

AUGUST 2023

# Consumer Remediation Guidance for Businesses

Restoring balance and maintaining  
relationships with consumers



*Ma te tika te hē e whakatika*  
*The correct process will lead to a good outcome*

## Purpose and Scope

- 1 The Commerce Commission (the **Commission**) is responsible for enforcing New Zealand’s competition, fair trading, and consumer credit laws, and for regulating electricity lines, gas pipelines, telecommunications networks and services, aspects of the dairy supply chain and fuel, grocery and airport sectors, and retail payment systems.
- 2 This guidance is intended for use by businesses that:
  - 2.1 have identified conduct or omissions that may have led to a likely breach of one of the laws that the Commission enforces;<sup>1</sup> and
  - 2.2 intend to take steps to address the issue and, where appropriate, offer remediation (whether compensation or non-monetary measures) to affected consumers.<sup>2</sup>
- 3 This guidance relates to proactive remediation undertaken by a business and is intended to be high-level generalised guidance to assist businesses in understanding the Commission’s view as to how to conduct a structured and consumer-focussed remediation process. The principles in this guidance are ones to which the Commission is likely to have regard in any discussion with parties contemplating a remediation process.
- 4 If the Commission subsequently investigates a business for potential breaches of law, any early identification of issues and remediation that the business has provided to affected consumers will be taken into account in the Commission’s assessment of the appropriate enforcement response.
- 5 Businesses should note, however, that providing remediation to affected consumers will only form part of the Commission’s consideration where a potential breach of the law has occurred, and it will not prevent enforcement action from being pursued by the Commission. Please refer to the [Commission’s Enforcement Response Guidelines](#) for further information on the Commission’s enforcement approach.
- 6 Regardless of whether they undertake remediation, businesses should take all reasonable steps to ensure that the conduct or omission they have identified to be in likely breach of the law ceases as quickly as possible, and that consumers do not continue to be adversely affected.<sup>3</sup>
- 7 Please note this guidance is not intended to be used by businesses where cartel conduct is involved. For situations involving possible cartel conduct, please see the [Commission’s Cartel Leniency and Immunity Policy](#).

1 The Commission enforces the Commerce Act 1986, the Fair Trading Act 1986, the Credit Contracts and Consumer Finance Act 2003 (CCCF Act), the Telecommunications Act 2001, the Fuel Industry Act 2020, the Retail Payment System Act 2022 and the Grocery Industry Competition Act 2023, and also has a role under the Dairy Industry Restructuring Act 2001 and the Water Services Entities Act 2022. While only a court can ultimately determine whether a breach of the law has occurred, this guidance assumes that businesses have themselves assessed that an issue they have identified has likely led to a breach of the law. The guidance therefore adopts the phrase “likely breach” to describe any identified issues.

2 Remediation might also be undertaken where businesses have identified a failure to deliver on customers’ expectations, short of potential breaches of law.

3 This might involve, for example, modifying claims or representations; corrective advertising; a product safety recall; corrective disclosure; addressing gaps in systems and/or processes; and updating legacy products or services to meet compliance requirements.

## How businesses may approach remediation

- 8 The default aim of consumer remediation is to “put right” any harm that has been caused. This may involve putting consumers back in the position they would have been in but for the likely breach, or when that is not possible or appropriate, to make alternative arrangement for addressing harm (for example, payment of damages or another remedy (statutory or otherwise)), depending on the circumstances. Each remediation process will be different; there is no “one-size-fits-all” approach. There are some scenarios where a business may consider remediating consumers in the absence of harm caused to consumers; for example, where the likely breach could result in statutory damages for consumers.
- 9 The principles set out in this guidance should be adopted as part of any remediation process, and the remediation process can be scaled up or down to suit the circumstances, while ensuring that the remediation is a proportionate response. For example, where there is a small number of consumers affected and the effect of the likely breach is able to be addressed in a straightforward way, a more streamlined and simple remediation process may be appropriate.

