

JULY 2024

Enforcement Response Guidelines



Contents



Overview	2
Purpose of the Guidelines	2
Who the Guidelines are for	2
Related Information	2
Our Enforcement Response Options	3
Our regulatory toolkit	3
Our enforcement tools	3
Deciding on our enforcement response	3
Enforcement Criteria	3
Enforcement against individuals	3
Self-reporting and cooperation	4
Enforcement tools	5
Compliance Advice Letters	5
Warning letters	6
Agreed Outcomes, including negotiated settlements and enforceable undertakings	8
Infringement Notices	10
Court Proceedings	11
Injunctions and other urgent responses	11
Criminal and civil court proceedings	12

Overview

Purpose of the Guidelines

- 1 The Commerce Commission has issued these Enforcement Response Guidelines to help you understand:
 - 1.1 our enforcement response options (or ‘toolkit’);
 - 1.2 the factors that we will take into account when deciding which enforcement response to use; and
 - 1.3 our approach to taking enforcement action.

Who the Guidelines are for

- 2 You should read these guidelines if:
 - 2.1 you have been notified by the Commission that an enquiry or complaint has been received about you or your organisation;
 - 2.2 you or your organisation are being investigated or prosecuted by the Commission; or
 - 2.3 you are an advisor to any of these people or organisations.

Related Information

- 3 Further information about the laws we enforce, our regulatory functions, and the principles that guide how we make decisions can be found [here](#).
- 4 These guidelines should also be read alongside the following publications (or any updated or replacement versions):
 - 4.1 [Enforcement Criteria](#) – these criteria are used to help decide our enforcement response;
 - 4.2 [Model Litigant Policy](#) – this policy expresses our commitment to enforcing the law in a principled and responsible way;
 - 4.3 [Investigation Guidelines](#) – these guidelines contain information about how we respond to enquiries and complaints, and conduct our investigations;
 - 4.4 [Criminal Prosecution Guidelines](#) – these guidelines provide further information about the principles and processes that apply when we are deciding whether to bring a criminal prosecution;
 - 4.5 [Cooperation Policy and Cartel Leniency and Immunity Policy](#) – these policies explain how parties with information can choose to assist the Commission and receive penalty discounts or immunity;
 - 4.6 [Remediation Guidance for Businesses](#) – these guidelines are intended to help businesses put things right for consumers after a likely breach of one of the laws the Commission enforces; and
 - 4.7 [Solicitor-General’s Prosecution Guidelines](#) – the Solicitor-General has published a range of formal guidance documents that apply to the Commission. These include the Prosecution Guidelines; the Use of Warnings; Immunity from Prosecution for Cartel Offences; Victims of Crime; and a Media Protocol.

Our Enforcement Response Options

Our regulatory toolkit

- 5 There is a range of tools that we use to help perform our statutory functions. These include various enforcement tools that are available in the legislation we implement and enforce. Our regulatory toolkit is summarised in the diagram [here](#).

Our enforcement tools

- 6 The following “Enforcement Tools” are the focus of these Guidelines:
 - 6.1 compliance advice letters;
 - 6.2 warning letters;
 - 6.3 infringement notices;
 - 6.4 agreed outcomes, including negotiated settlements and enforceable undertakings; and
 - 6.5 court proceedings.
- 7 We may also (or instead) choose to use a variety of other regulatory tools as part of any enforcement response, such as education, engagement, outreach and advocacy.

Deciding on our enforcement response

Enforcement Criteria

- 8 We use our [Enforcement Criteria](#) to help determine which enforcement tool (or tools) best addresses the circumstances of the particular case. These criteria are:
 - 8.1 extent of detriment or harm;
 - 8.2 seriousness of conduct; and
 - 8.3 public interest.
- 9 In addition, our enforcement response will consider individual-specific factors; whether the breach was self-reported; and the level of cooperation. These factors are discussed further below.

