



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

Consumer Protection

Part II

ENFORCEMENT AND PROSECUTION POLICY

September 2011

Enforcement and Prosecution Policy

Objective	The objective of this policy is to achieve compliance in an appropriate, consistent and transparent manner in line with the purposes of the legislation that Consumer Protection administers (Consumer Protection legislation).
Scope	This policy applies to every State public officer who is empowered to carry out functions with respect to the legislation administered by Consumer Protection. Such officers include those whose duties include carrying out, supervising, co-ordinating, managing or directing enforcement action.
Delegations	The Commissioner for Consumer Protection is responsible for ensuring the policy is followed.
Definitions	<p>Department: the Department of Commerce</p> <p>Consumer Protection: the Consumer Protection Division of the Department of Commerce</p> <p>ACCC: the Australian Competition and Consumer Commission</p> <p>ACL the <i>Australian Consumer Law</i></p>
Policy headings	<p>Explanatory Notes</p> <p>Enforcement</p> <p>Available Enforcement Methods</p> <p>Pecuniary Penalties</p> <p>Prosecution</p> <p>Plea Negotiation</p> <p>Actions in the State Administrative Tribunal</p> <p>Appeals</p>

Approving Authority: Commissioner for Consumer Protection		Business Unit Responsible: Consumer Protection Legal Unit	
Effective Date: 2011	Endorsement Date: 2011	Review Date: 2012	
This policy replaces			
Policy type and category			
Insert hyperlinks to other relevant policies, guides, procedures, plans			
File Number	CP00788/2010	Objective Id No.	A2418755

Table of Contents

1	Explanatory Notes	1
1.1	Organisational Background	1
1.2	Statement on Consumer Protection Position on Enforcement Generally.....	1
1.3	When did this Enforcement and Prosecution Policy Come into Operation? ..	2
1.4	What does this Enforcement and Prosecution Policy Achieve?	2
1.5	What is the Purpose of this Enforcement and Prosecution Policy?	2
1.6	To Whom does this Enforcement and Prosecution Policy Relate?	3
1.7	What is the Scope of this Enforcement and Prosecution Policy?.....	3
1.8	What is the Legal Status of this Enforcement and Prosecution Policy?.....	3
2	Enforcement	5
2.1	Principles of Enforcement	5
2.2	Enforcement Under the ACL	5
2.3	Discretion	6
2.4	Co-Operation.....	6
2.5	Choosing the Appropriate Person to Pursue	7
2.6	Choosing the Appropriate Enforcement Action	8
3	Available Enforcement Methods	9
3.1	Formal Warnings	9
3.2	Infringement Notices	11
3.3	Naming	12
3.4	Industry-wide Warning.....	14
3.5	Representative Action	14
3.6	Undertakings	16
3.7	njunction	16
3.8	Pecuniary Penalties.....	18
3.9	Prosecution	18
3.10	Actions in the State Administrative Tribunal.....	18
4	Pecuniary Penalties Under The ACL.....	19
4.1	Introduction	19
4.2	Objects of Pecuniary Penalties	19
4.3	Who Decides to Seek a Pecuniary Penalty?	20
4.4	Discretion	20
4.5	Deciding Whether to Seek a Pecuniary Penalty.....	20
4.6	Prima Facie Case.....	20
4.7	Prospects of Success.....	21
4.8	Prospects of Success – Factors to Take Into Account.....	21
4.9	The Public Interest	23
4.10	Public Interest Factors In Favour of Seeking a Pecuniary Penalty	23
4.11	Public Interest Factors Against Seeking a Pecuniary Penalty.....	24
4.12	Pecuniary Penalty or Prosecution?	24
4.13	Fairness, Impartiality and Transparency	25
4.14	Penalty Negotiations	25

5	Prosecution	26
5.1	Introduction	26
5.2	Objects of Prosecution	26
5.3	Who Decides to Prosecute?	27
5.4	Discretion	27
5.5	Deciding Whether to Prosecute	27
5.6	Prima facie Case	28
5.7	Prospects of Conviction	28
5.8	The Prospects of Conviction – Factors to Take Into Account	28
5.9	The Public Interest	30
5.10	Public Interest Factors in Favour of Prosecuting	30
5.11	Public Interest Factors Against Prosecuting	31
5.12	Fairness, Impartiality and Transparency	32
6	Plea Negotiation	33
6.1	Should an Offer to Plead Guilty be Accepted?	33
7	Actions in the State Administrative Tribunal.....	34
7.1	Disciplinary Action - Introduction.....	34
7.2	Objects of Disciplinary Action	34
7.3	Who decides to commence disciplinary action?	35
7.4	Discretion	35
7.5	Deciding Whether to Commence Disciplinary Action.....	35
7.6	Prima facie Case.....	36
7.7	Prospects of Sanction being imposed.....	36
7.8	The Prospects of Disciplinary Sanction – Factors to Take Into Account	37
7.9	The Public Interest.....	38
7.10	Public Interest Factors in Favour of Commencing Disciplinary Action.....	38
7.11	Public Interest Factors Against Commencing Disciplinary Action.....	39
7.12	Fairness, Impartiality and Transparency	40
7.13	Non-Disciplinary Action	41
8	Appeals	42
8.1	The Appeals Process.....	42
8.2	Factors Relating to Pursuing or Defending Appeals	42

1 Explanatory Notes

1.1 Organisational Background

Consumer Protection is a division of the Department of Commerce (**the Department**), the State Government department responsible for consumer protection, energy and workplace safety, labour relations, science and innovation, corporate services and the Office of Director General.

The mission of the Consumer Protection Division (**Consumer Protection**) of the Department is to promote consumer protection and fair trading in Western Australia.

The key responsibilities of Consumer Protection include providing information and assistance to consumers and traders about their rights and responsibilities; helping consumers resolve disputes with traders; monitoring compliance with consumer protection legislation; investigating complaints about unfair trading practices; prosecution and other enforcement action against unscrupulous traders; regulating and licensing a range of occupational activities and developing, reviewing and amending legislation that protects consumers.

This policy applies to every State public officer who is empowered to carry out functions with respect to the legislation administered by Consumer Protection. Such officers include those whose duties include carrying out, supervising, co-ordinating, managing or directing enforcement action.

1.2 Statement on Consumer Protection Position on Enforcement Generally

In summary, Consumer Protection's policy position regarding enforcement is as follows:

1.2a Consumer Protection seeks to encourage compliance where possible. Compliance will generally be achieved by education;

1.2b For more serious matters and where poor attitudes to compliance are manifest, more formal enforcement will be required. However Consumer Protection will always

1.1a.i seek a response proportionate to the degree of harm caused;

1.1a.ii have regard to the public interest and the cost/benefit test.

1.2c In making decisions, Consumer Protection is bound by its Code of Ethics and Code of Conduct: in particular Consumer Protection will act fairly.

1.3 When did this Enforcement and Prosecution Policy Come into Operation?

This Policy came into effect on September 2011.

1.4 What does this Enforcement and Prosecution Policy Achieve?

This Policy promotes enforcement action to achieve compliance in an appropriate, consistent, transparent and measurable manner in line with the purposes of the legislation that Consumer Protection administers (**Consumer Protection legislation**).

1.5 What is the Purpose of this Enforcement and Prosecution Policy?

The purpose of this Policy is to:

- 1.5a provide general information to the public about Consumer Protection's task of enforcement including information about;
 - i. the range of enforcement methods available to Consumer Protection;
 - ii. Consumer Protection's statutory powers regarding enforcement;
 - iii. the manner in which those powers may be exercised by Consumer Protection's officers;
- 1.5b provide a guide to Consumer Protection officers about Consumer Protection's task of enforcement including guidance about;
 - 1.1a.iii whether or not enforcement action should be taken in a given case
 - 1.1a.iv against whom enforcement action should be taken in a given case; and
 - 1.1a.v the most appropriate enforcement method to use in a given case, including the exercise of prosecutorial discretion.
- 1.5c foster measured, consistent and integrated enforcement action across all sections of Consumer Protection;
- 1.5d promote among the public and the business sector an awareness of Consumer Protection's enforcement capability; and
- 1.5e promote a business sector culture of consultation and cooperation with Consumer Protection.

