



Government of **Western Australia**  
Department of **Mines, Industry Regulation and Safety**  
**Consumer Protection**

# **Compliance and Enforcement Policy**

**October 2020**

**Consumer Protection Compliance Compendium**

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**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.

## **1. Explanatory Notes**

### **1.1 Organisational background**

Consumer Protection is a division of the Department of Mines, Industry Regulation and Safety (**the Department**), the State Government department that brings together leadership in regulation and related activities for mines, petroleum, building, consumer protection, labour relations, and energy and worker safety.

The Consumer Protection Division (Consumer Protection) assists Western Australians navigate local, national and global markets by helping consumers and traders, regulating business and enforcing consumer protection laws.

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 involve carrying out, supervising, co-ordinating, managing or directing enforcement action.

## 1.2 Departmental Compliance Strategy

The (former) Department of Commerce developed a [Compliance Strategy](#) which outlines compliance approaches and activities used to enforce the law. The Compliance Strategy is based on the assumption that most individuals or organisations will comply, or will try to comply, with their obligations. As such, the Compliance Strategy encompasses activities aimed at providing information and encouraging compliance, and providing assistance and monitoring compliance, as well as using the full force of law to enforce compliance.

The Departmental Compliance Strategy underpins and aligns with the Consumer Protection Compliance and Enforcement Policy.

## 1.3 Statement on Consumer Protection position on compliance and enforcement generally

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

- 1.3a Consumer Protection seeks to encourage compliance where possible. Compliance will generally be achieved by education.
- 1.3b For more serious matters and where poor attitudes to compliance are manifest, more formal enforcement will be required. However Consumer Protection will always:
  - 1.3b.i seek a response proportionate to the degree of harm caused;
  - 1.3b.ii have regard to the public interest and the cost/benefit test.
- 1.3c In making decisions, Consumer Protection is bound by its Code of Ethics and Code of Conduct: in particular Consumer Protection will act fairly.

## 1.4 What does this Compliance and Enforcement Policy achieve?

This Policy promotes 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 Compliance and Enforcement Policy?**

The purpose of this Policy is to:

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

## **1.6 To whom does this Compliance and Enforcement 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 Departmental staff who undertake Consumer Protection work.

## **1.7 What is the Scope of this Compliance and Enforcement Policy?**

The scope of this policy covers all legislation administered by Consumer Protection.

## **1.8 What is the legal status of this Compliance and Enforcement Policy?**

This Policy provides general information and guidance about Consumer Protection's approach to compliance, 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 and others should obtain independent legal advice on their legal rights and obligations.

## **2. Sources of Information about Compliance**

Consumer Protection is committed to detecting, deterring and remedying improper practices that have the potential to cause detriment to consumers and traders in the marketplace. It does this through the use of a range of activities.

Consumer Protection obtains information that may trigger a compliance activity response from a wide range of sources including consumer complaints, external agencies, proactive compliance activity, contact centre enquiries, marketplace surveillance, and intelligence gathering and analysis.

### **2.1 Complaints**

Complaints that can trigger a compliance response are received by Consumer Protection from a range of entities including:

- consumers who are dissatisfied with the quality or suitability of goods or services, or both, received or provided to them by traders;
- people (consumers or traders) who wish to report a potential breach of legislation administered by Consumer Protection;
- people who may be dissatisfied with entities that are (or should be) registered or licensed with Consumer Protection; and
- other Government bodies who wish to refer a complaint to Consumer Protection as it falls within Consumer Protection's jurisdiction.

When complaints are received by Consumer Protection they are subject to assessment to identify the complaints that are suitable for a conciliated outcome and those which indicate non-compliance with the law. Some complaints may have elements of both.

Consumer Protection’s conciliation service assists consumers to enforce their “private rights” as individuals. When a dispute cannot be resolved through conciliation, conciliation officers can provide information to consumers on the process that they will need to follow should they seek a court settlement to their problem.

“Public rights” belong to the community as a whole. When public rights are infringed, that is when a breach of consumer protection law occurs, Consumer Protection investigates the matter and may take action to enforce the law.

In some cases both conciliation and enforcement action may be appropriate.

