

COMPETITION AND CONSUMER

INVESTIGATION GUIDELINES



LEGISLATION ENFORCED BY THE COMMERCE COMMISSION

Commerce Act	Commerce Act 1986
CCCF Act	Credit Contracts and Consumer Finance Act 2003
DIR Act	Dairy Industry Restructuring Act 2001
Fair Trading Act	Fair Trading Act 1986
Telecommunications Act	Telecommunications Act 2001

© Crown Copyright

Issued July 2018

This work is licensed under the Creative Commons Attribution 4.0 New Zealand licence.

In essence, you are free to copy, distribute and adapt the work, as long as you attribute the work to the Commerce Commission and abide by the other licence terms. To view a copy of this licence, visit <http://creativecommons.org/licenses/by-nc/4.0/>.



Contents

Purpose	3
Terms used in these guidelines	3
Scope	3
When these guidelines apply	3
How we apply these guidelines	4
Other guidelines and policies	4
Commission independence, staffing and structure	5
Investigation process roadmap	6
Investigation principles	7
Principle 1: We are objective, fair and impartial	7
Principle 2: We aim to be as open and transparent as we can be	7
Principle 3: We investigate in a timely way	8
Principle 4: We handle information responsibly	8
Principle 5: We are accountable for our decisions	8
Observance of human rights	9
How we investigate	9
How we make decisions	12
Commission members and staff	12
Decision-making before an investigation	12
Decision-making during an investigation	12
Decision-making after an investigation	12
Timing	12
Communication with parties during an investigation	13
Communication with the investigated party	13
Communication with complainants	14
Communication with other affected parties	14
Letters seeking to alter conduct	14
Communication at the end of an investigation	15
Information gathering	16
Information requests	16
Types of information request	16
Voluntary requests	16
‘Please explain’ letters	17
Compulsory notices	17
Comparison of voluntary and compulsory requests	17
Compulsory notice power	18
Source and scope of the power	18
“Documents” defined	18
When the power can be used	19
The formal notice	19
Complying with a notice	19
Varying or extending a statutory notice	20
Non-compliance with a notice	20
Compulsory notices after proceedings have begun	20

Interviews	21
Compelling information or conducting an interview	21
Voluntary interviews	21
Compulsory interviews	22
Source of the power	22
When the power can be used	22
The formal notice	22
Who can attend the interview	23
Changing the date of the interview	23
Non-compliance with a notice	23
Requirement to answer questions	24
At the compulsory interview	24
Admissibility of information gathered through a compulsory notice	25
Search powers	25
Using a search warrant	25
The scope of the power	25
When we may seek a search warrant	25
Specifics of a search warrant	26
Commission staff executing a warrant	27
What you must do during the execution of a warrant	27
Seizure of items and removal from a place	28
Warrantless search or entry	29
Entry under an implied license	29
Consent searches	29
Gathering product safety information	29
How we deal with information	30
How we use information during an investigation	30
Using information for the purposes of the investigation	30
Sharing information within the commission and using information for another investigation	30
The Official Information Act	31
How we protect confidential information	32
Protection of information during an investigation	32
Confidentiality orders under the Commerce Act	32
Protecting information when a matter goes to court	32
Protecting complainants – confidential informants policy	33
Sharing information with other regulators	33
Joint investigations	33
Financial markets authority and the takeovers panel	33
Serious Fraud Office	33
Other criminal offending	34
Issues of public safety	34
Overseas regulators	34
Public or media comment by the Commission	34
Opening of an investigation	35
During an investigation	35
When investigation is completed	35
Complaints about investigation process	35
Attachment A – Glossary of terms	36

Purpose

The purpose of these competition and consumer investigation guidelines is to help you understand how we investigate competition and consumer law matters and what you can expect to happen during an investigation.

You should read these guidelines if:

- You are being investigated by the Commission under Part 2 or 3 of the Commerce Act 1986, the Fair Trading Act 1986, or the Credit Contracts and Consumer Finance Act 2003
- You have made an enquiry or complaint 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 credit contract laws. These competition and consumer investigation guidelines apply when we are investigating or considering investigating a possible breach of:
 - Part 2 or 3 of the Commerce Act 1986¹
 - the Fair Trading Act 1986
 - the Credit Contracts and Consumer Finance Act 2003 (CCCF Act).
- 3 Every reference in this document to "investigation" is accordingly a reference to competition and consumer investigations.
- 4 These guidelines do not apply to our:
 - regulatory functions under Part 4 of the Commerce Act 1986, the Dairy Industry Restructuring Act 2001, or the Telecommunications Act 2001
 - clearance and authorisation work.²

1. Part 2 of the Commerce Act 1986 covers restrictive trade practices, and Part 3 deals with business acquisitions.

2. For guidance on clearance and authorisation process, see our published Mergers and Authorisation Guidelines, Authorisation Guidelines and (Draft) Competitor Collaboration Guidelines available at <http://www.comcom.govt.nz/business-competition/guidelines-2/mergers-and-acquisitions-guidelines/>; <http://www.comcom.govt.nz/guidelines-2/authorisation-guidelines/> and <http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/>

How we apply these guidelines

- 5 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.
- 6 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, through measures such as public education or a **change of conduct letter**. Our available **enforcement responses** are referred to below.
- 7 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.
- 8 These guidelines also do not cover the legal tests that we apply in assessing potential breaches of competition and consumer law. We have published fact sheets and other guidance on our website that explain the laws that we enforce.³

Other guidelines and policies

- 9 The investigation guidelines should be read alongside other related Commission documents:
 - 9.1 Our *Enforcement Criteria* – these **enforcement criteria** apply at every stage of an investigation and enforcement process.⁴
 - 9.2 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*.⁵
 - 9.3 Our *Cartel Leniency Policy and Cooperation Policy* – these policies explain how parties with information can choose to assist the Commission and receive penalty discounts.⁶
 - 9.4 Our *Model Litigant Policy* – this policy restates our commitment to behaving as a model litigant in the litigation to which we are a party.⁷

3. See our anti-competitive conduct fact sheets at <http://www.comcom.govt.nz/business-competition/fact-sheets-3/>, consumer credit fact sheets at <http://www.comcom.govt.nz/consumer-credit/consumer-credit-fact-sheets/> and fair trading fact sheets at <http://www.comcom.govt.nz/fair-trading/fair-trading-act-fact-sheets/>.