1.6 To Whom does this Enforcement and Prosecution Policy Relate?

This Policy relates to Consumer Protection's dealings with the public as a whole in respect of the matters that it regulates in this State. This Policy is relevant to the community as a whole including:

- 1.6a consumers;
- 1.6b complainants to Consumer Protection about contraventions of Consumer Protection legislation;
- 1.6c persons suspected of contraventions of Consumer Protection legislation;
- 1.6d persons engaging in occupational, trade, commercial and business enterprises, whether regulated or unregulated;
- 1.6e Federal, State and local government agencies;
- 1.6f non-government organisations and interest groups;
- 1.6g legal practitioners; and
- 1.6h the Department/Consumer Protection staff.

1.7 What is the Scope of this Enforcement and Prosecution Policy?

The scope of this policy covers all legislation administered by Consumer Protection.. It includes but is not limited to the legislation listed at:

http://www.slp.wa.gov.au/legislation/agency.nsf/docep_menu.htmlx&category=1

1.8 What is the Legal Status of this Enforcement and Prosecution Policy?

This Policy provides general information and guidance about Consumer Protection's approach to enforcement and prosecution. This policy:

- 1.8a is not legally binding on Consumer Protection, any other division within The Department, The Department, other organisations (such as other government agencies) or statutory bodies empowered to regulate occupations in this State;
- 1.8b is general in nature and does not exhaustively address all the specific statutory limitations and considerations that may be relevant under Consumer Protection legislation;

1.8c does not confine, restrain or limit the discretion of Consumer Protection to take any action; and

1.8d is not intended as a substitute for legal advice, legal processes or the professional judgment of Consumer Protection's officers.

Individuals/corporations/others should obtain independent legal advice on their legal rights and obligations.

2 Enforcement

2.1 Principles of Enforcement

Enforcement action will be taken to meet consumer protection and fair trading objectives and for any other objects under Consumer Protection legislation.

As indicated in paragraph 1.2 above, compliance will frequently be achieved through education. Enforcement action will usually only be required for serious or repetitive breaches, or where poor attitudes have been shown to compliance. This reflects the Consumer Protection's overall Compliance Strategy¹. This section of the Policy deals with the enforcement methods available to Consumer Protection.

A range of enforcement methods are used by Consumer Protection. The choice of enforcement method will be used when it is appropriate to do so having regard to the particular circumstances of the case.

Enforcement will be carried out in accordance with the legislative powers and obligations conferred on Consumer Protection officers under Consumer Protection legislation.

Enforcement action will be taken in proportion to the level of seriousness of the alleged contravention or offence. Factors to consider in determining such seriousness include the impact of the misconduct on the public, the conduct of the parties (including repetition) and any implications for Consumer Protection in administering the legislation.

Decisions on enforcement action will be taken in a timely fashion. However, flexibility will be retained to be able to respond to additional information or changes in circumstance.

In exercising enforcement powers, Consumer Protection will have regard to desired outcomes. Factors to consider when determining such outcomes include, the benefit to consumers and to fair trading, the prospect of successful litigation outcomes (e.g. the likelihood of success in court or tribunal proceedings), deterrence, maintaining appropriate standards in a particular occupation, cost effectiveness, timeliness and the impact on Consumer Protection in terms of its ability to properly administer its legislation.

Consumer Protection legislation and enforcement will be applied consistently across all sectors of the community, business and government.

2.2 Enforcement Under the ACL

Additional considerations in relation to enforcement apply in respect of the Australian Consumer Law (**ACL**). The following documents are attached:

¹ See further "Compliance Strategy" brochure produced by the Department of Consumer and Employment Protection dated October 2009

Schedule 1	Dispute Resolution and Compliance & Enforcement Protocol
Schedule 2	Compliance and Enforcement – How regulators enforce the Australian Consumer Law

The document at Schedule 1 gives guidance on how state ACL regulators will co-operate when enforcing serious breaches of the ACL across multiple states.

The document at Schedule 2 gives guidance on how compliance and enforcement issues should be approached under the ACL. Essentially the approach mirrors that adopted by Consumer Protection.

2.3 Discretion

Consumer Protection's officers exercise a wide discretion when deciding whether to undertake enforcement action and the most appropriate method of enforcement action to take in a given case. The matters that Consumer Protection officers take into account when exercising their discretion include:

- 2.3a the seriousness of the alleged contravention;
- 2.3b the appropriate person or authority to pursue;
- 2.3c the public interest factors for and against undertaking enforcement action;
- 2.3d the resources available;
- 2.3e the prospect of the proposed enforcement action being successful; and
- 2.3f the ramifications of withdrawing enforcement action should the need to do so arise.
- 2.3g whether another ACL regulator is currently undertaking (or planning to undertake) enforcement action against an entity. This is done by checking the shared information platform ACLink.² If another ACL regulator is undertaking enforcement action, then agencies should confer with each other.

(Please see Dispute Resolution and Compliance & Enforcement Protocol for further information regarding parallel enforcement action, lead ACL regulator, and progress and outcome reporting.)

2.4 Co-operation

Consumer Protection will take into account the level of co-operation of the alleged offender before deciding what type of enforcement action to take. Regardless of the level of co-operation and voluntary disclosure, the appropriateness of court action will still be considered.

2.5 Choosing the Appropriate Person to Pursue

In determining the appropriate person or persons to be the subject of enforcement action, Consumer Protection will consider a number of factors concerning the person or persons involved in the offence/contravention (**contravention**). In that regard the following factors (expressed in question form) will be considered:

- 2.5a Who formed the intention and/or made the plan resulting in the contravention?
- 2.5b Who created the material circumstances leading to the contravention?
- 2.5c Who did the act and/or made the omission resulting in the contravention?
- 2.5d If several people were involved in the breach, what was the degree of responsibility of each person in relation to the contravention?
- 2.5e Has the person or persons previously contravened Consumer Protection or similar legislation?
- 2.5f Was the contravention attributable to any dishonesty on a person's part?
- 2.5g Is the person or are the persons able to be located?
- 2.5h Where Consumer Protection legislation imposes liability on a superior officer (e.g. a corporation, director, executive officer or a business owner) for the contravention of a subordinate officer (e.g. an employee), did the superior officer know or ought reasonably to have known about the conduct of the subordinate resulting in the contravention?
- 2.5i The likely effectiveness of any court orders made against the responsible person (e.g. if a corporation has been wound up it may not be possible to proceed).

It may not always be appropriate to take enforcement action against each and every person involved in a contravention. However, in many cases where more than one person combines to contravene Consumer Protection legislation it may be appropriate to take enforcement action against all of the relevant people.

Although it is possible in the exercise of the prosecutorial discretion not to take enforcement action against a person who has committed an offence, it is not within the power of the Department or Consumer Protection to grant a person immunity from prosecution.

The power to grant immunity from prosecution is an aspect of the prerogative power of the Crown and is exercisable by the Attorney-General on the Crown's behalf. This

² Dispute Resolution and Compliance & Enforcement Protocol.

power has also been expressly conferred upon the Director of Public Prosecutions (**DPP**) pursuant to section 20(2)(c) of the *Director of Public Prosecutions Act 1991*.

The considerations relevant to a grant of immunity by the DPP are set out at [45] to [52] of the *DPP Statement of Prosecution Policy and Guidelines 2005* (**Guidelines**).

Were the Department to consider that in a particular case it would be appropriate to grant a person immunity from prosecution, the matter should be put to the DPP. The Department should not seek the DPP's approval for such an arrangement unless it considers that the factors set out in the Guidelines are met and that there are strong public interest reasons for seeking the DPP's approval.

