procedural fairness, including dealing with any objections or issues that arise. A Commission legal representative can, if in attendance, also assist with and advise the Commission member or delegate on procedural issues.
  - 167.2** Receive the evidence that is given by the interviewee. The Commission member or delegate is not the lead investigator and so will typically not be the principal interviewer. But the member or delegate will want to ensure that clear questions are asked and answers given and so may have questions of their own and may ask supplementary or clarifying questions.
- 168** The interviewee is required to swear an oath or affirm that the information to be given during the interview is the truth. The decision on whether to swear an oath or affirm is up to the witness; the only difference is that an oath is sworn by the witness placing their hand on the Bible. It makes no evidential difference which is selected.
- 169** At the start of the interview, we will provide an explanation of the procedure to be followed, an overview of the topics to be covered, and then we will begin asking questions. We will only ask questions that relate to the investigation as described in the notice, unless you consent to expand the available topics.
- 170** You must answer questions that are put to you. While you may consult your lawyer in private during the course of the interview, the lawyer cannot answer our questions on your behalf or suggest possible answers to assist you.
- 171** If you wish to take a short break during the interview, you can ask the Commission member or delegate and we will accommodate that request at a suitable time.
- 172** We will usually take notes during the interview, and we often also ask to record interviews by video or audio. Recording interviews ensures that both parties have access to a complete record of what was discussed. Upon request we will provide you with a copy of the recording and any transcript that we make of it.
- 173** Where we have not recorded an interview, we may ask you to sign a written statement after the interview, confirming that the information contained in the statement accurately reflects what you have said to us. If a matter proceeds to Court, such notes, recordings, transcripts, or statements made during and after an interview may be used as evidence.

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<sup>59</sup> Section 98(1)(c) Commerce Act 1986 and section 47G(1)(c) Fair Trading Act 1986. Section 98 of the Commerce Act also applies under the CCCF Act: see section 113(c), the Telecommunications Act; see section 15(f), the Dairy Industry Restructuring Act; see section 150ZF(i), the Fuel Industry Act; see section 33(f), the Retail Payment System Act; see section 36(a), and the Grocery Industry Competition Act: see section 180(a).



## Admissibility of information gathered through a compulsory notice

- 174** Where we issue you with a compulsory notice, you cannot refuse to comply with the notice or to answer a question in a compulsory interview on the grounds that the information you provide might incriminate you or expose you to a penalty or punishment under the law.<sup>60</sup>
- 175** However, the information you provide will only be admissible in evidence in proceedings against you in certain circumstances. Specifically, information you provide can only be used against you:
- 175.1** for charges of misleading the Commission<sup>61</sup> or for charges of perjury<sup>62</sup>
  - 175.2** in civil proceedings (other than proceedings for pecuniary penalties).<sup>63</sup>
- 176** Information provided in response to a compulsory notice or during a compulsory interview may be used:
- 176.1** in civil or criminal proceedings against any other person (whether another individual or a company)
  - 176.2** to pursue any line of enquiry that results from the information you have provided. Those lines of enquiry may lead to admissible evidence against you or other persons.
- 177** We may also share information gathered as a result of a compulsory notice or given in a compulsory interview with overseas regulators with whom we have a formal cooperation agreement to which Part 7 of the Commerce Act applies, or using our powers under section 99AA of the Commerce Act.<sup>64</sup>

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<sup>60</sup> Section 106(4) Commerce Act and section 47G(3) Fair Trading Act. Section 106 of the Commerce Act also applies under the CCCF: see section 113(l), the Telecommunications Act: see section 15(1)(o), the Dairy Industry Restructuring Act: see section 150ZF(1)(r), the Fuel Industry Act: see section 45(f), the Retail Payment System Act: see section 36(e), and the Grocery Industry Competition Act: see section 180(k).

<sup>61</sup> Section 103(2) Commerce Act, s 42(2) Fuel Industry Act and section 183(2) of the Grocery Competition Industry Act. Section 103(2) Commerce Act also applies under the CCCF Act: see s 113(i), the Telecommunications Act 2001: see s 15(1)(l), the Dairy Industry Restructuring Act: see section 150ZF(1)(p), and the Retail Payment System Act: see section 38(p).

<sup>62</sup> Sections 108-109 Crimes Act 1961.

<sup>63</sup> For example, section 47G(4) Fair Trading Act 1986.

<sup>64</sup> Section 99I Commerce Act, section 48I Fair Trading Act. Section 99I Commerce Act also applies under the CCCF Act: see section 113(ea), the Telecommunications Act: see section 15(1)(ha), the Fuel Industry Act: see section 33(ha), the Retail Payment System Act: see section 38(m) and the Grocery Industry Competition Act: see section 180(e). These agreements can be found on the Commission's website <https://comcom.govt.nz/about-us/working-with-other-agencies>

## Search powers

- 178** The Commission has the power to search premises and other places (including homes) to obtain information for investigative purposes. Our search powers and applicable restrictions are summarised below.

### Using a search warrant

#### The scope of the power

- 179** The Commission is able, like other enforcement agencies, to apply for a search warrant in certain situations.
- 180** Such a warrant must be obtained from an issuing officer such as a judge.<sup>65</sup> The scope of the power to search is limited by the relevant provisions of Part 4 of the Search and Surveillance Act 2012 (with any modifications necessary for consistency with our own statutes)<sup>66</sup> and by the terms of any warrant that is issued. These provisions and limitations are set out below. A search warrant must be lawful, reasonable and fair.