Enforcement against individuals

- 10 Under some legislation we can take enforcement action against both individuals and businesses. We will consider additional factors when deciding on any enforcement response against an individual. These most commonly include:
 - 10.1 the individual’s role within the company, including their level of seniority (if applicable);
 - 10.2 whether the individual acted deliberately, recklessly or was a ringleader;
 - 10.3 whether the individual benefitted personally from the breach;
 - 10.4 whether the individual has previously breached the laws that we enforce, or other laws relevant to the work of the Commission;
 - 10.5 whether the individual directly breached the law, helped others breach the law, and/or indirectly breached the law through a trading entity;
 - 10.6 whether the individual is likely to re-offend, including through starting another business;
 - 10.7 whether action against the business alone is sufficient to achieve our enforcement objectives;
 - 10.8 whether the individual has interfered or cooperated with our investigation;
 - 10.9 whether and to what extent the individual is suffering under personal or professional hardships such that individual enforcement may have an unusually detrimental effect;
 - 10.10 whether the defendant is elderly or a youth, or of diminished capacity; and
 - 10.11 whether and how the individual has demonstrated remorse.

- 11 The above factors may also be relevant to whether we decide to take civil and/or criminal proceedings against an individual, and any penalty or sentence we seek from the Court.

Self-reporting and cooperation

- 12 When considering our enforcement response, we will take into account whether the breach or potential non-compliance was self-reported to us. We will also consider the extent to which an individual or business assists or cooperates with the Commission. For example, where we decide to take court proceedings, a self-reported breach may receive penalty or sentencing discounts from the court.
- 13 Factors we may place weight on include:
 - 13.1 whether the self-reporting was done voluntarily, or whether there is a mandatory reporting obligation;
 - 13.2 any remediation that has been carried out or is planned; and
 - 13.3 whether the behaviour indicates remorse, cooperation and a positive attitude towards future compliance by the business or individual.
- 14 Further criteria and conditions are in the Commission's [Remediation Guidance for Businesses and Cooperation Policy](#).
- 15 In relation to cartel conduct only, the Commission will consider applications for leniency and immunity in accordance with our [Cartel Leniency and Immunity Policy](#) and the Solicitor General's [Guidelines on Immunity from Prosecution for Cartel Offences](#).

Enforcement tools

Compliance Advice Letters

Description

- 16 The purpose of a compliance advice letter is to educate. The letter is issued where we have identified potentially problematic conduct. A compliance advice letter may follow a full investigation, but may also be issued after an initial inquiry and evidence gathering.
- 17 Compliance advice letters usually advise on the risk of conduct breaching the law and the fines and penalties that can be imposed. Where appropriate, the letter may explain how a potential breach in future may be avoided.
- 18 A compliance advice letter is not legal advice. If you want further information or guidance on the matter, you should consult your own lawyer.

Additional factors we take into account

- 19 We may issue a compliance advice letter where we consider that the conduct may have breached the law, but in our opinion the matter is not a priority to take further at that time.
- 20 We may also issue a compliance advice letter if we recognise that legal proceedings would be unlikely to succeed; for example, where we are out of time to take proceedings or where a plausible defence exists.

Our approach

- 21 We will not say in any compliance advice letter or media statement that we have made a 'finding' of non-compliance with the law. Only the courts can determine whether a breach of the law has occurred. However, where the recipient of the letter has acknowledged the possible breach, this fact may be recorded and published.
- 22 We will not ordinarily publicise in the media or in any public report the details of a compliance advice letter or the identity of the recipient of a letter. But there are exceptions to this general approach:
 - 22.1 we may in some cases decide that the public interest requires disclosure of a compliance advice letter or its contents – usually, in the case register on the Commission's website;
 - 22.2 we may decide to publicly discuss the subject matter giving rise to compliance advice if we consider it is in the public interest to do so - for example, to provide guidance to a wider group or industry or to consumers; and
 - 22.3 we may be required to disclose information about compliance advice letters, and copies of the letters themselves, under the Official Information Act 1982.

