

Consumer remediation guidance for businesses – consultation on draft



Feedback on consumer remediation guidance

The Commerce Commission (Commission) is seeking feedback on draft consumer remediation guidance for businesses.

Businesses who have identified an issue which gives rise to a likely breach of one of the laws the Commission enforces may wish to proactively remediate the harm caused to consumers by that breach.

The consumer remediation guidance is intended to assist any business (and/or their professional advisers), where they become aware of an issue, to conduct a 'root cause' analysis, to take steps to correct whatever gave rise to the issue, and to work through a structured process to compensate affected consumers (whether that be by monetary and/or non-monetary remedies).

The draft consumer remediation guidance is expressed as high-level principles. The Commission is seeking feedback through this consultation on whether the draft guidance is meaningful, helpful and produces the right outcomes for consumers.

The questions below may be used as a guide to focus your submissions to the Commission. However, we welcome any feedback and/or comments on the draft guidance set out below.

Consultation Questions

- What do you think of the proposed principles for how businesses may approach remediation (paragraphs 7 to 10 of the draft guidance) and why?
- What do you think of the proposed principles for calculating compensation (paragraph 11 of the draft guidance) and why?
- In terms of calculating compensation, are there any other general issues that businesses require guidance on that are not currently included in the principles?
- What do you think of the proposed principles for engagement with consumers (paragraphs 12 to 15 of the draft guidance) and why?
- What do you think of the proposed principles for governance and record keeping (paragraphs 16 to 18 of the draft guidance) and why?
- Do you have any other feedback or comments?

Your responses to these questions, as well as any other feedback or comments, can be sent by email to guidancefeedback@comcom.govt.nz by 22 September 2022.

Consumer remediation guidance for businesses

Scope

- 1 This guidance may be used by businesses where they have identified an issue which gives rise to a likely breach of one of the laws the Commerce Commission (the Commission) enforces¹, and the business intends to take steps to address the issue and, where appropriate, offer remediation (whether compensation or non-monetary measures) to affected consumers.
- 2 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](#).

Purpose

- 3 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 and airport sectors, and retail payment networks.
- 4 The Commission recognises that where businesses identify conduct or omissions that may have led to a likely breach or breaches of the laws enforced by the Commission, those businesses may decide to pro-actively remediate consumers affected by that conduct or omission.²
- 5 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.
- 6 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 where the Commission considers it appropriate. Please refer to the Commission's [Enforcement Response Guidelines](#) for further information on the Commission's enforcement approach.



1. 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 is therefore phrased as any identified issues being a "likely breach".
2. 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, and that consumers do not continue to be adversely affected. This might involve, for example, modifying claims or representations; corrective advertising; a product safety recall; corrective disclosure; addressing gaps in systems and/or processes or updating legacy products or services to meet compliance requirements.

How businesses may approach remediation

- 7 The aim of consumer remediation is to “put right” the 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 it may require 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.
- 8 The principles set out in this guidance can be scaled up or down to suit the circumstances.
- 9 Businesses who decide to remediate should take a genuinely consumer-focussed approach. This means:
 - 9.1 being pro-active and helpful;
 - 9.2 communicating clearly with consumers using plain language;
 - 9.3 showing a commitment to remediate any loss or detriment suffered and/or putting right the harm;
 - 9.4 making the remediation process accessible and free for consumers;
 - 9.5 being objective, unbiased and fair to consumers; and
 - 9.6 giving consumers the benefit of the doubt where there is uncertainty (for example, where the business is missing information).
- 10 Consumer remediation processes should be comprehensive, timely, fair and transparent.
 - 10.1 A comprehensive process:
 - 10.1.1 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” the harm that has been caused. That may involve monetary compensation and/or taking steps to remedy the likely breach.
 - 10.1.2 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.
 - 10.1.3 Seeks to identify when the issue first arose and reviews records back to the time where the business reasonably suspects the conduct or omission which first caused loss or detriment to a consumer occurred.
 - 10.1.4 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.
 - 10.2 A timely process:
 - 10.2.1 Is initiated promptly - as soon as a business becomes aware of an issue that may have caused loss or detriment. Businesses should not wait for a complaint to be made or a claim asserted against them or, once aware of a single instance of loss, wait for evidence of potentially more wide-spread harm before taking action.
 - 10.2.2 Is progressed to appropriate timeframes, taking into account the size and complexity of the exercise.
 - 10.2.3 Is not treated as a distraction from the business’ core activities.
 - 10.2.4 Appropriately balances activities to prevent the issue from continuing with those to “put right” those customers that have been impacted.

10.3 A fair process:

- 10.3.1** Puts consumers' interests and needs at the heart of the exercise and considers, wherever possible, the individual circumstances of consumers who may be detrimentally impacted, as well as the need to treat different groups of consumers equitably.
- 10.3.2** Where necessary and appropriate, invites consumers to participate in the process to properly assess their individual circumstances.
- 10.3.3** Considers consumers' rights and remedies in the relevant statutory context.
- 10.3.4** 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.
- 10.3.5** Does not take a legalistic approach in order to limit consumer entitlements, for example, by strictly applying time-bars.
- 10.3.6** Makes the process easy for consumers to engage with.
- 10.3.7** Provides an avenue for consumers to seek independent review, if the process or its outcomes are not satisfactory to them.