## **2.2 Proactive compliance inspections**

The proactive compliance inspection program used by Consumer Protection is designed to assist individuals and organisations in complying with their responsibilities and legislative requirements by providing relevant advice and education. However, the proactive compliance inspection program can also bring about an enforcement response through the identification of current and emerging issues of non-compliance and their associated risks.

## **2.3 Contact Centre enquiries**

As the main point of contact for consumers, Consumer Protection’s Contact Centre is a vital source of information on current and emerging compliance-related trends, issues, and opportunities. The information obtained from the Contact Centre assists in informing Consumer Protection’s compliance priorities and actions.

## **2.4 Market Surveillance and Intelligence Gathering**

Consumer Protection undertakes market surveillance and intelligence gathering activities to enable early identification of emerging trends, risks and opportunities regarding potential compliance issues that may impact on the community. The surveillance and intelligence activities undertaken by Consumer Protection assist in facilitating responsive intervention compliance activities. Media and social media play a major role in identifying consumer issues.

### 3. Compliance Responses

Consumer Protection has available to it a range of escalating actions that it can use to encourage, assist and enforce compliance with the legislation administered.

The specific actions that Consumer Protection takes are determined initially by an assessment of the issues that have triggered the compliance response and will be in direct proportion to the seriousness of the related breach or issue. Matters on-foot are continuously monitored in order to identify any changes in the apparent seriousness of a matter so that the response can be appropriately adjusted.

The approaches that Consumer Protection takes in relation to its compliance and enforcement activities are outlined in the Departmental Compliance Strategy and are determined by the regulatory environment in which Consumer Protection operates. The Compliance Strategy recognises that most individuals and organisations will attempt to comply with the law and that as a result the responses to non-compliance should be measured, reasonable and proportionate.

#### 3.1 Education and advice

It is Consumer Protection's belief that compliance will frequently be achieved through the provision of education and advisory services to both consumers and traders relating to their consumer rights, responsibilities and obligations.

In line with the Compliance Strategy, the following approaches are used by Consumer Protection to provide education and advice to encourage compliance with consumer laws.

*Informing* – Consumer Protection provides information to consumers and traders using a variety of formats including newsletters and other publications, hotlines, front counter and call centre services and the provision of online information and services.

*Encouraging* – To encourage voluntary compliance Consumer Protection uses activities such as targeted campaigns promoting compliance in high-risk areas and media activity.

### 3.2 Consultation and Cooperation

Consumer Protection helps and supports individuals and organisations who are endeavouring to comply with regulation through the use of a range of consultative and cooperative compliance activities.

In line with the *Compliance Strategy*, the following approach is taken by Consumer Protection to support consultative and cooperative compliance activities.

*Assisting* - To assist individuals and organisations comply with Consumer Protection regulation, Consumer Protection conducts educational seminars, undertakes consultative visits to industry participants and offers conciliation services to resolve disputes.

### 3.3 Monitoring

Consumer Protection checks whether individuals and organisations are complying with their regulatory obligations through the use of a variety of monitoring methods including auditing programs, proactive inspections and investigation of complaints.

### 3.4 Enforcement

It is Consumer Protection's position that formal enforcement action is required for serious breaches of consumer protection legislation or where poor attitudes have been shown to compliance.

The approaches used by Consumer Protection to enforce compliance or punish non-compliance align with the *Compliance Strategy* as follows.

*Warning* – Where appropriate, Consumer Protection notifies and cautions individuals and organisations that are not complying with their obligations. Some of the approaches used include issuing formal warnings and education letters.

*Full force of the law* – There are some failures for which the most appropriate regulatory response is for Consumer Protection to take more traditional enforcement action. Such actions include:

- prosecutions seeking the imposition of penalties;
- disciplinary proceedings relating to licence holders;

- civil action seeking pecuniary penalties, injunctions or other orders; and
- the use of media to protect the public from offenders.

#### **4. Compliance and enforcement principles**

The Compliance and Enforcement Policy is based on the following key principles.

Principle 1:

Compliance activities are outcome focused, concerned with delivering quality outcomes that prevent and deter non-compliant behaviour.

