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# Guidelines for Overseas Requests for Compulsorily Acquired Information and Investigative Assistance

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## Purpose

1. These guidelines explain how the Commerce Commission deals with requests from recognised overseas regulators, made under a co-operation arrangement, for compulsorily acquired information and/or investigative assistance in relation to competition, fair trading or consumer credit law, or to the regulation of telecommunications.

## Background

2. Amendments made in 2012 to the Commerce Act 1986, the Fair Trading Act 1986, the Credit Contracts and Consumer Finance Act 2003 and the Telecommunications Act 2001 empower the Commission to provide compulsorily acquired information and investigative assistance to recognised overseas regulators.<sup>1</sup> This means that the Commission can use its powers to gather information for a recognised overseas regulator, or can provide information already gathered, to assist that regulator in performing its functions.
3. The amendments enhance co-operation between the Commission and overseas competition and consumer regulators, while ensuring that appropriate safeguards are in place to protect privacy interests and privilege.

## Terms used in these guidelines

4. These guidelines adopt the following terms, which are defined in the legislation.<sup>2</sup>
  - 4.1 **Recognised overseas regulator** means an overseas body that has functions corresponding to those of the Commission (in competition law, fair trading law or relating to the regulation of telecommunications) which is party to a co-operation arrangement.
  - 4.2 **Co-operation arrangement** means an arrangement concerning the Commission and an overseas regulator providing for the reciprocal provision of investigative assistance and compulsorily acquired information.<sup>3</sup>
  - 4.3 **Compulsorily acquired information** means information that is not in the public domain, and which is acquired by the Commission as a result of or in relation to the exercise by the Commission of any of its powers under sections 98, 98A or 98H of the Commerce Act or sections 47 or 47G of the Fair Trading Act, and any powers incidental to those powers.
  - 4.4 **Investigative assistance** includes the provision of assistance by way of exercising any power of the Commission under or in relation to sections 98, 98A or 98H of the Commerce Act or sections 47 or 47G of the Fair Trading Act, and any powers incidental to those powers.

1. The amendments were made by the Commerce (International Co-operation, and Fees) Amendment Act 2012, the Fair Trading (International Co-operation) Amendment Act 2012, the Credit Contracts and Consumer Finance (International Co-operation) Amendment Act 2012 and the Telecommunications (International Co-operation) Amendment Act 2012. Note that the relevant sections of the Commerce Act (sections 99B to 99P) also apply, with all the necessary modifications, to the Credit Contracts and Consumer Finance Act 2003 (via section 113(ea) of that Act) and to the Telecommunications Act 2001 (via section 15(ha) of that Act).
2. Commerce Act, section 99C; Fair Trading Act, section 48C.
3. For further information on co-operation arrangements, refer to Attachment A.

## Application

### When these guidelines apply

5. These guidelines apply to all requests from recognised overseas regulators, made under a co-operation arrangement, for compulsorily acquired information and/or investigative assistance.<sup>4</sup> (From this point forward, these guidelines will use the term “information/assistance” to refer to “compulsorily acquired information and/or investigative assistance”.)

### When these guidelines do not apply

6. These guidelines do not apply:
  - 6.1 to requests made by non-recognised overseas regulators (that is, where there is no co-operation arrangement in place); or
  - 6.2 to requests for information that has been provided by parties to the Commission on a voluntary basis.<sup>5</sup>

### Commerce Act Part 4 information must not be provided

7. The Commission must not provide to an overseas regulator information that the Commission has obtained for the purposes of Part 4 of the Commerce Act (which deals with regulated goods and services) unless the information is already in the public domain.<sup>6</sup>

## Responding to requests from overseas regulators

### Requests must be made under a co-operation arrangement

8. The Commission will provide information/assistance to an overseas regulator only:
  - 8.1 if the request has been made by a recognised overseas regulator pursuant to a co-operation arrangement that is government-to-government<sup>7</sup> or regulator-to-regulator;<sup>8</sup> and
  - 8.2 in accordance with these guidelines and with the relevant legislation.<sup>9</sup>
9. The Commission will publish on its website copies of all co-operation arrangements that are in force, and any amendments to them.<sup>10</sup>

4. Commerce Act, section 99D; Fair Trading Act, section 48D.

5. Commerce Act, section 99M; Fair Trading Act section 48M.

6. Commerce Act, section 99O.

7. Commerce Act, section 99E; Fair Trading Act, section 48E.

8. Commerce Act, section 99F; Fair Trading Act, section 48F.

9. Commerce Act, section 99D; Fair Trading Act, section 48D (which restrict the Commission from otherwise providing such information/assistance).