2.6 Choosing the Appropriate Enforcement Action

When identifying the appropriate enforcement action to take in a given case, Consumer Protection will take into account a number of factors including:

- 2.6a the enforcement method that is most likely to achieve the best outcome in terms of consumer protection, fair trade and/or which will best promote any other objects of Consumer Protection legislation;
- 2.6b the enforcement measures that are necessary to ensure compliance with the requirements of Consumer Protection legislation;
- 2.6c the impact or potential impact of the contravention on consumer protection and fair trade including its impact on the community as a whole; consumers; traders; the maintenance of acceptable standards within an occupation or trade and the Consumer Protection's ability to administer its legislation;
- 2.6d the level of harm that the misconduct causes to victims after taking into account factors such as their age, health (including any disability or impairment), language, level of commercial experience, the amount of loss and damage suffered and the number of people affected or potentially affected by the contravention;
- 2.6e the extent and duration of the loss and/or damage (or potential thereof) to victims;
- 2.6f the level of cooperation given to the Consumer Protection by alleged offenders when responding to informal requests, lawful directions or prescribed notices;
- 2.6g the level of willingness by alleged offenders to commit to appropriate remedial action;

- 2.6h voluntary action by alleged offenders to mitigate any harm to consumers and/or fair trade and to put into place mechanisms to prevent any recurrence of the contravention;
- 2.6i the previous history of alleged offenders in complying with Consumer Protection or similar legislation, and the type and frequency of contraventions against that legislation;
- 2.6j whether alleged offenders have made false or misleading statements to Consumer Protection during the investigation;
- 2.6k whether or not an alleged offender is a corporation;
- 2.6l the degree, if any, of dishonesty involved;
- 2.6m the culpability of the alleged offender, including any mitigating or aggravating circumstances;
- 2.6n the public interest, including the need for specific and general deterrence;
- 2.6o legal precedents;
- 2.6p statutory time limits; and
- 2.6q justice

3. Available Enforcement Methods

Each statute administered by Consumer Protection has its own range of enforcement methods. Enforcement methods that are commonly found in Consumer Protection legislation are as follows:

3.1 Formal Warnings

A formal or administrative warning is a written notice sent or given to a person who has contravened Consumer Protection legislation, warning that person that such contravention has been recorded on the Consumer Protection database and may be taken into consideration in any future investigation and in any future decision concerning prosecution.

A decision to issue a formal warning should be made only if the following preconditions have been met:

- 3.1a There must be sufficient evidence to establish a prima facie case for a contravention.
- 3.1b The allegation of the contravention must be put to the person and the person must be afforded an opportunity to respond to the allegation.
- 3.1c The public interest must be protected sufficiently by the issuing of a formal warning.

A draft of the formal warning letter shall be prepared by the officer responsible for investigating the matter and must be approved and signed by the manager (or similar office holder).

Formal warning letters are to contain the following elements:

- 3.1d A summary of the essence of the alleged contravention sufficient to be understood and responded to;
- 3.1e An extract of the relevant legislation that has allegedly been contravened.

A formal warning will be recorded in the Complaints and Licensing System (**CALS**). Any officer who arranges the issue of a formal warning will ensure that a copy of that warning is placed in CALS and appropriate closure codes are recorded against the CALS record.

Information contained in CALS is for internal use only and is not to be disclosed to any member of the public, unless by compulsion of law.

This part of the Policy is subject to the legal requirements imposed on Consumer Protection by the *Freedom of Information Act 1992*.

Examples of the circumstances where it may be appropriate to give a formal warning are as follows:

- 3.1f the level of seriousness of the act or omission giving rise to the contravention is relatively low (e.g. is trivial, minor or technical);
- 3.1g there is little or no adverse impact on consumers and/or fair trading;
- 3.1h where a prima facie case exists but there is no reasonable prospect of conviction
- 3.1i the matter is one that can be easily rectified; and

- 3.1j the recipient is co-operative and demonstrates a willingness to put right and comply with the legislative requirements the subject of the warning.

3.2 Infringement Notices

An Infringement Notice is a written notice of an alleged offence given to a person under the relevant provisions of an Act administered by Consumer Protection.

Infringement Notices require alleged offenders to pay a fine or elect to have the matter heard in court.

Payment of a fine is not to be regarded as an admission of liability for the purpose of any civil claim, action or proceeding arising out of the same occurrence.

Fine payments do not result in criminal convictions being recorded against alleged offenders.

However, if the alleged offender elects to have the matter heard in court or fails to pay the fine (and the Infringement Notice is not withdrawn by the Consumer Protection) the matter may be prosecuted and heard in the Magistrates Court.

An Infringement Notice will be issued in accordance with the requirements of the relevant Act. Infringement Notices are to be issued promptly. Most infringement notices are issued under the *Criminal Procedure Act 2004 (WA)* which requires infringement notices to be **served** on the person **within 21 days** of the alleged offence.

Infringement Notices cannot be issued nor allowed to proceed unless:

- 3.2a the legislation prescribes that an Infringement Notice may be issued for the alleged offence;
- 3.2b there is a sufficient basis for a belief that the offence was committed (but need not require comprehensive legal advice); and

It may be appropriate to issue an Infringement Notice when:

- 3.2c The alleged offence is a “one off” occurrence, having no or little impact on consumers and fair trade and can be easily remedied;
- 3.2d The alleged offence is relatively technical , minor or trivial;
- 3.2e The alleged offence resulted from an inadvertent oversight having regard to the usual practices of the business; and/or
- 3.2f The Infringement Notice is likely to deter the recipient from engaging in similar misconduct again.

Factors indicating that it may be inappropriate to issue an Infringement Notice include:

- 3.2g the act or omission giving rise to the alleged offence is of itself serious (e.g. dishonesty and deliberately taking advantage of vulnerable consumers);
- 3.2h the alleged offence has a significant impact on consumer/s, fair trading and the public;
- 3.2i the extent of the loss, damage and harm suffered by persons and/or the number of people affected by the alleged offence cannot be assessed immediately;
- 3.2j the alleged offence is continuing and the alleged offender lacks any willingness or ability to stop or to remedy it quickly;
- 3.2k multiple similar contraventions of Consumer Protection legislation are occurring or have occurred previously; or
- 3.2l another government agency has issued a notice for the same or similar misconduct in the same period (e.g. ACCC).

3.3 Naming

Pursuant to s57 of the *Fair Trading Act 2010 (FTA)* the Commissioner may publish, in any form, a statement identifying and giving warnings or information about (among other things) dangerous or unsatisfactory goods and/or services, suppliers of such goods and/or services and unfair business practices.

Pursuant to s.223 of the ACL, the Commissioner has the power to issue a public warning notice about the conduct of a trader.

Further information about naming can be found in Consumer Protection's Policy on the Public Naming of Traders³

Naming is commonly used when the public or section/s of the public need to be informed immediately about a trader's contravention to protect them from personal or financial harm.

As an enforcement method, naming can also be used to:

- 3.3a influence problem traders to remedy their unfair practices or comply with specific legislative protections;

3

http://intranet.home.docep.wa.gov.au/Intranet/Divisions/Consumer_Protection/PDF/Policy_on_the_Public.pdf

- 3.3b deter other traders from adopting such practices;
- 3.3c warn the public about particular unsatisfactory traders; or
- 3.3d provide information to members of the public about ways to deal with problem traders and how to obtain any redress to which they may be entitled.

Naming may occur in media releases, media interviews, Annual Reports, Parliamentary statements or responses to the general public.

All decisions about naming are the responsibility of the Commissioner. Consumer Protection officers must not make any statement to the media or public about particular traders who have not already been named unless expressly authorised to do so by the Commissioner.

When deciding whether to name a person, the public interest in favour of protecting members of the public from harm needs to be weighed against the public interest in favour of protecting the trader from being named unfairly.

Some of the factors to consider when deciding whether or not to name a trader may include:

- 3.3e Does the conduct endanger the health or safety of the public?
- 3.3f Is there an imminent danger of significant loss or detriment to members of the public?
- 3.3g Has the trader been the subject of adverse naming by a consumer protection agency in another jurisdiction?
- 3.3h If yes to sub-paragraph 3.4g, is there evidence indicating the trader operates in WA in the same or similar manner?
- 3.3i Has the trader been given the opportunity to respond to the allegations made against him/her/it?
- 3.3j Are legal proceedings under way or contemplated? If so, will naming prejudice those proceedings?
- 3.3k Do the statements made when naming the trader derive from sources of information that are correct?
- 3.3l Do the statements accurately reflect that information?
- 3.3m Are the statements made in good faith and are they free from bias?

