

12 March 2020

[REDACTED]

By email only: [REDACTED]

Dear [REDACTED]

Official Information Act #19.127 [REDACTED]

1. We refer to your request received on 13 February 2020 for information about the decision making process(es) in place and used to arrive at the decision on your complaint to the Commerce Commission (Commission) about [REDACTED]
2. We have treated this as a request for information under the Official Information Act 1982 (OIA).

Our response

3. We have decided to grant your request.
4. We have provided the documents which outline the process(es) the Commission undertakes in relation to all complaints. We do not hold information specific to your complaint additional to what we provided on [REDACTED]
5. We have provided our Flow Diagram for handling incoming reports (**Attachment A**).
6. We have also provided the relevant sections of two documents which describe the way the Commission make decisions on complaints we receive:
 - 6.1 From the Enquiries Team Reference Guide¹ the sections on:
 - 6.1.1 what a good report looks like and Performing a Screening Assessment (**Attachment B**); and

¹ The Enquiries Team Reference guide is given to new members of the Enquiries Team. It contains general information on the legislation the Commission enforces, operational procedures (e.g. time recording, using translation services) and the assessment and screening process.

- 6.1.2 what is Screening (**Attachment C**).
- 6.2 From the Enquiries Officer Desk File the sections on:
 - 6.2.1 logging and assessing new complaints (**Attachment D**);
 - 6.2.2 screening Assessments (**Attachment E**); and
 - 6.2.3 weekly Competition Branch Screening meeting (**Attachment F**).
- 7. The Commission undertakes an assessment of every complaint we receive; we do not make findings/rules. Only the Courts can decide if there has been a breach of the law.
- 8. The Commission will be publishing this response to your request on our website. Your personal details will be removed from the published response.
- 9. Please do not hesitate to contact us at oa@comcom.govt.nz if you have any questions about this request.