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

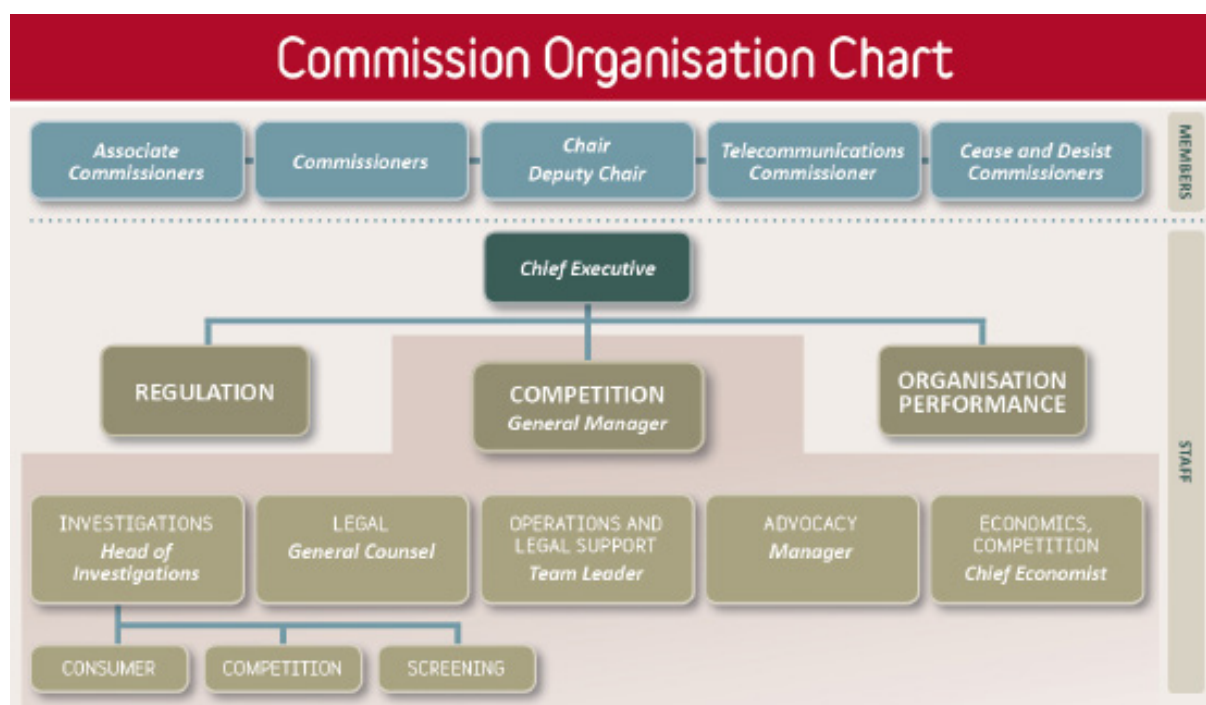
5. See our Enforcement Response Guidelines at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>.

6. See Cartel Leniency Policy at <http://www.comcom.govt.nz/the-commission/commission-policies/cartel-leniency-policy/>.

7. See Model Litigant Policy at <http://www.comcom.govt.nz/the-commission/commission-policies/model-litigant-policy/>.

Commission independence, staffing, and structure

- 10 The Commerce Commission is an Independent Crown Entity established under the Commerce Act 1986.⁸ 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 Minister of Communications for our performance. 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.⁹
- 11 Our role is to enforce various laws which together promote competition and fair trading, including in consumer credit markets, and to regulate telecommunications and some national infrastructure. Our organisational powers and functions are drawn from the laws we enforce, and from relevant case-law on those powers.
- 12 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 the Commission **members**, who are appointed by the Governor-General in accordance with section 28(1)(b) of the Crown Entities Act 2004.¹⁰ The Commission can and does delegate specific responsibilities to staff.
- 13 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.
- 14 The Commission usually sits as a group of members (known as a **Division**) that has been appointed by the Chair for that purpose.¹¹ 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.
- 15 Below is a simplified organisation chart for the Commission, depicting our basic structure and relevant roles:



8. See sections 8 and 8A Commerce Act 1986, and Crown Entities Act 2004.

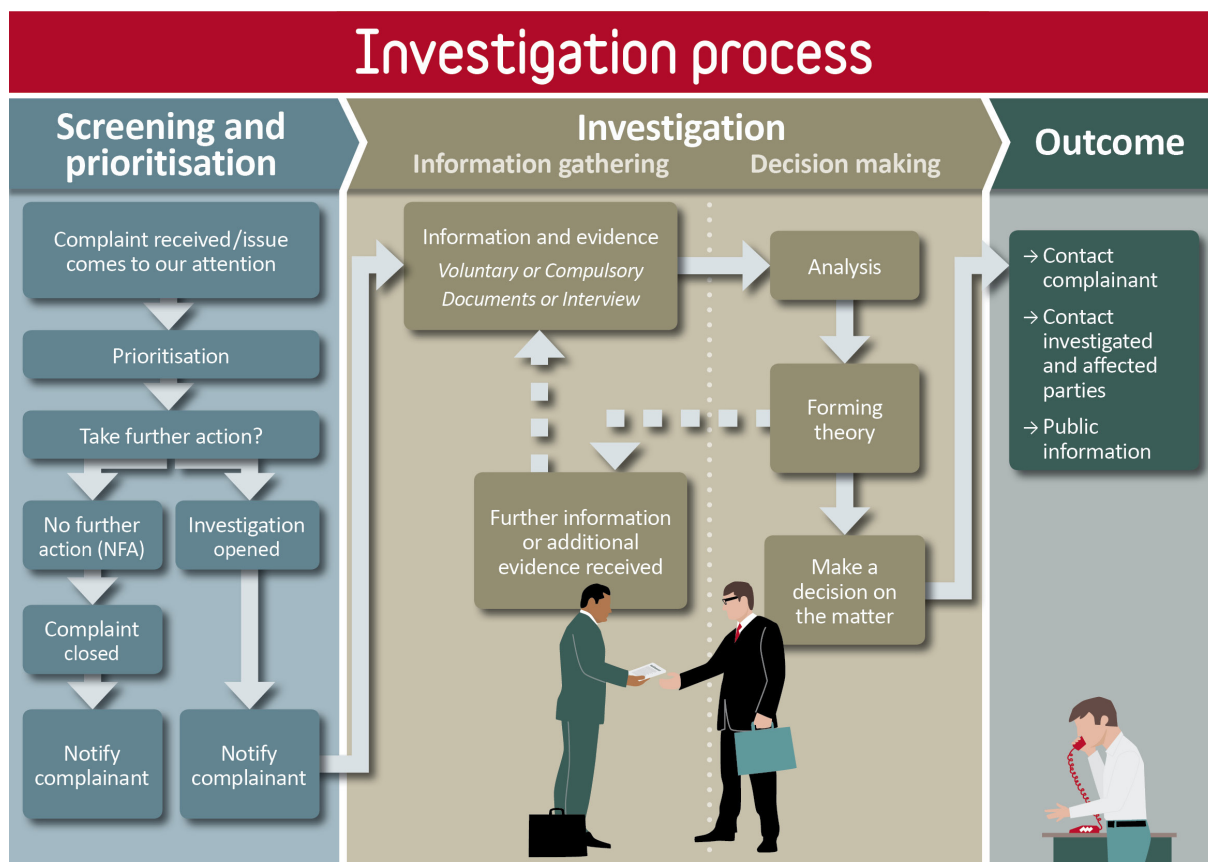
9. Section 105 Crown Entities Act 2004.

