



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

Public Naming of Traders Policy

June 2019

Consumer Protection Compliance Compendium

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1. EXPLANATORY NOTES

1.1 Organisational Background

The Department of Mines, Industry Regulation and Safety (Department) is 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 (CP) 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 traders who breach Consumer Protection Legislation; regulating and licensing a range of occupational activities and developing, reviewing and amending legislation that protects consumers.

The legislation administered by Consumer Protection (CP Legislation) varies from time to time. The legislation can be found online at Western Australian Legislation.

The legislation includes the [Fair Trading Act 2010 \(FTA\)](#) and the [Australian Consumer Law \(WA\)](#) (ACL). They give the Commissioner for Consumer Protection (Commissioner) the power to publish warnings about traders who supply unsatisfactory goods and services or dangerous goods and services. This policy on the public naming of traders (Policy) applies to every State Government public officer who is empowered to carry out functions with respect to the legislation administered by Consumer Protection.

A reference to Consumer Protection in this Policy includes a reference to the Commissioner.

1.2 When did this Policy Come into Operation?

This Policy first came into effect in February 2011 but has been reviewed most recently in 2019.

1.3 What does this Policy Achieve?

This Policy promotes a consistent approach to the manner in which Consumer Protection handles the public naming of traders. This Policy should be read in conjunction with the following Consumer Protection policies and the Public Warning Notices Guide issued by the Australian Consumer Law regulators through the Legislative and Governance Forum on Consumer Affairs (CAF) Committees (CAANZ and CDRAC). A full copy of that guide is located on the ACLink. The following policies can be found in the Consumer Protection Compliance Compendium:

- 1.3a the Compliance and Enforcement Policy;
- 1.3b the Media Policy; and
- 1.3c the Disclosure Policy.

1.4 What is the Purpose of this Policy?

The purpose of this Policy is to:

- 1.4a ensure that traders are named only where the truth of allegations against them is reasonably established and it is in the public interest to issue a warning to the public,
- 1.4b balance the risks of issuing a warning to the public about unfair and illegal practices of traders against the need to safeguard against traders' reputations from being unjustifiably damaged; and
- 1.4c ensure that public naming of traders is undertaken in accordance with the correct legal processes and requirements.

1.5 To whom does this 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 Western Australia. This Policy is relevant to the community as a whole including:

- 1.5a consumers;
- 1.5b complainants to Consumer Protection about contraventions of CP legislation;

- 1.5c persons reasonably suspected to have contravened Consumer Protection legislation;
- 1.5d persons engaging in occupational, trade, commercial and business enterprises, whether regulated or unregulated;
- 1.5e Federal, State and local government agencies;
- 1.5f non-government organisations and interest groups;
- 1.5g the media; and
- 1.5h legal practitioners.

1.6 What is the Legal Status of this Policy?

This Policy provides general information and guidance about Consumer Protection's approach to the disclosure of information. This policy:

- 1.6a 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;
- 1.6b is general in nature and does not exhaustively address all the specific statutory limitations and considerations that may be relevant under the CP legislation;
- 1.6c does not confine, restrain or limit the discretion of Consumer Protection to take any action; and
- 1.6d 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. NAMING

2.1 What is Naming?

Naming is the public identification of a trader reasonably suspected of contravening the ACL or other Consumer Protection legislation for the purpose of informing the public or section/s of the public immediately in order to protect them from personal or financial harm. It is commonly used when the public needs to be quickly informed about unfair business practices or those who engage in such practices.

There are two naming powers as outline below.

2.1.1 Power under the *Fair Trading Act 2010*

Section 57 of the *Fair Trading Act 2010* gives the Commissioner the power to publish a statement identifying and giving warnings or information about:

- 2.1.1a goods or services that are unsatisfactory or dangerous and traders who supply or are likely to supply them; and/or
- 2.1.1b unfair business practices and traders who engage or are likely to engage in them; and/or
- 2.1.1c any other matter which adversely affects or may adversely affect the interests of consumers in connection with the acquisition by them of goods or services.

The Commissioner must not make a statement unless it is in the public interest to do so.