## How Te Ao Māori can guide the remediation process

- 10 The Commission is committed to supporting future-focussed Māori-Crown relationships. This includes taking a good-faith and collaborative approach in recognising the interests of Māori in our mahi. The Commission recognises that the meaning of concepts taken from Te Ao Māori depend on context and often do not have direct English word equivalents.
- 11 In developing this guidance, we have taken inspiration from the Māori concept of ‘utu’. The concept of utu is the importance of maintaining balance and can be applied in both positive and negative contexts. Utu includes a number of processes, or tikanga, which can be applied to a situation to restore balance.
- 12 In the context of remediation, utu focusses on the need to “put right” a harm or transgression, and can include the repayment of a cost that is incurred, or a burden that is borne, in order to remedy the harm or transgression. It is a means of restoration of those who are aggrieved, through action that provides recompense or otherwise reciprocates or balances the harm caused. The aim of the utu process is to restore balance and harmony, in recognition of the obligations that exist between individuals and groups.
- 13 In giving effect to the principles set out in this guidance, the Commission encourages businesses to engage with Māori experts when considering the role of tikanga – particularly utu - in the design of their remediation processes to restore balance and maintain relationships with their consumers.

# Principles of remediation

- 14 The Commission has framed its remediation guidance around the nine principles listed below. Each of the principles is then explained in the following text.

## Principles of remediation

1. Businesses who decide to remediate should take a genuinely consumer-focused approach.
2. Consumer remediation processes should be comprehensive, timely, fair and transparent.
3. Businesses should determine and/or calculate appropriate compensation in a way that is fair, equitable, transparent, and takes into account consumers' interests and needs.
4. Businesses should communicate with consumers about the progress and outcome of review and remediation processes in a clear, concise, timely and effective manner.
5. Businesses should make all reasonable efforts to engage with affected consumers.
6. Businesses should communicate the outcome of the review to consumers in a way that is clear and transparent.
7. Businesses should provide remediation in a way that is convenient, accessible, and takes into account the needs of consumers.
8. Businesses should ensure that any consumer remediation processes have an appropriate governance structure. The processes should be adequately resourced and have an appropriate level of senior oversight and reporting.
9. Businesses should keep adequate records of any consumer remediation processes.

- 15 **Principle 1:** Businesses who decide to remediate should take a genuinely consumer-focussed approach. This means:

- 15.1 being proactive and helpful;
- 15.2 communicating clearly with consumers using plain language, tailored to the language needs of the consumer;<sup>4</sup>
- 15.3 showing a commitment to remediate any loss or detriment suffered by the consumer and/or putting right the harm;
- 15.4 making the remediation process accessible and free for consumers;
- 15.5 being objective, unbiased and fair to consumers; and
- 15.6 having regard to the diversity of consumers' backgrounds when designing and delivering the remediation process, including recognition of Te Ao Māori, and use of tikanga, and Te Reo Māori as appropriate.

4 Refer to paragraph 19.1.1 of this guidance.

**16 Principle 2:** Consumer remediation processes should be comprehensive, timely, fair and transparent.

**16.1** A comprehensive process:

- 16.1.1** Is well-scoped – to identify who (which consumers) may have been detrimentally impacted; how (in what way(s) and to what extent); and what needs to be done to, as far as possible, put “right” any harm that has been caused and prevent further harm to consumers. That may involve monetary compensation and/or taking steps to remedy the likely breach or conduct.
- 16.1.2** Is flexible, in that proper scoping will allow for the possibility that more information about the likely breach, or related conduct, may come to light.
- 16.1.3** Seeks to identify when the likely breach or conduct first arose and reviews available records back to the time where the business reasonably suspects the conduct or omission occurred.<sup>5</sup>
- 16.1.4** Examines the full extent of the likely breach, to understand - and to address - the root causes, in order to prevent similar issues from arising in the future.

**16.2** A timely process:

- 16.2.1** Is initiated promptly - as soon as reasonably practicable after a business becomes aware of a likely breach that may have caused loss or detriment. Businesses should consider not waiting for a complaint to be made or a claim asserted against them or, once aware of a single instance of loss, waiting for evidence of potentially more wide-spread harm before taking action.
- 16.2.2** Is progressed to appropriate timeframes; this will depend on the size and complexity of the remediation, the availability of information, the size of the business, the number of affected customers, the type of harm suffered by those customers, etc.
- 16.2.3** Is appropriately prioritised and resourced.
- 16.2.4** Appropriately balances activities to prevent the issue from continuing with those to “put right” any customers that may have been impacted.