10. Section 9(2) Commerce Act.

11. Section 16 Commerce Act.

Investigation process roadmap

- 16 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

- 17 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

- 18 We approach every investigation in an objective, fair, and impartial way.
- 19 All Commission staff and members with duties or accountabilities for investigations will act fairly, promptly, and in accordance with the law.
- 20 We undertake our investigative duties, functions, and powers with integrity and professionalism.
- 21 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.
- 22 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.
- 23 When making decisions we comply with the principles of natural justice and the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).
- 24 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

- 25 We aim to be as open and transparent as we can be. The Commission is a public agency and has a public education function.
- 26 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.
- 27 We make **investigated parties** aware, as soon as we are reasonably able to do so, of the nature of the complaints or 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.
- 28 We take reasonable steps to provide investigated parties with a chance to comment during our investigation, including through an evidential interview.
- 29 We take steps to ensure that **affected parties** also understand the investigation process and what is likely to be required of them during our investigation.
- 30 Generally all investigation outcomes are able to be made public shortly after completion of the investigation.
- 31 All information we receive is subject to the principle of availability under the Official Information Act 1982 (OIA).¹² But at [37] see our commitment to protecting certain information against disclosure.

12. Section 5 of the OIA, noting “the principle that the information shall be made available unless there is good reason for withholding it.”

Principle 3

We investigate in a timely way

- 32 We conduct every investigation as efficiently as our resources permit, with the aim of avoiding unnecessary uncertainty and delay.
- 33 We aim to complete investigations in a timely way and to make decisions as promptly as possible.
- 34 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.
- 35 We publish our performance measures in our Statement of Intent¹³ and we actively seek to meet those targets.

Principle 4

We handle information responsibly

- 36 We will only use information provided to us in a manner allowed by law.
- 37 We recognise that much of the information we receive is of a private, commercially sensitive, or confidential nature. 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

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



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

Observance of human rights

- 40 We acknowledge and comply with our obligations under the New Zealand Bill of Rights Act 1990.¹⁴
- 41 For example, as a public body we recognise and observe the principles of natural justice,¹⁵ to the extent that the Commission may make decisions in respect of a person's rights, obligations, or interests.¹⁶ We recognise that we may be judicially reviewed in respect of such decisions, or that we may be the subject of civil court proceedings.
- 42 We also expressly recognise:
 - 42.1 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 way¹⁷
 - 42.2 the right of persons, including corporations, to be protected from unreasonable search and seizure¹⁸
 - 42.3 the right to legal representation of persons investigated or appearing as witnesses.
- 43 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.
- 44 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.¹⁹ You can see these limitations on rights and freedoms below, in sections covering our use of compulsory powers, such as *Information requests* at [102-142], *Interviews* at [143-183] and *Search powers* at [188-223].
- 45 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 [184-187].

How we investigate

- 46 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, we are constantly assessing considerations like:
 - 46.1 whether a breach of the laws we enforce may have occurred
 - 46.2 what further information is needed to help us reach a view on whether or not a breach has occurred
 - 46.3 whether further investigation is warranted
 - 46.4 whether new information has come to light that warrants a new line of inquiry or resolves a current line of enquiry.

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

15. Section 27 New Zealand Bill of Rights Act.

16. 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.

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

18. Section 21 New Zealand Bill of Rights Act.

19. See section 5 New Zealand Bill of Rights Act.

Stage 1 – Screening and prioritisation stage

Screening and prioritisation stage

Investigation stage

- 47 We identify matters that may warrant investigation through various sources and methods, including:
- 47.1 complaints to us about possible breaches of a law that we enforce
 - 47.2 referrals from other agencies
 - 47.3 the media
 - 47.4 our own intelligence-gathering, research and analysis.
- 48 During the **screening and prioritisation stage** we consider whether a matter warrants investigation. This involves assessing the known nature of any matter and considering:
- 48.1 whether there is a reasonable basis for suspecting that a breach of the laws we enforce may have occurred or be occurring
 - 48.2 our enforcement criteria
 - 48.3 our competing priorities and any current enforcement focus areas.
- 49 We cannot investigate every matter or complaint that we receive, so we must carefully consider our available resources when deciding which matters we investigate. Some complaints:
- 49.1 do not identify a breach of the law
 - 49.2 are factually or legally incorrect
 - 49.3 are outside of our jurisdiction²⁰
 - 49.4 are out of time for us to take legal action²¹
 - 49.5 do not identify any real harm
 - 49.6 are not in the public interest to pursue
 - 49.7 may be more effectively dealt with by other agencies
 - 49.8 involve private parties who are able to try to resolve their own dispute.
- 50 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.
- 51 In some cases, rather than open an investigation, the Commission may take low-level steps to resolve the issues underlying a complaint. These may include referring the complaint to another agency, a dispute resolution body, or the subject of the complaint. The Commission will obtain the permission of the **complainant** before passing on to another entity any identifying information about a complainant.

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

21. 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.

Stage 2 – Investigation stage

Screening and prioritisation stage

Investigation stage

- 52 After initial screening and prioritisation, some matters will move to the **investigation stage**.
- 53 The investigation stage involves gathering and analysing relevant information so that we can form a view on:
 - 53.1 what happened
 - 53.2 whether what happened breaches the laws we enforce
 - 53.3 if it does, what is the most appropriate enforcement response.
- 54 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.²² 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 Commerce Act, the Fair Trading Act, or the CCCF Act.
- 55 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.
- 56 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 [102-142] and *Interviews* at [143-183].
- 57 At any stage during an investigation we may:
 - 57.1 gather more information as a result of new facts or issues that arise, or to cross check other information that has been provided
 - 57.2 revisit and change the scope and focus of the investigation
 - 57.3 do research or analysis, including legal, marketing, or economic research
 - 57.4 seek external expert opinion or assistance.
- 58 An investigation is not complete until:
 - 58.1 staff have decided that the investigation can be closed with or without an enforcement response being made, or
 - 58.2 the relevant Division has decided on an enforcement response.
- 59 These decisions can in some cases be staggered, so that one entity or individual investigation, or one avenue of investigation, is decided before others.

22. For more information on what types of urgent action we may take, see the Urgent Responses section of our Enforcement Response Guidelines.

How we make decisions

Commission members and staff

- 60 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

- 61 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

- 62 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.

Decision-making after an investigation

- 63 Once the investigation team has completed its inquiries and assessed the available evidence, the investigation team presents to the relevant decision-maker:
 - 63.1 the salient facts and a summary of the evidence and legal or economic issues arising,
 - 63.2 an assessment of whether or not there is likely to have been a breach of the law, and
 - 63.3 if so, a recommendation as to the enforcement options and the most suitable type of enforcement response.
- 64 The decision-maker may ask that further inquiries are made 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.
- 65 Decisions to take a **high-level enforcement response**, such as court action, enforceable undertakings, or settlement, are taken by a Division.
- 66 Decisions to take a **low-level enforcement response**, such as warning, infringement notice, or compliance advice letter, are often (but not always) taken by authorised staff at manager level. In appropriate cases, lower-level enforcement responses may be decided upon by a Division.
- 67 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

- 68 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 weeks or months. Other more complex or large-scale investigations can take longer, such as investigations entailing:
 - 68.1 novel or complex legal, economic or evidential matters
 - 68.2 expert evidence
 - 68.3 difficulties in accessing relevant information
 - 68.4 multiple or overseas parties
 - 68.5 a large volume of documents or witnesses.