- 3.3n Prior to seeking the Commissioner's authorisation:
- 3.3o has the relevant officer obtained legal advice; and
- 3.3p has the Commissioner's approval been obtained by means of a written recommendation approved by the relevant director?
- 3.3q Has the shared information platform ACLink been checked to determine if any other ACL regulator is currently undertaking or planning to undertake any enforcement action?⁴

3.4 Industry-wide Warning

As an alternative to naming traders, consideration may also be given to industry-wide warnings. Information relating to industry-wide warnings can be found in:

- i. The Department's Media Policy at:
http://intranet.home.docep.wa.gov.au/intranet/Divisions/Office_of_the_Direct/Communications/Communications_policies.html and
- ii. Consumer Protection's Policy on the Public Naming of Traders at:
http://intranet.home.docep.wa.gov.au/Intranet/Divisions/Consumer_Protection/PDF/Policy_on_the_Public.pdf

3.5 Representative Action

The Commissioner may institute, defend or take over the conduct of legal proceedings on behalf of consumers pursuant to the following provisions:

- FTA (section 48, section 58);
- ACL (section 149);
- *Consumer Affairs Act 1971* (section 18);
- *Fair Trading Act 1987* (section 47);
- *Residential Parks (Long-stay Tenants) Act 2006* (section 79);
- *Residential Tenancies Act 1987* (section 9);
- *Retirement Villages Act 1992* (section 9);

Not all the provisions are worded in the same way but can globally be described as follows:

⁴ Public Naming document

- 3.5a the Commissioner may institute, defend or take over the conduct of legal proceedings on behalf of consumers (or on behalf of a business under section 58 of the FTA);
- 3.5b before doing so, the Commissioner must be satisfied that:
 - i. there is a cause of action;
 - ii. it is in the public interest to take part in the proceedings
- 3.5c the consumer (or business) must consent in writing before the Commissioner takes representative action;
- 3.5d the Minister must consent in writing before the Commissioner takes representative action (except in the *Retirement Villages Act 1992* and *ACL* where this is not a requirement).

It should also be noted that:

- 3.5e the amount involved must not exceed the sum prescribed in section 58 of the FTA and section 18 of the *Consumer Affairs Act 1971* for actions under these Acts;
- 3.5f there are time limits for bringing actions in cases where a long-stay agreement or a residential tenancy agreement has been terminated.

Some of the factors to consider when considering representative action may include:

- 3.5g whether there are good prospects of success;
- 3.5h whether the behaviour complained of is particularly unfair;
- 3.5i** whether more than one consumer has been/may be affected by the behaviour;
- 3.5j whether the behaviour complained of has wider ramifications for the public as a whole;

- 3.5k whether the consumer has a special disability or vulnerability e.g. non-English speaking, elderly;
- 3.5l whether the consumer is impecunious;
- 3.5m whether the consumer (or business) has taken/is able to take reasonable steps to protect their own interests;
- 3.5n whether the costs and resources necessary to proceed with the matter would be disproportionate to the sums involved in the litigation;
- 3.5o whether there are other ways in which the consumer (or business) can be assisted besides taking representative action;
- 3.5p the willingness of the consumer (or business) to co-operate with the proceedings.

3.6 Undertakings

Section 218 of the ACL provides that a person may give the Commissioner a written undertaking to do or refrain from doing certain specified acts. If the undertaking is breached, the Commissioner may apply to court for an order that the person comply with their undertaking and/or pay compensation.

An undertaking will usually be sought:

- 3.6a where the trader is likely to be co-operative;
- 3.6b where an undertaking on its own is likely to resolve compliance issues;
- 3.6c as a preparatory step before applying to court for a formal injunction

3.7 Injunction

Part VII of the FTA and Chapter 5, Division 2 of the ACL provide (among other things) for injunctions to be granted, on the application of the Commissioner, the Minister or any other person, by the District or Supreme Court against traders who act in a manner that contravenes or is likely to contravene:

- 3.7a FTA/ACL provision/s; or
- 3.7b non FTA provisions provided that those provisions are administered by the Commissioner.

The Commissioner may seek an injunction where it is considered in the public interest to do so.

A trader who is the subject of an injunction must stop acting or act in the manner that the court determines.

The orders which the court may make include:

- 3.7c An order requiring a person to disclose to the public specified information; or
- 3.7d An order requiring a person to publish an advertisement containing specified information.

Injunctions under the FTA may be granted in civil proceedings and are granted at the discretion of the court.

Usually a letter of demand, requiring an undertaking from the trader or other party from whom an injunction is sought, will be sent before an application for injunction is made to the court.

A court will not grant an injunction if, in all the circumstances, an order for common law damages is appropriate and the party against whom the injunction is sought will be able to pay them.

Additional to or instead of granting an injunction, the District or Supreme Court may order the trader to compensate the consumer (e.g. a trader may be ordered to compensate a consumer for the cost of preventing or reducing the extent of such loss or damage). The Court may also make a variety of other orders e.g. declare a contract to be void.

Factors to take into account when considering whether to seek injunctive relief include:

- 3.7e Is the case sufficiently serious to seek injunctive relief from the District or Supreme Court?
- 3.7f What is the strength or weakness of the case against the trader and is the case likely to succeed?
- 3.7g What are the adverse effects of an injunction not being granted on the Commissioner, the public or a section of the public?
- 3.7h Is it in the public interest to seek an injunction?
- 3.7i What prejudice is the trader likely to suffer if the injunction is granted?
- 3.7j Has too much time elapsed since the contravention occurred so that the granting of an injunction would have little or no effect?
- 3.7k Is there a need to act urgently?

3.8 Pecuniary Penalties

Pecuniary penalties are dealt with more comprehensively in a separate part of this Policy (see Section 4). Pecuniary penalty action is to be considered equally together with all other enforcement methods in line with the principles outlined in this Policy.

3.9 Prosecution

Prosecution is dealt with more comprehensively in a separate part of this Policy (see Section 5). Prosecution is to be considered equally together with all other enforcement methods in line with the principles outlined in this Policy.

3.10 Actions in the State Administrative Tribunal

Actions in the State Administrative Tribunal, including disciplinary action, are dealt with more comprehensively in a separate part of this Policy (see below). Action in the State Administrative Tribunal, including disciplinary action, is to be considered equally together with all other enforcement methods in line with the principles outlined in this Policy.

4 Pecuniary Penalties Under The ACL

4.1 Introduction⁵

Section 224 of the ACL provides that the Commissioner may seek a civil pecuniary penalty for breach of various provisions of the ACL e.g. Part 3.1 which deals with unfair practices.

A pecuniary penalty action already underway is liable to be stayed if a criminal prosecution is subsequently commenced in respect of the same conduct. However, criminal proceedings may be started against a person even if a pecuniary penalty has already been obtained in respect of conduct which is substantially the same.

It is possible to commence a pecuniary penalty action after an unsuccessful criminal prosecution.

In considering whether to order a pecuniary penalty, the court must give preference to compensation for victims of the contravention.

4.2 Objects of Pecuniary Penalties

The pecuniary penalty is one of the enforcement methods used to protect consumers and promote fair trading.

Generally, decisions to seek a pecuniary penalty are made in cases where the misconduct giving rise to the offence is serious (or has serious consequences) and/or in cases where Consumer Protection wishes to target an undesirable practice.

The aims of seeking a pecuniary penalty include:

- 4.2a enforcing the ACL;
- 4.2b protecting consumers and people engaged in a trade or occupation from loss, harm, injury or damage;
- 4.2c satisfying the public interest that the ACL is being properly enforced;
- 4.2d bringing justice to those who breach the ACL;
- 4.2e providing a purely financial deterrent to conduct by a body corporate;

⁵ Draft Pecuniary Penalty Guide

- 4.2f providing an expeditious way of compensating victims of contraventions of the ACL (since compensation can be sought as part of a pecuniary penalty action); and
- 4.2g acting as a deterrent to others who might consider breaching the same or similar provisions.

4.3 Who Decides to Seek a Pecuniary Penalty?

The Commissioner exercises the discretion about whether to seek a pecuniary penalty. For the purposes of this Policy, the Commissioner will be referred to as the **Decision Maker**.

4.4 Discretion

The Decision Maker has a wide discretion when deciding whether to seek a pecuniary penalty. However, a decision to seek a pecuniary penalty has a significant impact on a person because that person becomes subject to court action and the costs that entails. Accordingly, Decision Makers must exercise their discretion reasonably and with sufficient care. In that regard, Decision Makers cannot ignore factors that are relevant to making their decision and they cannot consider factors that are irrelevant to making their decision.

4.5 Deciding Whether to Seek a Pecuniary Penalty

Generally, Decision Makers will consider many factors before deciding whether or not to seek a pecuniary penalty. While the Decision Maker must apply their own mind to the decision, they may have regard to the views of others e.g. Consumer Protection officers and lawyers before making the decision.

The factors that the Decision Maker may take into account when deciding whether to seek a pecuniary penalty include but are not limited to those described at paragraphs 4.6 to 4.12 below.

