



# **FAIR TRADING COMMISSION**

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## **ENFORCEMENT POLICY FOR FAIR COMPETITION AND CONSUMER PROTECTION MATTERS**

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# Enforcement Policy for Fair Competition and Consumer Protection Matters

## Introduction

1. The Fair Trading Commission (Commission) administers, *inter alia*, the Fair Competition Act CAP. 326C (FCA) and the Consumer Protection Act, CAP. 326D (CPA). Both the FCA and the CPA, as well as the Fair Trading Commission Act, CAP. 326B, (FTCA) give the Commission the power to investigate breaches of the legislation it administers and to enforce the provisions of the legislation.
2. Section 4(1) of the FTCA empowers the Commission to pursue the enforcement of the legislation it administers. Section 4(1) provides as follows:

*“The functions of the Commission are to enforce the Utilities Regulation Act and any laws relating to consumer protection and fair competition which the Commission has jurisdiction to administer.”*

3. Similarly, section 5(1) (e) of the FCA empowers the Commission to take necessary action to prevent certain anti-competitive behaviours<sup>1</sup> and section 54 of the CPA empowers the Commission to administer and enforce the CPA and to institute and carry on legal proceedings in respect of breaches of the CPA.<sup>2</sup>

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<sup>1</sup> Section 5(1)(e) states as follows: “The Fair Trading Commission shall take such action as it considers necessary to

- (i) Prevent the abuse of dominant position by any enterprise;
- (ii) Eliminate anti-competitive agreements;
- (iii) Prevent or control mergers;

<sup>2</sup> Section 54 states as follows: “It is the duty of the Commission

- (a) To administer this Act, and
  - (b) To enforce the provisions of this Act.
- (2) For the purposes of its duty under subsection (1) (b), the Commission may institute and carry on such proceedings in respect of contraventions of the provisions of this Act as may be necessary to ensure observance of those provisions; and any officer of the Commission, if so authorized by the Commission, may institute and carry on any such proceedings on behalf of the Commission, whether or not he is an attorney-at-law.

For consumer protection and fair competition matters, the Commission will investigate any alleged breaches of the legislation, advise the relevant party of its findings and (where necessary) pursue enforcement action against that party, which may include instituting legal proceedings in the civil or criminal courts to establish breach of the relevant legislation, enforce compliance and to pursue legal sanctions.

### **Objective of Enforcement**

4. The objective of any Enforcement Policy is to maximise compliance with the relevant legislation. It should also seek to deter companies/service providers from reoffending and discourage non-compliance with the legislation by setting an overarching policy framework that enables effective and appropriate enforcement activities. This would be achieved by encouraging a community and corporate culture of positive action, accountability, consultation and cooperation with the Commission. Therefore, the Enforcement Policy should be read in conjunction with the specific sections of relevant legislation when any action is being considered.
5. This policy guides the Commission in exercising its enforcement responsibilities. It also provides guidance to stakeholders and the community on how the Commission approaches its statutory enforcement responsibilities.
6. Enforcement action will be considered after the Commission has conducted a thorough investigation, satisfied itself that there has been a breach of legislation which it administers, advised the relevant party or parties of its findings and given them the opportunity to respond to the Commission's findings.

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(3) Without prejudice to any other power that the Commission has towards the carrying out of its duty under subsection (1), the Commission has the powers conferred on the Commission by sections 55 to 59.

Any enforcement action undertaken by the Commission will be done with integrity and professionalism in the interest of the public. Therefore, as the regulator, the Commission will seek to encourage service providers and companies to comply with the relevant legislative requirements and to understand their rights and obligations by providing information and education.