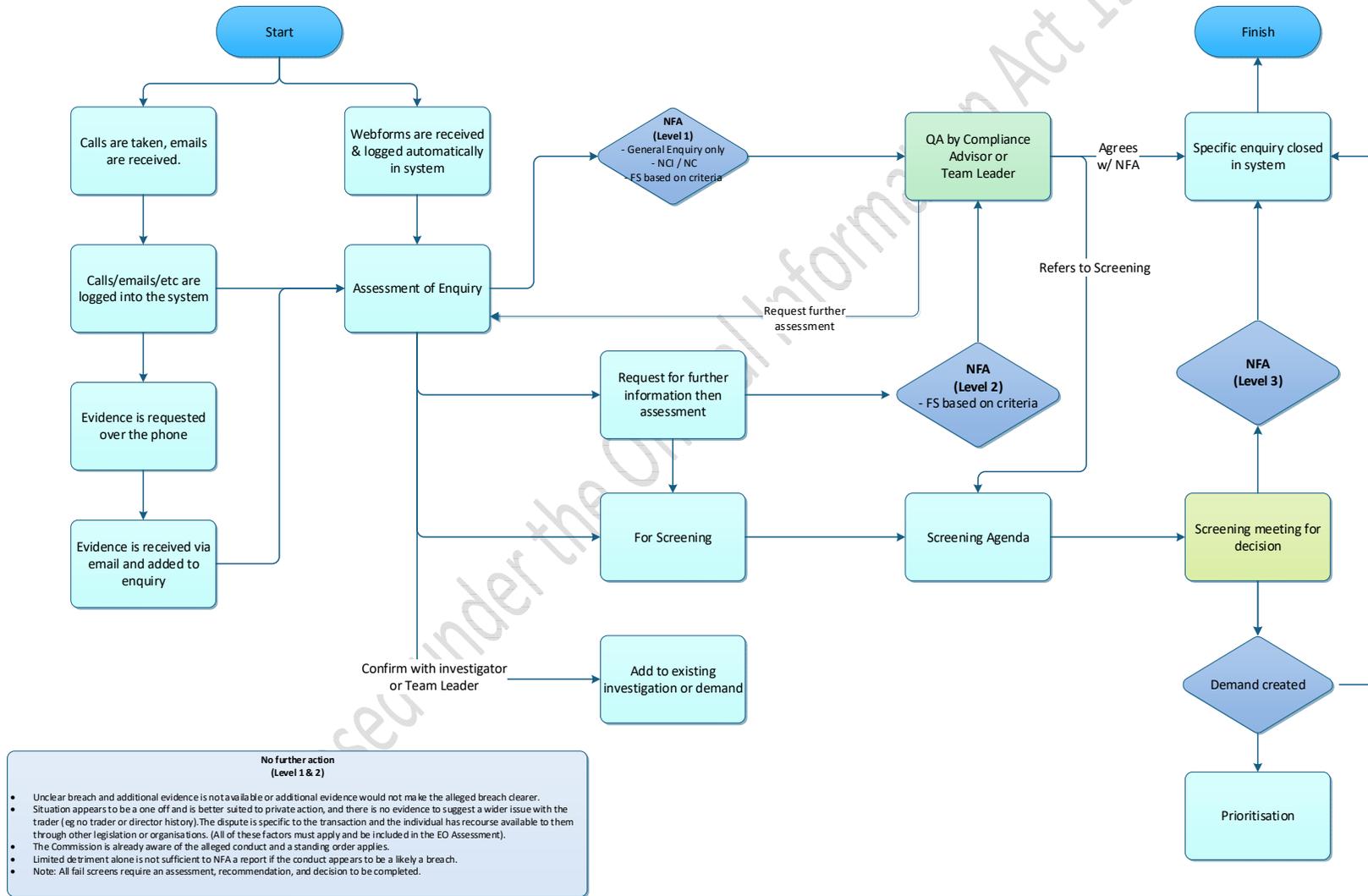
Yours sincerely

Mary Sheppard

Mary Sheppard
OIA Coordinator

Attachment A – Flow diagram for handling incoming reports

Flow diagram for handling incoming reports - current



Attachment B - What does a good report look like

A good report will contain as much information as is required to identify the relevant issues, and any background or further information that is relevant to help make a screening decision.

This of course will differ depending on the report, but there are a few things to look out for.

- The report description reads like a story and is written in the third person. It answers the questions – **Who, What, When, Where, Why and How, or by its shorter reference as 5W1H**

For example:

“C purchased some shoes from Ts Hamilton store for \$149. The shoes were sold as a "leather upper, synthetic lining, man-made sole" type in this style. The supposedly leather upper shoes are actually vinyl upper.

C has taken shoes to a cobbler who verifies that the shoes are vinyl. C also took the shoes to a saddlery who also says that the shoes are vinyl.

The T claims that it is "action backed leather" but C does not know what this means and has not found any reference on google to it.

T have contacted C and offered to buy the shoes back from C. C has refused.”

This report outlines the **who** (shoe store) **what** the problem is (shoes as leather) **when** (not taken, but the date that the report is entered in i-lign is an indication) **where** (Hamilton) **why** (because the shoes are vinyl, not leather.) **How** (independent observers who are experts state it is not leather)

- You should always endeavour to get **dates, prices, and names of people involved**, and any other relevant information that helps to ‘fill out’ the reason for why the report is being made. It is not helpful for us if the consumer cannot remember and they should be pushed to provide as much information as they can.
- If you do not think the report is clear, imagine if someone else who hasn’t spoken to the complainant is reading the Streamline entry. Would they be able to clearly understand what is being stated without having to request clarification?
- If an emailed report is clear and concise and all the information is detailed, there is nothing wrong with cutting and pasting the information directly into Streamline with quote marks around it.
- If the caller is unable to provide information there and then, take their details and give them the Report Number for them to call us back or email us with more information.
- If the caller has photos or other documentation, provide them with our email address (evidence@comcom.govt.nz), fax number, or PO Box address along with the enquiry number for them to get the information to us.

- The complainant is referenced as “C” and the trader as “T”. No personal names are used in the description fields. If there are other people involved you should establish an acronym for them as well e.g. complainant’s sister-in-law = SIL
- Evidence of the breach has been collected and is saved to filesite, and is noted in the “Note” section of Streamline. You may need to get this evidence yourself, or ask for it to be provided by the complainant.
- When loading a business that has multiple locations, such as XYZ for example, use the company name i.e. XYZ Group Limited T/A XYZ refer to the store involved in the body of the report.

Privacy waivers

We generally ask all callers to whether they provide us with a privacy waiver.

“If the Commission decides that your report is better suited to another organisation, do you agree to us disclosing your report and personal details to that organisation.”

There is a box to check in Streamline if a waiver has been given.

Facts of the Report

Complainants are often concerned with resolving “their” issue and are generally not interested in other aspects unless they pertain to the complainants issue directly.

Officers will often note other potential breaches in the description. This additional information is useful for the screening unit/managers to be more fully informed of any other potential breaches of legislation that the trader concerned may be at risk of contravening if the Officer refers the file for screening

Any alleged breaches are often captured through evidence obtained such as newspaper advertisements, magazine or other advertising such as in store promotions. Breaches identified on websites are captured using the snag it tool. Any such evidence obtained is noted in the “Note” section.