- 69 We publish our performance measures in our Statement of Intent and we actively seek to meet those timeliness targets.
- 70 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

- 71 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.
- 72 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 *Public or media comment by the Commission* at [268]-[279] below.
- 73 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:
 - 73.1 the Investigation Principles
 - 73.2 whether the communication will assist or hinder our investigation, including the integrity of the information that may be gathered
 - 73.3 the need to give investigated parties information to enable them to participate in the investigation
 - 73.4 the interests of complainants, witnesses, or affected persons
 - 73.5 whether heightened confidentiality or commercial sensitivity attaches to the investigation
 - 73.6 what information is already publicly known, for example through disclosure by interested or affected parties.

Communication with the investigated party

- 74 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 complaints or concerns that we are investigating, and an indicative timeframe for our investigation.
- 75 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. Staff will endeavour to provide you with an indicative timeframe, but this can be only a guide and not a commitment.
- 76 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.
- 77 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.
- 78 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.
- 79 We will take reasonable steps to provide investigated parties with a chance to comment on or provide evidence about the complaints or 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.

- 80 If we have taken an alternative course of action, such as referring a complaint to another agency, we will take reasonable steps to advise an investigated party of that decision.

Communication with complainants

- 81 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.
- 82 There are likely to be stages during an investigation when we are able to communicate only quite limited information.
- 83 If we have taken an alternative course of action, such as referring a complaint to another agency, we will take reasonable steps to advise the complainant of that decision.

Communication with other affected parties

- 84 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.
- 85 Communication with affected parties may take place by way of individual communications, or through public comment by the Commission. See below the section on *Public or media comment by the Commission* at [268-279].

Letters seeking to alter conduct

- 86 During an investigation, an investigated party might receive a letter from us in which we ask it to stop engaging in current conduct or business practices.
- 87 If we issue one of these letters, 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.
- 88 There are generally two such letters, and in some cases an investigated party might receive both:
- 88.1 **Change of conduct letter:** a Change of Conduct letter is usually issued where we want to influence a change of behaviour but may be prepared to agree some of the changes that will apply, or where we have sufficient time to engage with the investigated party about our concerns. Such a letter often seeks more information, such as when a change is able to be made, how extensive it will be, whether the change will be backdated so as to benefit customers who were already affected etc.
- 88.2 **Stop Now letter:** 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.²³ Sometimes we publicise that we have issued a Stop Now letter, so that the public is warned about the conduct that concerns us.



23. For more on injunctions, see Enforcement Response Guidelines at [46].

- 89 Both letters serve the purpose of giving the recipient early warning of our concerns, and a chance to change their behaviour.
- 90 The letters do not signal that we will not also take an enforcement response, such as a warning letter or court action. But they do give 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.
- 91 A recipient who receives either of these letters should take it seriously and, if necessary, seek legal advice on how to respond.
- 92 Recipients can also contact the signatory to the letter, at our office, to discuss it.

Communication at the end of an investigation

- 93 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.
- 94 We will also take reasonable steps to advise complainants and affected parties of the end of the investigation and of any outcome.
- 95 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.²⁴ 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 *Public or media comment by the Commission* at [268]-[279].
- 96 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.²⁵
- 97 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 Official Information Act 1982, in cases where we have not already publicly released a report. Whether we are able to release a report will depend upon an application of the OIA principles. Whether or not a report has been prepared, parties affected by the Commission's decision may request the Commission's reasons under the Official Information Act.²⁶
- 98 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.²⁷ Such a report can contain only material that would be suitable for release under the OIA.



24. The Commission adheres to the Solicitor-General's guidelines, including where applicable Crown Law's Victims of Crime – Guidance for Prosecutors available at http://www.crownlaw.govt.nz/uploads/victims_guidance_2014.pdf. See in particular paragraphs [11] – [13].

25. See especially Enforcement Response Guidelines at [34] for compliance advice letters; warning letters at [42]-[44]; media comment on settlements at [95].

26. Section 23, Official Information Act 1982.

27. The Commission is empowered to release information for public education purposes, see: s 25 Commerce Act; s6 Fair Trading Act; s 111(2)(d) CCCF Act.

Information gathering

- 99 The investigation stage involves gathering facts and analysing information for the purpose of determining whether a breach of the law might have occurred.
- 100 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.
- 101 We collect information by methods that include:
 - 101.1 gathering publicly available information
 - 101.2 requesting or receiving information, including documents
 - 101.3 conducting interviews
 - 101.4 executing searches under warrant or otherwise.

Information requests

- 102 We may ask persons (including companies and other entities) to supply us with information voluntarily, 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.²⁸
- 103 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

- 104 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.
- 105 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 specifying the information that we would like you to supply.
- 106 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.
- 107 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 [184-187] below.
- 108 There can be advantages to you as well as to us if information is supplied voluntarily:
 - 108.1 it can help our investigation proceed more quickly
 - 108.2 it often seems less 'adversarial' than when we issue a formal notice. Sometimes people do not like being forced by us to do something
 - 108.3 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.

28. Section 98 Commerce Act 1986; section 47G Fair Trading Act 1986; section 113 of the CCCF Act (via section 98 of the Commerce Act).

- 109 If you supply information voluntarily, it is still your legal duty to be complete, truthful, and accurate in what you provide; see at [117]-1[18] below.

‘Please Explain’ Letters

- 110 Before or during an investigation we sometimes issue what is known as a **please explain letter**, although such correspondence will not always be labelled in this way.
- 111 A please explain letter is a type of voluntary request. It sets out briefly what our investigative concerns are, and seeks the recipient’s explanation of its conduct. For example, if a business has chosen to advertise its products in a way that concerns us, we may ask why that method of advertising was chosen in preference to other methods.
- 112 As with other voluntary information requests, there is no legal obligation on the recipient to respond to a please explain letter or to provide an explanation. But if we do not receive a sufficient response, 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. If necessary or desirable to do so, we can also compel explanatory information where a please explain letter is not satisfactorily answered.

Compulsory notices

- 113 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:
- 113.1 sometimes people are under a legal obligation, such as an obligation of confidence, and feel unable to assist us unless they are compelled
 - 113.2 sometimes people feel unable to supply information voluntarily, for other reasons, and feel more ‘protected’ by a formal compulsory notice from us – they cannot be criticised (say by their employer, colleagues, customers or suppliers) for being made to help our enquiries
 - 113.3 sometimes we require information to be provided by a deadline that we set in the notice
 - 113.4 we will not seek voluntary information if we anticipate that there is a real risk of non-compliance or the supply of misleading or incomplete information.

Comparison of voluntary and compulsory requests

- 114 You may wish to seek legal advice if you are asked or required to supply the Commission with information.
- 115 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.²⁹ We discuss the features of gathering information on a compulsory basis below at [119-142].
- 116 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 [184-187] below.

29. Section 103(1) Commerce Act 1986 and s 47J(1) Fair Trading Act. Section 103 Commerce Act also applies in relation to investigations under the CCCF Act: see s 113(i) (via section 98 Commerce Act).