### **Core Principles**

7. The Commission will seek to employ the following key principles to guide its approach to enforcement of the legislation it administers:

**Accountability** - the Commission will engage in decision-making that is in accordance with already established guidelines, procedures and/or corporate governance processes;

**Consistency** - the Commission will utilise the previously mentioned established procedures and processes to ensure consistent decision making, therefore providing a system that is equitable and fair;

**Proportionality** - the Commission's response will be proportionate to the risks and damage caused/posed by any non-compliance with the legislation. This will take into account the overall conduct of service providers and companies including but not limited to any past transgressions and compliance history where applicable;

**Targeting** - the Commission will apply targeted regulatory effort directed towards activities or trends which could generate or result in significant breaches of the legislation;

**Transparency** - the Commission will ensure that any enforcement measures will be transparent, in accordance with relevant legislation and

applicable principles of natural justice so that all parties understand the reasons for the actions taken and what is expected of them to ensure compliance and deter reoffending, and in the process creating public confidence in the Commission's enforcement activities.

8. This enforcement policy provides general guidance on:

- (i) the types of enforcement action available to the Commission
- (ii) the principles the Commission will apply in deciding to enforce and
- (iii) the factors the Commission will take into consideration in determining what enforcement action will be pursued.

## **The Types of Enforcement Action**

### **Consumer Protection Act**

9. The CPA addresses the enforcement of its provisions in Part IX. The following are among the options available to the Commission when deciding to enforce the CPA:

- (i) Issuing a Prohibition Notice (section 55(1)(a))
- (ii) Issuing a Warning Notice (section 55 (1)(b))
- (iii) Accepting and enforcing Undertakings (section 57)
- (iv) Applying for an injunction in the law courts (section 58)
- (v) Applying for an order for the disclosure of information to the public or others (section 59(1), or other orders.
- (vi) Pursuing criminal proceedings for offences under the CPA (e.g. Section 62).

### **Fair Competition Act**

10. Under the FCA, the Commission may pursue the following enforcement actions, among others:

- (i) serving a 'cease and desist' or termination notice requiring a party to cease a practice or terminate an agreement (section 15)
- (ii) directing an enterprise to cease a practice which constitutes an abuse of dominant position (section 17(2))
- (iii) issuing a notice to direct that certain practices be discontinued (section 18 (1))

- (iv) directing that merging enterprises divest interests or part of their combined business or operations (section 20(8))
- (v) prohibiting mergers or requiring modifications to mergers (section 21(3) or terminate mergers which have proceeded without the Commission's permission (section 22(1))
- (vi) directing that a Director serve on not more than one board of interlocking companies (section 23)
- (vii) applying to the Law Courts for injunctive relief, restraining orders, compensations orders or damages (section 37 of the FCA and section 31 of the FTCA)
- (viii) pursuing the criminal prosecution of parties who breach the relevant legislation under Part VIII of the FCA or fail to comply with an order of the Commission (section 43 of the FTCA).

**Criteria the Commission will Apply in Deciding Whether to Pursue Enforcement Action**

11. The Commission assesses whether it will pursue enforcement action with reference to the following criteria:

- **Cooperation and willingness** of the service provider, company, business or individual being investigated to cooperate with the Commission during investigation and to take remedial action for non-compliance once established;
- **Culpability** - the degree of non-compliance, including whether there is evidence of egregious breaches, reckless or significantly risky behavior or evidence of serious harm caused to any person as a result of non-compliance or an activity that otherwise results in significant breaches of the legislation;



- **Due diligence** – whether the service provider or business demonstrated an effort or intention to comply with the legislation, any relevant procedures currently in place or an existing compliance programme;
- **Prior failure to comply** with either a previous legal direction or notice, or previous non-compliance with the legislation administered by the Commission;
- **Level of public concern or harm** caused by the breach by the service provider or business or by similar breaches by that provider;
- **General mitigating or aggravating circumstances;**
- **The desirability of taking enforcement action** when weighed together with the Commission’s available resources and the likely impact of the enforcement action contemplated in deterring future non-compliance by the business or service provider or other person(s).