Principle 2:

Compliance is based on risk management so resources are appropriately allocated to investigate alleged breaches of Consumer Protection legislation effectively and efficiently.

Principle 3:

All breaches of legislation administered by Consumer Protection are addressed by some form of compliance action, commensurate with the nature of the breach.

Principle 4:

Trader behaviour that Consumer Protection suspects is deceitful, dishonest or seriously non-compliant and involves serious consumer detriment is given the highest priority.

Principle 5:

Compliance matters are investigated in accordance with best practice investigation methodology and are consistent with the provisions of the policies, procedures and manuals referred to within the framework.

Principle 6:

The purpose of an investigation is to impartially ascertain the facts, assess the sufficiency of evidence and, where appropriate, consider enforcement action.

Principle 7:

Enforcement action is consistent and commensurate with the type of breach of legislation and the circumstances surrounding it.

Principle 8:

Compliance files are constantly reviewed to ensure consistency, best practice and continuous improvement.

Principle 9:

Consumers and business alike are dealt with in a professional, ethical, timely and accountable manner.

## **5. Enforcement**

### **5.1 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 section 3.1, 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. The following sections of the Policy deal 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.

## **5.2 Enforcement under the ACL**

Additional considerations in relation to enforcement apply in respect of the Australian Consumer Law (WA) (ACL) can be found in the following document.

Dispute Resolution and Compliance & Enforcement Protocol

This document gives guidance on how ACL regulators will cooperate when enforcing serious breaches of the ACL across multiple jurisdictions. Please note that the document is not public.

[Compliance and Enforcement – How regulators enforce the Australian Consumer Law](#)

The document, published by the Australian Competition and Consumer Commission (ACCC) provides guidance on how compliance and enforcement issues should be approached under the ACL. Essentially the approach described in the document mirrors that adopted by Consumer Protection.

## **5.3 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. However, the General Manager guides the enforcement strategy of the Branch in consultation with the relevant Director and the Commissioner.

The matters that Consumer Protection officers take into account when exercising their discretion include:

- 5.3a the seriousness of the alleged contravention;
- 5.3b the appropriate person or authority to pursue;
- 5.3c the public interest factors for and against undertaking enforcement action;
- 5.3d the resources available;
- 5.3e the prospect of the proposed enforcement action being successful; and
- 5.3f the ramifications of withdrawing enforcement action should the need to do so arise.
- 5.3g whether another ACL regulator is currently undertaking (or planning to undertake) enforcement action against an entity, which is done by checking the shared information platform ACLink.<sup>1</sup> If another ACL regulator is undertaking enforcement action, then agencies should confer with each other.

#### **5.4 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.

#### **5.5 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**)

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<sup>1</sup> Please see Dispute Resolution and Compliance & Enforcement Protocol for further information regarding parallel enforcement action, lead ACL regulator, and progress and outcome reporting. Please note, this document is not available in the public domain.

In that regard the following factors (expressed in question form) will be considered:

- 5.5a who formed the intention and/or made the plan resulting in the contravention;
- 5.5b who created the material circumstances leading to the contravention;
- 5.5c who did the act and/or made the omission resulting in the contravention;
- 5.5d whether several people were involved in the breach, what was the degree of responsibility of each person in relation to the contravention;
- 5.5e whether the person or persons had previously contravened Consumer Protection or similar legislation;
- 5.5f whether the contravention was attributable to any dishonesty on a person's part;
- 5.5g whether the person or persons are the persons able to be locate;
- 5.5h 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), whether the superior officer knew or ought reasonably to have known about the conduct of the subordinate resulting in the contravention; and
- 5.5i the likely effectiveness of any court orders made against the responsible person (e.g. if a corporation has been wound up and/or deregistered 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 indemnity from prosecution.

The power to grant indemnity 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 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 indemnity by the DPP are set out at [42] to [51] of the [DPP Statement of Prosecution Policy and Guidelines 2018 \(Guidelines\)](#). Were the Department to consider that in a particular case it would be appropriate to grant a person indemnity 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.

