

# Compliance and Enforcement Policy 2018-2020





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## Introduction

This document sets out the framework adopted by the Commissioner, supported by Consumer and Business Services (CBS), to achieve compliance with the law. It outlines the enforcement powers, functions, priorities and strategies of CBS. Where there is a reference to CBS in this document it includes the:

- Commissioner for Consumer Affairs
- Commissioner for Corporate Affairs
- Liquor and Gambling Commissioner
- Commissioner for Prices
- Registrar of Births, Deaths and Marriages.

In formulating this policy, CBS sought the views of industry bodies and external stakeholders to help shape the strategic direction of CBS' compliance and enforcement activities. This policy will next be reviewed in April 2020.

## Strategic Goals

CBS has strategic goals which include providing informative and responsive customer service, providing education and focusing on regulation, working with our external partners and building flexible service delivery channels.

## Compliance and Enforcement

Achieving compliance and enforcing the law are important components in achieving CBS' strategic goals. To assist with this, there are three key business units in CBS whose roles aim to assist consumers and traders in resolving disputes, understanding their rights and obligations, and to achieve compliance where there may be a breach of the law. These units are:

- Advice and Conciliation
- Compliance and Enforcement
- Education and Engagement.

## Requests for advice or assistance

CBS provides advice to consumers and traders who are involved in a dispute to assist those parties in understanding their rights and responsibilities.

### Advice

CBS provides practical advice to consumers on how to resolve their disputes without CBS' assistance. Using an ownership model which provides one point of contact for consumers, consumers are encouraged to contact the initial CBS officer if they require further assistance.

### Conciliation

Where consumers request further assistance, CBS will attempt to conciliate the dispute between the parties. If initial conciliation fails CBS is able, in some circumstances, to provide a compulsory conciliation service between a consumer and a trader to seek to resolve the dispute. In these instances, should parties reach an agreement, an instrument of agreement will be drawn up that is enforceable in the Magistrates Court of South Australia.

Where a breach of legislation is identified, the matter is also sent for assessment to consider whether any further action should be taken in line with CBS' strategic priorities and the priority areas set out in this Compliance and Enforcement Policy. It is important to note that even if a dispute is resolved between the consumer and trader, CBS may still take compliance and enforcement action.

## Breaches of legislation

Our aim is to regulate the environment for consumers and businesses by focusing our resources on issues where there is the greatest harm or risk and by ensuring any enforcement action is proportionate to the level of harm and seriousness of the breach.

We will identify these issues using an intelligence led approach to understand emerging threats, risks and opportunities. We will also focus on the priorities that we have identified for specific industries as outlined below (refer to 'Industry areas of focus', pg9-11). By focusing on these issues, CBS aims to send a strong deterrent message to the industry to secure voluntary compliance with the laws administered by CBS.

While CBS treats all complaints and issues raised by both businesses and consumers seriously, it cannot pursue all the complaints it receives or issues that come to its attention about the conduct of traders or businesses.

To make the best use of resources and maximise public benefit, compliance and enforcement activity will target areas of strategic priority and incidents with evidence or likelihood of broader consumer detriment.

Factors considered by CBS in its assessment of a complaint concerning an alleged breach of legislation administered by CBS include:

- conduct of significant public interest or concern
- conduct resulting in substantial harm or detriment to consumers or an industry
- the vulnerability of consumers affected or likely to be affected by the conduct in question
- conduct demonstrating blatant or systemic misconduct
- any national priorities that are identified together with other fair trading agencies at the State or Commonwealth level.

Once the matter has been assessed, CBS will consider whether any of the below compliance and enforcement tools should be used to deal with the alleged breach.

Should CBS decide not to pursue compliance or enforcement action in relation to a matter, it may still:

- provide advice to empower consumers to seek their own remedy, including enforcing their own private rights
- offer a conciliation service to the trader and consumer to assist in resolving a dispute
- retain the information provided for intelligence purposes and place the relevant trader or business on notice about CBS' concerns
- provide education to the trader or business to inform them of the possible contravention and encourage a culture of compliance
- refer a matter to another agency where there may be scope for the enforcement action to be taken by another agency for reasons of expediency and efficiency or where it is agreed between agencies.