4.6 Prima Facie Case

The Decision Maker must be reasonably satisfied that the available material raises a “*prima facie*” case against the person suspected of committing a contravention of a provision of the ACL, and a reasonable prospect of success in the action..

Whether a *prima facie* case exists is a question of law. It involves determining, on the available evidence, whether a court is able to find that each and every element of the

provision is proved on the balance of probabilities. It should be noted that, as a rule, all available witnesses ought to be called in order to make out a *prima facie* case.

A pecuniary penalty must not be sought if the evidence does not support a *prima facie* case, and a reasonable prospect of success.

A pecuniary penalty action must be withdrawn if the evidence ceases to support a *prima facie* case and reasonable prospect of success.

That is not to say that a case must be withdrawn in the natural ebb and flow of a trial, but ought to be withdrawn if some compelling matter arises which makes the action no longer viable.

4.7 Prospects of Success

Even if a *prima facie* case exists, a pecuniary penalty must not be sought unless there are reasonable prospects of success.

Whether a reasonable prospect of success in the action exists will flow from an enquiry into matters such as whether any relevant defences might be made out, whether the credibility of any witnesses might undermine the weight of the witness' evidence, whether any difficulties with the investigation or documentary evidence might restrict the ability to rely on evidence.

However, if further enquiries have a reasonable chance of remedying a deficiency in the investigation then it may be appropriate to proceed. Mostly, errors in the course of an investigation should not be fatal.

The Decision Maker must be objective and dispassionate when considering if there is are reasonable prospects of success. Sometimes such consideration is difficult. However, it is always to be remembered that it is the Court's role (not Consumer Protection's) to determine disputed issues of fact.

The Decision Maker will generally take legal advice and have regard to the corporate knowledge and experience of other Consumer Protection officers when considering the prospects of success.

4.8 Prospects of Success – Factors to Take Into Account

The factors to take into account when considering the prospects of success include:

- 4.8a Whether there is sufficient evidence to prove each and every element of the alleged offence to the evidential standard of proof on the balance of probabilities;
- 4.8b The availability and reliability of witnesses;

- 4.8c Whether the testimony of witnesses will be sufficiently credible, cogent and compelling. Factors to consider include whether a witness:
- i. has an adequate recollection of events;
 - ii. is adversely affected by a situation of disadvantage (e.g. language, hearing, sight, impaired mental faculties etc) making it unlikely for the testimony to advance the case;
 - iii. has made prior inconsistent statements relevant to the matter;
 - iv. is hostile to the case;
 - v. has any relevant prior convictions, including for dishonesty
 - vi. has any interest in the outcome, or has any relationship or association with an interested person
and
 - vii. will testify about an important aspect of the case (e.g. the identity of the alleged offender) that conflicts with the testimony of another witness;
- 4.8d Whether any purported admission or confessional statement made by the defendant meets all of the evidential requirements necessary for the court to accept it as evidence (e.g. the voluntariness or otherwise of the admission);
- 4.8e The likelihood of a court exercising its discretion to exclude any important evidence on the grounds that it is inadmissible (e.g. it was obtained unfairly or illegally);
- 4.8f Any defences that are open to the defendant. In that regard, questions arise as to whether the information/material disclosed:
- i. substantiates or is likely to substantiate a purported defence; or
 - ii. amounts to mere assertions that are in the Decision Maker's opinion unable to form the basis of a credible defence;

Evaluation of the prospects of conviction will generally have no regard to a defence that is based on:

- i. unsubstantiated assertions of fact;
- ii. information that the Decision Maker believes or is advised will not be admissible as evidence in court; and
- iii. witnesses who are unlikely to testify in a way that is credible, cogent or compelling.

4.9 The Public Interest

Even if a *prima facie* case exists and the prospects of success are good, action for a pecuniary penalty must not be commenced unless it is in the public interest.

Deciding whether an action is in the public interest involves:

- 4.9a considering each public interest factor in favour of the action;
- 4.9b considering each public interest factor against the action;
- 4.9c weighing up the factors in favour of the action and the factors against the action; and
- 4.9d deciding if the public interest factors in favour of the action outweigh the public interest factors against.

Appropriate care and judgment must be given when making these decisions.

4.10 Public Interest Factors In Favour of Seeking a Pecuniary Penalty

Public interest factors favouring an action for a pecuniary penalty include:

- 4.10a maintaining public confidence in State agencies;
- 4.10b giving effect to the objects of Consumer Protection legislation;
- 4.10c ensuring that the ACL is properly administered and enforced;
- 4.10d taking appropriate action that reflects the seriousness of the misconduct giving rise to an alleged offence;
- 4.10e protecting consumers and people in a trade or occupation from loss, harm, injury or damage;
- 4.10f prior behaviour/criminal convictions of the alleged offender relevant to the alleged offence;
- 4.10g bringing justice to those who contravene the ACL;
- 4.10h providing an expeditious way of compensating victims of crime; and
- 4.10i deterring others who might consider committing the same or a similar contravention.

4.11 Public Interest Factors Against Seeking a Pecuniary Penalty

Public interest factors which may render a pecuniary penalty inappropriate include:

- 4.11a the trivial or technical nature of the alleged contravention in the circumstances;
- 4.11b the poor state of health, disability or age of the victim, proposed defendant or witness;
- 4.11c the lack of previous contravening behaviour/criminal convictions relevant to the alleged contravention;
relative to any other persons involved in the misconduct;

4.12 Pecuniary Penalty or Prosecution?

Some contraventions of the ACL may be the subject of either a criminal prosecution or a pecuniary penalty.

When considering which action is appropriate, thought must be given to the criminality involved in the contravention.

Factors in favour of prosecution may include cases where there is:

- 4.12a a strong element of serious culpability that merits a criminal conviction;
- 4.12b contempt or disregard for the law;
- 4.12c behaviour that has had significant adverse impact e.g. on one or more members of the public;
- 4.12d a pattern of previous contraventions;
- 4.12e an element of dishonesty or deception.

If injunctive relief or other civil remedies are being sought, then it may be simpler and cheaper to seek a pecuniary penalty in the context of that action rather than a criminal sanction in a separate action.

Generally, civil penalty actions would be expected to be more expensive and to take longer than criminal prosecutions, but would be easier to prove.

4.13 Fairness, Impartiality and Transparency

It is in the public interest that pecuniary penalty actions be conducted fairly and impartially. An action which is conducted for improper purposes, capriciously or oppressively is not in the public interest. Accordingly, the following matters are not to be taken into account in evaluating the public interest:

- 4.13a the race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the proposed defendant;
- 4.13b the personal feelings that officers involved in the matter have toward the proposed defendant; and
- 4.13c the possible political, personal or professional consequences of the exercise of the discretion.

4.14 Penalty Negotiations

As civil penalty proceedings are civil proceedings between parties, just like other civil proceedings, they can be settled. However, because civil penalty proceedings are punitive and involve elements of deterrent to the public at large, the discretion as to the suitability of penalties is not left entirely to the parties.

The law in this area is that the courts will give effect to parties' agreements on penalties provided the amount falls within a "range" of penalties which the court would approve. In other words, provided the agreement is not clearly too low, or clearly too high, the court will not interfere with the penalties agreed.

5 Prosecution

5.1 Introduction

Prosecution is one of the enforcement methods that may be used when there are reasonable grounds for suspecting that an offence has been committed against Consumer Protection legislation. Prosecution is to be considered equally together with all other enforcement methods in line with the principles outlined in this Policy.

The majority of criminal prosecutions in Western Australia commence in the State Magistrates' Court with the process set out in the *Criminal Procedures Act 2004*. A prosecution commences when a "Prosecution Notice" is signed alleging that an offence has been committed against Consumer Protection legislation and a "Court Hearing Notice" or summons (requiring the Accused to appear at court) is issued.

5.2 Objects of Prosecution

Prosecution is one of the enforcement methods used to protect consumers, promote fair trading and for any other purpose or object under Consumer Protection legislation.

Generally, decisions to prosecute are made in cases where the misconduct giving rise to the offence is serious (or has serious consequences) and/or in cases where Consumer Protection wishes to target an undesirable practice in a particular trade or occupation.