- 117** But however information is provided to us – 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,³⁰ 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 – whether voluntarily or compulsorily – should use their best efforts to be accurate and complete in what they supply.
- 118** The Crimes Act also creates additional offences, punishable by imprisonment, that may apply.³¹ 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.”³² 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.

Compulsory notice power

Source and scope of the power

- 119** We can compel any person or company to supply information to us by serving on them a formal notice, signed by a Commission member.³³
- 120** This power exists under:
- 120.1** section 98 of the Commerce Act 1986;
 - 120.2** section 47G of the Fair Trading Act 1986; and
 - 120.3** section 113 of the CCCF Act (via section 98 of the Commerce Act).
- 121** We can require you to provide to us:
- 121.1** any information or class of information specified in the notice; or
 - 121.2** any document or class of documents specified in the notice.
- 122** 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

- 123** “Documents” includes any writing on any material and can include any book, map, plan, graph or drawing.³⁴
- 124** Documents also includes:
- 124.1** 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.
 - 124.2** 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.

30. Section 103(2) Commerce Act 1986 and s 47J(2) Fair Trading Act. Section 103 Commerce Act also applies in relation to investigations under the CCCF Act: see s 113(i) (via section 98 Commerce Act).

31. See sections 108 to 117 Crimes Act 1961.

32. Sections 116 and 117(e) Crimes Act 1961.

33. 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 s 47L Fair Trading Act 1986.

34. Section 2(1) Commerce Act 1986; section 2(1) Fair Trading Act 1986.

When the power can be used

- 125 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 Commerce Act, Fair Trading Act or CCCF Act.³⁵
- 126 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 after receiving appropriate information.

The formal notice

- 127 We can seek under notice any information that we consider is relevant to an investigation³⁶ and where the conduct being investigated could, if proven, amount to a breach of the laws that we enforce.³⁷
- 128 We must draft and serve each notice in accordance with the requirements of the law. Every compulsory notice will set out, amongst other information:
 - 128.1 A brief summary of the matter under investigation.
 - 128.2 The information that you must provide to us.
 - 128.3 How you should provide the information to us, including guidance on how to supply electronically-stored information.
 - 128.4 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.
- 129 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

- 130 If you receive a statutory notice, you need to treat the notice seriously and act quickly 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.
- 131 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.
- 132 The recipient is not required to provide **privileged material** in response to a notice.
- 133 But 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.
- 134 The law does not excuse persons from furnishing documents or information, or giving evidence, on the basis that to do so might incriminate them.³⁸ There are, however, important limits on the uses that the Commission can make of statements provided to the Commission in these circumstances:³⁹ see the section on *Admissibility of evidence gathered through a compulsory notice* at [184]-[187.]

35. Section 98 Commerce Act 1986; section 47G Fair Trading Act 1986; section 113 of the CCCF Act (via section 98 of the Commerce Act).

36. See *Telecom Corp of New Zealand v Commerce Commission* (1991) 3 NZBLC 101,962 (Court of Appeal).

37. See *AstraZeneca v Commerce Commission* [2010] 1 NZLR 297 (Supreme Court).

38. Section 106(4) Commerce Act; s47G(3) Fair Trading Act; section 113 CCCF Act.

39. Section 106(5) Commerce Act; s47G(4) Fair Trading Act; section 113 CCCF Act.

Varying or extending a statutory notice

- 135 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.
- 136 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

- 137 It is a criminal offence to refuse or fail to comply with a statutory notice without a reasonable excuse.⁴⁰
- 138 The penalty for non-compliance with a notice 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.⁴¹ Under the Fair Trading Act, the fine is up to \$10,000 and \$30,000, respectively.⁴²
- 139 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.
- 140 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

- 141 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.⁴³
- 142 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.⁴⁴

40. 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.

41. Section 103(4) Commerce Act 1986; section 113 CCCF Act.

42. Section 47J Fair Trading Act 1986.

43. Section 98G Commerce Act 1986; section 113(d) CCCF Act.

44. *Commerce Commission v Air New Zealand Ltd* [2011] 2 NZLR 194 (Court of Appeal.)

Interviews

- 143 We may ask you to attend an interview voluntarily, or we may issue you with a compulsory notice⁴⁵ requiring you to attend an interview, if we consider it necessary or desirable to do so for the purposes of our investigation.
- 144 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 [107]-[108] and [113], and below at [147].
- 145 For the restrictions that apply to us when we compel information at an interview, see *Admissibility of information gathered through a compulsory notice* at [184]-[187.]

Compelling information or conducting an interview

- 146 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.
- 147 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

- 148 An interview can take place in person, over the telephone or by video link, or otherwise.
- 149 Before the interview, we will provide you with an outline of our investigation so that you can understand the relevant context.
- 150 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.⁴⁶
- 151 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.
- 152 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 evidence gathered through a compulsory notice* at [184-187.]
- 153 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.
- 154 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.

45. Section 98(c) Commerce Act; section 47G(1)(c) Fair Trading Act; section 113 CCCF Act.

46. 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 http://ausit.org/AUSIT/Documents/Code_Of_Ethics_Full.pdf

Compulsory interviews

- 155 We also have the power to require a person to attend a compulsory interview.

Source of the power

- 156 Under the Acts we enforce, we have the power to compel a person to appear before the Commission to give evidence, either orally or in writing.⁴⁷

When the power can be used

- 157 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 or CCCF Act.
- 158 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 after receiving appropriate information.
- 159 There are a variety of investigative reasons why we may decide to compel a person to attend an interview, including where:
- 159.1 it can be a timely method of obtaining critical information
 - 159.2 a person has failed or refused to assist us voluntarily
 - 159.3 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
 - 159.4 the person prefers not to assist us voluntarily, such as where they perceive that confidentiality or employment restrictions prevents it
 - 159.5 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

- 160 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:
- 160.1 a brief summary of the matter under investigation
 - 160.2 what topics we want to ask you about
 - 160.3 your rights (discussed below, and these rights will also be explained to you at the interview)
 - 160.4 the time and location of the interview, which may be held at our offices or elsewhere, as we decide is most appropriate.⁴⁸ We will try to set the interview at a location that is convenient to you, although this will not be possible in every case.
- 161 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.



47. Section 98(1)(c) Commerce Act 1986; section 47G(1)(c) Fair Trading Act 1986; section 113(c) CCCF Act 2003.

48. 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

- 162 The Commission is responsible for the proper and fair conduct of the interview, and will decide who is permitted to attend the interview.
- 163 You can bring a lawyer with you to the interview, or a support person if you prefer.
- 164 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.
- 165 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.
- 166 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.
- 167 A Commission member or their delegate will 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

- 168 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.
- 169 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

- 170 Unless you have a “reasonable excuse,” it is a criminal offence to fail to attend a compulsory interview.⁴⁹ 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.
- 171 It is also a criminal offence to:
 - 171.1 fail to answer all questions put to you during a compulsory interview.⁵⁰ See below under *Requirement to answer questions* at [173-175]
 - 171.2 furnish information knowing it to be misleading⁵¹
 - 171.3 deceive or otherwise knowingly mislead the Commission, or attempt to do so.⁵²
- 172 The penalty for non-compliance 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.⁵³ Under the Fair Trading Act, the fine is up to \$10,000 and \$30,000, respectively.⁵⁴

49. Section 103(1)(a) Commerce Act 1986; section 47J(1) Fair Trading Act 1986; section 113(i) CCCF Act.

50. Section 106(4) Commerce Act 1986; section 47G(3); section 113(i) CCCF Act.

51. Section 103(1)(b) Commerce Act 1986; section 47J(1) Fair Trading Act 1986; section 113(i) CCCF Act.

52. Section 103(2) Commerce Act 1986; section 113(i) CCCF Act.

53. Section 103(4) Commerce Act 1986; section 113 CCCF Act.

54. Section 47J Fair Trading Act 1986.

Requirement to answer questions

- 173 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.⁵⁵
- 174 However, because the law requires interviewees to answer our questions, it also limits the use that we can make of the answers.
- 175 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 [184-187.]