## 5.6 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:

- 5.6a 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;
- 5.6b the enforcement measures that are necessary to ensure compliance with the requirements of Consumer Protection legislation;
- 5.6c 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;
- 5.6d 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;

- 5.6e the extent and duration of the loss and/or damage (or potential thereof) to victims;
- 5.6f the level of cooperation given to the Consumer Protection by alleged offenders when responding to informal requests, lawful directions or prescribed notices;
- 5.6g the level of willingness by alleged offenders to commit to appropriate remedial action;
- 5.6h 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;
- 5.6i the previous history of alleged offenders in complying with Consumer Protection or similar legislation, and the type and frequency of contraventions against that legislation;
- 5.6j whether alleged offenders have made false or misleading statements to Consumer Protection during the investigation;
- 5.6k whether or not an alleged offender is a corporation;
- 5.6l the degree, if any, of dishonesty involved;
- 5.6m the culpability of the alleged offender, including any mitigating or aggravating circumstances;
- 5.6n the public interest, including the need for specific and general deterrence;
- 5.6o legal precedents;
- 5.6p statutory time limits; and
- 5.6q justice.

## **6. 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:

## 6.1 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.

- 6.1a There must be sufficient evidence to establish a *prima facie* case for a contravention.
- 6.1b The allegation of the contravention must be put to the person and the person must be afforded an opportunity to respond to the allegation.
- 6.1c 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 General Manager (or similar office holder).

Formal warning letters are to contain the following elements:

- 6.1d A summary of the essence of the alleged contravention sufficient to be understood and responded to;
- 6.1e 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:

- 6.1f the level of seriousness of the act or omission giving rise to the contravention is relatively low (e.g. is trivial, minor or technical);
- 6.1g there is little or no adverse impact on consumers and/or fair trading;
- 6.1h where a *prima facie* case exists but there are public policy reasons not to proceed further.
- 6.1i the matter is one that can be easily rectified; and
- 6.1j the recipient is co-operative and demonstrates a willingness to put right and comply with the legislative requirements the subject of the warning.

## 6.2 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 or allowed to proceed unless:

- 6.2a the legislation prescribes that an Infringement Notice may be issued for the alleged offence; and
- 6.2b there is a sufficient basis for a belief that the offence was committed (but need not require comprehensive legal advice).

It may be appropriate to issue an Infringement Notice when:

- 6.2c the alleged offence is a “one off” occurrence, having no or little impact on consumers and fair trade and can be easily remedied;
- 6.2d the alleged offence is relatively technical, minor or trivial;
- 6.2e the alleged offence resulted from an inadvertent oversight having regard to the usual practices of the business; and/or
- 6.2f 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:

- 6.2g the act or omission giving rise to the alleged offence is of itself serious (e.g. dishonesty and deliberately taking advantage of vulnerable consumers);
- 6.2h the alleged offence has a significant impact on consumer/s, fair trading and the public;
- 6.2i 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;
- 6.2j the alleged offence is continuing and the alleged offender lacks any willingness or ability to stop or to remedy it quickly;
- 6.2k multiple similar contraventions of Consumer Protection legislation are occurring or have occurred previously; or
- 6.2l another government agency has issued a notice for the same or similar misconduct in the same period (e.g. ACCC).

### 6.3 Naming

Pursuant to s.57 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, where the Commissioner:

- has reasonable grounds to suspect that the conduct may contravene a provision of Chapter 2, 3 or 4;
- is satisfied one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct; and
- is satisfied that it is in the public interest to issue the notice.

Further information about naming can be found in the Public Naming of Traders Policy.