10. Commerce Act, section 99H(2)(b); Fair Trading Act, section 48H(2)(b).

### **The Commission must consider and be satisfied about certain factors**

10. Following a request by a recognised overseas regulator for compulsorily acquired information and/or investigative assistance, the Commission must consider **and be satisfied** that:<sup>11</sup>
  - 10.1 there is in force a co-operation arrangement with the requesting party;<sup>12</sup>
  - 10.2 the provision of information/assistance will, or is likely to, assist the recognised overseas regulator in performing its functions or exercising its powers in relation to competition, fair trading or consumer credit law or the regulation of telecommunications;
  - 10.3 the provision of information/assistance will not be inconsistent with the terms of the relevant co-operation arrangement; and
  - 10.4 providing the information/assistance will not significantly prejudice New Zealand's international trade interests.

### **Procedure where there may be significant prejudice to international trade interests**

11. If the Commission considers that a request for information/assistance may have significant trade consequences, the Commission must (in consultation with the Ministry of Foreign Affairs and Trade) refer the request to the Minister of Trade.<sup>13</sup>
12. The Commission will assess whether a request may have significant trade consequences on a case-by-case basis. In making that assessment, the Commission will have regard to whether the action being undertaken by the overseas regulator, for which it has requested information/assistance, is likely to:
  - 12.1 reduce New Zealand's export trade; or
  - 12.2 adversely affect the ability of New Zealand exporters of goods and/or services to access overseas markets (including through trade remedy actions or other sanctions); or
  - 12.3 prevent or limit the ability of New Zealand importers or producers to access imports of goods and/or services.
13. This is not an exhaustive list and other circumstances may be relevant to the Commission's assessment of whether a request may have significant trade consequences.
14. If the Minister of Trade states in writing that he or she is satisfied that the provision of the information/assistance will not significantly prejudice New Zealand's international trade interests, the Commission is deemed to be "satisfied" of this for the purposes of [10.4] above.<sup>14</sup>
15. If the Minister does not issue such a statement, and the Commission is not satisfied (ie is in doubt) whether the provision of the information/assistance will significantly prejudice New Zealand's international trade interests, then the Commission must decline the request.<sup>15</sup>

11. Commerce Act, section 99I(2); Fair Trading Act, section 48I(2).

12. Commerce Act, section 99D; Fair Trading Act, section 48D.

13. Commerce Act, section 99I(3); Fair Trading Act, section 48I(3).

14. Commerce Act, section 99I(4); Fair Trading Act, section 48I(4).

15. In such a case a mandatory element of the statutory test (Commerce Act, section 99I(2)(c); Fair Trading Act, section 48I(2)(c)) will not have been satisfied.

### **The Commission must consider additional factors**

16. In addition to the factors set out at [10] above (about which the Commission must be satisfied), the Commission must also consider the following factors when deciding whether to grant a request for information/assistance:<sup>16</sup>
- 16.1 whether complying with the request will substantially affect the Commission's ability to perform any of its statutory functions;
  - 16.2 whether the recognised overseas regulator could more conveniently obtain the information/assistance from another source; and
  - 16.3 whether the request would, in the Commission's opinion, be more appropriately dealt with under the Mutual Assistance in Criminal Matters Act 1992.<sup>17</sup>

### **Consent not required**

17. Nothing in the relevant legislation requires the Commission to seek the consent of any party before deciding whether to provide information or assistance to an overseas regulator.<sup>18</sup>

### **Public interest safeguards**

18. If, having considered the factors set out in [10] and [16] above, the Commission is satisfied that it can grant the request, it may do so only in accordance with the public interest safeguards set out in the Commerce Act and Fair Trading Act.