At the compulsory interview

- 176 The compulsory interview power is to require a person “to appear before the Commission... to give evidence.”⁵⁶ 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.
- 177 The Commission member’s role is to:
 - 177.1 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 on procedural issues.
 - 177.2 Receive the evidence that is given by the interviewee. The Commission member is not the lead investigator and so will typically not be the principal interviewer. But the member 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.
- 178 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.
- 179 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.
- 180 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.
- 181 If you wish to take a short break during the interview, you can ask the Commission member and we will accommodate that request at a suitable time.
- 182 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.
- 183 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.

55. Section 106(4) Commerce Act 1986; section 47G(3) Fair Trading Act 1986; section 113(l) CCCF Act.

56. Section 98(c) Commerce Act 1986; section 47G(1) (c) Fair Trading Act; section 113(c) CCCF Act.

Admissibility of information gathered through a compulsory notice

- 184 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.⁵⁷
- 185 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:
- 185.1 for charges of misleading the Commission⁵⁸ or for charges of perjury⁵⁹
 - 185.2 in civil proceedings under the Fair Trading Act.⁶⁰
- 186 Information provided in response to a compulsory notice or during a compulsory interview may also be used:
- 186.1 in proceedings against any other person
 - 186.2 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.
- 187 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 1986 applies.⁶¹

Search powers

- 188 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

- 189 The Commission is able, like other enforcement agencies, to apply for a search warrant in certain situations.
- 190 Such a warrant must be obtained from an issuing officer such as a judge.⁶² 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)⁶³ 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

- 191 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.⁶⁴

57. Section 106(4) Commerce Act 1986; section 47G(3) Fair Trading Act 1986; section 113(l) CCCF Act.

58. Section 103 Commerce Act; section 47J Fair Trading Act; section 113(i) CCCF Act.

59. Sections 108-109 Crimes Act 1961.

60. Section 47G(4) Fair Trading Act 1986.

61. Section 99I Commerce Act 1986; section 48I Fair Trading Act 1986; section 113(ea) CCCF Act 2003. These agreements can be found on the Commission's website at <http://www.comcom.govt.nz/the-commission/about-us/international-relations/>.

62. 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.

63. Section 98A(3) Commerce Act 1986; section 47(2) Fair Trading Act 1986; section 113(d) CCCF Act.

64. Section 98A Commerce Act 1986; section 47 Fair Trading Act 1986; section 113(d) CCCF Act.

- 192 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,⁶⁵ and that the information we seek is likely to be at the location specified in the warrant.⁶⁶
- 193 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.

Specifics of a search warrant

- 194 A search warrant is a judicial authorisation to search a person's premises or place and imposes limits on our power to search.
- 195 A search warrant may be issued to search any place (including a dwelling), and any thing within that place.
- 196 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.
- 197 The warrant will outline:
- 197.1 **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.
 - 197.2 **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.
 - 197.3 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.
 - 197.4 **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.
 - 197.5 **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. After 7:30am on a business day will generally be a reasonable time to execute a search warrant. 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.
- 198 The warrant will also include any other conditions the issuing officer has placed on the execution of the warrant.
- 198.1 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.
 - 198.2 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.
 - 198.3 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.

65. Section 98A(2) Commerce Act 1986.

66. Section 98A Commerce Act 1986; section 47 Fair Trading Act 1986; section 113(d) CCCF Act.

- 199 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 to you the Commission's legal team.

Commission staff executing a warrant

- 200 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.⁶⁷ We are entitled to enlist the assistance of other suitable persons with executing a search warrant.⁶⁸
- 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

- 202 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.
- 203 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.
- 204 The person in charge of the premises must provide us with reasonable assistance when we execute a search warrant.⁶⁹ This includes assisting us by:
- 204.1 identifying and locating the information required
 - 204.2 providing keys, computer passwords and other information or tools necessary to undertake the search
 - 204.3 accessing or reproducing information stored or recorded (such as computer records).
- 205 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).⁷⁰
- 206 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.⁷¹ Under the Fair Trading Act, the fine is up to \$10,000 and \$30,000, respectively.⁷²
- 207 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.
- 208 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.

67. Section 98A Commerce Act; Part 4 Search and Surveillance Act (except ss 118 and 119); s 113(d) CCCF Act; s 47 Fair Trading Act. Also see s 21 New Zealand Bill of Rights Act.

68. Section 110(b) Search and Surveillance Act (via s 98A(3) Commerce and s 47(3) Fair Trading Act); s 113(d) CCCF Act.

69. Sections 110(b) and 130 Search and Surveillance Act (via s 98A(3) Commerce Act); s 113(d) and (e) CCCF Act; s 47G(1) Fair Trading Act.

70. Section 110(c) Search and Surveillance Act (via s 98A(3) Commerce Act, s 47(3) Fair Trading Act, s 113(d) CCCF Act; s 39 Crimes Act.

71. Section 103(4) Commerce Act 1986; section 113 CCCF Act.

72. Section 47F(2) Fair Trading Act 1986.

Seizure of items and removal from a place

- 209** A warrant may allow us to remove documents, computer discs and hard drives, mobile phones and other electronic devices.⁷³ We may also instruct an independent forensic investigator to clone electronic devices on or off site.⁷⁴
- 210** 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.⁷⁵ This will frequently be the case with computer files and large quantities of documents that cannot practically be sorted through on-site.
- 211** 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.⁷⁶
- 212** 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.⁷⁷
- 213** 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.⁷⁸ We will also return the original item if we no longer require it for evidential or investigative purposes.⁷⁹ Within six months of seizing the items, we must either bring proceedings, return the seized items,⁸⁰ or seek permission of the Court to retain the items for a further period.⁸¹
- 214** 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.⁸² 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).



73. Section 47G Fair Trading Act; s 98 and 98A Commerce Act; s 110(d) and (h) Search and Surveillance Act (via s 98A(3) Commerce Act; s 113(d) and (e) CCCF Act.

74. Section 110(i) Search and Surveillance Act (via s 98A(3) Commerce Act); s 47(3) Fair Trading Act; s 113(d) CCCF Act.

75. 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: s 123(2) Search and Surveillance Act.

76. Sections 145, 146 and 147 Search and Surveillance Act.

77. *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 (CA).