While this policy refers to the naming of a “trader” it is recognised that a warning may relate to a specific product, service or business practice, instead of a specific business entity. The details about the product, service or business practice may lead to a business entity being identified if, for example, the entity is the only one offering that particular product or service, or the only one using the particular business practice. In these types of situations, the outcome could be the same as “naming the trader”. As such, the considerations outlined in this Policy apply to these circumstances.

2.1.2 Power under the ACL

Section 223 of the ACL gives the Commissioner the power to issue a public warning notice about the conduct of a trader if:

- 2.1d there are reasonable grounds to suspect that the conduct may contravene a provision of the ACL relating to general or specific protections for consumers (Chapters 2 and 3) or an offence provision (Chapter 4); and
- 2.1e the Commissioner is satisfied that one or more people have suffered, or are likely to suffer, detriment as a result of the conduct; and
- 2.1f it is in the public interest to issue the notice. Further, a public warning notice can be issued indicating that a person has refused to respond to a substantiation notice where the Commissioner is satisfied that it is in the public interest to do so.

It should be noted that in certain circumstances information providers (TV and radio broadcasters) are excluded from misleading or deceptive conduct provisions (s.19) and various unfair practices (s.38). Some types of insurance and shipping-related contracts are excluded from unfair contract term provisions (s.28). Legal advice should be sought in respect of the operation of these exclusions.

2.2 How Does Naming Occur?

Naming may occur in a media release, interview, Annual Report, Parliamentary statement, correspondence or in response to a public inquiry.

2.3 The Purpose of Naming

Naming is a compliance and enforcement tool available to Consumer Protection. It can be used to:

- 2.3a influence problem traders to remedy their unfair practices or comply with specific legislative protections;
- 2.3b deter other traders from adopting such practices;
- 2.3c warn the public about particular unsatisfactory traders, goods or services; or

- 2.3d provide information to the public about ways to deal with problem traders and how to obtain any redress to which they may be entitled.

Consumer Protection's objective in naming is to ensure a fair and informed marketplace.

2.4 Considerations When Naming

Care must be taken when deciding to name a trader to ensure that it is done responsibly. A trader who is named may go out of business as a result of the naming.

While section 57 of the *Fair Trading Act 2010* and section 223 of the ACL protect the Commissioner when naming, their use must still be considered carefully. A trader whose reputation is injured as a result of inaccurate information used when named by Consumer Protection may be able to bring an action for defamation to recover compensation for any loss suffered as a result of any defamatory statement.

The naming of traders in media releases and other non-Parliamentary circumstances will only be protected in an action for defamation if the statement can be proven to be true, if it is made in good faith or if other defences set out in the [Defamation Act 2005](#) apply. The circumstances in which these defences apply vary and need to be assessed on a case-by-case basis.

An ACL regulator may discuss its intention to issue a public warning and the conduct that contravenes the ACL with other ACL regulators.

2.5 Statutory Considerations

The power to name a trader should be considered as an exception to section 112 of the *Fair Trading Act 2010*, which requires that information officially obtained by Consumer Protection be kept confidential. This is because section 112(3)(c) allows information to be disclosed where the person is performing a function under or in connection with the Act or one of the Acts listed in Schedule 2 of the FTA e.g. under a naming provision.

Section 115(3) of the *Fair Trading Act 2010* provides that the Commissioner and Consumer Protection officers are not liable for any statements issued in good faith in the course of administering the Act. However, it is necessary to carefully check all information before this protection will apply.

3. PROCEDURES FOR NAMING

3.1 Who Decides to Name?

All decisions about naming are the responsibility of the Commissioner.

Consumer Protection officers must take care not to make statements to the media or public about particular traders who have not already been named unless expressly authorised by the Commissioner to do so.

While the Commissioner must make the decision to name, the Commissioner may have regard to the views of others, such as Consumer Protection officers and lawyers, before making the decision. The Commissioner may also have regard to the circumstances of the case, the stage of the investigation and the parties involved in the matter.

The Commissioner has a wide discretion when deciding to name. However, a decision to name has a significant impact on a trader. Therefore, the Commissioner must exercise the discretion reasonably, in good faith and with sufficient care.

Matters to be considered before deciding to name a trader are outlined below. It is important to ensure that all relevant issues are considered and documented before any decision to name is made.