Assessment of the Report

The Officer will need to consider what information is necessary to support the enquiry if a possible breach is identified. It may be necessary to obtain supporting information from the complainant, or the Officer to obtain the relevant information themselves if the alleged breach is obvious, before the enquiry can be assessed properly and referred on For Screening.

The Officer should ask the complainant to supply any information he or she has or can obtain easily. The information requested might include:

- Documents such as letters or contracts

- Photographs, website screenshots or advertisements
- Physical objects.

All requests sent for evidence must be noted in the “Notes and activities section” and sent from evidence@comcom.govt.nz

All you need to write is a brief update such as “*Evidence - Asked C to send “*”

If evidence is crucial or important – you should try to call the complainant.

Once all the information is obtained, the Officer then assesses the information in order to determine where a potential breach has occurred and makes a recommendation as to whether to refer Screening or be closed NFA.

When a report is closed or has been NFA’d either by the Enquiries Officer or at the CBS Screening Meeting, Officer should consider whether the complainant/s needs to be informed of the outcomes.

Officers have templates that need to be used which provide standardised responses to complainants. Any deviations from the templates needs to be discussed with the Team Leader.

Performing a Screening Assessment

How do I perform the assessment?

1. Note that you do not need to assess every issue raised by the complainant. You should assess the matters relevant to the Commission and the legislation that we enforce.
2. Consider the following information:
 - 2.1 What has the complainant alleged?
 - 2.1.1 If the complaint was made via email or through the online form, open the original document by searching for the enquiry number in File Site;
 - 2.1.2 This will allow you to understand the report in the complainant’s own words.
 - 2.2 If the allegation can be substantiated, is it likely to present a breach of legislation enforced by the Commission?
 - 2.2.1 This requires forming a clear idea of what the complaint issues raised are about and then appropriately applying relevant legislation;
 - 2.2.2 Be careful not to categorize issues as only having one piece of legislation applicable - where there are issues under the Credit

Contracts and Consumer Finance Act or Commerce Acts, there may also be Fair Trading Act issues and vice versa;

2.2.3 Consider whether the alleged breach is only possible when a number of assumed factors are proven true or is likely on the face of the evidence available.

2.3 Is there evidence available to support the allegation?

2.3.1 Evidence can come from many places;

2.3.2 Commonly consumers either will have or will be able to provide evidence. Check the enquiry number to see if any evidence has been supplied or is referred to by the complainant. Enquiries Officers will store evidence under the enquiry number in File Site;

2.3.3 Most traders have some kind of on-line presence, either a website, Trade Me listings or a Facebook page where there may be further information available;

2.3.4 Once an investigation has commenced Investigators will have a wider range of information able to be requested from the trader, however, traders may be unwilling to provide information. Consideration should be given to the likelihood of the Commission engaging in the compulsory supply of information if this is likely to be required.

2.4 Does the conduct appear deliberate, reckless or careless?

2.4.1 This factor will inform the appropriate level of response from the Commission;

2.4.2 Conduct which is deliberate or reckless is more likely to see a matter proceed to Investigation, rather than Low Level Enquiry although consideration of the wider issues is also required.

2.5 Are there other issues present which the complainant has not identified?

2.5.1 Often, where a specific issue is raised against a trader, there will be other issues on the periphery. Our assessment should also capture these issues as they help inform the level of harm potentially caused by a trader's conduct generally;

2.5.2 These issues often relate to a trader's terms and conditions denying a consumer rights they are provided under the Consumer Guarantees Act ;

2.5.3 There is also significant interplay between the Credit Contracts and Consumer Finance Act and the Fair Trading Act which should be considered.

- 2.6 What is the trader's history with the Commission like?
- 2.6.1 Establish whether we have received other complaints against the trader;
 - 2.6.2 Establish whether those complaints involve the same conduct alleged in the complaint you are currently assessing;
 - 2.6.3 Establish whether we have or taken previous enforcement action against the trader or issued previous compliance advice and if so, whether this was in relation to the same conduct currently under assessment.
- 2.7 What is the detriment and public interest present in the complaint issues alleged?
- 2.7.1 Detriment can involve an individual or a class of consumers, other businesses or can be reputational;
 - 2.7.2 In assessing public interest, the Commission considers the following questions:
 - (a) Is there likely to be widespread public interest in the issue?
 - (b) Would a decision not to commence or continue enforcement action likely undermine public confidence in the law?
 - (c) Is it more appropriate for the Commission, rather than another agency or an affected party, to address the issue?
 - (d) Are there any mitigating or aggravating features involved?
 - (e) Do the personal circumstances of the parties involved argue for or against enforcement action?
 - (f) Is there a significant need to clarify the law?
 - (g) Is it necessary to reinforce the application of the legislation?
 - (h) Are the issues timely?
- 2.8 Having considered points above, what is the appropriate way for the Commission to handle the current complaint issues raised?
- 2.8.1 This involves consideration of the Enforcement Response Guidelines in conjunction with Enforcement Criteria.
 - (a) Information Passed to the Trader (IPTT) – this is appropriate where the matter appears to present a breach of legislation and we believe we can encourage trader compliance by

notifying them of the complaint and educating them about their obligations under the legislation. This response is particularly useful for new traders who appear ignorant of their legal obligations.

