



Fair
Trading

Compliance and Enforcement Policy

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NSW Fair Trading
NSW Department of **Finance & Services**



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1.COMPLIANCE AND ENFORCEMENT

1.1. POLICY PURPOSE

NSW Fair Trading serves the consumers and traders of NSW, and aims to achieve an ethical, fair and efficient marketplace for all.

NSW Fair Trading is a regulatory agency that administers a wide variety of NSW legislation across a range of industries. We safeguard consumer rights and we investigate potential breaches of the laws we administer.

This policy sets out the principles and priorities adopted by Fair Trading to achieve compliance with the law and outlines the range of activities and powers available to encourage and enforce compliance.

Like all regulators, Fair Trading's resources are finite. Therefore, we cannot pursue all of the allegations of non-compliance we receive. This policy set outs the priorities adopted by Fair Trading in determining which complaints to further investigate based on the level of consumer detriment and other important factors.

1.2. OUR MODEL OF COMPLIANCE & ENFORCEMENT

COMPLIANCE

Fair Trading has a range of tools and powers available to support and enforce compliance. The key objective of this policy is to promote a high level of compliance with the law. Our compliance efforts include a commitment to working with business, industry groups and other government agencies to promote voluntary compliance.

We consider that consumers are best served by competitive markets where businesses compete fairly for custom in compliance with the law and where customers are able to make informed choices free of misrepresentation. We also consider that most businesses want to treat their customers fairly and comply with the law.

A wide range of factors can influence whether a business complies or fails to comply with the law. Understanding compliance behaviour assists us to address the actual causes of non-compliance, not just the symptoms, and to respond appropriately and proportionately.

We use a range of available remedies designed to promote behavioural change, stop ongoing breaches and achieve future compliance.

To make the best use of our resources, and to maximise the public benefit, our compliance activities take account of the level of risk and consequence of matters and the specific circumstances of each case. Our responses are based on intelligence-led initiatives that inform marketplace practices.

Prevention is better than cure. We make comprehensive use of educational campaigns to inform consumers and businesses on their rights and obligations under the law.

We seek to ensure that it is as simple as possible for consumers and traders to understand and comply with their rights and obligations.

Fair Trading’s front-line customer services seek to ensure that information and services are available to businesses and consumers so that all parties are informed and supported to meet their obligations.

We offer dispute resolution services to encourage and assist the parties to a complaint or a dispute to understand and meet their obligations and to resolve matters between themselves as quickly and simply as possible.

We regularly conduct targeted education and compliance activities across key industries and we utilise the media to educate the community on our compliance and enforcement role.

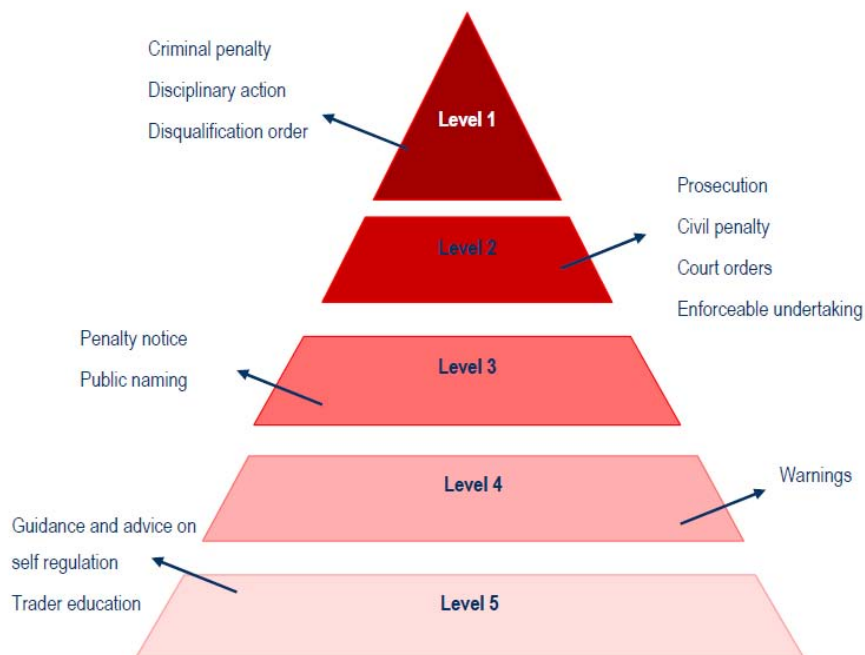
Fair Trading also publishes relevant information about compliance with specific laws, which should be read in conjunction with this policy. Our website contains all Fair Trading publications, including this policy.