10.4 A transparent process:

- 10.4.1** Is well-structured and documented.
- 10.4.2** Is explained to consumers clearly, simply and through channels that are easily accessible.
- 10.4.3** 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.
- 10.4.4** Takes all reasonable steps to trace and contact affected consumers.
- 10.4.5** 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.
- 10.4.6** Takes on board feedback received.



Calculating compensation

- 11 Businesses should determine and/or calculate appropriate compensation in a way that is fair, equitable and transparent and takes into account consumers' interests and needs.
 - 11.1 Fair, equitable and transparent means:
 - 11.1.1 Considering first, and wherever possible, the individual circumstances of consumers who may be detrimentally impacted.
 - 11.1.2 Seeking further information from affected consumers in order to fill gaps in business records and/or to properly assess their individual circumstances.
 - 11.1.3 Using beneficial assumptions where necessary or appropriate. Where businesses have incomplete records or information, 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 had not occurred. Beneficial assumptions err towards inclusion, rather than exclusion, and/or towards over-compensation rather than under-compensation.
 - 11.1.4 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.
 - 11.1.5 Where appropriate, paying affected consumers a use-of-money interest component, or a component to compensate for lost investment returns. Assessments will 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 had not occurred.

Engagement with consumers

- 12 Businesses should communicate with consumers about the progress and outcome of review and remediation processes in a clear, concise, timely and effective manner.
 - 12.1 Clear, concise, timely and effective communication:
 - 12.1.1 Will be clear, direct, and in plain language appropriately tailored to the informational and/or language needs of the consumer audience that the business is trying to reach.
 - 12.1.2 Will be well-timed in relation to any decisions that affected consumers may be required to make and allow ample time for consumer responses.
 - 12.1.3 Will be in writing or, if communicated verbally initially (by telephone or in person), confirmed in writing promptly thereafter.

13 Businesses should make all reasonable efforts to engage with affected consumers.

13.1 Reasonable efforts include:

13.1.1 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. In larger-scale exercises businesses may wish to consider engaging independent expertise for communications planning.

13.1.2 Using all available contact information and contact methods (for example, email, post, phone calls, SMS, social media).

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

13.2 Reasonable efforts may also 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.

13.3 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:

13.3.1 Businesses should not profit from any identified breaches.

13.3.2 Businesses can consider aggregating all unreturned compensation beneath a proposed minimum value threshold and paying the total combined amount to a charity or community organisation. The business should document, with reasons and justification, any minimum value threshold applied and the reasons why in the circumstances it was not feasible to trace the affected consumers.

13.3.3 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.

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

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

13.4.2 For any unreturned compensation where it is not mandatory to pay the money to Inland Revenue in accordance with the UMA, businesses can either: (1) approach Inland Revenue to see whether it may agree to hold the unclaimed money in any event; or (2) consider aggregating the unclaimed amounts and paying the total combined amount to a charity or community organisation.

13.4.3 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.

13.4.4 Businesses should ensure 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.

14 Businesses should communicate the outcome of the review to consumers in a way that is clear and transparent.

14.1 Clear and transparent communication of outcomes:

14.1.1 Will explain the likely breach that the business has identified and how the issue has affected the consumer.

14.1.2 In offering remediation, the components to that and how they have been determined or calculated.

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

14.1.4 In most cases, provides for affected consumers to have access to some form of external dispute resolution process, if they are not satisfied with the business' review process or its outcomes for them. That might be to an industry external dispute resolution body, or a different option.

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

15 Businesses should provide remediation in a way that is convenient and accessible and takes into account the needs of consumers.

15.1 Convenient and accessible means:

15.1.1 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).

15.1.2 Where offering a refund, making payment by electronic bank transfer (as many banks are no longer accepting cheques).

15.1.3 Offering secure methods for consumers to provide updated bank account details.



Governance

- 16 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.
 - 16.1 While the processes in individual circumstances will be different, businesses will in most cases need to consider:
 - 16.1.1 The governance structure and oversight for the process.
 - 16.1.2 The resources required to support it.
 - 16.1.3 Record-keeping and reporting.
 - 16.1.4 Whether to report publicly on progress.
- 17 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.

Record keeping

- 18 Businesses should keep adequate records of any consumer remediation processes.
 - 18.1 Adequate record-keeping involves documenting:
 - 18.1.1 The steps taken and decisions made in scoping and developing the process.
 - 18.1.2 The governance arrangements.
 - 18.1.3 External advice in relation to, or third-party quality assurance of, the process or its outcomes.
 - 18.1.4 Communications with consumers – whether in writing, by telephone or in person.
 - 18.1.5 All decisions made as part of the process - for example in relation to beneficial assumptions or a low-value minimum threshold - and the reasons for those decisions.
 - 18.1.6 The assessments of loss or detriment and basis for the remediation measures offered, including the basis for calculations of monetary compensation, any time-cost-of-money component etc., and reasons for the rate(s) chosen.
 - 18.1.7 Progress against timeframes.
 - 18.1.8 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

- 19 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.
- 20 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

- 21 As set out above, the early identification and remedy of issues and the remediation provided to affected consumers is one of the factors the Commission will take into account when considering the appropriate enforcement response. Other such factors may include:
 - 21.1 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.
 - 21.2 Whether the business has taken appropriate steps to identify, make contact with, and communicate effectively with, affected consumers.
 - 21.3 The level of remediation provided to (or proposed to be provided to) affected consumers.
 - 21.4 The scale and seriousness of the identified issue and whether the business has had similar issues in the past.
- 22 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.
- 23 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 the Court in its consideration of any fine or pecuniary penalty that it is asked to impose.

Amendments

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