Warning letters

Description

- 23 The purposes of a warning letter are to:
 - 23.1 inform the recipient, the industry and the public of our view that there has been a breach or likely breach of the law;
 - 23.2 give the recipient a chance to change its behaviour;
 - 23.3 encourage future compliance by the recipient; and
 - 23.4 educate the industry and the public, to assist them to comply with the law.
- 24 A warning letter will usually:
 - 24.1 advise the recipient that, in our opinion, it has or is likely to have breached the law and state our reasons;
 - 24.2 explain the potential legal consequences of such a breach;
 - 24.3 explain that, in this instance, we have exercised our discretion to issue a warning letter rather than adopt a more stringent enforcement response;
 - 24.4 advise the recipient that it should cease any ongoing conduct of the same kind, and explain the consequences if it does not; and
 - 24.5 state that in cases of continued or repeated similar conduct, we may, in our enforcement decision-making, rely on the fact of having already issued a warning letter. We may also draw that fact to the attention of a court in any subsequent proceedings brought by us against the recipient.
- 25 A warning letter is not legal advice. If you want further information or guidance on the matter, you should consult your own lawyer.

Additional factors we take into account

- 26 We are guided by the [Solicitor-General's Guidelines for the Use of Warnings](#) that set out the principles and processes for warnings. Generally, agencies are expected to consider:
 - 26.1 the needs and interests of the person to be warned, their whānau and community (the person);
 - 26.2 the needs and interests of any person harmed or affected by the person's behaviour, their whānau and community (the harmed person); and
 - 26.3 the wider public interest.
- 27 We may issue a warning letter as an alternative to court proceedings where we consider that:
 - 27.1 the evidence that has been gathered is sufficiently strong to establish a *prima facie* case;¹and
 - 27.2 there has therefore been a **breach or likely breach** of the law; but
 - 27.3 the matter can be satisfactorily resolved without legal proceedings; and
 - 27.4 the public interest is best served by not litigating.

Our approach

- 28 Before issuing a warning letter, we will engage with you or your representative to discuss the proposed content of the letter.
- 29 We will not say in any warning letter or media statement that we have made a 'finding' of non-compliance with the law. Only the courts can determine whether a breach of the law has occurred. However, where the recipient of the letter has acknowledged the likelihood of breach, and/or reported the breach or likely breach to us, this may be recorded and published.
- 30 Where we have issued a warning letter, we will only reconsider our decision not to prosecute in the rare cases set out in the [Solicitor-General's Prosecution Guidelines](#).

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

- 31 We will usually:
 - 31.1 publish a copy of a warning letter on our website; and
 - 31.2 include the name of the recipient and the subject matter of the warning letter on the case register on our website.
- 32 However, we may choose not to publish a warning letter, or we may redact identifying or other details from our published warning letters, or we may decide to take down a published warning letter at a later date. We may do this where, for example:
 - 32.1 The likely effect of publication (or ongoing publication) of the warning letter would be disproportionate for the recipient or a person close to them, when weighed against the seriousness of the likely breach and its consequences;
 - 32.2 publication would otherwise be unduly harmful to the recipient or a person close to them; or
 - 32.3 publication would adversely affect the complainant, an informant or some other person.
- 33 We will also take down a published warning letter if it has been issued to an individual, and the individual would have been eligible for the clean slate scheme under the Criminal Records (Clean Slate) Act 2004 if they had been convicted of the offence that is the subject of the warning letter.
- 34 We may issue a media release about any warning letter that we have issued. We may also publish details about warning letters that we have issued in our Annual Report or other accountability publications.
- 35 We may in some instances publish additional information alongside a warning letter; for example, summaries, reports or information about why we formed our views.
- 36 The warned person may request a review of the decision to warn within one month after a warning letter has been issued if they are able to identify relevant material that was not considered as part of the decision. Such a review would be processed as a complaint against the Commission, and would be handled in accordance with the Commission's complaints processes, including the involvement of staff who were not involved in the original decision to warn.