ENFORCEMENT

We have a range of administrative, civil and criminal enforcement remedies available under NSW legislation. We use enforcement as a key tool for addressing conduct which involves potential for significant consumer detriment or shows a blatant or persistent disregard for the law.

Fair Trading may use one, or a number of actions to address trader or market behaviour. In some cases we may decide that litigation is the most appropriate way to achieve our compliance and enforcement objectives.

Our approach to compliance and enforcement and the range of enforcement remedies is summarised in the following diagram. It shows how we use a range of different compliance and enforcement tools reflecting the nature of the non-compliance. We exercise judgement and discretion in determining the appropriate resources allocated and action to be taken in individual matters based on the specific circumstances.



1.3. GUIDING PRINCIPLES

We adhere to the following guiding principles in undertaking all of our compliance and enforcement activity.

Best Practice

We strive to undertake our compliance and enforcement functions efficiently and effectively and to foster public confidence in our capacity and effectiveness as a regulator.

Impartiality

We exercise our compliance and enforcement powers independently in the public interest with integrity and professionalism and without fear, favour or bias.

Objectivity

We act fairly and objectively to ensure our enforcement actions are based on evidence and that appropriate checks and balances exist in the decision making process. Our aim is to ensure that the ultimate decision maker reviews the matter thoroughly and at arms length from the initial investigations process before deciding to take action.

Transparency

We deal with consumers and businesses in an open and transparent manner so that they have a clear understanding of what is expected from them and what they can expect from the regulator. Transparency has two aspects:

- our decision-making takes place within appropriate governance arrangements and is able to be reviewed by courts and tribunals, and other agencies such as the NSW Ombudsman, the Independent Commission Against Corruption and the NSW Auditor General;
- enforcement matters that are dealt with through our administrative, civil or criminal powers will be made public consistent with section 3 of this policy.

Accessibility

We are customer service focused. We assist customers to undertake and enforce their consumer rights by providing information on the laws we administer and Fair Trading's role as a consumer protection regulator. We provide consumers, businesses and traders with relevant information on our complaints management process.

Timeliness

When managing complaints and investigations we conduct a process of full, impartial and timely enquiry and investigation into all significant aspects of the complaint, and provide fair and reasonable remedies where warranted.

Consistency

Consistency does not mean that we take a one-size-fits-all approach to every matter. Our aim is to provide clarity and certainty about our priorities and processes while taking account of the circumstances of each matter.

Proportionality

Any enforcement action should be in proportion to the level of consumer detriment and to the seriousness of the breach. More serious or persistent offences or industry wide levels of non-compliance warrant more serious enforcement action.

Targeted

We make effective use of finite resources by targeting issues, practices and industries in line with risks, new and emerging issues and our enforcement priorities.

We will particularly target people and organisations who continue to offend after enforcement action has been undertaken by Fair Trading or by other regulators ('repeat offenders').

Accountability

We are accountable for our compliance and enforcement activity. We seek to ensure that businesses, consumers, peers and other stakeholders are:

- able to understand that decisions on enforcement action are based on these principles;
- able to understand how we target our resources to obtain maximum influence on marketplace behaviour;
- clear on the factors we have taken into account when deciding the appropriate enforcement action.

2.SETTING OUR PRIORITIES

Fair Trading allocates resources where we can best address non-compliant conduct with the greatest benefit to individuals and the community. While all complaints are considered, we exercise discretion in determining the action to be taken including the commitment of resources to a formal investigation.

We give priority to matters that demonstrate one or more of the following factors:

- conduct of significant public interest or concern;
- conduct resulting in significant consumer detriment;
- conduct affecting disadvantaged or vulnerable consumer groups;
- conduct that suggests a pattern of non-compliance by the business or is indicative of a risk of future misconduct;
- conduct demonstrating a blatant disregard for the law;
- conduct involving a significant new or emerging market issue;
- whether action is likely to have a worthwhile educative or deterrent effect; and
- conduct that is industry-wide or may become widespread.

There are some forms of conduct that are so detrimental to consumer welfare and the public interest (such as significant trust account frauds) that Fair Trading will always assess them as a priority. Fair Trading will also prioritise the assessment of product safety issues which have the potential to cause harm to consumers.

Annual Priorities

Each year we determine and publish our annual compliance priorities for the financial year ahead (July to June).

Priorities are set by considering the business practices and/or marketplace conduct that are of greatest concern based on analysis, intelligence and past enforcement activity and outlining the compliance activity proposed to target the activity.