#### When we may seek a search warrant

- 181** We may apply for a search warrant to investigate whether a party has engaged in or is engaging in conduct that may breach one of the Acts we enforce, or to gather, obtain, or recover evidence.<sup>67</sup>
- 182** We must satisfy an issuing officer that we have reasonable grounds to believe that a search is necessary for the purposes of ascertaining whether a person has engaged in (or is engaging in) a contravention,<sup>68</sup> and that the information we seek is likely to be at the location specified in the warrant.<sup>69</sup>
- 183** We apply for a search warrant where we are unable to obtain in a less intrusive way specific evidence required for an investigation, such as by using a voluntary request or compulsory notice. This may include where we are concerned that the evidence or information may be concealed, removed or destroyed, or where a person is being uncooperative with our investigation where we believe them to be in control of relevant evidence.

<sup>65</sup> An issuing officer may also be a Justice of Peace, Community Magistrate, Registrar, or Deputy Registrar that is authorised to act as an issuing officer by the Attorney General. See section 3 Search and Surveillance Act 2012.

<sup>66</sup> Section 98A(3) Commerce Act and section 47(3) Fair Trading Act. Section 98A of the Commerce Act also applies under the CCCF Act: see section 113(d), the Telecommunications Act; see section 15(1)(g), the Dairy Industry Restructuring Act: see section 150ZF(1)(j), the Fuel Industry Act: see section 33(g), the Retail Payment System Act: see section 36(b), and the Grocery Industry Competition Act: see section 180(b).

<sup>67</sup> Section 98A Commerce Act and section 47 Fair Trading Act. Section 98A of the Commerce Act also applies under the CCCF Act: see section 113(d), the Telecommunications Act; see section 15(1)(g), the Dairy Industry Restructuring Act: see section 150ZF(1)(j), the Fuel Industry Act: see section 33(g), the Retail Payment System Act: see section 36(b), and the Grocery Industry Competition Act: see section 180(b).

<sup>68</sup> Section 98A Commerce Act and section 47 Fair Trading Act. Section 98A of the Commerce Act also applies under the CCCF Act: see section 113(d), the Telecommunications Act; see section 15(1)(g), the Dairy Industry Restructuring Act: see section 150ZF(1)(j), the Fuel Industry Act: see section 33(g), the Retail Payment System Act: see section 36(b), and the Grocery Industry Competition Act: see section 180(b).

<sup>69</sup> Section 98A Commerce Act and section 47 Fair Trading Act. Section 98A of the Commerce Act also applies under the CCCF Act: see section 113(d), the Telecommunications Act; see section 15(1)(g), the Dairy Industry Restructuring Act: see section 150ZF(1)(j), the Fuel Industry Act: see section 33(g), the Retail Payment System Act: see section 36(b), and the Grocery Industry Competition Act: see section 180(b).

## Specifics of a search warrant

- 184** A search warrant is a judicial authorisation to search a person's premises or place and imposes limits on our power to search.
- 185** A search warrant may be issued to search any place (including a dwelling), and anything within that place.
- 186** When we execute a search warrant, a copy will be provided to the occupier or, if they are not present, will be left behind at the place.
- 187** The warrant will outline:
- 187.1** **Which place** we are entitled to search under that warrant. There may, however, be other warrants executed at other places at the same time or other times.
  - 187.2** **Who is the warrant holder.** This person will be responsible for the search at the place specified in the warrant. Where multiple warrants are being executed concurrently, there may be a search co-ordinator who is responsible for managing the searches across multiple locations.
  - 187.3** The **alleged contravention** of the law to which the search warrant relates. This will generally involve a short summary of the Commission's investigation at the time the warrant was issued.
  - 187.4** **What we may seize** under the warrant. The warrant, or a schedule to the warrant, will describe, with as much specificity as possible, the types of evidence the Commission is entitled to seize under the warrant.
  - 187.5** **When** the search warrant may be executed. We can only be authorised to search the place at a reasonable time. What is reasonable will depend on the circumstances. The warrant may authorise us to search on multiple occasions. This would be appropriate where, for example, we are unable to complete the search on the first visit.
- 188** The warrant will also include any other conditions the issuing officer has placed on the execution of the warrant.
- 188.1** Often it is likely that some of the evidence will be found on *computer systems*. The warrant may authorise us to obtain reasonable assistance in searching computer systems from other persons, including electronic forensic investigators from another agency.
  - 188.2** It is common for a warrant to place express conditions on how we are to deal with potentially privileged material, particularly where an electronic search is involved.
  - 188.3** In many cases we will be executing a search warrant at business premises where many documents are held, and where it would be impracticable for us to physically inspect every document within a reasonable time frame. We will frequently seek a warrant condition requiring the occupier to provide *reasonable assistance* to the warrant holder.
- 189** If you have questions about the scope of the warrant or how it is being executed, you should raise them with the warrant holder at the time of search. They may be able to directly address your concern or may refer you to the Commission's legal team.

## Commission staff executing a warrant

- 190** The search warrant authorises Commission staff to enter the specified place and carry out the search as specified in the warrant. We must execute the search warrant in a manner that is lawful, reasonable and fair.<sup>70</sup> We are entitled to enlist the assistance of other suitable persons with executing a search warrant.<sup>71</sup>
- 191** 201 Commission staff involved in the execution of a warrant will carry their Commerce Commission identification with them.