Agreed Outcomes, including negotiated settlements and enforceable undertakings

Description

- 37 We may agree an enforcement outcome with a party, where that outcome can be promptly and easily implemented and is in the public interest.
- 38 There are a range of different features and terms that could form part of an agreed outcome, depending on the circumstances, such as:
 - 38.1 ceasing the conduct (e.g. a product safety recall);
 - 38.2 putting in place a formal compliance programme, additional procedural steps or compliance training, addressing gaps in systems and processes or updating legacy products or services to current compliance standards;
 - 38.3 admissions of breach or likely breach of the law;
 - 38.4 remediation or compensation to affected consumers, businesses or others that have been harmed by the conduct;
 - 38.5 where it is not possible to identify those harmed or an available remedy, then a donation to an appropriate public cause, funding of a project that promotes statutory compliance, or a general payment to all consumers in a particular class;
 - 38.6 payment to the Commission of a portion of our costs in investigating the breach and taking legal steps;
 - 38.7 payment of a penalty (subject to the Court's decision);
 - 38.8 publishing and distributing corrective information or correcting misleading information on websites or at point of sale; and/or
 - 38.9 making and publishing a formal apology to affected consumers, to industry representatives, or to the general public.
- 39 Agreed outcomes tend to have the following benefits:
 - 39.1 lower cost to the parties;
 - 39.2 faster outcomes;
 - 39.3 greater flexibility of terms and outcome; and
 - 39.4 greater control of the process, including timing.
- 40 Agreed outcomes will be formally recorded in writing, for example, in a settlement agreement.
- 41 Agreed outcomes may take the form of “enforceable undertakings” (where permitted under the relevant legislation). This means any commitments can be enforced by us in court if the person giving the undertaking does not subsequently comply with them.
- 42 Agreed outcomes can usually be reached directly between the parties without court proceedings needing to be issued.
- 43 However, an agreed outcome will still require court proceedings where the court is required to deliver a judgment, set a penalty, impose a sentence or make other court orders.

Additional factors we take into account

- 44 We take into account our [Model Litigant Policy](#) that requires the Commission to consider alternate means of avoiding or resolving litigation, where appropriate.
- 45 It may not be appropriate to reach agreement without court involvement where, for example:
 - 45.1 a full hearing is needed to test the issues and set legal precedent;
 - 45.2 the conduct is particularly serious or deserving of condemnation;
 - 45.3 the defendant is a repeat offender, lacks contrition or actively resists compliance;
 - 45.4 urgent remedies are sought and a delay while the parties try to negotiate an outcome would cause further harm; or
 - 45.5 agreement between the parties is unlikely.
- 46 Although compensation and remediation are certainly relevant factors that we take into account, a matter will not necessarily be resolved by agreement simply because the party in breach has rectified the loss or harm caused or has indicated a willingness or intention to do so. In particular, the Commission applies Supreme Court authority that defendants should not avoid court proceedings in criminal cases simply through the payment of compensation.²

Our approach

- 47 Any party can at any time approach us to make a proposal to resolve a matter, or to initiate a plea discussion in respect of a criminal case. This includes anyone who is self-reporting a breach, is under investigation, or is named as a defendant in court proceedings issued by the Commission.
- 48 Discussions may be conducted on a ‘without prejudice’ basis.³ This means that any concessions or proposals that are discussed will not be used in court against a defendant if an agreed outcome cannot be achieved.
- 49 We will consider any proposal that is well developed, principled and realistic. Proposals should be made, where possible, with reference to the relevant case law and applicable principles. Useful proposals will contain draft admissions and a detailed account of how any non-compliance has been or will be rectified.
- 50 We will not approach any discussion as a commercial negotiation in which ‘horse trading’ is appropriate. Rather, we aim to serve the public interest by arriving at an outcome that fairly represents the conduct and its consequences. We expect any agreed commitments, facts, penalty or other recommendations will be consistent with our view of the evidence and the applicable law.
- 51 Our staff will work with parties and their lawyers to develop a proposal that is suitable to be submitted to the relevant Commission decision-maker for their consideration. Our staff do not make decisions to resolve matters, except where authority to that effect has been delegated.
- 52 Where the resolution needs to involve the court, the Commission and parties will give effect to the agreement by presenting the judge with admissions and/or submissions that are in a form consistent with court procedure. This may include submissions to the court as to the appropriate discounts to reflect the making of admissions, co-operation and other relevant factors. Ultimately, the determination of any court proceedings is a matter solely for the judge.
- 53 In most criminal cases, we expect any agreed outcome to involve the court and to include the defendant making admissions of guilt which adequately reflect their wrongdoing. We will be willing to discuss in advance the wording and scope of charges which may be admitted and to indicate the likely penalty outcomes that we would submit to the court.