## **Factors the Commission will take into Consideration in Determining What Enforcement Action will be Pursued**

12. The type of enforcement action which the Commission will pursue in any given circumstance will be determined after consideration of the following factors:

- (i) whether the breach of the legislation is serious, sustained or constitutes egregious conduct on the part of the relevant party;
- (ii) what level of enforcement action is, in the Commission's sole discretion, most likely to eliminate the conduct complained of deter further breaches by the relevant party or any other person;
- (iii) the resources available to the Commission for enforcement;
- (iv) the public interest;
- (v) whether there are aggravating factors, including whether the breach is one about which the Commission previously engaged the party to encourage compliance. Other aggravating factors could include where the relevant party deliberately tried to evade compliance or to frustrate or obstruct the Commission's investigation efforts.

It should be noted that the above list is not exhaustive and additional factors may be used depending on the particulars of the individual case.

## **Decisions not to Pursue Enforcement Action**

13. While the Commission has the legislative power to pursue enforcement action, it also has the implied attendant power not to pursue enforcement in any given case. The Commission may exercise its power **not** to pursue enforcement action in several circumstances, including, but not limited to circumstances:

- (i) where, in the Commission's sole discretion, the pursuit of enforcement action in any particular case does not represent a reasonable extension of the Commission's resources when weighed against the likelihood that the contemplated enforcement action will deter further infractions or avoid or discourage public harm;
- (ii) where the remedy sought is unlikely to deter or stop the conduct complained of;
- (iii) where there are other remedies available to a complainant which, in the Commission's sole discretion, are likely to be more effective in resolving the issues raised by a complaint, or where the issues at hand are essentially private contractual disputes.

14. The Commission will endeavour to pursue enforcement action in a consistent manner. In all cases, the Commission will seek to pursue enforcement action which is proportionate to the harm caused by the breach of the legislation it administers. In some cases, the Commission's assessment of the proportionality of an enforcement remedy sought may be influenced by:

- (i) the degree to which relevant parties cooperate with the Commission during its investigations;
- (ii) the possibility to which, in the Commission's estimation, the interests of justice may be served by pursuing settlement of any action;
- (iii) the willingness of a relevant party to execute a voluntary undertaking, in terms to be approved by the Commission, undertaking not commit the infractions in future, and agreeing to the implementation of an appropriate compliance plan to mitigate against future breaches of the legislation;

- (iv) the degree to which a relevant party can demonstrate honest effort to comply with the relevant legislation or timely and appropriate implementation of remedial measures once an infraction was discovered.

### **Sharing Information with Public**

15. The Commission maintains confidentiality while investigating possible infractions of the legislation it administers and as a general rule does not comment publicly or privately about investigations that are ongoing, except to the parties involved. Where breaches of the legislation are found and the Commission decides to pursue enforcement action, the Commission may inform the general public as to the type of enforcement action that will be taken in the interest of transparency. As such, the Commission will make public in summary form certain information about its enforcement activities including:

- findings of breach of legislation after investigation
- decisions to pursue enforcement action
- agreements to settle enforcement matters
- the nature and content of undertakings
- the outcome of court matters

### **Leniency**

16. When investigating and enforcing the provisions of the FCA, the Commission may, in its sole discretion, determine that leniency in its enforcement action is appropriate. Any such determination shall be made in accordance with the Commission's leniency policy or programme, as may be in place at the

appropriate time. Where the provisions of the leniency policy or programme are applied, this fact will be disclosed to the public.

### **Criminal Matters**

17. Generally, where the Commission determines that enforcement action in the criminal courts is appropriate to enforce the provisions of the legislation which it administers, the Commission will refer the outcome of its investigations and relevant evidence to the Director of Public Prosecutions for action in the criminal courts. In such cases, the determination as to whether to prosecute a party for breach of the legislation which the Commission administers, shall be made by the D.P.P. in accordance with its own policies and procedures.

18. The Commission may also pursue criminal action against parties who:

- (i) obstruct the Commission in the exercise of its functions (section 44 of the FTCA);
- (ii) fail to provide information requested by the Commission (section 45 of the FTCA and section 41 of the FCA); or
- (iii) give false or misleading information to the Commission (section 42 of the FCA).

This policy comes into effect from August 1, 2021.