### **Conditions on granting requests**

19. The Commission may impose conditions on the provision of information/assistance to a recognised overseas regulator, including as to:
- 19.1 the confidentiality of information;
  - 19.2 the storage, use of, or access to anything provided;
  - 19.3 the copying, returning, or disposal of copies of anything provided; and
  - 19.4 the payment of costs the Commission incurred in providing anything or complying with the request.<sup>19</sup>

16. Commerce Act, section 99I(5); Fair Trading Act, section 48I(5).

17. Part 3 of the Mutual Assistance in Criminal Matters Act 1992 provides that requests may be made to the Attorney-General of New Zealand for requests by a foreign country for assistance in a criminal matter.

18. Commerce Act, section 99N; Fair Trading Act, section 48N. These provisions state that "Nothing in [the relevant sections] or any co-operation arrangement prevents the Commission providing any information to an overseas regulator with the consent of the person who is the subject of the information."

19. Commerce Act, section 99J(1); Fair Trading Act, section 48J(1).

**Conditions relating to self-incriminating statements**

20. The Commission must not provide copies of compulsorily acquired statements made by any person in answer to a question put by or before the Commission that might incriminate that person, unless the recognised overseas regulator gives a written undertaking:
- 20.1 that it will not use such statements as evidence in criminal proceedings (other than in respect of the falsity of the person's testimony) or in proceedings for a pecuniary penalty against that person;
  - 20.2 that, to the extent possible, the overseas regulator will ensure that such statements are not used by any other person, authority or agency as evidence in such proceedings.<sup>20</sup>

**Conditions relating to the maintenance of privilege**

21. The Commission will not provide information in respect of which it has some form of legal privilege,<sup>21</sup> unless the overseas regulator gives a written undertaking that it will treat the information as subject to the analogous privilege under the law of the regulator's country. The Commission will not be taken as having waived its privilege merely by providing the privileged information to the overseas regulator.<sup>22</sup>
22. Likewise, if an overseas regulator provides the Commission with any communication or information which is protected by a privilege under the law of the regulator's country, that communication or information will be treated as being subject to the analogous privilege in New Zealand, and the Evidence Act 2006 will apply.<sup>23</sup>
23. The Commission must not provide an overseas regulator with a communication or information which is subject to the privilege referred to in section 57 of the Evidence Act (which relates to settlement negotiations and mediation) without the consent of every other party who has that privilege.<sup>24</sup>

**The Commission must provide notice to affected persons**

24. Except as provided otherwise below, where the Commission provides any compulsorily acquired information to a recognised overseas regulator, the Commission must, as soon as practicable after providing the information, notify:
- 24.1 the person from whom the information was obtained; and
  - 24.2 every person to whom the information relates.<sup>25</sup>

20. Commerce Act, section 99J(2); Fair Trading Act, section 48J(2).

21. "Legal privilege" refers to those recognised in the following sections of the Evidence Act 2006: section 54 (privilege for communications with legal advisers), section 56 (privilege for preparatory materials for proceedings) and section 57 (privilege for settlement negotiations or mediation).

22. Commerce Act, section 99P(1); Fair Trading Act, section 48O(1).

23. Commerce Act, section 99P(2); Fair Trading Act, section 48O(2). The sections apply only to privileges under the law of the regulator's country which are analogous to the privileges set out in sections 54, 56 and 57 of the Evidence Act.

24. Commerce Act, section 99P(3); Fair Trading Act, section 48O(3).

25. Commerce Act, section 99K(1); Fair Trading Act, section 48K(1).

25. For the purposes of these guidelines, a “person to whom the information relates” is any person who is the subject of the information (ie any person whom the information is about).
26. For the avoidance of doubt, “person” includes a company or other entity.<sup>26</sup>
27. The Commission need not notify an affected person where:<sup>27</sup>
  - 27.1 giving notice might compromise any investigation conducted, or to be conducted, by the Commission or any overseas regulator;
  - 27.2 giving notice would prejudice the maintenance of the law (including the prevention, investigation and detection of offences, and the right to a fair trial) in New Zealand or elsewhere; or
  - 27.3 it is not practicable in the circumstances to give notice to that person (for example, where contact details for the person are not known, or where it would be necessary to instruct an agent to trace the person).