**16.3** A fair process:

- 16.3.1** Puts consumers’ interests and needs at the heart of the exercise and considers, wherever possible, the circumstances of consumers who may be detrimentally impacted, as well as the need to treat different groups of consumers equitably. For example:
  - (a) Consumers who are current customers of the business may need relief given their ongoing obligations to the business;
  - (b) A business may wish to prioritise the remediation of consumers that are in financial difficulty or particularly vulnerable;<sup>6</sup> or
  - (c) If the likely breach spans multiple products, the business may consider prioritising the remediation of one type of product. For example, if consumers with home loans, personal loans and credit cards are affected, depending on the nature of the likely breach the business may wish to first remediate those with credit cards, given the comparatively higher interest rates being charged.

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<sup>5</sup> The Commission acknowledges that a business might not retain information indefinitely, for example, due to the need to balance its legal obligations to retain records with its legal obligations under the Privacy Act 2020 (specifically, Privacy Principle 9). However, a business should pause document destruction undertaken in accordance with its usual business practices, and ensure it retains all relevant records, as soon as it suspects that it may have breached any of the laws that we enforce and/or becomes aware of a Commission investigation into its conduct and/or becomes aware that a remediation process may be required. When seeking to identify when any breach may have first arisen, a business should use all available records to determine the cause and time period of the conduct or omission. A business is not expected to re-create records that the business no longer holds due to the reasonable implementation of business as usual document management practices or other obligations such as legal obligations to destroy personal information.

<sup>6</sup> More information about vulnerable consumers can be found using the Consumer Vulnerability Framework released by the Council of Financial Regulators (<https://www.fma.govt.nz/assets/CoFR/CoFR-Consumer-Vulnerability-Framework-April-2021.pdf>). Additional information about vulnerable consumers for likely breaches of the CCCF Act is also available in the Responsible Lending Code (<https://www.mbie.govt.nz/dmsdocument/26304-responsible-lending-code-april-2023>).

- 16.3.2 Where necessary and appropriate, invites consumers to participate in the process to accurately assess their circumstances.
- 16.3.3 Considers consumers' rights and remedies in the relevant statutory context.<sup>7</sup>
- 16.3.4 Considers non-monetary measures such as: correcting misleading information on websites or at point of sale; corrective advertising; a product safety recall; where the likely breach involves deficiency with disclosure, corrective disclosure; addressing gaps in systems and/or processes; updating legacy products or services to current compliance standards.
- 16.3.5 Considers whether taking a strict approach to consumers' legal rights in order to limit consumer entitlements to remediation is appropriate.<sup>8</sup>
- 16.3.6 Makes the process easy for consumers to engage with.
- 16.3.7 Provides an avenue for consumers to seek independent review by a third party or external dispute resolution body if the process or its outcomes are not satisfactory to them, after raising their concerns through the business' internal complaints process.
- 16.4 A transparent process:
  - 16.4.1 Is well-structured and documented.
  - 16.4.2 Is explained to consumers clearly, simply and through channels that are easily accessible.
  - 16.4.3 Aims to reach as many affected consumers as possible with efforts that are multi-channelled and tailored for the consumer audience and the needs of that audience.
  - 16.4.4 Takes all reasonable steps to trace and contact affected consumers.
  - 16.4.5 Where appropriate, has a means for consumers to self-identify that they may have been affected by the likely breach and provides a way for these consumers to contact the business.<sup>9</sup>
  - 16.4.6 Where appropriate, takes on board feedback received.

## Calculating compensation

- 17 **Principle 3:** Businesses should determine and/or calculate appropriate compensation in a way that is fair, equitable, transparent, and takes into account consumers' interests and needs.

- 17.1 Fair, equitable and transparent means:
  - 17.1.1 Considering first, and wherever possible, the circumstances of consumers who may be detrimentally impacted.<sup>10</sup>
  - 17.1.2 Seeking further information from affected consumers in order to fill gaps in business records and/or to accurately assess their circumstances. Note, however, that in these circumstances, beneficial assumptions may be used instead.