² *Osborne v Worksafe New Zealand* [2018] 1 NZLR 447. See also the Solicitor-General’s Prosecution Guidelines.

³ Section 57 of the Evidence Act 2006 regulates when privilege is available for civil and criminal settlement negotiations.

- 54 We expect all agreed outcomes will be publicised unless there are legal or other compelling reasons not to do so. We reserve the right to issue a media release after a resolution is reached or undertakings are provided, unless we have agreed otherwise. This approach is intended to serve the public interest, including by:
 - 54.1 being transparent about our decisions;
 - 54.2 maximising deterrence;
 - 54.3 educating market participants about their rights and obligations, and the consequences of non-compliance; and
 - 54.4 being accountable to the New Zealand public.
- 55 In some cases we will agree terms about the timing of media comment or to provide prior notice of our key media messages. We will only very rarely agree to provide parties with advance copies of our proposed media releases.

Infringement Notices

Description

- 56 We can issue infringement notices for breaches of some legislation. Infringement notices usually relate to breaches that can be readily established, such as the failure to disclose certain information required by law.
- 57 The fee or penalty specified in the infringement notice becomes payable immediately. Failure to pay may result in further criminal or civil enforcement action.
- 58 The recipient can object to and challenge an infringement notice.

Additional factors we take into account

- 59 We may issue an infringement notice where:
 - 59.1 we believe on reasonable grounds that a person is committing or has committed an infringement offence or breached the relevant law; and
 - 59.2 no court proceeding or infringement notice has already been issued for the same matter.

Our approach

- 60 We are required to issue an infringement notice within 6 or 12 months (depending on the legislation) of the alleged breach or offence.
- 61 An infringement notice can be issued only in respect of a single infringement offence. Multiple infringement notices may be issued where multiple offences are alleged to have occurred.
- 62 If we choose not to issue an infringement notice, we may still decide to take some other enforcement action instead.
- 63 We will publicise all infringement notices that are issued, upon (as applicable): payment of the infringement fee, referral to the Ministry of Justice if unpaid, or decision of the court.

Court Proceedings

Injunctions and other urgent responses

Description

- 64 An injunction is a court order that a party must do – or stop doing – something. An injunction restrains a person or business from committing an actual or attempted breach of the law, or from assisting or conspiring with another to breach the law. Injunctions may be interim (temporary) or permanent.
- 65 Other types of similar orders (such as compliance orders) may be available under legislation the Commission enforces.
- 66 Prior to seeking an injunction (or taking some other enforcement action), we may write to party directly asking that it stop engaging in current conduct or business practices. This is known as a Stop Now letter. The purpose is to give the recipient early warning of our concerns, and a chance to change their behaviour.

Additional factors we take into account

- 67 We may seek an injunction where we consider the public interest requires us to act promptly to restrain a person from conduct that breaches the law or is likely to do so.
- 68 We may issue a Stop Now letter where we urgently want conduct to stop that we regard as likely to be harmful to the market, consumers or public safety. Before issuing a Stop Now letter we will usually have reached a view that:
 - 68.2.1 there is ongoing conduct that is likely to breach a law we enforce;
 - 68.2.2 the business or individual ought to be put on formal notice that the conduct should cease; and
 - 68.2.3 a Stop Now letter is preferable in the first instance to an injunction.

Our approach

- 69 For injunctions and similar court orders, we follow the requirements in the court rules and in the legislation that we enforce.
- 70 We will issue a Stop Now letter to put a business or individual on notice of our concerns and that the recipient may not, from the date of receipt, allege that it was unaware of the Commission's views of its conduct.
- 71 We may publicise the fact we have issued a Stop Now letter or sought an injunction, so that the public is made aware about the conduct that concerns us.
- 72 If we issue a Stop Now letter or seek an injunction, it does not signal that we will not also pursue another enforcement response, such as a warning letter, enforceable undertakings or court action.