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:

- 6.3a influence problem traders to remedy their unfair practices or comply with specific legislative protections;
- 6.3b deter other traders from adopting such practices;
- 6.3c warn the public about particular unsatisfactory traders; or
- 6.3d 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:

- 6.3e Does the conduct endanger the health or safety of the public?
- 6.3f Is there an imminent danger of significant loss or detriment to members of the public?
- 6.3g Has the trader been the subject of adverse naming by a consumer protection agency in another jurisdiction?
- 6.3h If yes to sub-paragraph 6.3g, is there evidence indicating the trader operates in WA in the same or similar manner?
- 6.3i Has the trader been given the opportunity to respond to the allegations made against him/her/it?
- 6.3j Are legal proceedings under way or contemplated? If so, will naming prejudice those proceedings?
- 6.3k Do the statements made when naming the trader derive from sources of information that are reliable and correct?
- 6.3l Do the statements accurately reflect that information?
- 6.3m Are the statements made in good faith and are they free from bias?
- 6.3n Prior to seeking the Commissioner's authorisation:
  - 3.3n.i has the relevant officer obtained legal advice; and
  - 3.3n.ii has the Commissioner's approval been obtained by means of a written recommendation approved by the relevant director?

- 6.3o 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?<sup>2</sup>

#### 6.4 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:

- 6.4a the Media Policy and
- 6.4b the Public Naming of Traders Policy

#### 6.5 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);
- [Residential Parks \(Long-stay Tenants\) Act 2006](#) (section 79);
- [Residential Tenancies Act 1987](#) (section 9); and
- [Retirement Villages Act 1992](#) (section 9).

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

- 6.5a 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);
- 6.5b 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;

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<sup>2</sup> Dispute Resolution and Compliance & Enforcement Protocol

- 6.5c the consumer (or business) must consent in writing before the Commissioner takes representative action;
- 6.5d 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:

- 6.5e the amount involved must not exceed the sum prescribed in section 58 of the FTA for actions under this Act;
- 6.5f 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:

- 6.5g whether there are good prospects of success;
- 6.5h whether the behaviour complained of is particularly unfair;
- 6.5i whether more than one consumer has been/may be affected by the behaviour;
- 6.5j whether the behaviour complained of has wider ramifications for the public as a whole;
- 6.5k whether the consumer has a special disability or vulnerability e.g. non-English speaking, elderly;
- 6.5l whether the consumer is impecunious;
- 6.5m whether the consumer (or business) has taken/is able to take reasonable steps to protect their own interests;
- 6.5n whether the costs and resources necessary to proceed with the matter would be disproportionate to the sums involved in the litigation;
- 6.5o whether there are other ways in which the consumer (or business) can be assisted besides taking representative action;
- 6.5p the willingness of the consumer (or business) to co-operate with the proceedings.

## 6.6 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. When drafting undertakings, consideration should be given to its application outside WA in the event that the trader crosses borders or impacts consumers in other States or Territories.

An undertaking will usually be sought:

- 6.6a where the trader is likely to be co-operative;
- 6.6b where an undertaking on its own is likely to resolve compliance issues;
- 6.6c where restitution to multiple consumers is a likely outcome; and
- 6.6d as a preparatory step before applying to court for a formal injunction (in the event the terms of the undertaking are breached).

## 6.7 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:

- 6.7a FTA/ACL provision/s; or
- 6.7b non FTA provisions provided that those provisions are administered by the Commissioner.

The Commissioner may seek an injunction where a *prima facie* case is established and 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:

- 6.7c an order requiring a person to disclose to the public specified information; or
- 6.7d 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. corrective advertising.

Factors to take into account when considering whether to seek injunctive relief include the following.

- 6.7e Is the case sufficiently serious to seek injunctive relief from the District or Supreme Court?
- 6.7f What is the strength or weakness of the case against the trader and is the case likely to succeed?
- 6.7g What are the adverse effects of an injunction not being granted on the Commissioner, the public or a section of the public?
- 6.7h Is it in the public interest to seek an injunction?
- 6.7i What prejudice is the trader likely to suffer if the injunction is granted?
- 6.7j Has too much time elapsed since the contravention occurred so that the granting of an injunction would have little or no effect?
- 6.7k Is there a need to act urgently?

## **6.8 Pecuniary Penalties**

Pecuniary penalties are dealt with more comprehensively in a separate part of this Policy (see Section 8). Pecuniary penalty action is to be considered equally together with all other enforcement methods in line with the principles outlined in this Policy.

## **6.9 Prosecution**

Prosecution is dealt with more comprehensively in a separate part of this Policy (see Section 9). Prosecution is to be considered equally together with all other enforcement methods in line with the principles outlined in this Policy.

