

South Australian Office of Consumer and Business Affairs

# Compliance and Enforcement Policy

**Our mission:** to regulate the trading environment in which consumers buy to ensure they are confident that they will be treated fairly when buying goods or services.



Government  
of South Australia



Office of  
Consumer and  
Business Affairs

# Compliance and Enforcement

South Australia's fair-trading legislation provides a framework for ethical business practices, fair trading and consumer protection in this State. It also provides an environment in which competition can flourish and the State's economy can expand. Ensuring compliance with fair-trading legislation is crucial to achieving these outcomes.

The Office of Consumer and Business Affairs (OCBA) supports the Commissioner for Consumer Affairs to fulfil the statutory obligations set out in the *Fair Trading Act 1987*. These include a clear obligation to:

- monitor business activities that affect consumers and to investigate practices that may adversely affect the interests of consumers generally or a particular class of consumers;
- encourage trade, industry and professional associations to draft, disseminate to their members and enforce codes of practice that promote fair trading and safeguard the interests of consumers;
- prepare and disseminate guidelines to traders;
- enforce the requirements of fair-trading legislation by the prosecution of offences and other appropriate action;
- license businesses and register workers; and
- make reports to the Minister on matters referred to the Commissioner by the Minister and on the exercise of the functions of the Commissioner.

Where there is a reference to OCBA in this document it includes the:

- Commissioner for Consumer Affairs;
- Commissioner for Corporate Affairs;
- Registrar of Births Deaths and Marriages; and
- their delegates.

Consumer protection and compliance with relevant laws are pivotal components of OCBA's current work plan. Maintaining public confidence in the fairness and efficiency of its compliance efforts is crucial.

This document outlines the framework within which OCBA operates. A range of activities and approaches are used to ensure compliance with legislated standards and ultimately improve trading standards.

Securing voluntary compliance with fair-trading standards will always have high priority. When the trading standards in the legislation are complied with, a culture of compliance grows and unfair trading is deterred.

OCBA applies its priority guidelines when undertaking its enforcement activities. OCBA officers use discretion and common sense in choosing a course of action appropriate to particular conduct. Any action will be based on the objective facts and circumstances of each particular matter and not on supposition. Prejudices and bias will not intrude.

## **'OCBA will strive to ensure that any 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; and
- publicly accountable.'

# Compliance Strategies

OCBA uses the following strategies to assist in securing compliance with the relevant and appropriate standards:

## Education

OCBA provides information and delivers educational programs and materials to consumers and traders. It is important that consumers know about their rights and how to exercise them. Similarly, businesses should be aware of their rights and obligations to each other and in dealings with their customers.

Special measures are taken to ensure that new legislation and trading standards are properly introduced to the business community bound by them. Similarly, where trading standards have not been the subject of OCBA's compliance monitoring or other activity for a long time, education about legal obligations will normally be the first response.

## Monitoring

OCBA initiates proactive checks and responds to reports from consumers, competitors, industry associations and other agencies about alleged breaches of the legislation OCBA administers.

Effective compliance with the law cannot be gauged by relying only on reports of alleged contraventions. Many consumers are not able to detect contravention of the relevant law or standards. They are therefore unable to report them.

Checking compliance with trading standards set out in weights and measures legislation, and the many information and safety standards set out in the trade standards legislation, is an important part of OCBA's compliance work. Compliance work in these areas requires technical knowledge and testing.

## Self-regulation and Co-regulation

OCBA is committed to co-operative working relations with representative industry organisations and individual traders aimed at improving industry trading standards and overall compliance.

Individual trader and industry-wide compliance programs are important parts of self-regulation. OCBA encourages such programs and will also work with industry to make codes of conduct and practice that establish high standards.

Industry agreements, whereby some of the Commissioner's functions are formally delegated to industry bodies, may be pursued in appropriate cases in accordance with the relevant legislation.

Many provisions of the *Fair Trading Act 1987*, are self-enforcing, in that businesses who contravene them are liable to private civil actions by competitors. Whenever appropriate, this possibility will be drawn to the attention of the business community.

Although OCBA will normally not play a part in these suits, it will consider exercising its right to intervene where to do so would be in the public interest.

## Cooperating with Others

Under section 9 of the *Fair Trading Act 1987*, the Commissioner has a specific legislative mandate to co-operate with other public and private bodies and agencies in the interests of consumers.

Where legislatively sanctioned, and bearing in mind the secrecy provisions contained in section 11 of the Act, there is much to gain from an appropriate sharing of resources and information among agencies performing related work. Joint programs with other agencies, or co-ordinated action building on the strengths of different agencies, will be pursued.