7 If, for example, the business enters into a settlement deed with a consumer as part of the remediation, the business should consider whether any of the terms of the settlement deed unreasonably limit the consumer's opportunity to discuss their situation with advocates, lawyers, advisors, and with regulators.

8 A strict approach would include applying limitation time-bars to historic likely breaches or excluding classes of consumers from remediation who the business previously would have treated as included. If the business' likely breach or conduct occurred during a period in respect of which the business may have a statutory limitation defence, the business should nonetheless consider remediating customers who were affected in that period.

9 Refer to paragraph 19.4 of this guidance.

10 For example, to identify whether those detrimentally impacted are vulnerable consumers. See paragraph 16.3.1 of this guidance.

- 17.1.3 Using beneficial assumptions where necessary or appropriate. Where businesses have incomplete records or information,<sup>11</sup> or where they might wish to provide blanket remediation to save themselves the time and expense of calculating exact figures for each consumer, they might wish to use beneficial assumptions. Beneficial assumptions should aim to restore affected consumers to, as close as possible, the position they would otherwise have been in if the likely breach or conduct had not occurred. Beneficial assumptions err towards inclusion of affected consumers in the scope of the remediation, rather than exclusion, and/or minimise the risk of under-compensation when determining remedies.
- 17.1.4 Any beneficial assumptions that are applied should be evidence-based, clearly documented and explained, and be performance-monitored to check the assumption(s) are producing appropriate outcomes.
- 17.1.5 Where appropriate, paying affected consumers a use-of-money interest component,<sup>12</sup> or a component to compensate for lost investment returns or any indirect financial loss suffered as a result of the likely breach or conduct (for example, overdraft fees or late payment fees, interest on credit cards and/or related charges by other creditors if known). Assessments should depend on what otherwise ought to have happened, and what is required to, as much as possible, put consumers back into the position they would have been in if the likely breach or conduct had not occurred.
- 17.1.6 Where the amount of the remediation is below a *de minimis* amount, the business may consider whether to make payments to a charity or community organisation, rather than to consumers.<sup>13</sup> The charity or community organisation should not be associated with the business and its purposes should be related to addressing harm of the type experienced by consumers as a result of the likely breach.
- 17.1.7 Where the business is able to provide the remediation by way of direct credit to account holders, the business should consider using that method first. Further, there should be no *de minimis* amount for direct credits (i.e. all amounts should be paid).
- 17.1.8 Where appropriate, a business may need to consider non-monetary compensation. For example, a business may need to provide updated and correct information to the consumers to remedy or correct the likely breach. A remediation exercise may involve different forms of compensation used concurrently.<sup>14</sup>

## Engagement with consumers

**18 Principle 4:** Businesses should communicate with consumers about the progress and outcome of review and remediation processes in a clear, concise, timely and effective manner.<sup>15</sup>

**18.1** Clear, concise, timely and effective communication:

**18.1.1** Will be clear, direct, and in plain language appropriately tailored to the informational and language needs of the consumer audience that the business is trying to reach. For example, the business may need to consider whether translations of communications are necessary or appropriate.

11 For example, where the business has incomplete records because it has destroyed information or documents in accordance with its usual document and information management practices (before becoming aware of any potential liability to consumers), or has destroyed personal information in compliance with the requirements of the Privacy Act 2020.

12 For example, use-of-money interest is appropriate where the remedying party has had use of the money for an extended period of time, or has had the use of a large amount of money from affected parties, etc.

13 The appropriate *de minimis* amount will be fact-specific, and may depend on factors such as the cost of making individual payments, the number of customers, the amount payable per customer, and the aggregate sum of remediation to be paid.

14 Refer to paragraph 16.3.4 of this guidance.

15 A business should always communicate with affected consumers about the outcome of the remediation process. The level of communication with consumers about the progress of the remediation may be proportionate to the remediation; for example, the longer the remediation process or greater the value of the remediation, the more communication with consumers would be appropriate during the remediation process. If a business does not have direct contact with the consumers, it may use an intermediary, or work with, for example, a retailer to ensure that affected consumers are able to be contacted and reimbursed.

18.1.2 Will be well-timed in relation to any decisions that affected consumers may be required to make and allow ample time for consumer responses.

18.1.3 Will be in writing or, if communicated verbally initially (by telephone or in person), confirmed in writing promptly afterwards.