## **6.10 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 Section 10). 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.

# **8. Pecuniary Penalties under the ACL**

## **8.1 Introduction**

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, however, there would need to be compelling reasons to do so.

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

## **8.2 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:

- 8.2a enforcing the ACL;
- 8.2b protecting consumers and people engaged in a trade or occupation from loss, harm, injury or damage;
- 8.2c satisfying the public interest that the ACL is being properly enforced;
- 8.2d bringing justice to those who breach the ACL;
- 8.2e providing a purely financial deterrent to conduct by a body corporate;
- 8.2f 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
- 8.2g acting as a deterrent to others who might consider breaching the same or similar provisions.

## **8.3 Who Decides to Seek a Pecuniary Penalty?**

The Decision Maker, who is the Commissioner for Consumer Protection.

## **8.4 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.

## **8.5 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 11.1 to 11.7 below.

## **8.6 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:

- 8.6a a strong element of serious culpability that merits a criminal conviction;
- 8.6b contempt or disregard for the law;
- 8.6c behaviour that has had significant adverse impact e.g. on one or more members of the public;
- 8.6d a pattern of previous contraventions;
- 8.6e 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 may be easier to prove as the evidential standard is on the balance of probabilities and not beyond reasonable doubt.

## **8.7 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.

## **9. Prosecution**

### **9.1 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.

All criminal prosecutions in Western Australia commence in the State Magistrates' Court with the process set out in the Criminal Procedure Act 2004. A prosecution commences when a "Prosecution Notice" is lodged with the court 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.

### **9.2 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:

- 9.2a enforcing Consumer Protection legislation;
- 9.2b protecting consumers and people engaged in a trade or occupation from loss, harm, injury or damage;
- 9.2c satisfying the public interest that Consumer Protection legislation is being properly enforced;
- 9.2d bringing justice to those who commit offences and punishing those who deserve punishment for their offences;
- 9.2e providing an expeditious way of compensating victims of crime (since compensation can be sought in a prosecution action); and
- 9.2f 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.

### **9.3 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. (see for example, s92 of the FTA).

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 Legal Services to ensure that the person who decides whether to prosecute is validly able to do so.

### **9.4 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.

## **9.5 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 11.1 to 11.7 below.

## **9.6. Plea Negotiation - 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,

- 9.6a Is accepting the offer likely to significantly diminish the public perception of the seriousness of the offence?
- 9.6b 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?
- 9.6c Is it likely to have a significant adverse effect on the penalty that the court will impose?
- 9.6d Is it appropriate having regard to strengths or weaknesses of the prosecution case?
- 9.6e In all the circumstances will the public interest be satisfied by an acknowledgment of guilt to less serious criminal conduct?

- 9.6f 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 Departmental lawyer who has carriage of the file, the complainant and/or the victim of the offence and to other persons affected by the offending conduct.

## 10. Actions in the State Administrative Tribunal

### 10.1 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 registration (**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.

## **10.2 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:

- 10.2a enforcing Consumer Protection legislation;
- 10.2b protecting consumers and people engaged in a trade or occupation from loss, harm, injury or damage;
- 10.2c satisfying the public interest that Consumer Protection legislation is being properly enforced;
- 10.2d 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 registration. 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.

### **10.3 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 Legal Services to ensure that the person who decides whether to commence disciplinary action is validly able to do so.

### **10.4 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.

### **10.5 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, such as 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 11.1 to 11.7 below.

### **10.6 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:

- 10.6a is there sufficient admissible evidence to proceed?
- 10.6b is the case sufficiently serious?
- 10.6c what are the strengths and weaknesses of the case?
- 10.6d what are the adverse effects of orders not being granted, on the Commissioner, the public, or a section of the public?
- 10.6e is the case in the public interest?

## **11. Considerations relevant to commencing litigation, namely either civil pecuniary penalty actions, prosecution or disciplinary actions**

The Commissioner exercises the discretion about whether to take these types of actions. For the purposes of this Policy, the Commissioner will be referred to as the **Decision Maker**.