# Enforcement Tools

There are a variety of tools including encouragement and sanctions available to enforce fair-trading legislation and standards. OCBA uses the following hierarchy of enforcement tools:

## 1. Oral and Written Warnings

Depending on the severity of the breach, OCBA may choose to issue either an oral or written warning to traders about individual instances of illegal conduct.

## 2. Undertakings and Assurances

Under section 79(1) of the *Fair Trading Act 1987* OCBA may accept an assurance (an undertaking, in writing) that a trader will refrain from engaging in specified unlawful conduct. Assurances can include undertakings to perform certain duties or refrain from certain activities.

Under section 79(2) OCBA may seek an assurance from a trader if it appears to OCBA that the trader has:

- breached the *Fair Trading Act 1987* or a related act; or
- become liable to disciplinary action under the occupational licensing legislation; or
- both.

If OCBA accepts the assurance, then OCBA will not proceed against a trader for the matter to which the assurance relates.

Where a trader fails to comply with an assurance given, they are guilty of an offence under section 81 of the *Fair Trading Act 1987* and are liable to prosecution. If an assurance is breached, then the trader can be subject to:

- a maximum fine of \$5,000;
- an injunction prohibiting conduct;
- affirmative orders to comply with the assurance;
- a requirement to account for profits to the Crown;
- compensatory orders for victims; and
- any other order the court may think fit.

Each assurance accepted forms part of a public register and may be published in both the annual report and on OCBA's Internet site.

### 3. Public Naming

The Minister for Consumer Affairs and the Commissioner for Consumer Affairs are empowered under section 91A of the *Fair Trading Act 1987* to publicly name a trader in order to protect the public. Section 91b provides immunity from liability for the Minister and the Commissioner.

### 4. Expiation

OCBA may issue an expiation notice in accordance with the *Expiation of Offences Act 1996* as an alternative to prosecution. Specific breaches of legislation are expiable with a fee set at a much lower level than the maximum penalty that may be imposed by the court. An alleged offender may choose to pay the expiation fee or elect to be prosecuted in court.

### 5. Disciplinary Action

OCBA may take disciplinary action against a licensee under the following occupational licensing legislation:

- *Building Work Contractors Act 1995*;
- *Conveyancers Act 1994*;
- *Hairdressers Act 1988*;
- *Land Agents Act 1994*;
- *Land Valuers Act 1994*;
- *Plumbers, Gas-Fitters and Electricians Act 1995*;
- *Second-hand Vehicle Dealers Act 1995*;
- *Security and Investigation Agents Act 1995*;
- *Trade Measurement Act 1993*; and
- *Travel Agents Act 1986*.

Disciplinary action is designed to protect the public from unfair trading. The forum for disciplinary action is the Administrative and Disciplinary Division of the District Court

and any person, including the Commissioner, may lodge a complaint to the court alleging grounds for disciplinary action to be commenced.

OCBA may seek orders from the District 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.

Each disciplinary action court outcome is recorded on the licensing public register available on OCBA's Internet site.

### 6. Civil Remedies

Civil action is designed to stop illegal conduct or to obtain redress for aggrieved parties or both. Under section 85 of the *Fair Trading Act 1987*, if the Supreme Court or District Court is satisfied that a person has suffered loss or damage owing to a contravention of this Act, the court may make an order against the person who breached the Act compensating the person who suffered the loss.

An application can be made by the person who has suffered the loss, or by OCBA, provided OCBA has written consent from the person who has suffered the loss. The application must be made within:

- two years from when the cause of action arose if it concerns unconscionable conduct under section 57; or
- three years from when the cause of action arose in any other case.

These orders may include orders for:

- 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 for a good or the provision of specified services.

### 7. Prosecution

Prosecution aims to stop illegal conduct and through sentencing to act as a deterrent to further breaches of the law. Under the legislation administered by OCBA there are a number of courses of conduct that are considered criminal breaches. The penalties for breaching these include:

- fines; and
- incarceration.

The guidelines for exercising the discretions set out in this document, outline when OCBA would seek prosecution.

# Priority Guidelines

Priority guidelines are used to ensure a balance of:

- appropriate resource utilisation;
- responsive and relevant compliance; and
- maximum overall effectiveness of compliance activities.

Any given matter may not meet all guidelines, but some matters will become more pressing because of the severity or the consequence of the alleged conduct.

The following guidelines are taken into account:

## Level of Penalty

The maximum penalty set by Parliament guides OCBA in determining how seriously conduct should be viewed.

## Duration of Conduct

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

## Consumer Detriment/Detriment to Industry

Matters that involve high levels of consumer detriment or detriment to industry have greater priority than those of low consumer detriment.