## What you must do during the execution of a warrant

- 192** When a search warrant is executed, the occupier or person in charge of the place should make themselves known to the warrant holder. The warrant holder will provide a copy of the warrant to them.
- 193** If requested, we will provide an opportunity for the occupier to contact their legal advisors. We may, if the warrant holder considers it necessary, take steps to secure the premises and ensure that no evidence is removed, deleted, or destroyed during this delay.
- 194** The person in charge of the premises must provide us with reasonable assistance when we execute a search warrant.<sup>72</sup> This includes assisting us by:
- 194.1** identifying and locating the information required
  - 194.2** providing keys, computer passwords and other information or tools necessary to undertake the search
  - 194.3** accessing or reproducing information stored or recorded (such as computer records).
- 195** If we are refused entry to premises or if there is no one present, we may use reasonably necessary force to enter the premises (but not against persons).<sup>73</sup>
- 196** It is a criminal offence to restrict, obstruct, or delay our search under a search warrant. The penalty for doing so under the Commerce Act and under the CCCF Act is a fine of up to \$100,000 for an individual and \$300,000 for a company.<sup>74</sup> Under the Fair Trading Act, the fine is up to \$10,000 and \$30,000, respectively.<sup>75</sup>
- 197** We will try to conduct our search in a manner that minimises any business interruption. We will generally ask the person in charge of the place to be searched to provide us with reasonable facilities when we execute a search warrant. A refusal to provide access to reasonable facilities may slow down the execution of the warrant and increase the level of business interruption, and in some cases may amount to obstruction or delay of our search.
- 198** It will frequently be impracticable for the Commission to search business premises while staff go about their ordinary work. In many cases a business will send employees home or to another site for the duration of the warrant. Where we have reasonable grounds to believe that the presence of any person will obstruct or hinder the execution of the warrant, we may exclude that person from the premises.

<sup>70</sup> Section 98A Commerce Act and section 47 Fair Trading Act. Section 98A of the Commerce Act also applies under the CCCF Act: see section 113(d), the Telecommunications Act; see section 15(1)(g), the Dairy Industry Restructuring Act: see section 150ZF(1)(j), the Fuel Industry Act: see section 33(g), the Retail Payment System Act: see section 36(b), and the Grocery Industry Competition Act: see section 180(b). Also see s 21 New Zealand Bill of Rights Act.

<sup>71</sup> Section 110(b) Search and Surveillance Act (via section 98A(3) Commerce Act and section 47(3) Fair Trading Act). Section 98A of the Commerce Act also applies under the CCCF Act: see section 113(d), the Telecommunications Act; see section 15(1)(g), the Dairy Industry Restructuring Act: see section 150ZF(1)(j), the Fuel Industry Act: see section 33(g), the Retail Payment System Act: see section 36(b), and the Grocery Industry Competition Act: see section 180(b).

<sup>72</sup> Sections 110(b) and 130 Search and Surveillance Act (via section 98A(3) Commerce Act and section 47(3) Fair Trading Act). Section 98A of the Commerce Act also applies under the CCCF Act: see section 113(d), the Telecommunications Act; see section 15(1)(g), the Dairy Industry Restructuring Act: see section 150ZF(1)(j), the Fuel Industry Act: see section 33(g), the Retail Payment System Act: see section 36(b), and the Grocery Industry Competition Act: see section 180(b).

<sup>73</sup> Section 110(c) Search and Surveillance Act (via section 98A(3) Commerce Act and section 47(3) Fair Trading Act). Section 98A of the Commerce Act also applies under the CCCF Act: see section 113(d), the Telecommunications Act; see section 15(1)(g), the Dairy Industry Restructuring Act: see section 150ZF(1)(j), the Fuel Industry Act: see section 33(g), the Retail Payment System Act: see section 36(b), and the Grocery Industry Competition Act: see section 180(b).

<sup>74</sup> Section 103(4) Commerce Act, section 42(4) Fuel Industry Act 2020 and section 183(4) Grocery Industry Competition Act. Section 103 Commerce Act also applies to the CCCF Act: see section 113(i), the Telecommunications Act: see section 15(1)(l), the Dairy Industry Restructuring Act: see section 150ZF(1)(p), and the Retail Payment System Act 2022: see section 38(p).

<sup>75</sup> Section 47J(2) Fair Trading Act.

## Seizure of items and removal from a place

- 199** A warrant may allow us to remove documents, computer file storage devices and hard drives, mobile phones and other electronic devices.<sup>76</sup> We may also instruct an independent forensic investigator to clone electronic devices on or off site.<sup>77</sup>
- 200** Generally speaking, we cannot take from a place anything that is outside of the scope of the warrant. Where it is uncertain whether we can lawfully seize an item, and it is not reasonably practicable for this to be determined during the execution of the warrant, we may seize the item so that its status can be resolved.<sup>78</sup> This will frequently be the case with computer files and large quantities of documents that cannot practically be sorted through on-site.
- 201** We also cannot generally take documents that we accept are privileged material. Where we come across documents that we believe are privileged, we will provide an opportunity for that privilege to be claimed. Where we dispute a claimed privilege, we will secure the documents (without further review of them) and provide an opportunity for the party claiming the privilege to specify its grounds. We will try to resolve such disputes by agreement. If we cannot agree to resolve a dispute, we will refer the matter to the Court for its decision.<sup>79</sup>
- 202** Where it is not possible on-site to identify and separate privileged material and non-privileged material, we will secure the material and make appropriate arrangements to protect privilege while this separation occurs. As that is most likely to arise in the context of an electronic search, we will ensure that the search warrant contains a protocol for how such seized material will be sorted and privileged material returned.<sup>80</sup>
- 203** Generally we will seize original documents. We will provide a schedule of the items seized either at the time, or within 7 days. If a copy of the original document will be sufficient for our purposes, then we will return the original.<sup>81</sup> We will also return the original item if we no longer require it for evidential or investigative purposes.<sup>82</sup> Within six months of seizing the items, we must either bring proceedings, return the seized items,<sup>83</sup> or seek permission of the Court to retain the items for a further period.<sup>84</sup>
- 204** The owner of seized items, and certain other people, can ask us to return the items, or to give the owner reasonable access to them.<sup>85</sup> We are usually agreeable to providing a business access to its records so that it can continue to trade. Because we often need original items to use in evidence, we will usually provide reasonable access to copies of documents (rather than returning the original records).