3.2 General Principles

The following general principles apply when considering whether to name a trader:

- 3.2a The decision to name a trader can have serious consequences for the trader's livelihood. Indeed, it may be a far more damaging (and effective) sanction than a monetary fine or suspension imposed by a court or tribunal.
- 3.2b Consideration must be given to the likely detriment to the public should a trader not be named. A failure to warn or a warning issued too late may result in physical injury, extensive loss or inconvenience to members of the public and, as a result expose the Minister or Commissioner to serious criticism.

- 3.2c The naming of traders is often regarded as a measure of last resort. However, this is not always appropriate: in some circumstances naming may be the quickest and most effective method of dealing with a problem, but it must be properly assessed along with other enforcement options available in accordance with the Compliance and Enforcement Policy.
- 3.2d In order to help ensure that statements issued are not defamatory, a decision to name a trader must be made on fair, reasonable and accurate information. In addition, the statement published must accurately reflect and not embellish that information.
- 3.2e It is important, where circumstances permit, to give traders the right to respond to the proposed statement in draft. Not only is this in accordance with the principles of natural justice but it can help to ensure the accuracy of any proposed statement.
- 3.2f It is essential that recommendations and decisions to name traders are made in good faith and that they are free from bias. A Consumer Protection officer who believes they may face a possible conflict of interests in considering whether a trader should be named must not participate in the process. Consumer Protection officers are referred to the Department's Code of Conduct and the Code of Ethics issued by the Public Sector Commission as well as the DMIRS Conflict of Interest Policy and supporting documents.
- 3.2g If legal action against a trader is under way, or contemplated, consideration should be given to the potential impact on that action of naming the trader. Public discussion of issues that are before the courts, or subject to legal or disciplinary proceedings, may prejudice the action and lead to contempt of court.
- 3.2h When possible, legal advice should be sought at an early stage to establish whether naming is an appropriate option.

3.3 Alternatives to Naming

As an alternative to naming a specific trader, consideration may also be given to industry-wide warnings. Such warnings could be considered where:

- 3.3a the practice concerned is confined to one industry and is not widespread;
- 3.3b more than one trader is engaging in the practice concerned;
- 3.3c it is not appropriate to single out or name any particular trader; or
- 3.3d the warning is expressed in general terms.

Where an undesirable industry practice is engaged in only by traders whose identity will be clearly apparent from an industry warning, it is possible that they may be named by implication. Care should be taken with the wording of such statements to avoid the possibility of such statements effectively naming traders without undertaking the due process and complying with the notice requirements set out in this Policy.

3.4 Before Naming

Before naming can be considered, Consumer Protection officers must be sure that the circumstances of the case fall within one of the categories set out in either section 57 of the *Fair Trading Act 2010* or section 223 of the ACL. Once this has been confirmed, Consumer Protection officers can go on to consider the factors set out below.

3.5 Situations where the naming of a trader will be considered

There are a number of situations and circumstances under which the naming of a trader will be considered. The following is a non-exhaustive list of situations where Consumer Protection may undertake a naming:

- when making a statement naming a trader could prevent widespread misconduct, or allay public concern;
- when making a statement will protect the public from matters that may endanger its safety or cause significant loss;
- comment is necessary in order to maintain public confidence that Consumer Protection is fulfilling its responsibility by investigating issues of public concern;
- when reporting or commenting on the outcome of proceedings, or other formal resolution of enforcement activity; and
- when it is in the public interest to do so when an investigation is being undertaken or when legal proceedings have been commenced against a trader (see 3.7 and 3.8 for further detail).

3.6 Factors to Take Into Account

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

- 3.6a do the goods/services/business practices/conduct/other matters endanger the health or safety of the public?

