



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

# Consumer Protection

## Part II

### ENFORCEMENT AND PROSECUTION POLICY

September 2011

## Enforcement and Prosecution Policy

|                        |   |
|------------------------|---|
| <b>Objective</b>       | 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).   |
| <b>Scope</b>           | 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. |
| <b>Delegations</b>     | The Commissioner for Consumer Protection is responsible for ensuring the policy is followed.  |
| <b>Definitions</b>     | <p><b>Department:</b> the Department of Commerce</p> <p><b>Consumer Protection:</b> the Consumer Protection Division of the Department of Commerce</p> <p><b>ACCC:</b> the Australian Competition and Consumer Commission</p> <p><b>ACL</b> the <i>Australian Consumer Law</i></p>                  |
| <b>Policy headings</b> | <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>   |

|  |                           |   |          |
|--|---------------------------|---|----------|
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| <b>Policy type and category</b>  |                           |   |          |
| Insert hyperlinks to other relevant policies,<br>guides, procedures, plans |                           |   |          |
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# 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](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 Strategy<sup>1</sup>. 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:

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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> 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 Traders<sup>3</sup>

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;

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[http://intranet.home.docep.wa.gov.au/Intranet/Divisions/Consumer\\_Protection/PDF/Policy\\_on\\_the\\_Public.pdf](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?































