78. Section 152 Search and Surveillance Act.

79. Section 150 Search and Surveillance Act.

80. If the decision not to bring proceedings is taken earlier than 6 months, the seized items are to be promptly returned after that decision.

81. Section 151 Search and Surveillance Act.

82. Section 156 Search and Surveillance Act.

Warrantless search or entry

- 215 In addition, the Commission has limited powers to conduct searches without a warrant.

Entry under an implied licence

- 216 Commission staff are entitled, as is any member of the public, to avail themselves of the implied licence to:
- 216.1 enter the public area of a business premises during its business hours
 - 216.2 to approach the front door of a residential premises for the purpose of speaking to the occupants.
- 217 When doing so our staff may do anything that a member of the public can do, including:
- 217.1 taking notes, photographing or recording what they can see from the public area of the business premises or from the street front
 - 217.2 asking questions of any person present
 - 217.3 purchasing any relevant goods or services.
- 218 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

- 219 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.⁸³
- 220 Before conducting any consent search, our staff member who proposes to conduct the search must advise you:⁸⁴
- 220.1 of the reason for the proposed search, and
 - 220.2 that you can either consent or refuse to consent to the search.
- 221 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, or CCCF Act.

Gathering product safety information

- 222 Under the Fair Trading Act, authorised Commission employees have powers to monitor and enforce compliance with the following safety standards and notices:⁸⁵
- 222.1 consumer information standards⁸⁶
 - 222.2 product safety standards⁸⁷
 - 222.3 unsafe goods notices⁸⁸
 - 222.4 suspension of supply notices
 - 222.5 services safety standards.
- 223 Specific guidance is available on our website about these kinds of investigations.

83. Section 92 Search and Surveillance Act.

84. Section 93 Search and Surveillance Act.

85. Sections 47K and 47L Fair Trading Act 1986.

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

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

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

How we deal with information

- 224 At Investigation Principle 4 above at [36-37] we have committed to handling information responsibly. We note that this includes:
- 224.1 using information only as allowed by law
 - 224.2 taking steps to ensure that for private, confidential, or commercially sensitive information we provide appropriate protections against disclosure.
- 225 The majority of information that 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.
- 226 We seek to balance parties' rights and expectations as to the confidentiality of information they supply to us against:
- 226.1 the need for us to effectively and efficiently conduct our investigations
 - 226.2 our legal obligations under the OIA, and in particular, the principle of availability of information.⁸⁹
- 227 This section describes:
- 227.1 how we use information during an investigation
 - 227.2 our obligations to make information available under the OIA
 - 227.3 how we protect confidential information during an investigation, and what protections are in place if a matter subsequently goes to Court
 - 227.4 our confidential informants policy
 - 227.5 when we can share information with other agencies.

How we use information during an investigation

Using information for the purposes of the investigation

- 228 We use the information we receive for the purposes of the investigation for which it was obtained.
- 229 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, see below at [250].
- 230 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

- 231 We can and do share within the Commission any information that we receive.
- 232 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, and can be shared between the competition and consumer staff. Alternatively, the information may be relevant to another investigation that is already ongoing.
- 233 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.

89. See section 5 Official Information Act 1982.

The Official Information Act

- 234** 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.⁹⁰ This is known as the principle of availability.
- 235** The Commission does not need to receive an OIA request for information in order for the principle of availability to apply. We can release information that in our assessment should be made publicly available.
- 236** 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:
- 236.1** release would prejudice our investigation⁹¹
 - 236.2** release would be in contempt of court.⁹²
- 237** In other cases the Commission must undertake a balancing exercise. This includes, most relevantly, where:
- 237.1** release would unreasonably prejudice the commercial position of the supplier or subject of the information⁹³
 - 237.2** withholding the information is necessary to protect the privacy of natural persons⁹⁴
 - 237.3** we received the information under an obligation of confidence, and if we were to make that information available it would:
 - 237.3.1** 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 us⁹⁵
 - 237.3.2** be likely otherwise to damage the public interest.⁹⁶
 - 237.4** The information is the subject of legal professional privilege.⁹⁷
- 238** If we think that any of these potential reasons for withholding apply, we must still consider the public interest in release.⁹⁸ 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.
- 239** As is reflected in the discussion above at [25-31] 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:
- 239.1** Investigations are not generally conducted in the public eye and it may in some cases be necessary to investigate confidentially. This means that we will often 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.
 - 239.2** But generally all investigation outcomes are able to be made public shortly after completion of the investigation.

90. Section 5 Official Information Act 1982.

91. Section 6(c) Official Information Act 1982.

92. Section 100 Commerce Act and s 18(c)(i) Official Information Act 1982.

93. Section 9(2)(b)(ii) Official Information Act 1992.

94. Section 9(2)(a) Official Information Act 1992.

95. Section 9(2)(ba)(i) Official Information Act 1992.

96. Section 9(2)(ba)(ii) Official Information Act 1992.

97. Section 9(2)(h) Official Information Act 1992.

98. Section 9(1) Official Information Act 1992.

How we protect confidential information

Protection of information during an investigation

- 240 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.
- 241 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.
- 242 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 supplier 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.
- 243 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.
- 244 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. Such cases are likely to be rare.

Confidentiality orders under the Commerce Act

- 245 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.
- 246 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.⁹⁹
- 247 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.¹⁰⁰
- 248 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.
- 249 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.¹⁰¹

Protecting information when a matter goes to court

- 250 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.¹⁰²

99. Section 100(4) Commerce Act 1986.

100. *Commerce Commission v Air New Zealand Ltd* [2011] 2 NZLR 194 (Court of Appeal.)

101. 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 1986). *Commerce Commission v Air New Zealand Ltd* [2011] 2 NZLR 194 (Court of Appeal.)

102. See for example the High Court Rules, rr 8.15(2)(f), 8.25 and 8.28(3).

Protecting complainants – confidential informants policy

- 251 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 complaint about).
- 252 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.
- 253 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.¹⁰³

Sharing information with other regulators

- 254 Where we gather information that appears to raise concerns under a law that another enforcement agency enforces, we may advise that agency in general terms of our concern and possible sources of information for its own enquiry.
- 255 Other than as provided for in the specific situations discussed below, we do not share evidence with other New Zealand or overseas law enforcement or government departments or entities.

Joint investigations

- 256 Where we conduct an investigation in conjunction with another enforcement agency, we may provide information to that agency.
- 257 Before providing another enforcement agency with confidential information in the course of a joint investigation, we will ensure that the other agency has provided appropriate assurances that it will:
 - 257.1 keep the information confidential, and
 - 257.2 use it only for the purposes for which it is provided.

Financial Markets Authority and the Takeovers Panel

- 258 The Fair Trading Act 1986 expressly permits us to share with the Financial Markets Authority and the Takeovers Panel any information or document that we have obtained in performing our Fair Trading Act functions, which we consider may assist the Financial Markets Authority or Takeovers Panel to exercise their respective statutory powers.¹⁰⁴
- 259 We may also use any information or document that those agencies have provided to us, when we are performing our functions under the Fair Trading Act.¹⁰⁵

Serious Fraud Office

- 260 Where information before us suggests that serious or complex fraud¹⁰⁶ has been committed, we will provide that information to the Serious Fraud Office.¹⁰⁷
- 261 Where we have obtained such information in confidence, or through use of our compulsory powers, we will advise the Serious Fraud Office of this.

