



New NZ Commerce Commission enforcement guidelines

The Commission exercises much discretion in dealing with breaches under the Fair Trading Act, Commerce Act, CCCFA and the Telecommunications Act. Knowing its objectives helps those in the sights to get better outcomes, while meeting the Commission's objectives. Now they've written up their approach in November 2012 Enforcement Response Guidelines. The Guidelines are very good although we disagree on the approach to agreeing media releases.

November 2012

There's a case study on great outcomes for businesses and the Commission in our article, *Managing Fair Trading Act complaints - a great example*.¹ This month, the Commission put that sort of approach into writing in its new *Enforcement Response Guidelines*.² The case study – involving an insurer – is a great example of:

- The Commission achieving its objectives, including getting the message out to other insurers just as strongly as a court decision, while avoiding the risk and cost of court action; and
- The insurer rightly coming across in the media as having acted responsibly when the problem was uncovered but still being outed in public.
- Lateral solutions: in this case, setting up a scheme by which affected insured customers got compensated.

The *Guidelines* apply where there is a possible or actual breach of the Fair Trading Act, Commerce Act or the CCCFA. Our experience is that a similar approach is taken under the Telecommunications Act, so the guidelines are helpful too for Telcos.

The *Guidelines* confirm that the Commission often looks to solutions other than Court proceedings. It prefers to encourage compliance with the law through the use of non-enforcement options, such as industry education through to warning letters.

The Commission will also prioritise certain industry sectors or behaviours. This changes over time. For example, the Commission has recently started targeting procurement practices such as bid rigging, in the context of the Christchurch earthquakes. As we point out in our article *ComCom targets Christchurch anti-competitive supplier practices*,³ the initial education programme is likely to be followed – increasingly – by enforcement action if suppliers – and, importantly, their managers and sales people – don't make their practices compliant. With bid rigging and similar cartel activity, there's a real chance of individuals being prosecuted too.

That Christchurch situation reflects the overall approach. Educate first. Talk to market participants. If this doesn't work, escalate action, issue warning letters and then, maybe, select a wayward supplier or two to prosecute to set an "informative public precedent", *pour encourager les autres*.

But if someone has engaged in major breaches or isn't cooperative with the Commission, the Commission may decide to prosecute without taking options with lesser impact. So, companies and their managers shouldn't assume they have breathing space, especially if they have a track history with the Commission.

All these enforcement decisions weigh up the factors including harm, the conduct of the firm and people in the sights, and the public interest.

New NZ Commerce Commission enforcement guidelines

As each case differs, there is no magic formula. The *Guidelines* are great because they make the thinking transparent. They help companies and managers to make an assessment of the best approach.

The Commission must pick and choose its cases, as there isn't enough time and money to do them all. If the Commission is presented with a way to achieve its objectives, short of prosecution, that generally will be attractive. But the Commission won't horse-trade.

We think that, except in one important respect, the *Guidelines* are excellent. The exception relates to media releases announcing resolution: the *Guidelines* say that the Commission will only in exceptional cases agree media releases. Often the media impact will be the biggest issue for businesses; always it will be near the top of the list. A business may be reluctant to settle a case if the media release is an unknown item.

There are ways in which the Commission can get its message across while tailoring the message to fit the situation. The Commission won't and shouldn't compromise media releases. We don't understand why a media release can't be agreed, when all other aspects of the settlement are agreed. In all of this, the Commission has the ability to go only as far as it is comfortable to go. Media releases are no different. So there is nothing wrong about a pre-agreed press release as the Commission holds the pen.

Taking this line of not agreeing releases won't help the Commission settle matters as the press release uncertainty for the business may be

enough to kill settlement. And we are aware of situations where businesses consider that the underlying position does not support the Commission's release.

However, the insurer case in our earlier article is a great example of things going right in the media release. The Commission got the message across to other insurers and affected customers were compensated. The insurer got rapped over the knuckles very publically, but also it was complimented for fessing up quickly and dealing with this proactively. We think this speaks well of the Commission and the insurer: it's a great role model example for others.

1. <http://www.wigleylaw.com/assets/Uploads/Fair-Trading-Act-breach.pdf>

2. <http://www.comcom.govt.nz/assets/The-Commission/Policies/Enforcement-Response-Guidelines-November-2012.pdf>

3. <http://www.wigleylaw.com/assets/Uploads/ComCom-targets-Christchurch.pdf>

Wigley+Company

PO Box 10842
Level 7/107 Customhouse Quay, Wellington
T +64(4) 472 3023 E info@wigleylaw.com

and in Auckland
T +64(9) 307 5957
www.wigleylaw.com

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.