- (b) Low level Investigation – this is appropriate where the matter appears likely to present a breach of legislation but is a matter which appears capable of resolution through an administrative outcome (commonly the issuing of a Compliance Advice letter or on occasion a Warning letter)
- (c) Mod/High Investigation – this is appropriate where the matters are complex, likely to result in litigation or involve a trader with significant prior history with the Commission suggesting a high level enforcement response is required
- (a) Refer internally/externally – this is appropriate where the matter is best handled by a specific part of the Commission (eg Regulation or Advocacy) or another agency. For screening purposes this is recorded as FAB (further assessment by branch)
- (b) Group Discussion – if the matter is complex and an appropriate recommendation is not clear, you can use this option to request the screening managers provide direction
- (c) Add to demand – the trader/issue is already on our list of pending work.
- (d) No further action

Attachment C - What is screening?

The Enquiries Team is responsible for undertaking an assessment of all reports that have been referred to Screening. The Team has a spreadsheet that tracks all the reports and the assessments and decisions made on the reports. Assessments and recommendations are sent to the Screening meeting each week for consideration by managers.

A weekly meeting, usually on a Tuesday, of Competition branch managers.

The Screening Meeting makes decisions on which reports will be sent for investigation. They use the Commission Enforcement Criteria to assist with this decision making, and if the report fails the screening process by not meeting the criteria, a code is used to explain the decision.

The most popular codes used are:

- B – one off behaviour
- G – Not a clear breach
- Q – Appropriate for other agency or civil action
- QE – referral to another agency
- V – Are the issues timely
- W – Other priorities

The Enquiries Team attends and records the decisions made at the meeting. One Enquiry officer attends the meeting each week and assists with note taking.

Enforcement Criteria

The current Enforcement Criteria used by the Screening Managers falls generally into three categories – extent of detriment; seriousness of conduct; and public interest.

The Commission must also consider the strength of the case; the availability of staff and other resources; and whether the report is a priority.

Extent of Detriment

Are consumers or businesses likely to suffer and to what extent:

- physical harm?
- increased costs?
- loss of property?
- impaired choice?
- Are the more vulnerable targeted by the behaviour?
- Are a wide range of consumers or businesses likely to be affected?

- Is competition in the relevant markets likely to be adversely affected?
- Are excess profits likely to be gained?
- Are emerging markets likely to be adversely affected?
- Is the behaviour likely to have significant adverse national or regional impact?

Seriousness of Conduct

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

In the Public Interest

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

Attachment D - Direction for logging and assessing new complaints sent via emails/letters/webform

a) Read each report and:

- i. Create a new Streamline enquiry
- ii. Owner = you
- iii. Contact Method = Email or website
- iv. Tick the privacy waiver box if one has been provided
- v. Fill in the referred by box if the report has been referred by another agency.
- vi. Received date = Date of the email/letter/webform
- vii. Description = Copy and paste of complaint from email/letter/report form
- viii. Create a new business if required and new individual if required.
- ix. Select the appropriate Act and section of Act. Section can be completed later if you are not immediately sure what the section should be.
 - **REMEMBER:** It is important to fill in the contact method, date received and relevant Act as soon as possible for reporting purposes.

b) Assess the report and provide the assessment in Assessment and Screening tab and Assessment field.

- i. Is it a Commission issue?
 - if yes, proceed with assessment;
 - if no, consider whether there is an appropriate agency to refer the report to, if we do think it is better for another agency we need to remember to be helpful and respond to them advising them of this;
 - if appropriate, send the complainant the relevant email/letter (from the External messaging templates for responses document [#3228504](#)) and refer the complainant to the appropriate agency for their concerns – close the report NFA with Q, NCI, and Referred Externally as the Enforcement Criteria. Date closed will automatically populate when NFA is selected and saved.
- ii. Request any additional evidence that may be required for the assessment. The Initial Recommendation field in Streamline should be left as “Waiting for Information” until an initial assessment/decision is made. When evidence is received, file and assess it.
- iii. Apply the Enforcement Criteria for all assessments.