Criminal and civil court proceedings

Description

- 73 We may decide that the most appropriate enforcement response is to issue court proceedings against a company, an individual, or both. We may take criminal and/or civil proceedings, depending on the particular legislation and all the circumstances of the conduct.
- 74 In a criminal proceeding, a defendant may be liable to fines and, in the case of individuals, imprisonment in very serious cases. Courts may also impose reparations.
- 75 In a civil proceeding, there are a wide range of remedies available depending on the law breached. These commonly include:
 - 75.1 financial penalties;
 - 75.2 damages for losses caused to others;
 - 75.3 payments to consumers, such as statutory damages and orders for refunds or reparations;
 - 75.4 declarations of breach of the law;
 - 75.5 orders prohibiting persons from managing a business;
 - 75.6 orders to divest assets or shares, or to cease a business;
 - 75.7 orders requiring publication of corrective information; and
 - 75.8 orders requiring regulated businesses to comply with information disclosure, price-quality or negotiate-arbitrate requirements.

Additional factors we take into account

- 76 When deciding whether to issue court proceedings, we follow the [Solicitor-General's Prosecution Guidelines](#) and our [Criminal Prosecution Guidelines](#).
- 77 Based on those guidelines, we are more likely to bring court proceedings where, for example:
 - 77.1 the conduct is of significant public interest or concern;
 - 77.2 the conduct is deliberate, sophisticated, serious or repeated;
 - 77.3 there has been a disregard for the law;
 - 77.4 there is or may be significant detriment caused to consumers, competitors or to the market;
 - 77.5 the defendant is a large or sophisticated trader with the potential to cause widespread detriment;
 - 77.6 the victims include disadvantaged or vulnerable members of the community;
 - 77.7 the breach was hard to detect;
 - 77.8 the defendant has previously breached legislation that we enforce;
 - 77.9 the conduct involves a significant new or emerging market issue or one where our action is likely to have an educative or deterrent effect;
 - 77.10 we want to recover compensation or obtain orders that only a court can make (for example, banning a person from operating a company); or
 - 77.11 we want a court to determine a novel, important or uncertain question of law; for example, in order to set legal precedent.
- 78 In some cases we may be influenced by the fact that a whistle-blower or other informant has brought the matter to our attention. Where a person takes personal or professional risks to report a concern to us, that may weigh in our decision-making to issue court proceedings.
- 79 The [Solicitor-General's Prosecution Guidelines](#) contain a presumption in favour of criminal prosecution once the evidential sufficiency test is met. However, they also acknowledge that it may not be in the public interest that criminal proceedings are brought.

- 80 In addition to the above factors, our decision whether to commence criminal or civil proceedings – where there is a choice in the legislation - will focus on:
 - 80.1 whether and what time limitations apply (these can differ between criminal and civil cases);
 - 80.2 the sufficiency of the evidence, and the standard of proof required: civil cases must be proved on the ‘balance of probabilities’ standard, but criminal cases require proof ‘beyond reasonable doubt’;
 - 80.3 the remedies that are available (these differ between criminal and civil cases);
 - 80.4 the seriousness of the conduct and its consequences;
 - 80.5 whether the conduct was deliberate or especially blameworthy; and
 - 80.6 whether the law being enforced is long-standing and well understood.

Our approach

- 81 When making an enforcement decision the Commission may also seek and take into account the position and views of another Government agency.
- 82 Where we identify serious criminal conduct that is properly within the remit of another Government agency, such as the Police, the Serious Fraud Office, the Financial Markets Authority or the Inland Revenue Department, we may refer the matter to that agency.
- 83 In addition to the offences set out in the laws that we enforce, we can also bring a criminal prosecution under the Crimes Act 1961 for serious offences covered by that Act where the offence relates closely to a matter we are investigating.

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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.

You can subscribe for information updates at www.comcom.govt.nz/subscribe

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

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