2.1. OUTCOME FOCUSED

When we decide to use enforcement action to achieve compliance, our objective is to ensure that this action will deliver a result that is designed to:

- stop the non-compliant conduct;
- change the behaviour of the individual/s involved;
- address any unlawful financial gain or benefit from non-compliance (where our powers allow this) and achieve some level of redress for the victims of the non-compliance;
- demonstrate the requirements of the relevant law;

- deter those businesses or individuals who would deliberately flout their legal obligations, including punishing wrong-doing where appropriate; and
- improve community confidence in our ability as a regulator.

2.2. ENFORCEMENT OPTIONS

The range of enforcement actions available to Fair Trading includes administrative action, civil remedies, and criminal proceedings (see section 1.2 above).

Matters to be pursued are determined after consideration of the following factors:

- the available enforcement options and resources, and the cost benefit analysis of undertaking enforcement action and likelihood of a successful outcome;
- intelligence, including culpability and history of the alleged offender; and
- the seriousness of the breach and/or consumer detriment or likelihood of achieving compliance using the level of enforcement undertaken.

Where appropriate, we work with other state and territory regulators to achieve optimal compliance outcomes.

Where significant compliance and enforcement matters are brought to our attention involving international traders and consumer protection regulators we may refer those matters to the Australian Competition and Consumer Commission for potential consideration by the International Consumer Protection and Enforcement Network (ICPEN).

ICPEN is an organisation comprised of consumer protection authorities from over 50 countries, whose aim is to protect consumers' economic interests around the world; share information about cross-border commercial activities that may affect consumer welfare; and encourage global cooperation among law enforcement agencies.

We are less likely to pursue matters that:

- are isolated events unless there is an overriding public interest in protecting consumers or the seriousness of the breach warrants action even if an isolated incident;
- are more appropriately resolved directly between the parties privately or under an industry code (for example, by mediation or an ombudsman); or
- involve issues more effectively dealt with by another agency.

Where we decide to take particular compliance or enforcement action, our first priority is always to achieve the best possible outcome for consumers and the community.

Wherever possible we will aim to give the business or trader concerned a reasonable opportunity to respond and a general explanation of the actions we propose to take. However, in some instances it may be necessary to act promptly and without prior warning to protect the public interest.

2.2.1. ADMINISTRATIVE ACTION

Without prejudice discussion

Without prejudice discussions are informal discussions with a business about alleged or potentially alleged non-compliance. The discussions are aimed at promptly resolving an issue of concern to Fair Trading.

Formal written warning

A formal written warning is a letter to a business where we believe that a person or business has breached the law. It serves as a reminder to the business of its obligations under the law.

Enforceable undertaking

An enforceable undertaking is a written undertaking given by a person or business that has breached a law. The undertaking is enforceable by a court if breached.

Disciplinary action

Disciplinary action is action taken against a person or business operating under a licensing regime, where it is believed that the alleged breaches are so serious in nature that action such as the suspension or cancellation of a licence or the imposition of a monetary penalty is appropriate.

Public Naming

Public naming refers to the public identification of the trader and their conduct in breach of a law. Fair Trading has published [guidelines](#) about public warnings.

2.2.2. CIVIL REMEDIES

Injunction

An injunction is an order that may be made by a court. An injunction may require a person or business that has breached a law to do certain things or to cease doing certain things.

Compensation order

A compensation order is sought when consumers have suffered a loss as a result of a breach of the law by a business. In some circumstances we apply to a court for orders which deal with consumer redress, refunds or contract variations.

Non-punitive order

This is a court order addressing the breach of a law by a business. This can include requiring the business to improve internal operations or establish training programs.

Adverse publicity order

This is a court order requiring a person who has breached the legislation to make public the nature of their actions. The order may include an order for corrective advertising or an apology.

Disqualification order

This is a court order disqualifying a person from being involved in the management of a corporation.

Civil pecuniary penalty

This is a court-ordered financial penalty of up to \$1.1 million, aimed at punishing the wrong doer and reflecting the seriousness of the offence.

2.2.3. CRIMINAL ACTIONS

Infringement notice

An infringement notice is a monetary penalty for a prescribed offence asserting a breach of a law. The issue of an infringement notice is not an admission that a person is guilty and does not constitute a conviction. If you receive an infringement notice you are able to elect to have the matter determined by a court instead. You may also make representations to the State Debt Recovery Office seeking to have the infringement notice withdrawn if you believe there is insufficient evidence of a breach or the penalty is harsh or there are other mitigating factors.

2.2.4. CRIMINAL PROCEEDINGS

Where warranted, we take action in the courts to obtain orders which punish the wrongdoer by the imposition of penalties or fines and deter others from breaching the law.