CBS will endeavour to communicate and explain its decision to the person who reported the complaint.

## Available compliance and enforcement options

When a matter is pursued by CBS, the legislation administered by CBS provides a range of investigative tools and enforcement options including court based outcomes and court enforceable assurances and undertakings.

Investigative tools include compulsory information gathering powers, the ability to issue substantiation notices, and the ability to conduct search warrants in appropriate circumstances.

CBS also achieves compliance by using a range of tools to prevent breaches of the legislation including education, monitoring and surveillance. Further, CBS works closely with industry and other stakeholders where compliance outcomes can be achieved through self-regulation and co-regulation, or through targeted industry specific initiatives.

In deciding which compliance action or enforcement tool to pursue, CBS uses its discretion and will choose a course of action appropriate to the conduct in question. CBS strives to ensure that its enforcement activity is:

- without fear or favour
- fair, proportionate and appropriate to the conduct
- dealt with in a timely manner
- in the public interest
- conducted to best utilise its resources
- undertaken as a model litigant
- publicly accountable.

## Education and engagement

CBS views prevention of a breach as preferable to taking action after a breach has occurred. CBS's Education and Engagement Unit works to ensure businesses understand their obligations, and consumers are aware of their rights and are empowered to take action.

CBS provides information and delivers educational programs and materials to businesses and consumers. This includes programs tailored for specific industry sectors, and using targeted tools such as advertising campaigns, information resources, direct mail, presentations, stakeholder forums and articles for industry publications.

CBS also works closely with the media to help raise public awareness about particular issues or significant changes affecting industry and the public. CBS has an obligation to the public and will publicise its enforcement outcomes to ensure consumers and businesses are aware of their rights and obligations.

Special measures are taken to ensure that new legislation is properly introduced to the businesses bound by it. Where trading standards have changed, or have not been the subject of CBS compliance monitoring or other activity for some time, education about legal obligations will generally be our first response.

The overarching education objectives for CBS are to:

- inform business and industry of their obligations and changes to legislation
- empower consumers through increased awareness of their rights
- promote the role and function of CBS
- promote the range of information resources available from CBS for consumers
- leverage enforcement outcomes to achieve general deterrence for industries and markets.

In engaging and partnering with industry bodies and other regulators, CBS is able to better understand and target its compliance and regulatory initiatives to identify risk, and proactively address areas of harm.

## Monitoring and surveillance

CBS initiates proactive checks and conducts surveillance to protect the majority of consumers who are not able to identify breaches of the legislation. CBS also responds to reports from members of the public, industry associations and other government agencies about alleged breaches of the legislation administered by CBS through undertaking targeted monitoring.

## Self-regulation and co-regulation

CBS is committed to co-operative working relations with industry bodies and businesses aimed at improving industry standards and overall compliance. Individual trader and industry-wide compliance programs are an important part of self-regulation. CBS encourages such programs and will also work with industry to make codes of conduct and practice that establish high standards and a culture of compliance.

## Co-operating with others

Under the *Fair Trading Act 1987*, CBS has a specific legislative mandate to co-operate with other public and private bodies and agencies in the interests of consumers. Where appropriate, CBS will consider sharing resources and information amongst agencies performing related work.

## Written warnings

Depending on the severity of the breach, CBS may choose to issue a written warning to the business or individual trader about instances of illegal or inappropriate conduct.

## Public assurances and undertakings

As an alternative to taking legal action, CBS may accept a written assurance or undertaking that states that the business or individual will refrain from engaging in specified unlawful conduct.

Factors that may result in CBS accepting an assurance from a business or individual, if it appears that the business or individual has breached the legislation administered by CBS, include whether the person is:

- prepared to take responsibility for and acknowledge its conduct may have breached the law
- co-operative with CBS' investigation
- prepared to provide redress to affected consumers or some other remedy to undo the harm
- prepared to put in place measures to achieve future compliance.