### **The Commission must report on the use of co-operation arrangements**

28. In its Annual Report the Commission must give an account of the use and operation of co-operation arrangements during the relevant period, including the number and general nature of requests received from and made to recognised overseas regulators.<sup>28</sup>

### **Administration of these guidelines**

29. The Commission’s Advocacy and Development team administers these guidelines.

### **Co-operation arrangements**

30. The Advocacy and Development team will be the Commission’s point of contact for negotiating and entering into co-operation arrangements with overseas regulators, and for liaising with the responsible Minister in this respect. The process for entering into co-operation arrangements is set out in **Attachment A**.

### **Managing requests for information/assistance**

31. The Advocacy and Development team will receive, manage and respond to requests received from overseas regulators for information/assistance. The process for dealing with such requests is set out in **Attachment B**.

### **Register of Overseas Requests**

32. The Commission will maintain a confidential internal register which will contain:
  - 32.1 details of all requests received from overseas regulators under the relevant legislation;
  - 32.2 details of all consultation with the Ministry of Foreign Affairs and Trade and correspondence with the Minister of Trade, in respect of significant trade issues arising;
  - 32.3 decisions made on requests; and
  - 32.4 copies of notices sent to affected parties.

26. The Commission adopts the definition of “person” in the Interpretation Act 1999, section 29: “in an enactment... person includes a corporation sole, a body corporate, and an unincorporated body.”

27. Commerce Act, section 99K(2); Fair Trading Act, section 48K(2).

28. Commerce Act, section 99L; Fair Trading Act, section 48L.



## Attachment A: Co-operation arrangements

### Types of co-operation arrangement

1. Co-operation arrangements may be government-to-government or regulator-to-regulator.<sup>29</sup>

### Government-to-government co-operation arrangements

2. The relevant Minister (being the Minister of Commerce or the Minister of Consumer Affairs), on behalf of the Government of New Zealand, may enter into a co-operation arrangement with the government of the country in which an overseas regulator is established.<sup>30</sup>
3. Before entering into such an arrangement, the Minister must:<sup>31</sup>
  - 3.1 have regard to the legal framework relating to the use of compulsorily acquired information in the jurisdiction of the overseas regulator;
  - 3.2 have regard to the potential consequences for New Zealand consumers and businesses of providing compulsorily acquired information or investigative assistance to the overseas regulator; and
  - 3.3 consult with the Privacy Commissioner on any privacy issues arising from the proposed co-operation arrangement.
4. The Minister must not enter into a co-operation arrangement unless he or she is satisfied that entering into the arrangement is not inconsistent with any of New Zealand's obligations under international agreements, conventions or treaties.<sup>32</sup>

### Regulator-to-regulator co-operation arrangements

5. The Commission may, with the prior written approval of the relevant Minister, enter into a co-operation arrangement with an overseas regulator.<sup>33</sup>
6. The Minister may not give approval to a co-operation arrangement unless the Minister:<sup>34</sup>
  - 6.1 has had regard to the matters specified at [3.1] and [3.2] above;
  - 6.2 has consulted with the Privacy Commissioner as specified at [3.3] above; and
  - 6.3 is satisfied that entering into the arrangement is not inconsistent with any of New Zealand's obligations under international agreements, conventions or treaties.

### Content of co-operation arrangements

7. Every co-operation arrangement must:<sup>35</sup>
  - 7.1 identify the overseas regulator that it concerns;

29. Commerce Act, sections 99E and 99F; Fair Trading Act, sections 48E and 48F.

30. If the overseas regulator is established by an international body, then the Minister may enter into a co-operation arrangement with the governing body of that international body: Commerce Act, section 99E(1)(b); Fair Trading Act, section 48E(1)(b).