- 3.6b are the goods/services/business practices/conduct/other matters likely to cause significant loss to or adversely affect the public?
- 3.6c is there an imminent danger to the public from the goods/services/business practices/conduct/other matters?
- 3.6d is there reasonable information to support the allegations being made if the trader is named?
- 3.6e have there been complaints from the public?
- 3.6f who has been/will be affected by the conduct? Are they a specially disadvantaged group (e.g. elderly, migrants, children etc)? Do these persons have any practical, timely and effective means of obtaining redress of their own accord?
- 3.6g what action has Consumer Protection taken to address the conduct?
- 3.6h has there been a full investigation of the trader?
- 3.6i have there been any attempts to resolve disputes with consumers?
- 3.6j if so, has the trader co-operated?
- 3.6k are there any other options available to Consumer Protection apart from naming? If so, what is the likely effectiveness of these?
- 3.6l is any action against the trader already underway in a court or tribunal?
- 3.6m what will be the consequences of naming/not naming?
- 3.6n what will be the likely benefit to the public if the trader is named or detriment if not named?
- 3.6o what will be the effect of naming on the trader's industry group/trade association?
- 3.6p has the trader previously been named either by Consumer Protection or by a consumer protection agency in another jurisdiction?
- 3.6q has the conduct been drawn to the trader's attention?
- 3.6r are there any mitigating or aggravating circumstances?

The reasons for a decision to name must be recorded in writing.

3.7 Naming Before the Completion of an Investigation

It is clearly preferable that a full investigation is undertaken before a decision is made to name a trader, to ensure that the trader's offending behaviour against section 57 of the *Fair Trading Act 2010* or section 223 of the ACL can be proved to the relevant standard of proof.

However, from time to time circumstances may arise where it is in the public interest to name a trader before an investigation is concluded.

Factors to consider when making a decision to name before the completion of an investigation include:

- 3.6a is there a risk to the health and safety of the public?
- 3.6b is there an imminent danger of significant loss or detriment to the public?
- 3.6c how can the facts on which the naming is to be based be ascertained?

3.8 Naming of Traders Upon the Commencement of Proceedings

In select cases, where it is in the public interest and as determined by the Commissioner, a trader may be named in a media statement upon the commencement of legal proceedings against them. A trader will be named only after the appropriate court or tribunal documents have been filed and the trader in question served with those documents (for example in a Prosecution matter - the Prosecution notice, Court Hearing Notice and Statement of Material Facts).

With regard to section 4 of the Media Policy, care must be taken when a statement is released not to speak of matters in such a way as may give rise to a contempt of court. In practice this means the statement should only contain information which is part of a charge or charges, the allegations against the defendant or defendants, details which are part of actual proceedings and information concerning the legislation involved. No opinion regarding the guilt of the defendant/s should be provided within the statement.

3.9 Natural Justice Considerations

It is important, when naming is being considered, to give the trader a copy of the proposed statement and a reasonable time to respond. The amount of time that is reasonable will depend on the circumstances in each particular case.

It is also important for Consumer Protection officers to consider any response received from the trader before proceeding with a recommendation to the Commissioner to name the trader.

In some circumstances it may not be appropriate or possible to give a trader the right to respond to the proposed statement. Such circumstances may include:

- 3.8a the risk to the public is too great to delay naming;
- 3.8b the trader cannot be identified e.g. an itinerant trader; or
- 3.8c the trader cannot be contacted.

3.10 Accuracy

Consumer Protection officers must take care that a statement that names a trader is accurate.

In particular, the trader's personal and business names must be correct.

3.11 Legal Advice

In almost all circumstances it will be appropriate for the Commissioner to seek legal advice before a final decision to name a trader is made. Ideally, legal advice should be sought at an early stage in the process.

3.12 Spent Convictions

It is not appropriate to name a trader who has a spent conviction recorded against them. In certain circumstances, the Commissioner may be of the view that it is in the public interest to name a trader who has been granted a spent conviction. Public naming of a trader with a spent conviction is done only at the discretion of the Commissioner.

3.13 Maintenance of naming

Most public warnings will be published by way of a media statement and warnings will be maintained in a searchable form on the Consumer Protection website. Warnings will be maintained in the public domain for a default period of six years. This time frame is consistent with the time frame adopted for maintaining general media releases on the Consumer Protection website.

3.14 Extension to naming

The Commissioner may decide to revisit and extend the time a media statement or warning is maintained on the Consumer Protection website if a trader or individual is the subject of a further warning within six years of a previous warning. Additionally, the Commissioner may decide to extend the time a media statement or warning is maintained on the website if they consider it is in the public interest to do so.