**19 Principle 5:** Businesses should make all reasonable efforts to engage with affected consumers.

**19.1** Reasonable efforts include:

19.1.1 Businesses having a communications plan that aims to reach as many affected consumers as possible. Communication efforts may need to be multi-channelled and should be tailored for the consumer audience and the needs of that audience.<sup>16</sup> In larger-scale exercises businesses may wish to consider engaging independent expertise for communications planning.

19.1.2 Businesses using all appropriate available contact information and contact methods (for example, email, post, phone calls, SMS).

19.1.3 Following up to establish contact and making the process easy for consumers to engage with.

19.1.4 It may mean using any other methods for locating consumers that the business would itself use when acting in its own interests (for example, to trace and contact unresponsive debtors), even if those methods have a cost to the business.

19.1.5 Where the business has no direct contact with end consumers who may be affected by the likely breach, a business can work with an intermediary to communicate with, and reimburse, affected consumers.

**19.2** In the rare circumstance where the business considers that the cost of tracing and contacting disengaged consumers is materially disproportionate to the amount of monetary compensation assessed as owing to them, then:

19.2.1 Businesses should not profit from any identified likely breaches.

19.2.2 Businesses may consider aggregating all unreturned remediation below a *de minimis* amount and paying the total combined amount to a charity or community organisation.<sup>17</sup> The business should document, with reasons and justification, any *de minimis* amount applied and the reasons why in the circumstances it was not feasible to trace the affected consumers.

19.2.3 The fact that a business has made payment to a charity or community organisation will not relieve the business of the obligation to remediate an affected consumer who later identifies themselves to the business and requests compensation.

**19.3** Where, despite reasonable efforts, a consumer cannot be traced, then:

19.3.1 The business should ascertain whether any unreturned compensation must be paid to Inland Revenue in accordance with the Unclaimed Money Act 1971 (**UMA**).

19.3.2 For any unreturned compensation where it is not mandatory to pay the money to Inland Revenue in accordance with the UMA (for example unclaimed monies less than \$100), businesses may aggregate the unclaimed monies and pay the total combined amount to a charity or community organisation.<sup>18</sup>

<sup>16</sup> For example, for a supplier, this may include working with relevant retailers to determine how best to communicate with affected consumers.

<sup>17</sup> Refer to paragraph 17.1.6 of this guidance for information about *de minimis* amounts and payments to charities.

<sup>18</sup> Refer to paragraph 17.1.6 of this guidance for information about *de minimis* amounts and payments to charities.



19.3.3 As above, the fact that a business has made payment to a charity or community organisation will not relieve the business of the obligation to remediate an affected consumer who later identifies themselves to the business and requests compensation.

19.4 Where appropriate, businesses should consider ensuring that consumers have a means of self-identifying that they may have been impacted by the likely breach, for example, by maintaining a webpage which outlines the remediation programme and describes the customers that are entitled to remediation (using product names that consumers can readily understand). Consumers should have a means to easily contact the business about whether they have been impacted.

**20 Principle 6:** Businesses should communicate the outcome of the review to consumers in a way that is clear and transparent.

20.1 Clear and transparent communication of outcomes:

20.1.1 Explains why the remediation is being offered.

20.1.2 In offering remediation, explains its components and how they have been determined or calculated.

20.1.3 Explains what, if anything, affected consumers need to do, and the timeframes within which they are asked to respond.

20.1.4 Explains consumers' rights to raise a complaint or challenge if they are not satisfied with the process or its outcomes for them.

**21 Principle 7:** Businesses should provide remediation in a way that is convenient, accessible, and takes into account the needs of consumers.

21.1 Convenient and accessible is:

21.1.1 Looking to return monetary compensation to consumers either by way of credit (where the consumer is a customer with an existing account with the business) or refund (where the consumer is not, or is no longer, a customer with an existing account to credit).<sup>19</sup>

21.1.2 Where offering a refund, making payment by electronic bank transfer (as banks may not accept cheques).

21.1.3 Offering secure methods for consumers to provide updated bank account details (a variety of such methods are available).

21.1.4 Using appropriate means of communication to otherwise remediate the consumer (for example, by sending the consumer updated and correct information by email).