31. Commerce Act, section 99E(2); Fair Trading Act, section 48E(2).

32. Commerce Act, section 99E(3), Fair Trading Act, section 48E(3).

33. Commerce Act, section 99F(1), Fair Trading Act, section 48F(1).

34. Commerce Act, section 99F(2), Fair Trading Act, section 48F(2).

35. Commerce Act, section 99G(1), Fair Trading Act, section 48G(1).

- 7.2 identify the foreign enactments in connection with which the recognised overseas regulator may seek compulsorily acquired information and investigative assistance from the Commission; and
  - 7.3 set out how any compulsorily acquired information that is provided may be used by the overseas regulator, and how it is to be kept secure.
8. A co-operation arrangement may also:<sup>36</sup>
- 8.1 provide for the reimbursement of the Commission for costs incurred in providing the information/assistance; and
  - 8.2 include conditions on the provision of information/assistance.<sup>37</sup>

### **Process for entering into co-operation arrangements**

9. Every co-operation arrangement must be in writing and signed by either:<sup>38</sup>
- 9.1 the Minister and his or her overseas equivalent (if government-to-government); or
  - 9.2 the chairperson of the Commission and his or her overseas equivalent (if regulator-to-regulator).
10. No later than 15 working days after a co-operation arrangement is entered into, the Minister or Commission, as appropriate, must publish a notice in the Gazette that:<sup>39</sup>
- 10.1 states that the arrangement has been entered into, and the date on which it comes into effect; and
  - 10.2 identifies the overseas regulator concerned and the parties to the arrangement.
11. The Commission must publish a copy of the co-operation arrangement (and any amendments to it) on its website while the arrangement is in force.<sup>40</sup>

36. Commerce Act, section 99G(2), Fair Trading Act, section 48G(2).

37. Commerce Act, section 99F; Fair Trading Act, section 48F.

38. Commerce Act, section 99H(1), Fair Trading Act, section 99H(1).

39. Commerce Act, section 99H(2), Fair Trading Act, section 99H(2).

40. Commerce Act, section 99H(2)(b); Fair Trading Act, section 48H(2)(b).

## Attachment B: Process for dealing with overseas requests

1. The Commission will follow the process set out in this Attachment when it receives a request from a recognised overseas regulator for compulsorily acquired information and/or investigative assistance.
2. The Commission must liaise with the recognised overseas regulator to ensure that the Commission has sufficient information to understand the nature and extent of the request, and to determine the appropriate response to it. This information must include a statement (preferably written) from the recognised overseas regulator that explains:
  - 2.1 the information/assistance requested;
  - 2.2 how the provision of the information/assistance will assist the overseas regulator in performing its functions or exercising its powers; and
  - 2.3 why the Commission is the most appropriate source of the requested information/assistance, including any limitations on the overseas regulator's ability to source the information/assistance by other means.
3. Where applicable, the overseas regulator must also provide a written undertaking:
  - 3.1 in relation to self-incriminating statements (see [20] of the guidelines); and
  - 3.2 in relation to privileged information (see [21] of the guidelines).
4. The Commission will forward the request to a staff member nominated by the Competition or Regulation General Manager (as the case may be). In the case of requests for compulsorily acquired information, the nominated staff member should be the most senior staff member (if available) who was assigned to the investigation that is the subject of the request.
5. The nominated staff member must, in consultation with legal counsel, decide whether to recommend that the request should be granted in accordance with the factors set out in these guidelines.
6. If the nominated staff member and legal counsel decide that the request raises significant trade concerns (as set out in [10.4] of the guidelines), the Commission must consult with the Ministry of Foreign Affairs and Trade and, if required, ensure that the matter is referred to the Minister of Trade.
7. Following the steps set out in [2] to [6] above, if the nominated staff member decides that a request for information should be granted, he or she must, in consultation with legal counsel, consider whether any conditions should be imposed on the provision of information.
8. The nominated staff member must provide a memorandum to the relevant General Manager (Competition or Regulation) setting out his or her recommendation and the reasons for it.
9. The General Manager must decide whether to grant the request, and on what conditions, taking into account the nominated staff member's recommendation and the considerations set out in these guidelines.
10. If the General Manager approves the request, the Advocacy and Development team is responsible for ensuring that:
  - 10.1 the information/assistance is provided to the overseas regulator in a timely way; and
  - 10.2 the relevant notice is sent to affected parties as required by these guidelines and the law.

This is a guideline only and reflects the Commission's view. The publication is not intended to be definitive and should not be used instead of legal advice. It is businesses' responsibility to remain up to date with legislation.

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