If CBS accepts the assurance or undertaking, CBS will not proceed against the business or individual concerned. However, if the business or individual fails to comply with an assurance or undertaking, they are guilty of an offence and are liable for prosecution. Where a business or individual enters into an assurance or undertaking with CBS, it may be referred to in public or media statements and will be placed on the public register located on CBS' website.

## Public naming

CBS is empowered under the Australian Consumer Law and section 48 of the *Fair Trading Act 1987* to publicly name a trader in order to protect the public. For example, CBS may do so where unsafe goods are being sold, or the services being supplied by a trader are unsatisfactory and are causing immediate and ongoing harm to consumers.

## Expiations

As an alternative to prosecution, CBS may issue an expiation notice in accordance with the *Expiation of Offences Act 1996* or under the Australian Consumer Law.

Specific breaches of legislation are expiable with a fee set at a much lower level than the maximum penalty that may be imposed by a Court. A business or individual may choose to pay the expiation fee or elect to be prosecuted in Court.

## Disciplinary action

CBS may take disciplinary action against an individual. CBS may seek orders from a Court in a disciplinary action for pecuniary penalties, cancellation or suspension of a licence or registration, variation to the licence or registration, disqualification from being licensed or prohibition from participating in an industry.

## Civil remedies

Civil action may be taken to stop illegal conduct or to obtain redress for consumers or both. An application can be made by the person who suffered the loss or by CBS in appropriate circumstances.

The Court may make an order against the person who breached the legislation compensating the person who suffered the loss for the payment of money as loss or damage, avoiding whole or parts of a contract, variation of a contract, directing a refund or return of property or directing repair or parts of a good or the provision of specified services.

Civil pecuniary penalties may also apply. For example, under the Australian Consumer Law, penalties of up to \$1.1 million for companies, and \$220,000 for individuals may be imposed by a court for each offence.

## Prosecution

Criminal prosecution aims to stop illegal conduct and to act as a strong deterrent to further breaches of legislation administered by CBS. The penalties can include fines or incarceration and other remedies such as orders providing redress or compensation may be made.

## Priority guidelines

CBS cannot pursue all complaints brought to its attention. CBS will strive to ensure that it only takes the action necessary to achieve compliance. The choice of response remains at CBS' discretion to enable CBS to apply its resources to maximum effect for all consumers. However, CBS will ensure that its response is fair, appropriate and proportionate to the alleged conduct taking into consideration all relevant circumstances.

We will identify issues using an intelligence led approach to understand emerging threats, risks and opportunities. We will also focus on the priorities that we have identified for specific industries as outlined below. By focusing on these issues, CBS aims to send a strong deterrent message to the industry to secure voluntary compliance with the laws administered by CBS.

To assist CBS in determining what action may be necessary, CBS considers a range of factors in determining whether to prioritise a matter. Whilst CBS will consider all matters brought to its attention, the following priority guidelines are considered by CBS when determining what action, if any, should be taken:

### Level of penalty

The maximum penalty set by the South Australian Parliament guides CBS in determining how seriously conduct should be viewed.

### Duration of conduct and repeat offenders

Continuing misconduct over a long period is likely to receive higher priority than isolated or one-off misconduct matters.

### Consumer detriment/detriment to the industry

Matters that involve high levels of consumer detriment or detriment to an industry have greater priority than those of low consumer detriment. The vulnerability of consumers affected will also be relevant.

### Civil, disciplinary action or criminal breach

The legislation may give an indication of what the South Australian Parliament deems an appropriate response to the conduct that is prohibited by legislation. Where the legislation provides for a variety of responses, CBS will consider an appropriate response in the circumstances of the case.

### Best addressed by private action

The more suitable a matter is for private action by parties, the less likely it is that CBS will apply a high priority to it.

### Likelihood of success

It may not be an appropriate use of resources to pursue an action that only has a small chance of success. That said, CBS may pursue matters to clarify the law where there is a public interest to do so.