3.15 Early end to naming

A trader or individual may request that the Commissioner remove a media statement or warning from the Consumer Protection website before the elapsed six years

Traders and/or individuals wishing to have their related warnings/statements removed from the website prior to the end of the six year period should present their case in writing to the Commissioner for Consumer Protection. If a sufficient case is presented the Commissioner is able to exercise their discretion in determining whether to remove the trader or individual from the website prior to the end of the six year period. The grounds on which this may be done, however, will be generally limited to the overturning of the decision, a change of business ownership, on humanitarian grounds or where it is demonstrated it is in the public interest to do so.

3.16 Australian Consumer Law jurisdictional interaction

The *Public Warning Notices* guide issued on this matter should also be consulted in the process. Sharing information and publication of public warning notices under the ACL is an important step in ensuring that consistent advice and actions are taken by all jurisdictional regulators.

As most public warnings will be published by way of a media statement the warnings will be maintained in a searchable form on the Consumer Protection website for six years.

The ACLink (Australian Consumer Law information network knowledge) is a web based interface established by the ACL regulators as an information sharing platform. Officers should both search and post public warning information on this platform.

Checklist for consideration of naming under s.57 *Fair Trading Act 2010*

Question:

Are any of the following circumstances applicable in this matter?

- Goods that are unsatisfactory or dangerous and persons who supply or are likely to supply those goods?
- Services supplied in an unsatisfactory or dangerous manner and persons who supply or are likely to supply those services?
- Unfair business practices and persons who engage or are likely to engage in those practices?
- Any other matter that adversely affects or may adversely affect the interests of consumers in connection with the acquisition by them of goods or services?
- Is it in the public interest to make or issue a statement under s.58 of the Fair Trading Act 2010 (see factors in section 3.5 of the Policy)?

APPENDIX B

Checklist for consideration of naming under s.223(1) of the *Australian Consumer Law (WA)*

Question:

Are ALL of the following circumstances applicable in this matter?

- Reasonable grounds to suspect that the conduct may constitute a contravention of a provision of Chapter 2, 3 or 4?

AND

- One or more other persons has suffered, or is likely to suffer, detriment as a result of the conduct?

AND

- Is it in the public interest to make or issue a statement under s.223(1) of the Australian Consumer Law (WA)?

APPENDIX C

Checklist for consideration of naming under s.223(2) *Australian Consumer Law (WA)*

Question:

Are ALL of the following circumstances applicable in this matter?

- Has the person refused to respond to a substantiation notice or failed to respond before the end of the substantiation notice compliance period for the notice?

AND

- Is it in the public interest to issue a notice under s.223(2) of the Australian Consumer Law (WA)?

Checklist for consideration of seeking legal advice before naming

It is also requirement to record the reasons for a decision to name in writing. In doing so it would be appropriate to consider a range of factors stemming from the examination of the FTA 2010 and the ACL above and prior to submitting a Legal Services Request.

Question:

Are any of the following factors relevant in deciding whether or not to name trader:

- Do the goods/services/business practices/conduct/other matters endanger the health or safety of the public?
- Are the goods/services/business practices/conduct/other matters likely to cause significant loss to or adversely affect the public?
- Is there an imminent danger to the public from the goods/services/business practices/conduct/other matters?
- Is there reasonable information to support the allegations being made if the trader is named?
- Have there been complaints from the public?
- Who has been/will be affected by the conduct? Are they a specially disadvantaged group (e.g. elderly, migrants, children etc.)?
- Do these persons have any practical, timely and effective means of obtaining redress of their own accord?
- What action has Consumer Protection taken to address the conduct?
- Has there been a full investigation of the trader?
- Have there been any attempts to resolve disputes with consumers? If so, has the trader co-operated?
- Are there any other options available to Consumer Protection apart from naming? If so, what is the likely effectiveness of these?
- Is any action against the trader already underway in a court or tribunal?
- What will be the consequences of naming/not naming?
- What will be the likely benefit to the public if the trader is named or detriment if not named?

- What will be the effect of naming on the trader's industry group/trade association?
- Has the trader previously been named either by Consumer Protection or by a consumer protection agency in another jurisdiction?
- Has the conduct been drawn to the trader's attention?
- Are there any mitigating or aggravating circumstances?

Now that you have determined that a notice may be issued under the FTA 2010 and/or the ACL (WA) as well as considering in details the range of contributing factors above, you now need to formally request legal advice on the matter.

Consider if it appropriate at this stage to arrange with media staff to draft the media release for inclusion and settling with the Legal Services Request.