<sup>76</sup> Section 98A Commerce Act and section 47 Fair Trading Act. Section 98A of the Commerce Act also applies under the CCCF Act: see section 113(d), the Telecommunications Act; see section 15(1)(g), the Dairy Industry Restructuring Act: see section 150ZF(1)(j), the Fuel Industry Act: see section 33(g), the Retail Payment System Act: see section 36(b), and the Grocery Industry Competition Act: see section 180(b).

<sup>77</sup> Section 110(i) Search and Surveillance Act (via section 98A(3) Commerce Act and section 47(3) Fair Trading Act). Section 98A of the Commerce Act also applies under the CCCF Act: see section 113(d), the Telecommunications Act; see section 15(1)(g), the Dairy Industry Restructuring Act: see section 150ZF(1)(j), the Fuel Industry Act: see section 33(g), the Retail Payment System Act: see section 36(b), and the Grocery Industry Competition Act: see section 180(b). Section 112 Search and Surveillance Act.

<sup>78</sup> Section 112 Search and Surveillance Act. The Commission may also seize an item outside the warrant where the warrant holder, or a person assisting them, has reasonable grounds to believe they could have obtained a search warrant for that item: section 123(2) Search and Surveillance Act.

<sup>79</sup> Sections 145, 146 and 147 Search and Surveillance Act.

<sup>80</sup> *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 (CA).

<sup>81</sup> Section 152 Search and Surveillance Act.

<sup>82</sup> Section 150 Search and Surveillance Act.

<sup>83</sup> If the decision not to bring proceedings is taken earlier than 6 months, the seized items are to be promptly returned after that decision.

<sup>84</sup> Section 151 Search and Surveillance Act.

<sup>85</sup> Section 156 Search and Surveillance Act.

## Warrantless search or entry

**205** In addition, the Commission has limited powers to conduct searches without a warrant.

## Entry under an implied licence

**206** Commission staff are entitled, as is any member of the public, to avail themselves of the implied licence to:

**206.1** enter the public area of a business premises during its business hours

**206.2** to approach the front door of a residential premises for the purpose of speaking to the occupants.

**207** When doing so our staff may do anything that a member of the public can do, including:

**207.1** taking notes, photographing or recording what they can see from the public area of the business premises or from the street front

**207.2** asking questions of any person present

**207.3** purchasing any relevant goods or services.

**208** The implied licence may be expressly varied or revoked at any time. If our staff are asked to leave, or to cease any activity, they will do so.

## Consent searches

**209** Commission staff may also search a place, vehicle or thing if they have your permission. To grant permission you must be in apparent control of that place, vehicle, or thing, and must be over 14 years old.<sup>86</sup>

**210** Before conducting any consent search, our staff member who proposes to conduct the search must advise you:<sup>87</sup>

**210.1** of the reason for the proposed search, and

**210.2** that you can either consent or refuse to consent to the search.

**211** The Commission may only undertake a consent search for the purpose of investigating whether an offence has been committed, or obtaining information for the purpose of ascertaining whether a person has engaged in, or is engaging in, conduct that constitutes or may constitute a contravention of the Commerce Act, Fair Trading Act, CCCF Act, Telecommunications Act, Dairy Industry Restructuring Act, Fuel Industry Act, Retail Payment System Act, and/or Grocery Industry Competition Act.

## Gathering product safety information

**212** Under the Fair Trading Act, authorised Commission employees have powers to monitor and enforce compliance with the following safety standards and notices:<sup>88</sup>

**212.1** consumer information standards<sup>89</sup>

**212.2** product safety standards<sup>90</sup>

**212.3** unsafe goods notices<sup>91</sup>

**212.4** suspension of supply notices

**212.5** services safety standards.

**213** Specific guidance is available on our website about these kinds of investigations.

<sup>86</sup> Section 92 Search and Surveillance Act.

<sup>87</sup> Section 93 Search and Surveillance Act.

<sup>88</sup> Sections 47K and 47L Fair Trading Act.