## Governance

**22 Principle 8:** Businesses should ensure that any consumer remediation processes have an appropriate governance structure.<sup>20</sup> The processes should be adequately resourced and have an appropriate level of senior oversight and reporting.

22.1 While the processes in individual circumstances will be different, businesses may consider:

22.1.1 The governance structure and oversight for the process.<sup>21</sup>

22.1.2 The resources required to support it.

22.1.3 Record-keeping and reporting.

22.1.4 Whether to report publicly on progress and outcome.<sup>22</sup>

19 Businesses should be sure to comply with any relevant legislation when considering whether to offer a credit or refund.

20 Existing governance structures may be able to be utilised for this purpose if appropriate.

21 Businesses could consider including a customer advocate within the governance structure, with the aim of ensuring that consumers' interests are at the heart of the remediation process.

22 In the Commission's experience, public reporting at the outset and whilst remediation is underway assists consumers to know that they may be entitled to remediation if they have otherwise not been able to be contacted.

- 23 Independent assurance may be appropriate in certain circumstances; for example, very large consumer remediation programmes or where there is public concern because of significant or wide-spread consumer harm. Typically, the independent assurance would take place by way of an audit at the end of the remediation process.

## Record keeping

- 24 **Principle 9:** Businesses should keep adequate records of any consumer remediation processes.
- 24.1 Adequate record-keeping involves documenting:
- 24.1.1 The steps taken and decisions made in scoping and developing the process.
  - 24.1.2 The governance arrangements.
  - 24.1.3 External advice in relation to, or third-party quality assurance of, the process or its outcomes.
  - 24.1.4 Communications with consumers – whether in writing, by telephone or in person.
  - 24.1.5 All decisions made as part of the process - for example in relation to beneficial assumptions or a *de minimis* amount<sup>23</sup> - and the reasons for those decisions.
  - 24.1.6 The assessments of loss or detriment and basis for the remediation measures offered, including the basis for calculations of monetary compensation, any use-of-money component etc., and reasons for the rate(s) chosen.
  - 24.1.7 Progress against timeframes.
  - 24.1.8 Details of steps taken in respect of unclaimed compensation either paid to Inland Revenue as unclaimed money and/or paid as a residual remediation payment to a charity or community organisation, and the affected consumers to whom those amounts belong.

## Seeking legal advice or independent expertise

- 25 Businesses may wish to seek legal advice or other independent expertise to assist with the design and implementation of remediation programmes. This will be particularly important where the programme is larger in scale or complex. Public reporting in such cases may also be appropriate.
- 26 Where businesses have identified an issue, they may want to consider seeking legal advice on whether to report the circumstances to the Commission and/or (depending upon the context) other regulators.

## The Commission's approach to remediation

- 27 As set out above, the early identification and remedy of issues and the remediation provided to affected consumers are some of the factors the Commission will take into account when considering the appropriate enforcement response. Other such factors may include:
- 27.1 How the business has investigated the issue and the steps it has taken to ensure lessons have been learned to prevent similar incidents occurring in the future.
  - 27.2 Whether the business has taken appropriate steps to identify, make contact with, and communicate effectively with affected consumers.
  - 27.3 The level of remediation provided (or proposed to be provided) to affected consumers.
  - 27.4 The scale and seriousness of the identified issue and whether the business has had similar issues in the past.

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23 Refer to paragraphs 17.1.4 and 19.2.2 of this guidance.

- 28 As part of an investigation into matters in which a business chose to remediate, the Commission may request records of the business' remediation process and decision-making.
- 29 The above list is not exhaustive, and the Commission will consider the facts of individual cases in the round before reaching its decision on what enforcement response is most appropriate in the circumstances.
- 30 The public interest and, in particular, the seriousness of the conduct involved, may mean that the Commission decides to bring civil and/or criminal enforcement proceedings even if a business has remediated or is in the process of remediating the harm suffered by affected consumers. In such cases, the extent of remediation will be a relevant factor for a court in its consideration of the amount of any fine or pecuniary penalty that is sought.

## **Amendments**

- 31 The Commission may amend this guidance from time to time.

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

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**Phone:** 0800 943 600

**Write:** Enquiries Team, PO Box 2351, Wellington 6140

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

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