The objects of prosecution include:

- 5.2a enforcing Consumer Protection legislation;
- 5.2b protecting consumers and people engaged in a trade or occupation from loss, harm, injury or damage;
- 5.2c satisfying the public interest that Consumer Protection legislation is being properly enforced;
- 5.2d bringing justice to those who commit offences and punishing those who deserve punishment for their offences;
- 5.2e providing an expeditious way of compensating victims of crime (since compensation can be sought in a prosecution action); and
- 5.2f acting as a deterrent to others who might consider committing the same or a similar offence.

Prosecution action is taken only when it is appropriate to do so in a particular case and is not to be used only as a last resort.

5.3 Who Decides to Prosecute?

The power to make decisions about whether a person should be prosecuted (the power to prosecute) is exercised by the person holding the office/position described in the applicable Consumer Protection statute. The applicable statute may also provide for the superior officer (e.g. the Commissioner) to authorise or to delegate to the holder of a subordinate position the power to make such decisions. For example, s92 of the FTA provides that the Commissioner or a person authorised by the Commissioner may institute prosecutions. In addition, the legislation may allow any Consumer Protection officer to institute proceedings subject to the written consent of the Commissioner, delegate or authorised person.

For the purposes of this Policy the person who is authorised to prosecute will be referred to as the **Decision Maker**.

Every authorisation and delegation must be recorded in writing.

Consumer Protection staff should check with their supervisors and if necessary Consumer Protection's Legal Unit to ensure that the person who decides whether to prosecute is validly able to do so.

5.4 Discretion

The Decision Maker has a wide discretion when deciding whether to prosecute. However, a decision to prosecute has a significant impact on an accused person because that person becomes subject to the requirements (and decisions) imposed under the criminal justice system. Accordingly, Decision Makers must exercise prosecutorial discretion reasonably and with sufficient care. In that regard, Decision Makers cannot ignore factors that are relevant to making their decision and they cannot consider factors that are irrelevant to making their decision.

5.5 Deciding Whether to Prosecute

Generally, Decision Makers will consider many factors before deciding whether or not to prosecute. While the particular Decision Maker must make the decision, they may have regard to the views of others e.g. Consumer Protection officers and lawyers before making the decision.

The factors that the Decision Maker may take into account when deciding whether to prosecute include but are not limited to those described at paragraphs 5.6 to 5.12 below.

5.6 Prima facie Case

The Decision Maker must be reasonably satisfied that the available material raises a “*prima facie*” case against the person suspected of committing an offence, and a reasonable prospect of conviction in the action.

Whether a *prima facie* case exists is a question of law. It involves determining, on the available evidence, whether a court is able to find that each and every element of the offence is proved beyond a reasonable doubt. .

A person must not be prosecuted if the evidence does not support a *prima facie* case and a reasonable prospect of conviction.

A prosecution must be withdrawn if the evidence ceases to support a *prima facie* case or reasonable prospect of conviction.

That is not to say that a case must be withdrawn in the natural ebb and flow of a trial, but ought to be withdrawn if some compelling matter arises which makes the action no longer viable.

5.7 Prospects of Conviction

Even if a *prima facie* case exists, a person must not be prosecuted unless there are reasonable prospects of conviction. However, if further enquiries have a reasonable chance of remedying a deficiency in the investigation then it may be appropriate to proceed with the prosecution. Mostly, errors in the course of an investigation should not be fatal.

Whether a reasonable prospect of conviction in the action exists must be considered against any relevant defences which might be made out, whether the credibility of any witnesses might undermine the weight of the witness’ evidence, and whether any difficulties with the investigation or documentary evidence might restrict the ability to rely on evidence.

The Decision Maker must be objective and dispassionate when considering if there is a reasonable prospect of a conviction. Sometimes such consideration is difficult. However, it is always to be remembered that it is the Court’s role (not Consumer Protection’s) to determine disputed issues of fact and the guilt or innocence of the accused.

The Decision Maker will generally take legal advice and may have regard to the corporate knowledge and experience of other Consumer Protection officers when considering the prospects of conviction.

5.8 The Prospects of Conviction – Factors to Take Into Account

The factors to take into account when considering the prospects of conviction include:

- 5.8a Whether there is sufficient evidence to prove each and every element of the alleged offence to the evidential standard of proof beyond reasonable doubt.
- 5.8b The availability and reliability of prosecution witnesses.
- 5.8c Whether the testimony of prosecution witnesses will be sufficiently credible, cogent and compelling. Factors to consider include whether a prosecution witness:
- i. has an adequate recollection of events;
 - ii. is adversely affected by a situation of disadvantage (e.g. language, hearing, sight, impaired mental faculties etc) making it unlikely for the testimony to advance the prosecution's case;
 - iii. has made prior inconsistent statements relevant to the matter;
 - iv. is hostile to the prosecution's case;
 - v. has any relevant prior convictions, including for dishonesty;
 - vi. has any interest in the outcome, or has any relationship or association with an interested person;
- and
- vii. will testify about an important aspect of the prosecution's case (e.g. the identity of the alleged offender) that conflicts with the testimony of another prosecution witness;
- 5.8d Whether any purported admission or confessional statement made by the accused meets all of the evidential requirements necessary for the court to accept it as evidence (e.g. the voluntariness or otherwise of the admission).
- 5.8e The likelihood of a court exercising its discretion to exclude any important evidence on the grounds that it is inadmissible (e.g. it was obtained unfairly or illegally).
- 5.8f Any defences that are open to the accused. In that regard, questions arise as to whether the information/material disclosed by the accused or obtained by the prosecution:
- i. substantiates or is likely to substantiate a purported defence;
or
 - ii. amounts to mere assertions that are in the Decision Maker's opinion unable to form the basis of a credible defence.

Evaluation of the prospects of conviction will generally have no regard to:

- 5.8g material that the defence claims to have in its possession but is unwilling to disclose to the prosecution;
- 5.8h a defence that is based on:
 - i. unsubstantiated assertions of fact;
 - ii. information that the Decision Maker believes will not be admissible as evidence in court; and
 - iii. witnesses who are unlikely to testify in a way that is credible, cogent or compelling.

5.9 The Public Interest

Even if a *prima facie* case exists and the prospects of a conviction against a person are good, a prosecution must not be commenced unless it is in the public interest.

Deciding whether a prosecution is in the public interest involves:

- 5.9a considering each public interest factor in favour of prosecuting;
- 5.9b considering each public interest factor in favour of not prosecuting;
- 5.9c weighing up the factors in favour of prosecuting against the factors in favour of not prosecuting; and
- 5.9d deciding if the public interest factors in favour of prosecuting outweigh the public interest factors in favour of not prosecuting (or vice versa).

Appropriate care and judgment must be given when making these decisions.

5.10 Public Interest Factors in Favour of Prosecuting

Public interest factors favouring prosecution include:

- 5.10a maintaining public confidence in State agencies;
- 5.10b giving effect to the objects of Consumer Protection legislation;
- 5.10c ensuring that Consumer Protection legislation is properly administered and enforced;
- 5.10d taking appropriate action that reflects the seriousness of the misconduct giving rise to an alleged offence;

- 5.10e protecting consumers and people in a trade or occupation from loss, harm, injury or damage;
- 5.10f prior criminal convictions of the alleged offender relevant to the alleged offence;
- 5.10g recognising the courts' role in determining the guilt or innocence of accused persons;
- 5.10h bringing justice to those who commit offences and punishing those who deserve punishment for their offences;
- 5.10i providing an expeditious way of compensating victims of crime; and
- 5.10j deterring others who might consider committing the same or a similar offence.

5.11 Public Interest Factors Against Prosecuting

Public interest factors which may render a prosecution inappropriate include:

- 5.11a the trivial or technical nature of the alleged offence in the circumstances;
- 5.11b the poor state of health, disability or age of the victim, alleged offender or witness;
- 5.11c the lack of previous criminal convictions relevant to the alleged offence (although an absence of criminal history will not exclude prosecution);
- 5.11d the delay in prosecuting the matter resulting in prejudice to the defence;
- 5.11e the low degree of culpability of the alleged offender relative to his or her co-offenders;
- 5.11f the perception that prosecuting is counterproductive to the interests of justice having regard to aspects such as costs and resources necessary to prosecute the matter⁶;
- 5.11g the resources used to prosecute the matter are too expensive and too time consuming for Consumer Protection staff in circumstances where other enforcement options can be used;

⁶ In that regard, factors that may be relevant include the resources necessary to: (a) find and/or deal with relevant persons (e.g. expert witnesses and/or witnesses in remote locations); and/or (b) pay for travel and accommodation costs associated with court proceedings.