<sup>89</sup> For more information on consumer information standards, see <http://www.comcom.govt.nz/fair-trading/consumer-information-standards/>

<sup>90</sup> For more information on product safety standards, see <http://www.comcom.govt.nz/fair-trading/product-safety-standards/>

<sup>91</sup> For more information on unsafe goods see <http://www.comcom.govt.nz/fair-trading/product-safety-standards/unsafe-goods-notices/>

## How we deal with information

- 214** At Investigation Principle 4 above at [37-38] we have committed to handling information responsibly. We note that this includes:
- 214.1** using information only as allowed by law
  - 214.2** taking steps to ensure that for private, confidential, or commercially sensitive information we provide appropriate protections against disclosure.
- 215** Some of the information we receive during our investigations (whether provided voluntarily or compulsorily) is information that is not otherwise in the public domain. We are conscious of the need to ensure that parties can have confidence in our use and retention of information, including our commitment to respecting as far as possible any privacy, confidentiality, or commercial sensitivity attaching to the information.
- 216** Personal information is managed in accordance with the Privacy Act 2020 and the Commerce Commission's Privacy Policy. Except as authorised or required by law, the Commission will not use or disclose personal information for any other purpose without consent.
- 217** We seek to balance parties' rights and expectations as to the confidentiality of information they supply to us against:
- 217.1** the need for us to effectively and efficiently conduct our investigations
  - 217.2** our legal obligations under the OIA, and in particular, the principle of availability of information.<sup>92</sup>
- 218** This section describes:
- 218.1** how we use information during an investigation
  - 218.2** our obligations to make information available under the OIA
  - 218.3** how we protect confidential information during an investigation, and what protections are in place if a matter subsequently goes to Court
  - 218.4** our confidential informants policy
  - 218.5** when we can share information with other agencies.

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<sup>92</sup> See section 5 Official Information Act 1982.

## How we use information during an investigation

### Using information for the purposes of the investigation

- 219** We use the information we receive for the purposes of the investigation for which it was obtained.
- 220** In most investigations, we need to test the information we receive, often by putting the information provided by one party to other persons for their response. Ultimately we may also need to rely on information in legal proceedings.
- 221** Information may also be used by the Commission as the basis for analysis, including econometric or accounting analysis. This may be conducted by Commission staff, by external contractors, or a combination of both. The Commission will enter into appropriate confidentiality arrangements with any such contractor.

### Sharing information within the Commission and using information for another investigation

- 222** We can and do share within the Commission any information that we receive.
- 223** Information disclosed on one investigation may disclose a new issue of which we were unaware. For example, information received on a Commerce Act investigation may disclose the existence of a Fair Trading Act issue or an issue under the Grocery Industry Competition Act. This information can be shared with staff in the other team or branch. Alternatively, the information may be relevant to another investigation that is ongoing.
- 224** In either case, we will use the information for the other investigation. If a party were to object to us using the information for the other investigation, we have the power available to us of compelling the information specifically for use in the other investigation.



## The Official Information Act

- 225** The OIA provides the framework for disclosure of the information that we hold. Under the OIA all information is to be made available unless good reasons exist to withhold it.<sup>93</sup> This is known as the principle of availability.
- 226** The Commission does not need to receive an OIA request for information in order for the principle of availability to apply. We can proactively release information that in our assessment should be made publicly available.
- 227** There are a number of reasons that the Commission may withhold information from disclosure. In some cases the existence of particular facts is a conclusive reason to withhold the information. These include, most relevantly, where:
- 227.1** release would be likely to prejudice our investigation<sup>94</sup>
  - 227.2** release would be in contempt of court.<sup>95</sup>
- 228** In other cases the Commission must undertake a balancing exercise. This includes, most relevantly, where:
- 228.1** release would unreasonably prejudice the commercial position of the supplier or subject of the information<sup>96</sup>
  - 228.2** withholding the information is necessary to protect the privacy of natural persons<sup>97</sup>
  - 228.3** we received the information under an obligation of confidence, and if we were to make that information available it would:
    - 228.3.1** prejudice the supply of similar information to us (by any person) where it is in the public interest that such information continues to be supplied to us<sup>98</sup>
    - 228.3.2** be likely otherwise to damage the public interest.<sup>99</sup>
  - 228.4** The information is the subject of legal professional privilege.<sup>100</sup>
  - 228.5** If we think that any of these potential reasons for withholding under section 9 of the OIA apply, we must still consider the public interest in release.<sup>101</sup> As the principle of availability applies, the information may only be withheld if the potential harm from releasing it is greater than the public interest in disclosure. This 'balancing exercise' means that in some cases information can be released where nonetheless there is some possible harmful effect that might appear to justify withholding it.
  - 228.6** As is reflected in the discussion above at [26-32] as to our Investigation Principle 2 ('We aim to be as open and transparent as we can be'), during investigations we are not always able to release the information that is requested of us.
- 229** Investigations are not generally conducted in the public eye, and it may in some cases be necessary to investigate confidentially. This means that we may need to avoid prejudice to an investigation by not releasing information about it until the investigation has been completed or has reached some critical stage.
- 230** But generally all investigation outcomes are able to be made public shortly after completion of the investigation.

<sup>93</sup> Section 5 Official Information Act 1982.

<sup>94</sup> Section 6(c) Official Information Act 1982.

<sup>95</sup> Section 100 Commerce Act and s 18(c)(i) Official Information Act 1982

<sup>96</sup> Section 18(c)(i) Official Information Act 1982.

<sup>97</sup> Section 9(2)(a) Official Information Act 1982.

<sup>98</sup> Section 9(2)(ba)(i) Official information Act 1982.

<sup>99</sup> Section 9(2)(ba)(ii) Official Information Act 1982.

<sup>100</sup> Section 9(2)(h) Official Information Act 1982.

<sup>101</sup> Section 9(1) Official Information Act 1992.