Closing a report at the initial assessment stage

- If Enforcement Criteria appears to be met, send the complaint to For Screening Assessment as the Initial Recommendation.²

² Note that there may be additional factors that make the complaint suitable For Screening. For example, you may want managers views on a complicated or difficult matter.

- Ensure that your assessment provides the rationale for sending the report to For Screening Assessment.
- If Enforcement Criteria is not met, consider whether the complainant requires a written response.
 - If yes, use the appropriate fail screen email/letter from the [External messaging templates for responses](#) document #2245092.
 - Close the report NFA by:
 - selecting initial recommendation = NFA and selecting the appropriate Enforcement Criteria from the drop down list.
 - Then change the state of the report to “Closed”. Date closed will automatically populate when the report is then saved.

Reports related to current investigations

- iv. If the report raises similar issues as a current or pending investigation, the Officer should contact the investigation’s assigned investigator to see whether they want the report to be added to the investigation.
 - If yes, Initial Recommendation = Add to project
 - If no, Initial Recommendation = For Screening Assessment – Then assess as per normal. Note that the investigator did not wish to add the complaint to the project and why.

Reports relating to an open demand

- v. If the report raises similar issues as an open demand, the report could add to the strength of the demand and subsequent project. Reports that recommend “add to demand” do not need to go through screening. Check with the Team Leader or a Compliance Officer if you are unsure about whether or not to add a report to a demand.

Referring a matter to Screening

Attachment E - Screening Assessments

- vi. If a report meets the criteria that we consider when conducting an initial assessment, then a more fulsome assessment should be conducted. It should be sent through to managers to consider at the weekly CBS screening meeting. Some reports may not appear to meet the criteria but can still be sent to Screening for manager consideration.
- vii. A Screening Assessment should stand on its own; it should include a quick summary of the industry and trader profile, a recap of issues raised, then provide a comprehensive assessment. Note that you do not need to assess every issue raised by the complainant. You should assess the matters relevant to the Commission and the legislation that we enforce.
- viii. Officers are responsible for completing their Screening Assessments and sending them for review (via Streamline) in a timely manner in accordance with the performance agreement.
- ix. All assessments will be reviewed by a senior team member before inclusion in the CBS Screening Meeting agenda.
- x. More information on How to Perform a Screening Assessment can be found in the [Reference Guide](#) and relevant cheat sheets like the Commerce Act Guidance for assessments #[2976015](#).
- xi. To send the report to be considered at the screening meeting:
 - complete the assessment
 - select the appropriate screening recommendation and enforcement criteria (leave blank if the screening recommendation = Group Discussion and you are unsure).
 - Check for spelling errors and that all tabs are filled in (entity, individual, breaches).
 - Change state to “Assessment Complete” this will send the report to the team leader to review before it goes on the CBS Meeting agenda.

Considerations for assessments

- **Firstly focus on factors that support or mitigate the likelihood of a breach being present in the alleged conduct**, e.g “From my review of the trader’s listings on Trade Me, \ the majority of the vehicles offered for sale via auction or buy now do not display a CIN” or “The receipt supplied by the consumer shows they were charged \$5 for the item, whereas the trader’s advertising described the item’s price as \$3”
- **The breach should be clearly defined** e.g “the trader’s failure to display a CIN in a location where the transaction is capable of being completed is likely to breach section 28 FTA” or “charging consumers a higher price than that advertised is likely to breach section 13(g) FTA”.
- **Ensure that consideration is given to other issues which may be present in the trader’s practices and those issues are described.** The other factors identified will

often be within the trader's terms and conditions. Particular attention should be given to possible UCT or consumer rights issues.

- **Provide a high level overview of the industry and trader for context.** Is the trader new to market, do they have multiple storefronts in New Zealand, are they mainly overseas or online, who is the target audience?
- **If a breach appears possible or likely, then factors supporting or mitigating the need for Commission involvement should be described.**

Your assessment should read in a way that naturally supports your recommendation.

Released under the Official Information Act 1982

Attachment F - Weekly Competition Branch Screening meeting (CBS)

Each week the Competition Branch Screening Managers meet to discuss reports that have been assessed and to agree on a recommendation course of action.

- I. Chrissie will send out a Screening Meeting agenda on the Thursday prior to each meeting.
- II. Enquiry Officers take turns attending this meeting each week. The officer attending is always listed on the roster.
- III. After the meeting the CBS meeting register spreadsheet will be updated with the final decisions. File site #2152002.
- IV. Officers will sort the spreadsheet to find the reports they are responsible for. Chrissie will update Streamline but the Officer is responsible for sending out any required correspondence to the complainant using the agreed template messaging. External messaging templates for responses document.