Criminal proceedings can be taken against a person or business under any law administered by Fair Trading or the *Crimes Act 1900*. A criminal penalty can be a fine of up to \$1.1 million that also carries a criminal charge. Some laws administered by Fair Trading carry a term of imprisonment.

3.PROMOTING REGULATION

3.1. RELEASING INFORMATION TO REGULATORS

Fair Trading routinely exchanges information about compliance and enforcement activities with other regulators and government agencies, including all Australian consumer protection agencies. This information sharing and cooperation strengthens and coordinates regulatory activities and promotes consistency of enforcement actions nationally.

3.2. RELEASING INFORMATION PUBLICLY

Releasing information in the public interest

NSW laws permit Fair Trading to release information about compliance and enforcement activities.

Information is released to the public, social media or broadcast media when we consider it is in the public interest to do so, having regard to circumstances of the case, the stage of an investigation and the parties involved in the matter, and in compliance with privacy law.

Generally, we will not release information which would jeopardise an ongoing investigation. However, we may consider that the public interest is served in releasing information about an investigation where:

- there is potential or likelihood of ongoing consumer detriment;
- the release of information is likely to restore consumer confidence in a market, clarify what actions are being taken against a business or send an appropriate warning to problematic traders or industries of our compliance and enforcement role;
- the release of information will assist us to progress the investigation (for example, by encouraging other consumers to report non-compliant behaviour by a business).

A decision not to release information about a specific investigation does not stop Fair Trading from commenting on general market and business practices.

Releasing information to complainants

We will provide information on the status and outcomes of investigations to complainants.

Complainants will be provided with status updates on progress with investigating their complaint at least once per month during the course of the investigation and when a decision has been made to finalise the matter.

Complainants will be provided with all relevant information in relation to Fair Trading's investigation of their complaint, except where disclosure of information would jeopardise the investigation. In this case, the complainant will be informed accordingly.

A complainant who is a witness in court proceedings will be informed about the court process and the role of the complainant as a witness in the prosecution.

Releasing information under GIPA

The *Government Information (Public Access) Act 2009* (the GIPA Act) sets up a right to information system that is focused on making government information more readily available. A government agency must release information unless there is an overriding public interest against disclosure.

All requests for information under the GIPA Act should be made through Fair Trading's Ministerial and Executive Services Branch. Each application is considered on its own merits, subject to the specific circumstances. Consultation may be undertaken with individuals whose information is contained in the documents, and all documents are subject to the "public interest test" prior to a decision regarding release being made.

Dealing with the media during an investigation

Fair Trading encourages media interest in consumer protection and the role of Fair Trading as a consumer protection regulator.

We recognise the role of the media as a legitimate source of complaint information and encourage the media to provide information to Fair Trading which assists with our compliance and enforcement role.

We may release information on our compliance and enforcement activities to representatives of the media. We may do this in response to requests for information from the media, or proactively to highlight compliance and enforcement activities being undertaken by Fair Trading. We will not release information to the media which would jeopardise an investigation.

Further details about how we release information to the media are contained in our Media Policy.

Releasing information at the conclusion of enforcement action

A major reason why we undertake targeted compliance and enforcement action is to achieve outcomes that act as a deterrent to other businesses not to engage in unacceptable behaviour. Publicising the outcomes of our compliance and enforcement actions can achieve a positive deterrent effect.

Once a court or tribunal has made a decision, that decision is then a matter of public record. Accordingly, we release such information as soon as practicable after a court has made a decision.

Where determinations have been made in respect of disciplinary action against licensees (or former licensees), information about the outcomes is released when it has been confirmed that the person/corporation who is the subject of the action is in receipt of our determination.

Information about authority holders who have been subjected to disciplinary action is available to members of the general public during the period of any suspension or disqualification, and for a reasonable period after that (usually three years).

When we become aware that a licence-holder has sought a stay or review of a determination, then the further public release of information will cease until the review process is completed.

What information will be released?

When we decide to publicly release information about a compliance and enforcement result, we may:

- identify the trader or traders covered by the action;
- explain why we investigated – whether it is as a result of a complaint or as part of a targeted compliance operation; and
- outline what the law requires traders to do and what the penalties are for not complying with the law.

Where a disciplinary process is not yet complete, information will generally be limited to advising:

- enforcement action is currently underway; and
- if the outcome results in action being taken, the authority holder has appeal rights to challenge any decision made by Fair Trading.

Releasing information about consumers

When we release information about an investigation, information identifying a consumer will only be released if the consumer has agreed to its release.

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