

Managing Fair Trading Act complaints - a great example

A settlement of a Fair Trading Act breach allegation is a textbook example of how traders can get better outcomes when at risk of prosecution by taking the right steps. How? Recognise and meet the Commerce Commission's objectives.

October 2012

A Commerce Commission press release on 18 September 2012 shows insurer, IAG, handling very well a Fair Trading Act problem it had, as did the Commission. The Insurer entered a settlement with the Commission that in many ways put them in a positive corporate citizen light, or at least reduced downside reputational risk (a key concern). It's worth tracking what happened as an example of what to do in these situations.

What happened

When assessing Canterbury earthquake house and content claims in mid-2011, the insurer picked up administrative – that is, not deliberate – errors in the calculation of some claims, requiring around \$3.5M to fix. This also impacted renewal terms on around 150,000 policies.

It seems that the insurer concluded that this might involve a breach of the Fair Trading Act (FTA), leading to prosecution risk. Faced with the choice of saying nothing – and not sorting the problem including with their insured customers – or disclosing, they disclosed. They have reaped the benefits from that choice in their relationship with their customers – they've put it right for them – and the Commission.

The Commission's press release

The release announcing the settlement and the decision not to prosecute is balanced. The press release compliments the insurer on its early disclosure, cooperation, and willingness to put things right.

Traders may be most worried on damage to reputation. A Google news search shows that IAG took a hit in the media following the Commission

press release. But here's the key thing:

- It was limited to a one-day wonder;
- All the articles we've seen quoted the Commission's complimentary statements about IAG.

A fine outcome for the lawyers and the comms team.

What was the key to this outcome?

So, how did IAG achieve this outcome, at the same time as the Commission achieved its objectives? This "win-win" for both regulator and trader is the key to the solution. Knowing the Commission's objectives provides the answers.

Commission's objectives

The Commission is generally much more focussed on the bigger picture than the specifics of a particular case. It wants to encourage compliance with the FTA by traders. A successful prosecution achieves this by setting an example "pour encourager les autres". Successfully prosecute one insurer, and the other insurers will be encouraged to comply too.

But the Commission can achieve that outcome nearly as well by entering a publicised settlement with the trader. And the great benefit for the Commission is that it does not need to take the risk of succeeding or failing in Court, plus it can avoid the costs, when funds to pay costs are limited. Time and cost can be devoted elsewhere.

A big side benefit is that the settlement can involve, as it did here, fixing up the problem with affected consumers. Even better, such deals can involve lateral solutions to put things right,

**Managing Fair Trading
Act complaints - a
great example**

beyond what can be done by legal enforcement: the Commission has moved into that lateral solution space in a number of cases in the last 2 or 3 years and we think that is excellent.

So there's a big upside in a settlement for the Commission. They might compromise on a few things to get the settlement, but it is worth it. The Commission gets the trader's head on the petard, to encourage other traders to comply. A softer settlement can be as powerful as a successful prosecution. The insurance sure gets the message here, regardless of whether it is delivered by settlement or by court conviction and fine.

What IAG could do, in light of the Commission's objectives

Knowing the Commission's objectives, IAG has been able to agree settlement on terms that reduce damage for them, and in some ways actually shows them acting as model corporate citizens. They have ended up with a balanced Commission press release, also complimentary of them.

That press release is all important, and wouldn't be the same after a successful prosecution. We've even heard of situations where it appears that the release appears to have been drafted before the company is sentenced, and does not reflect material in the judge's sentencing notes.

We expect that the Commission was prepared to settle matters here, given, for example:

- Early and voluntary disclosure;
- Cooperation and providing all the details;
- Setting up a scheme to fix things with insured customers;
- Public disclosure of the settlement.

Some traders would instead be prepared to tough it out in dealing with the Commission. There could be a role for that, but it will often not be the best approach. If IAG had done that here, we suspect they'd be a lot worse off.

Negotiations

No doubt the fact this was only an administrative error makes the solution easier (although we can only speculate as to whether the facts weren't so clear cut and agreeing this to be an administrative error was part of the compromise). But even where a company has committed a more deliberate breach, where this is a poor prior history, or there were issues well known in that industry, a settlement may be possible. In that regard, having a knowledge of the Commission's enforcement priorities is essential. However, anything major to do with the earthquakes is likely to be near the top of the pile regardless.

What happened under the bonnet in this case is not known: both the Commission and IAG might have debated trade-offs and even assessed benefits and risks of taking other courses of action. Typically there would be assessments and discussions of that nature.

All that is legitimate and appropriate. In particular the Commission as a regulator won't engage in inappropriate horse trading. But there is much still that can be negotiated and discussed.

In terms of compromise, the settlement with the Commission is on the basis of IAG acknowledging it **may** have breached the FTA not that it did breach the FTA. That's a positive thing for IAG too.

Often a trader would prefer a confidential settlement with the Commission but the Commission will be reluctant to do that, in view of its objective of encouraging traders generally to comply. Second best is the sort of publicly notified solution that IAG achieved.

So we think both the Commission and IAG handled this very well.

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.