### **11.1 *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 Consumer Protection legislation, 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, depending on the type of action taken, either on the balance of probabilities or beyond reasonable doubt. It should be noted that, as a rule, all available witnesses ought to be called in order to make out a *prima facie* case.

An 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.

## 11.2. Prospects of Success

Even if a *prima facie* case exists, an action must not be taken 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 are reasonable prospects of success. Sometimes such consideration is difficult.

However, it is always to be remembered that it is the Court's (or Tribunal's) role (not Consumer Protection's) to determine disputed issues of fact.

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

## 11.3 Prospects of Success – Factors to Take Into Account

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

- 11.3a 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 or beyond reasonable doubt);
- 11.3b the availability and reliability of witnesses;
- 11.3c 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;
- 11.3d 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);
- 11.3e 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);
- 11.3f 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.

#### **11.4 The Public Interest**

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

Deciding whether an action is in the public interest involves:

- 11.4a considering each public interest factor in favour of the action;
- 11.4b considering each public interest factor against the action;
- 11.4c weighing up the factors in favour of the action and the factors against the action; and
- 11.4d 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.

#### **11.5 Public Interest Factors In Favour of Taking Litigation**

Public interest factors favouring taking litigation include:

- 11.5a maintaining public confidence in State agencies;
- 11.5b giving effect to the objects of Consumer Protection legislation;
- 11.5c ensuring that Consumer Protection legislation is properly administered and enforced;
- 11.5d taking appropriate action that reflects the seriousness of the misconduct giving rise to an alleged offence;
- 11.5e protecting consumers and people in a trade or occupation from loss, harm, injury or damage;

- 11.5f prior behaviour/criminal convictions of the alleged offender relevant to the alleged offence;
- 11.5g bringing justice to those who contravene Consumer Protection legislation;
- 11.5h providing an expeditious way of compensating victims of crime;
- 11.5i (for disciplinary action) recognising the Tribunal's role in determining whether the Licence Holder is a fit and proper person to maintain a vocational licence;
- 11.5j (for disciplinary action) 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
- 11.5k deterring others who might consider committing the same or a similar contravention.

## **11.6 Public Interest Factors against Taking Litigation**

Public interest factors which may render litigation inappropriate include:

- 11.6a the trivial or technical nature of the alleged contravention in the circumstances;
- 11.6b the poor state of health, disability or age of the victim, proposed defendant or witness;
- 11.6c the lack of previous contravening behaviour/criminal convictions relevant to the alleged contravention, relative to any other persons involved in the misconduct;
- 11.6d the perception that action is counterproductive to the interests of justice having regard to aspects such as costs and resources necessary to pursue the matter<sup>3</sup>;
- 11.6e 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;

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<sup>3</sup> 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.

- 11.6r other enforcement methods are just as effective or more effective than commencing disciplinary action;
- 11.6g 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;
- 11.6h the unavailability of witnesses or their unwillingness to co-operate with the Decision Maker;
- 11.6i the complainant (if any) has little or no interest in continuing with the matter;
- 11.6j the court or tribunal will most likely impose an insignificant penalty if a finding of guilt is made.
- 11.6k (for disciplinary action) whether the Licence Holder maintains a current licence or whether it has been surrendered or expired; and
- 11.6l (for disciplinary action) 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.

### **11.7 Fairness, Impartiality and Transparency**

It is in the public interest that 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:

- 11.7a the race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the proposed defendant;
- 11.7b the personal feelings that officers involved in the matter have toward the proposed defendant; and
- 11.7c the possible political, personal or professional consequences of the exercise of the discretion.

## **12. Appeals**

### **12.1 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.

### **12.2 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 11.1 to 11.7 above. Additional public interest factors may include:

- 12.2a whether pursuing/defending an appeal will provide precedent value in terms of clarifying legislation administered by Consumer Protection;
- 12.2b whether absent any precedential value, the matter is of sufficient significance that an appeal of the matter is inherently compelling, where for example, many complainant were affected or there is a serious element of dishonesty or deception;
- 12.2c the additional cost of pursuing/defending an appeal;
- 12.2d the additional stress placed upon the alleged offender by the appeal process;
- 12.2e whether it might instead be appropriate to seek clarification to the legislation.