### Public interest

Matters of high public interest will be given greater priority than those that are of low public interest.

## Breach of fiduciary duties and fraudulent conduct

Breaches of fiduciary duties (including, but not limited to, misappropriation or misapplication of trust monies) are likely to be of greater priority than those that do not involve breaches of fiduciary duties. At times, the conduct may be better dealt with by an appropriate law enforcement agency and the matter will be referred.

## Previous conviction, complaint or court order

Matters involving parties who have previously had enforcement action taken against them for the alleged or similar conduct are likely to be given greater priority than those involving first time breaches.

## Level of profit from the conduct

The greater the level of profit obtained by the individual or body corporate from the alleged illegal conduct, the greater the priority that will be applied to the matter.

## Blatant conduct

Blatant conduct may indicate a greater level of wrongdoing and require higher priority.

## Industry areas of focus

CBS administers laws regulating a broad range of industries and has, without limiting which matters it will pursue, identified a number of priority areas to focus on as follows:

### Australian Consumer Law

CBS is responsible for the administration of the Australian Consumer Law (ACL) in South Australia. CBS works closely with other State and Commonwealth ACL regulators on a range of issues to encourage and enforce compliance with the law. The key priorities that CBS will proactively consider include:

- the safety of products made for and marketed towards children;
- misleading or deceptive tactics used by traders for consumers who may be vulnerable or unable to help themselves; and
- traders who take payment from customers but do not provide the goods or services to customers.

CBS also supports national monitoring and compliance programs where issues are identified by the Commonwealth, state and territory consumer protection agencies.

### Associations

CBS is responsible for the administration of the *Associations Incorporation Act 1985*. Incorporated associations continue to be used by members of the public as an inexpensive means of establishing a legal entity separate from the individual members. The key focus for CBS will be that the profit obtained by any association is used for the association and not by the members of the association for personal gain.

### Builders

CBS is responsible for the administration of the *Building Work Contractors Act 1995*. The building industry remains a key focus for CBS as: it impacts a great number of South Australian consumers; disputes can be quite complex; the dollars invested by consumers are often significant; and substandard work can be a safety risk. The priority areas for CBS within this industry include:

- any individuals or companies performing unlicensed building work, including operating outside of licence conditions, with a particular focus on commercial and industrial projects, residential projects including homebuilding and renovation and landscaping services requiring licenced building work;
- any individuals or building work contractors who fail to take out building indemnity insurance when performing domestic building work costing \$12,000 or more that requires council approval;
- any individuals or companies who take an excessive deposit from consumers; and
- builders who take payment from consumers but do not complete the work.

### Casino, gaming and wagering

CBS, together with the Independent Gambling Authority, is responsible for the regulation of the Skycity Adelaide Casino ('Casino'). The relevant legislation is the *Casino Act 1997*.

CBS is also responsible for the administration of the *Gaming Machines Act 1992*. The regulation of gaming and wagering in South Australia remains a key focus for CBS.

The priority areas within these industries include:

- any minors on the licensed premises;
- ensuring problem gambling training and measures are in place and the role of staff in dealing with suspected problem gamblers is clear, and that effective reporting systems are in place for suspected problem gamblers; and
- the training undertaken by staff to ensure that gaming and wagering standards are adhered to.

## Liquor

CBS is responsible for the administration of the *Liquor Licensing Act 1997*. In balancing the economic driver of increased vibrancy, the responsible service and supply of liquor will remain a key focus for CBS in order to minimise potential harm from alcohol. The priority areas within this industry include:

- the responsible service of alcohol including the service of intoxicated patrons;
- licensed premises operating without effective supervision;
- the Late Night Trading and General Codes of Practice; and
- provisions related to alcohol and minors.

## Plumbers, Gas Fitters and Electricians

CBS is responsible for the administration of the *Plumbers, Gas Fitters and Electricians Act 1995*, and works closely with the Office of the Technical Regulator in maintaining industry integrity, and protecting consumer welfare.