## How we protect confidential information

### Protection of information during an investigation

- 231** Where a party provides us with information that they believe is confidential or commercially sensitive, they should clearly assert that qualification when (or before) they provide the information to us.
- 232** We will not always accept at face value a party's assertion that information is confidential or commercially sensitive, and we may test this with the provider of the information.
- 233** Where we want to test one party's information with another person, we will weigh any assertions of confidentiality before we make a decision about disclosing the information. We may consult with the provider of the information before we reach a decision. The Commission may request that 'public' copies of documents or information are provided, with the sensitive or confidential material redacted. We will also consider whether we can satisfactorily test the information during the investigation by asking questions based on the confidential information, but without disclosing the information itself.
- 234** We are able in some investigations to share confidential information within only a small, restricted circle and on terms that impede wider disclosure. For example, in some cases we can obtain solicitors' undertakings from the lawyers for certain parties, and those lawyers will be able to view information but their client will not.
- 235** We will not disclose any information we consider to be commercially sensitive in a media statement, public investigation report, or in response to a request, unless there is a countervailing public interest in doing so in a particular case.

## Confidentiality orders under the Commerce Act

- 236** We have the power to issue **confidentiality orders** under section 100 of the Commerce Act where we consider it necessary or desirable to do so to protect the integrity of an investigation.
- 237** These orders protect specific information or documents from being published, communicated, or given in evidence. It is a criminal offence to breach a confidentiality order, punishable by a fine of up to \$4,000 for an individual and \$12,000 for a company.<sup>102</sup> Information subject to a confidentiality order will not be released under the OIA.<sup>103</sup>
- 238** Such orders can be made over the questions that we ask or information that we convey, as well as the answers, information, and documents with which we are supplied.<sup>104</sup>
- 239** Parties from whom we seek information voluntarily or compulsorily sometimes also request confidentiality orders over the information and documents they provide. We are unlikely to agree to such a request unless we consider the order to be necessary or desirable.
- 240** Where a confidentiality order is made, we will continually assess throughout our investigation whether the order remains necessary, and will rescind any extant order that is no longer needed.<sup>105</sup>

## Protecting information when a matter goes to court

- 241** Where we take court proceedings, commercially sensitive information (along with all the other relevant information we hold relating to those proceedings) will become subject to the disclosure or discovery requirements of the relevant court. Where necessary to do so (say, because information remains commercially sensitive) we are able to use the courts' processes to protect confidential information from public disclosure.<sup>106</sup>

## Protecting complainants – confidential informants policy

- 242** In some circumstances a complainant may feel particularly concerned at the possibility that their identity might be disclosed or become obvious through the course of the investigation (for example the complainant may be an employee whistle-blower or trading partner of the person or organisation that they intend to make a concern about).
- 243** If parties are concerned about the need to protect their identity, they should let us know when they first contact us. We value information from confidential informants.
- 244** In such cases we will work with the complainant to determine whether further measures can be put in place to ensure that their identity remains confidential.<sup>107</sup>

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<sup>102</sup> Section 100(4) Commerce Act. Section 100 of the Commerce Act also applies under the CCCF Act: see section 113(f), the Telecommunications Act; see section 15(1)(i), the Dairy Industry Restructuring Act: see section 150ZF(1)(m), the Fuel Industry Act: see section 33(i), the Retail Payment System Act: see section 36(d), and the Grocery Industry Competition Act: see section 180(f).

<sup>103</sup> Section 18(c)(i) of the Official Information Act 1982.

<sup>104</sup> *Commerce Commission v Air New Zealand Ltd* [2011] 2 NZLR 194 (Court of Appeal.)

<sup>105</sup> Orders under section 100 are in effect for the period specified in the order but expire at the end of the investigation (section 100(2)(b) Commerce Act). *Commerce Commission v Air New Zealand Ltd* [2011] 2 NZLR 194 (Court of Appeal.)

<sup>106</sup> See for example the High Court Rules, rr 8.15(2)(f), 8.25 and 8.28(3).

<sup>107</sup> We acknowledge also the privilege for an informant's identity, where that person is not called to give evidence in court: section 64 Evidence Act 2006.

## Sharing information with other agencies

### Public service agencies, statutory entities, the Reserve Bank and the New Zealand Police

- 245** The Commerce Act permits us to provide information and documents that we hold in relation to the performance or exercise of our functions, powers or duties under the Commerce Act or any other legislation, to a public service agency,<sup>108</sup> a statutory entity,<sup>109</sup> the Reserve Bank of New Zealand, or the New Zealand Police.<sup>110</sup> However, we may only do so if:
- 245.1** we consider the information or document may assist the public service agency, a statutory entity, the Reserve Bank of New Zealand, or the New Zealand Police in the performance or exercise of its functions, powers, or duties under any other legislation;
  - 245.2** we are satisfied that providing the information or document will not substantially affect the performance of the Commission's other functions; and
  - 245.3** we are satisfied that appropriate protections are or will be in place for the purpose of maintaining the confidentiality of any information or document provided (in particular, information that is personal information within the meaning of the Privacy Act 2020).
- 246** The Commerce Act also allows us to use any information or document that we have received from a public service agency, a statutory entity, the Reserve Bank of New Zealand, the New Zealand Police, or an overseas regulator, in the performance or exercise of our functions, powers or duties under any legislation.<sup>111</sup>
- 247** Examples of situations where we may share information include:
- 247.1** where information we have obtained appears to raise concerns under a law that another enforcement agency enforces;
  - 247.2** where we are determining the appropriate enforcement agency to conduct an investigation;
  - 247.3** where we plan to, or are in the course of, conducting an investigation in conjunction with another enforcement agency;
  - 247.4** where information we have obtained suggests serious criminal offending in New Zealand that falls outside our responsibilities. In this situation we will likely provide that information to the New Zealand Police or other relevant agency (such as the Inland Revenue Department);<sup>112</sup>
  - 247.5** where information we have obtained suggests a serious threat to public health or public safety.<sup>113</sup> In this situation we will likely provide that information to any person or agency who has a relevant interest in preventing, or a duty to prevent, that serious threat.
- 248** Before providing another party with confidential information, we will ensure that the other party has provided appropriate assurances that it will:
- 248.1** keep the information confidential, and
  - 248.2** use it only for the purposes for which it is provided.
- 249** Where we have obtained such information in confidence, or through use of our compulsory powers, where appropriate or required by law, we will advise the party we are providing the information to of this.