- 5.11h other enforcement methods are just as effective or more effective than prosecuting;
- 5.11i the alleged misconduct is likely to be a “one off” occurrence, is of little or no public concern and there is little or no need for personal or general deterrence;
- 5.11j the unavailability of prosecution witnesses or their unwillingness to co-operate with the prosecution;
- 5.11k the complainant and/or victim has little or no interest in continuing with the matter;
- 5.11l the alleged offender is demonstrating a willingness to fully co-operate with the Consumer Protection by, for example, fully disclosing information to Consumer Protection officers when requested to do so, taking steps to prevent a recurrence of the misconduct, and/or compensating people who have been adversely affected by the misconduct;
- 5.11m the court will most likely impose a spent conviction order or an insignificant penalty if a finding of guilt is made; and
- 5.11n the anticipated penalty of one or more charges will adequately reflect the criminality of the circumstances without the need for all possible charges being laid.

5.12 Fairness, Impartiality and Transparency

It is in the public interest that prosecutions be conducted fairly and impartially. A prosecution which is conducted for improper purposes, capriciously or oppressively is not in the public interest. Accordingly, the following matters are not to be taken into account in evaluating the public interest:

- 5.12a the race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the alleged offender;
- 5.12b the personal feelings that officers involved in the matter have toward the alleged offender; and
- 5.12c the possible political, personal or professional consequences of the exercise of the discretion.

6 Plea Negotiation

6.1 Should an Offer to Plead Guilty be Accepted?

After a prosecution is commenced, the Accused may offer to plead guilty to a lesser offence or to the same offence but only on the basis that the certain facts giving rise to the offence are less serious than that being alleged by the prosecution. The prosecution may consider the following aspects when deciding whether to accept an offer. In that regard,

- 6.1a Is accepting the offer likely to significantly diminish the public perception of the seriousness of the offence?
- 6.1b Would accepting the offer obviate the benefit of having commenced the prosecution in the first place, for example undermining the general deterrent value of the prosecution?
- 6.1c Is it likely to have a significant adverse effect on the penalty that the court will impose?
- 6.1d Is it appropriate having regard to strengths or weaknesses of the prosecution case?
- 6.1e In all the circumstances will the public interest be satisfied by an acknowledgment of guilt to less serious criminal conduct?
- 6.1f Are the interests of justice best served by:
 - i. accepting an early offer or having the matter proceed to trial without accepting the plea; or
 - ii. will acceptance of the plea save witnesses, particularly vulnerable and other special witnesses, from the trauma of testifying in court?

A plea offer will not be accepted if doing so will distort the facts disclosed by the available evidence and result in an artificial basis for sentence.

In considering whether to accept a plea offer, regard may be had to the views of the complainant and/or the victim of the offence and to other persons affected by the offending conduct.

7 Actions in the State Administrative Tribunal

7.1 Disciplinary Action - Introduction

Disciplinary action is action taken in response to misconduct or breach of professional standards under which a particular vocation operates. It is one of the enforcement methods that may be used when there are reasonable grounds for suspecting that an individual or company who holds a relevant vocational licence, certificate or certification (**Licence Holder**) has engaged in conduct which offends either the legislation under which the licence etc is held or any other relevant legislation. This could be both under Consumer Protection legislation or other relevant criminal legislation. Disciplinary proceedings should be considered equally together with all other available enforcement methods in line with the principles outlined in this Policy.

Disciplinary proceedings under Consumer Protection legislation are commenced in the State Administrative Tribunal in accordance with the process set out in the *State Administrative Tribunal Act 2004*. A disciplinary proceeding commences when an "Application" is filed at the State Administrative Tribunal. The Application alleges that there is proper cause under the relevant Consumer Protection legislation and particularises the conduct which gives rise to the proper cause for disciplinary proceedings.

7.2 Objects of Disciplinary Action

Disciplinary action is one of the enforcement methods used to protect consumers, promote fair trading, to ensure that professional or industry standards are maintained and for any other purpose or object under Consumer Protection legislation.

Generally, decisions to commence disciplinary action are made in cases where the misconduct giving rise to the cause of disciplinary action is serious (or has serious consequences) and/or in cases where Consumer Protection wishes to target an undesirable practice in a particular occupation.

The objects of disciplinary action include:

- 7.2a enforcing Consumer Protection legislation;
- 7.2b protecting consumers and people engaged in a trade or occupation from loss, harm, injury or damage;
- 7.2c satisfying the public interest that Consumer Protection legislation is being properly enforced;
- 7.2d maintaining the high standards and good reputation of the profession or industry generally in the eyes of the community.

Disciplinary action is taken only when it is appropriate to do so in a particular case and is not to be used only as a last resort.

In order to achieve these objects, there may be a number of orders that can be sought, which include a reprimand or caution, a fine, suspension or cancellation of licence and disqualification (either temporary or permanent) from holding the relevant licence, certificate or certification. What order is sought depends upon the particular conduct which is alleged as grounds for disciplinary proceedings. A decision regarding the order/s sought should be made at the time when disciplinary proceedings are instituted. However, it may be possible to amend the orders sought should further evidence be located once proceedings have been commenced.

7.3 Who decides to commence disciplinary action?

The power to make decisions about whether a Licence Holder should have disciplinary action commenced against them is exercised by the person who issues the licence in the applicable Consumer Protection statute. For the purposes of this Policy this person will be referred to as the **Decision Maker**.

If in doubt, Consumer Protection staff should check with their supervisors and if necessary Consumer Protection's Legal Unit to ensure that the person who decides whether to commence disciplinary action is validly able to do so.

7.4 Discretion

The Decision Maker has a wide discretion when deciding whether to commence disciplinary action. However, a decision to commence disciplinary action has a significant impact on a Licence Holder because that person becomes subject to the requirements (and decisions) imposed by the State Administrative Tribunal which could adversely impact on their livelihood. Accordingly, the Decision Maker must exercise this discretion reasonably and with sufficient care. In that regard, the Decision Maker cannot ignore factors that are relevant to making their decision and cannot consider factors that are irrelevant to making their decision.

7.5 Deciding Whether to Commence Disciplinary Action

The Decision Maker will consider many factors before deciding whether or not to commence disciplinary proceedings against the Licence Holder. While the particular Decision Maker must make the decision, they may have regard to the views of others e.g. Board members, Consumer Protection officers and lawyers before making the decision.

The factors that the Decision Maker may take into account when deciding whether to commence disciplinary action include but are not limited to those described at paragraphs 7.6 to 7.12 below.

7.6 Prima facie Case

The Decision Maker must be reasonably satisfied that the available material raises a “*prima facie*” case against the Licence Holder suspected of misconduct that would warrant disciplinary action being taken, and reasonable prospects of success in the action.

Whether a *prima facie* case exists is a question of law. It involves determining, on the available evidence, whether the Tribunal is able to find that the misconduct is proved.

Disciplinary action must not be taken if the evidence does not support a *prima facie* case and a reasonable prospect of success.

Disciplinary action must be withdrawn if the evidence ceases to support a *prima facie* case and reasonable prospects of success.

That is not to say that a case must be withdrawn in the natural ebb and flow of a hearing, but ought to be withdrawn if some compelling matter arises which makes the action no longer viable.

7.7 Prospects of Sanction being imposed

Even if a *prima facie* case exists, a Licence Holder should not have disciplinary proceedings brought against them unless there are reasonable prospects of a disciplinary sanction being imposed. However, if further enquiries have a reasonable chance of remedying a deficiency in the investigation then it may be appropriate to proceed with the disciplinary proceedings.

Whether a reasonable prospect of sanction in the action exists will flow from an enquiry into matters such as whether any relevant defences might be made out, whether the credibility of any witnesses might undermine the weight of the witness’ evidence, whether any difficulties with the investigation or documentary evidence might restrict the ability to rely on evidence.

The Decision Maker must be objective and dispassionate when considering if there is a reasonable prospect of a disciplinary sanction being imposed. Sometimes such consideration is difficult. However, it is always to be remembered that it is the Tribunal’s role (not the Board’s, the Commissioner’s or Consumer Protection’s) to determine disputed issues of fact and the guilt or innocence in relation to the misconduct of the Licence Holder.

The Decision Maker responsible for making the decision to commence disciplinary proceedings must take legal advice and may have regard to the corporate knowledge and experience of Consumer Protection officers when considering the prospects of a disciplinary sanction being imposed.