These industries remain a key focus for CBS as they have the potential to impact a number of South Australian consumers and there are inherent safety risks. The priority areas within these industries include:

- any individuals performing unlicensed plumbing, gas fitting or electrical work. and
- ensuring that licensees display their licence number in any advertising for their services.

## Real Estate

CBS is responsible for the administration of the *Land Agents Act 1994*, the *Land and Business (Sale and Conveyancing) Act 1994*, *Conveyancers Act 1994*, and the *Residential Tenancies Act 1995*.

CBS is committed to ensuring that all consumers have fair and honest dealings with those working in the South Australian real estate industry, including licensed agents and conveyancers, landlords and room house proprietors. CBS wants to ensure that registered agencies and individuals who are engaging in unlawful behaviour are identified. The priority areas include:

- misrepresentations about properties, including pricing representations (underquoting) and 'bait' advertising;
- related party transactions
- unlicensed/unregistered conduct
- trust account/trust money issues
- non-lodgement and late lodgement of residential security bonds.

## Second-hand vehicle dealers

CBS is responsible for the administration of the *Second-Hand Vehicle Dealers Act 1995*. CBS is committed to ensuring that consumers are protected when making a significant purchase. The priority areas include:

- unlicensed sellers of second-hand vehicles;
- licensed dealers operating their business from their residential premises as consumers are often unaware that these people are licensed (e.g. CBS will check to ensure that they meet signage requirements and include correct notices on the vehicles); and
- odometer tampering, which remains a focus for CBS as it misrepresents the product being sold to the consumer.

## Security and investigation agents

CBS is responsible for the administration of the *Security and Investigation Industry Act 1995*. Any criminal convictions will continue to be assessed on a case by case basis to ensure the ongoing integrity of the industry.

CBS is committed to ensure that only appropriately licensed persons and organisations are permitted to engage with consumers in the provision of a security or investigative service.

## Other Acts

CBS administers laws which regulate a number of other industries, including births, deaths and marriages. Matters that arise in each of these industries will be assessed in accordance with the general priority factors set out above.

## CBS conduct

CBS will strive to conduct investigations in a manner that:

- is professional and appropriate
- is timely and effective
- has due regard for public expectations and the rights of individuals but bearing in mind the importance of gathering and maintaining the integrity of evidence
- will maintain the integrity of evidence.

When using statutory powers to obtain evidence, CBS will ensure that it does so in accordance with its obligations as set out in the applicable legislation. CBS will ensure that it does not abuse or misuse its investigative powers.

All parties that are the subject of an investigation relating to a material and substantiated allegation will be given an opportunity to respond to the allegation.

## Co-operation by alleged offenders

Without in any way limiting CBS' ability to deal appropriately with any illegal activity, it may be appropriate to deal leniently with a person who co-operates with CBS in its investigation or court actions. Such leniency may take the form of agreed submissions to the court on penalty, acceptance of an assurance or undertaking, a decision not to proceed with legal proceedings or a decision to accept an administrative resolution in lieu of litigation.

Leniency is most likely to be considered appropriate for persons who:

- come forward with valuable and important evidence of a contravention of which CBS is otherwise unaware or has insufficient evidence to initiate proceedings
- provide CBS with full and frank disclosure of the activity and relevant evidence available to them
- take prompt and effective action to stop the illegal conduct, or their part in it, and do something such as an internal compliance program, to ensure the conduct is not repeated
- undertake rectification or restitution or both for victims of the illegal conduct
- undertake to co-operate throughout CBS' investigation and comply with any such undertaking
- have not acted as ring leaders or originators of the conduct
- do not have a prior record of breaching the legislation administered by CBS.

## Without prejudice communications

CBS will not generally engage in 'without prejudice' discussions or correspondence. However, CBS does not wish to discourage any person from approaching it to discuss potentially unlawful conduct, and to resolve matters in the public interest and within the spirit and intent of this policy. There are some circumstances in which such communication is both appropriate and desirable, for example, in resolving litigation and the timely cessation of unlawful conduct.

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