<sup>108</sup> Listed in section 10(a) of the Public Service Act 2020.

<sup>109</sup> Listed in Schedule 1 of the Crown Entities Act 2004.

<sup>110</sup> Sections 99AA(1) and (2) Commerce Act.

<sup>111</sup> Section 99AA(3) Commerce Act.

<sup>112</sup> The Commission considers a serious criminal offence to one punishable by more than two years imprisonment.

<sup>113</sup> The Commission defines a serious threat as a threat the Commission reasonably believes to be serious having regard to the likelihood of the threat being realised, the severity of the consequences if the threat is realised, and the time at which the threat may be realised.

## Serious Fraud Office

- 250** Where information before us suggests that serious or complex fraud<sup>114</sup> has been committed, the Serious Fraud Office Act 1990 expressly permits us to provide that information to the Serious Fraud Office.<sup>115</sup>
- 251** Where we have obtained such information in confidence, or through use of our compulsory powers, we will advise the Serious Fraud Office of this.

## Overseas regulators

- 252** The Commerce Act, the Fair Trading Act, CCCF Act, the Telecommunications Act, the Retail Payment System Act and the Grocery Industry Competition Act permit us to use our information gathering powers to gather information or to provide information already gathered using our compulsory powers, to assist overseas regulators with whom we have a cooperation agreement. For further information, see our guidelines on how we deal with requests from overseas agencies for information and assistance.<sup>116</sup>
- 253** In certain circumstances,<sup>117</sup> we may share voluntarily or compulsorily provided confidential information with an overseas regulator.

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<sup>114</sup> Serious or complex fraud includes a series of connected incidents of fraud which, if taken together, amount to serious or complex fraud.

<sup>115</sup> Section 38 Serious Fraud Office Act 1990.

<sup>116</sup> See our guidance on sharing information with overseas regulators at <https://comcom.govt.nz/about-us/our-policies-and-guidelines/information-requests-from-overseas-regulators>

<sup>117</sup> See sections 99C to 99P of the Commerce Act.

## Publication and media comment by the Commission

- 254** As discussed above at Investigation Principle 2 ('We are as open and transparent as we can be') at [26]–[32], we aim to be as open and transparent as we can.
- 255** We will apply the principles in the OIA to determining what information we can make public while also having regard to the Solicitor-General's *Prosecution Guidelines*.<sup>118</sup>
- 256** The OIA provides that we can withhold information if releasing information would prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial.

### Opening of an investigation

- 257** When we open an investigation, we will generally publish some information about it on our case register.<sup>119</sup> At this stage, the information is likely to include the provision(s) of the Act under consideration, and may include the name of the investigated party/parties, and/or the industry they are in. The amount of information we publish will depend on the nature of the case.
- 258** In some cases, we may publish a party's name before a matter has concluded.
- 258.1** For criminal matters, we will consider publishing a party's name if one or more of the following apply:
- 258.1.1** When we believe there is a risk to public safety and/or a need to warn the public
  - 258.1.2** When information about the matter is already in the public domain
  - 258.1.3** When the conduct has been self-reported.
- 258.2** For civil matters, we will consider publishing a party's name unless one or both of the following apply:
- 258.2.1** The party is an individual
  - 258.2.2** We believe there is a need to preserve evidence or otherwise protect the integrity of the investigation.
- 259** In situations where we withhold a party's name, we may instead publish information about the industry in which that party is active.
- 260** When deciding what to publish, we will always seek to balance the rights and interests of the Commission, the public, and an investigated party. We will release publicly only such information as we properly can under the OIA and the Solicitor-General's *Prosecution Guidelines*.
- 261** We may, at the same time, consider announcing the investigation in the media. This could include situations where the matter is already in the public domain or the subject of public comment, where we see a risk to public safety, or where we consider a public announcement is necessary to elicit information from persons who may have been harmed or affected by the alleged conduct.

### During an investigation

- 262** As an investigation progresses, we will consider releasing more information about it. If the name of the investigated party and/or industry has not already been published, we may consider doing so, bearing in mind the considerations noted above.
- 263** We may in some cases choose to communicate to the public during an investigation to elicit further concerns or information. This can apply where we need help in determining how persons have been harmed or affected by alleged conduct, or if we want to otherwise understand the scale of the matter we are looking into.