7.8 The Prospects of Disciplinary Sanction – Factors to Take Into Account

The factors to take into account when considering the prospects of a disciplinary sanction being imposed by the Tribunal include:

- 7.8a Whether there is sufficient evidence to prove each and every allegation to the evidential standard of proof.
- 7.8b The availability and reliability of witnesses.
- 7.8c Whether the testimony of witnesses will be sufficiently credible, cogent and compelling. Factors to consider include whether a witness:
 - i. has an adequate recollection of events;
 - ii. is adversely affected by a situation of disadvantage (e.g. language, hearing, sight, impaired mental faculties etc) making it unlikely for the testimony to advance the Decision Maker's case;
 - iii. has made prior inconsistent statements relevant to the matter;
 - iv. is hostile to the Decision Maker's case;
 - v. has any relevant prior convictions, including for dishonesty;
 - vi. has any interest in the outcome, or has any relationship or association with an interested person;and
 - vii. will testify about an important aspect of the Decision Maker's case (e.g. the identity of the alleged offender) that conflicts with the testimony of another Board witness;
- 7.8d Whether any purported admission or confessional statement made by the Licence Holder meets all of the evidential requirements necessary for the Tribunal to accept it as evidence (e.g. the voluntariness or otherwise of the admission).
- 7.8e The likelihood of the Tribunal exercising its discretion to exclude any important evidence e.g. on the grounds that it was obtained unfairly or illegally.
- 7.8f Any defences that are open to the Licence Holder. In that regard, questions arise as to whether the information/material disclosed by the Licence Holder or obtained by the Decision Maker:
 - i. substantiates or is likely to substantiate a purported defence; or
 - ii. amounts to mere assertions that are in the Decision Maker's opinion unable to form the basis of a credible defence.

Evaluation of the prospects of sanction will generally have no regard to:

- 7.8g material that the defence claims to have in its possession but is unwilling to disclose to the Decision Maker;
- 7.8h a defence that is based on:
 - i. unsubstantiated assertions of fact;
 - ii. on information that the Decision Maker believes will not be admissible as evidence in court; and
 - iii. witnesses who are unlikely to testify in a way that is credible, cogent or compelling.

7.9 The Public Interest

Even if a *prima facie* case exists and the prospects of a disciplinary sanction being imposed on a Licence Holder are high, a disciplinary action must not be commenced unless it is in the public interest.

Deciding whether a disciplinary action is in the public interest involves:

- 7.9a considering each public interest factor in favour of commencing disciplinary action;
- 7.9b considering each public interest factor in favour of not commencing disciplinary action;
- 7.9c weighing up the factors in favour of commencing disciplinary action against the factors in favour of not commencing disciplinary action; and
- 7.9d deciding if the public interest factors in favour of commencing disciplinary action outweigh the public interest factors in favour of not commencing disciplinary action (or vice versa).

Appropriate care and judgment must be given when making these decisions.

7.10 Public Interest Factors in Favour of Commencing Disciplinary Action

Public interest factors favouring disciplinary action include:

- 7.10a maintaining public confidence in State agencies;
- 7.10b giving effect to the objects of Consumer Protection legislation;
- 7.10c ensuring that Consumer Protection legislation is properly administered and enforced;
- 7.10d taking appropriate action that reflects the seriousness of the misconduct giving rise to alleged misconduct;
- 7.10e protecting consumers and people in a trade or occupation from loss, harm, injury or damage;
- 7.10f prior criminal convictions of the Licence Holder relevant to the alleged misconduct;
- 7.10g recognising the Tribunal's role in determining whether the Licence Holder is a fit and proper person to maintain a vocational licence;
- 7.10h ensuring that the public is protected from unscrupulous and incompetent Licence Holders who are either ignorant or indifferent to professional requirements under the relevant legislation and industry best practice; and
- 7.10i deterring others who might consider committing the same or similar misconduct.

7.11 Public Interest Factors Against Commencing Disciplinary Action

Public interest factors which may render disciplinary action inappropriate include:

- 7.11a the trivial or technical nature of the alleged misconduct in the circumstances;
- 7.11b the poor state of health, disability or age of the Licence Holder or witness;
- 7.11c the lack of previous criminal convictions relevant to the alleged misconduct;
- 7.11d the delay in commencing disciplinary action resulting in prejudice to the Licence Holder;
- 7.11e the low degree of culpability of the Licence Holder relative to any other persons involved in the misconduct;

- 7.11f whether the Licence Holder maintains a current licence or whether it has been surrendered or expired;
- 7.11g the perception that disciplinary action is counterproductive to the interests of justice having regard to aspects such as costs and resources necessary to pursue the matter⁷;
- 7.11h the resources used to conduct the matter are too expensive and too time consuming for Consumer Protection staff in circumstances where other enforcement options can be used;
- 7.11i other enforcement methods are just as effective or more effective than commencing disciplinary action;
- 7.11j the alleged misconduct is likely to be a “one off” occurrence, is of little or no public concern and there is little or no need for personal or general deterrence;
- 7.11k the unavailability of witnesses or their unwillingness to co-operate with the Decision Maker;
- 7.11l the complainant (if any) has little or no interest in continuing with the matter;
- 7.11m the Licence Holder is demonstrating a willingness to fully co-operate with the Decision Maker by, for example, fully disclosing information when requested to do so, taking steps to prevent a recurrence of the misconduct, and/or compensating people who have been adversely affected by the misconduct; and
- 7.11n the Tribunal will most likely impose an insignificant penalty if a finding of guilt is made.

7.12 Fairness, Impartiality and Transparency

It is in the public interest that disciplinary action be conducted fairly and impartially. Disciplinary action which is conducted for improper purposes, capriciously or oppressively is not in the public interest. Accordingly, the following matters are not to be taken into account in evaluating the public interest:

⁷ In that regard, factors that may be relevant include the resources necessary to: (a) find and/or deal with relevant persons (e.g. expert witnesses and/or witnesses in remote locations); and/or (b) pay for travel and accommodation costs associated with tribunal proceedings.

- 7.12a the race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the Licence Holder;
- 7.12b the personal feelings that officers (either of the Decision Maker or Consumer Protection) involved in the matter have toward the Licence Holder; and
- 7.12c the possible political, personal or professional consequences of the exercise of the discretion.

7.13 Non-Disciplinary Action

Consumer Protection also has jurisdiction to bring non-disciplinary action before the State Administrative Tribunal e.g. orders relating to breaches of codes of practice under s.46 FTA.

The following considerations will apply in respect of bringing such actions:

- 7.13a is there sufficient admissible evidence to proceed?
- 7.13b is the case sufficiently serious?
- 7.13c what are the strengths and weaknesses of the case?
- 7.13d what are the adverse effects of orders not being granted, on the Commissioner, the public, or a section of the public?
- 7.13e is the case in the public interest?

8 Appeals

8.1 The Appeals Process

An appeal is a statutory right to apply to a “superior” decision maker, tribunal or court, to reconsider the decision of the prior decision maker, tribunal or court.

Generally, appeals will lie against decisions made by Magistrates Courts on prosecutions and by the State Administrative Tribunal in disciplinary actions.

8.2 Factors Relating to Pursuing or Defending Appeals

From time to time the Commissioner will have to decide whether to pursue an appeal or whether to defend an appeal pursued by another party to proceedings.

As part of this process the Commissioner will seek legal advice as to the merits of pursuing or defending an appeal.

In addition, the Commissioner will consider relevant public interest factors. Relevant public interest factors may include any of the factors set out in paragraphs 4.10, 4.11, 5.10, 5.11, 7.10 and 7.11 above. Additional public interest factors may include:

- 8.2a whether pursuing/defending an appeal will provide precedent value in terms of clarifying legislation administered by Consumer Protection;
- 8.2b whether absent any precedential value, the matter is of sufficient significance that an appeal of the matter is inherently compelling, where for example many complainants were affected or there is a serious element of dishonesty or deception;
- 8.2c the additional cost of pursuing/defending an appeal;
- 8.2d the additional stress placed upon the alleged offender by the appeal process;
- 8.2e whether it might instead be appropriate to seek a clarification to the legislation.

Note

This Policy has been developed for Consumer Protection’s specific requirements. In creating this Policy, regard has been had to policies used by other agencies, in particular, the DPP