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

104. Section 48A(1) Fair Trading Act 1986.

105. Section 48A(2) Fair Trading Act 1986.

106. Serious or complex fraud includes a series of connected incidents of fraud which, if taken together, amount to serious or complex fraud.

107. Section 38 Serious Fraud Office Act 1990.

Other criminal offending

- 262 Where we obtain information that suggests other serious criminal offending in New Zealand that falls outside our responsibilities, we will provide that information to the New Zealand Police or other relevant agency (such as the Inland Revenue Department).¹⁰⁸
- 263 Where we have obtained such information in confidence, or through use of our compulsory powers, we will advise the New Zealand Police of this.

Issues of public safety

- 264 Where we obtain information that suggests a serious threat to public health or public safety, we will provide that information to any person or agency who has a relevant interest in preventing, or a duty to prevent, that serious threat.¹⁰⁹
- 265 Where we have obtained such information in confidence, or through use of our compulsory powers, we will advise the person or agency of this.

Overseas regulators

- 266 The Commerce Act, the Fair Trading Act, and the CCCF 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.¹¹⁰
- 267 Where we wish to share voluntarily provided confidential information with an overseas regulator, we will seek a waiver from the person who supplied us with the confidential information before sharing or discussing the information with another agency.

Public or media comment by the Commission

- 268 As discussed above at Investigation Principle 2 ('We are as open and transparent as we can be') at [25-31], we aim to be as open and transparent as we can.
- 269 We will apply the principles in the OIA to determining what information we can make public while also having regard to the Crown Law *Media Protocol for Prosecutors*.¹¹¹
- 270 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.
- 271 The Crown Law *Media Protocol for Prosecutors* reinforces that, while agencies may in their discretion respond to enquiries about investigations and cases, before proceedings are issued comment by prosecuting agencies will rarely be appropriate:¹¹²
- "... any comment should be limited to providing an explanation of the general issues raised and should not address the particular case or its circumstances."*



108. The Commission considers a serious criminal offence to one punishable by more than two years imprisonment.

109. The Commission defines a serious threat as a threat the Commission reasonably believes to be a 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.

110. See our guidelines on sharing information with overseas regulators at <http://www.comcom.govt.nz/the-commission/commission-policies/guidelines-for-overseas-requests-for-compulsorily-acquired-information-and-investigative-assistance/>

111. See Crown law media protocol at http://www.crownlaw.govt.nz/uploads/media_protocol.pdf.

112. Media protocol at [15].

Opening of an investigation

- 272 We do not as a matter of course announce in the media when an investigation is opened. However, where an investigation – including whether we are investigating – is a matter of considerable public interest we may publish information about what we are investigating.
- 273 This can 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

- 274 During an investigation we will release publicly only such information as we properly can under the OIA and the Crown Law *Media Protocol for Prosecutors*.
- 275 We may in some cases choose to communicate to the public during an investigation to elicit further complaints 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.

When investigation is completed

- 276 At the end of an investigation, we may inform the public of the outcome of our investigation, through the media or otherwise. This might be that we are commencing legal action, entering into a settlement agreement affecting the public, or taking some other enforcement response.¹¹³
- 277 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.¹¹⁴ This will particularly be the case where the matter has been one of considerable public interest.
- 278 While proceedings are before the court, in accordance with the Solicitor-General's *Prosecution Guidelines*¹¹⁵ we avoid making any comment that may prejudice the public interest in a fair trial. The Crown Law *Media Protocol for Prosecutors* confirms that it is usually appropriate to provide information about the charges, the defendant and the progress of the proceedings.¹¹⁶
- 279 When any court proceeding is completed, or a major development occurs, we will inform the public.

Complaints about investigation process

- 280 Any person who wishes to complain to us about our investigative process in a particular case should follow our published Complaints Policy.

113. See Enforcement Response Guidelines

<http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>

114. The Commission is empowered to release information for public education purposes, see: s 25 Commerce Act; s 6 Fair Trading Act; s 111(2)(d) CCCF Act.

115. www.crownlaw.govt.nz/uploads/prosecution_guidelines_2013.pdf

116. Media Protocol at [16].

Attachment A – Glossary of terms

Affected party	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.
Change of conduct letter	A letter written by us to an investigated party, in which we seek to achieve a change in the behaviour of the investigated party. This is not an enforcement response; we still retain all options to warn, settle or take Court proceedings over the conduct.
Commission members	Members and Associate Members of the Commission appointed by the Governor-General in accordance with section 28(1)(b) of the Crown Entities Act 2004. Members are not salaried staff.
Complainant	A person who complains to the Commission about a possible breach of the laws that we enforce. We sometimes solicit complaints from the public. Often multiple people complain about substantially the same matter.
Compulsory interview	An interview with the Commission that a person is required to attend under a formal notice issued under s 98(c) Commerce Act 1986, s 47G(1)(c) Fair Trading Act 1986 or s 113 Credit Contracts and Consumer Finance Act 2003.
Confidentiality order	An order made under s 100 of the Commerce Act 1986, preventing a person from disclosing information that has been obtained by the Commission.
Division	A Division of Commission members exercising the powers of the Commission, as assigned to sit by the Chairperson under s 16 Commerce Act 1986.
Enforcement criteria	Our published criteria that we apply at every stage of the investigation and enforcement process.
Enforcement response	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 low-level responses (such as a compliance advice letter) to high-level responses (like court proceedings.)
Enforcement Response Guidelines	Our published guidelines on our enforcement response options following an investigation. These include our Criminal Prosecution Guidelines.
High-level enforcement response	These are the more serious enforcement responses that we make under the Enforcement Response Guidelines, when there is significant harm, serious conduct or a compelling public interest. These responses include: civil or criminal proceedings, cease and desist orders and injunctions, settlements, remedies, enforceable undertakings, compensation etc.
Investigated party	A party that is or has been under investigation by the Commission.
Investigation	A competition or consumer investigation conducted under Parts 2 or 3 of the Commerce Act 1986, the Fair Trading Act 1986, or the Credit Contracts and Consumer Finance Act 2003.
Investigation stage	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.
Low-level enforcement response	These are the less serious enforcement responses that we make under the Enforcement Response Guidelines, when there is less harm, less serious conduct and the public interest does not require a more extensive response. These responses include: no further action, an infringement notice, a compliance advice letter, or a warning letter.
Please explain letter	A letter written by us to an investigated party in which we ask for an explanation of the conduct of concern to us.
Privileged material	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.
Screening and prioritisation stage	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.
Stop now letter	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.
Voluntary interview	An interview with the Commission that a person agrees to attend without compulsion by the Commission.



ISBN 978-1-869454-80-7

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:

Phone: 0800 943 600

Write: Enquiries Team, PO Box 2351, Wellington 6140

Email: contact@comcom.govt.nz

www.comcom.govt.nz