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<sup>118</sup> <https://www.crownlaw.govt.nz/publications/prosecution-guidelines>

<sup>119</sup> <https://comcom.govt.nz/case-register>

## When investigation is completed

- 264** At the end of an investigation, we may publish its outcome on our case register, applying our Enforcement Response Guidelines.
- 265** In some cases, we may also announce the outcome through the media. This might be that we are commencing legal action, entering into a settlement agreement affecting the public, or taking some other enforcement response.<sup>120</sup> Even where we do not take any enforcement action or find that there has been no breach of the laws we enforce, we may still comment publicly on that outcome. The Commission has a public education function, and we may decide to publish information about issues of concern to us or outcomes.<sup>121</sup> This will particularly be the case where the matter has been one of considerable public interest.
- 266** While proceedings are before the court, in accordance with the Solicitor-General's *Prosecution Guidelines* we avoid making any comment that may prejudice the public interest in a fair trial. The *Prosecution Guidelines* confirm that it is usually appropriate to provide information about the charges, the defendant and the progress of the proceedings.<sup>122</sup>
- 267** When any court proceeding is completed, or a major development occurs, we will inform the public.

## Concerns about investigation process

- 268** Information on how to report a concern to the Commission, including about our investigative process in a particular case, can be found on our website.<sup>123</sup>

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<sup>120</sup> See Enforcement Response Guidelines: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

<sup>121</sup> The Commission is empowered to release information for public education purposes, see section 25 Commerce Act; section 6 Fair Trading Act and section 111(2)(d) CCCF Act. Section 25 of the Commerce Act also applies under the Fuel Industry Act: see section 45(d) and the Retail Payment System Act: see section 38(e).

<sup>122</sup> <https://www.crownlaw.govt.nz/publications/prosecution-guidelines>

<sup>123</sup> <https://comcom.govt.nz/report-a-concern>

## Attachment A – Glossary of terms

|   |  |
|---|--|
| <b>Affected party</b>                     | The group of persons who may be directly affected by an investigation. Affected parties can include a complainant and witnesses. The term does not extend to the public, competitors, customers and others who may be interested in an investigation but are less directly affected by it.   |
| <b>Commission members</b>                 | Members and Associate Members of the Commission appointed by the Governor-General and the Minister, respectively. Members and Associate Members are not salaried staff.  |
| <b>Complainant</b>                        | A person who reports a concern to the Commission about a possible breach of the laws that we enforce. We sometimes solicit concerns from the public. Often multiple people report concerns about substantially the same matter.  |
| <b>Compulsory interview</b>               | An interview with the Commission that a person is required to attend under a formal notice issued under section 98(1)(c) Commerce Act 1986 and section 47G(1)(c) Fair Trading Act 1986. Section 98 of the Commerce Act also applies under the CCCF Act: see section 113(c), the Telecommunications Act; see section 15(f), the Dairy Industry Restructuring Act; see section 150ZF(i), the Fuel Industry Act; see section 33(f), the Retail Payment System Act; see section 36(a), and the Grocery Industry Competition Act: see section 180(a). |
| <b>Confidentiality order</b>              | An order made under s 100 of the Commerce Act 1986, preventing a person from disclosing information that has been obtained by the Commission.  |
| <b>Division</b>                           | A Division of Commission members exercising the powers of the Commission, as assigned to sit by the Chairperson under s 16 Commerce Act 1986.  |
| <b>Enforcement criteria</b>               | Our published criteria that we apply at every stage of the investigation and enforcement process.  |
| <b>Enforcement response</b>               | The response that we make to conduct that potentially breaches the laws that we enforce. The enforcement response options are detailed in our published Enforcement Response Guidelines and range from no further action to court proceedings.   |
| <b>Enforcement Response Guidelines</b>    | Our published guidelines on our enforcement response options following an investigation. These include our Criminal Prosecution Guidelines.  |
| <b>Investigated party</b>                 | A party that is or has been under investigation by the Commission.   |
| <b>Investigation</b>                      | An investigation conducted under the Commerce Act 1986, the Fair Trading Act 1986, Credit Contracts and Consumer Finance Act 2003, Telecommunications Act 2001, Dairy Industry Restructuring Act 2001, the Fuel Industry Act 2020, Retail Payment System Act 2022, the Grocery Industry Competition Act 2023 or any other Acts we administer or enforce.   |
| <b>Investigation stage</b>                | The stage after the screening and prioritisation stage, where we gather and analyse relevant information so that we can form a view on what happened, whether there might be a breach of the laws we enforce and what enforcement response is most appropriate.  |
| <b>Privileged material</b>                | Privileged material is material that cannot be used in evidence or enquired into by the Commission. A common category of privilege is solicitor-client privilege (also called legal professional privilege), where documents seeking or recording legal advice are protected from being viewed.  |
| <b>Screening and prioritisation stage</b> | The pre-investigation stage in which we assess whether there is a reasonable basis for suspecting that a breach of the laws that we enforce may have occurred or be occurring.   |
| <b>Stop now letter</b>                    | A letter written by us to an investigated party in which we seek an urgent end to conduct that we think is harmful and likely to breach our laws. This is not an enforcement response; we still retain all options to warn, settle or take Court proceedings over the conduct.   |
| <b>Voluntary interview</b>                | An interview with the Commission that a person agrees to attend without compulsion by the Commission.  |



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This is a guideline only and reflects the Commission's view. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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[www.comcom.govt.nz/subscribe](http://www.comcom.govt.nz/subscribe)

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Contact us with information about possible breaches of the laws we enforce:

Phone: 0800 943 600

Write: PO Box 2351, Wellington 6140

Email: [contact@comcom.govt.nz](mailto:contact@comcom.govt.nz)

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