## Civil, Disciplinary Action or Criminal Breach

Where a person engages in some kind of conduct that is prohibited or restricted by legislation, the legislation itself gives an indication of what Parliament thinks is the appropriate response to it. Commonly, it provides for the imposition of a penalty. If the legislation provides for a variety of responses, such as taking civil action, bringing disciplinary proceedings, or laying criminal charges for certain conduct, it is an indication that, according to the circumstances of the case, any one of those may be an appropriate response. The issue of which remedy should be pursued must be considered in all the circumstances of the case as known at the time.

## Better Addressed by Private Action

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

## Likelihood of Success

It may not be an appropriate use of resources to pursue action that has only a small chance of success.

## 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. Similarly, the greater the nature and extent of a fraud involved in the conduct, the greater the priority that OCBA will apply to the matter.

"Fraud" in this context includes:

- misleading or deceptive conduct;
- fraudulent conversion;
- obtaining monies by false pretences.

Where the conduct is outside the jurisdiction of OCBA, the matter will be referred to an appropriate enforcement body eg SAPOL, ACCC, or interstate Fair Trading Offices.

## Previous Conviction, Complaint or Court Order

Matters involving parties who have been convicted previously, or had their licences suspended for similar conduct, or been warned previously for the alleged or similar conduct, are likely to be given greater priority than those involving alleged first offenders. This is also to be considered when looking at what level of compliance action may be appropriate. A first time offender on a minor matter may receive a warning. A re-offender may reasonably expect more severe action.

## Level of Profit from the Conduct

The greater the level of profit derived by the person 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 therefore require higher priority than less blatant conduct.

# Using Discretion

OCBA will strive to ensure that it takes only the action necessary to achieve compliance. The choice of response remains at OCBA's discretion, although the choice may be limited by the applicable legislation. OCBA has an overarching obligation to ensure that the response chosen is fair, appropriate and proportionate to the alleged conduct taking into consideration all relevant circumstances.

OCBA will consider the following when exercising this discretion:

- whether the action it proposes will achieve compliance;
- the public interest;
- the circumstances of the alleged conduct;
- whether the conduct is an isolated instance or part of a course of conduct;
- whether the parties involved have a prior record of complaints against them or court action with OCBA;
- whether the response is appropriate to use as a precedent or to act as a deterrent to other misconduct in the industry; and
- OCBA's priorities.

## Public Interest

OCBA takes into account the public interest. Without limiting the public interest, the following may be considered:

- the seriousness, or conversely, the triviality of the alleged conduct or that it is of a technical nature;
- the detriment to any person as a result of the alleged conduct;
- the profit that the alleged offender has made from the alleged conduct;
- any circumstances that may mitigate or aggravate the matter;
- the youth, age, intelligence, physical health, mental health, infirmity of the alleged offender or a victim;
- whether the alleged offender has any prior history of similar conduct;
- the time that has passed since the cause of action arose and whether the conduct is continuing;
- the degree of culpability of the alleged offender in the alleged conduct;
- the effect on the behaviour of others in the trade;
- whether the law is obsolete or obscure;
- whether the proposed course of action would bring the law or its administration into disrepute and the need to maintain public confidence in the law;
- availability and appropriateness of alternative courses of action;
- prevalence of the alleged conduct and the need for deterrence both to the offender and the public;
- whether the consequences of OCBA's action would be unduly harsh or oppressive;
- whether the alleged conduct is of public concern;

- the attitude of the alleged offender, whether the alleged offender is co-operative in the investigation or court action and has attempted restitution for any wrongdoing;
- where proceedings of any kind are contemplated, the length and expense of the proceedings;
- the likely outcome if the proposed course of action is successful.

## Taking Court Action

OCBA will undertake court action if:

- it is appropriate under the circumstances to take such action;
- it is in the public interest to take such action;
- there is a reasonable prospect of success based on available, admissible, credible evidence; and
- it would be reasonable and in accordance with community standards to proceed, bearing in mind any possible defence open on the evidence available to OCBA. Where defences rely on community standards, the allegations should usually be put to the court for determination.

## Assessment of Evidence

OCBA will assess the evidence that it gathers as part of determining what action it will take. Without in any way limiting the questions OCBA will raise and consider, these questions will be significant in assessing the evidence in any matter it pursues:

- Are there grounds for believing the evidence may be excluded, bearing in mind the principles of admissibility at common law and under statute?
- If the case depends in part on admissions by the defendant, are there any grounds for believing that they are of doubtful reliability, having regard to the age, intelligence, and apparent understanding of the defendant?
- Does it appear that a witness is exaggerating, hostile, friendly, or unreliable?
- Has a witness a motive for not telling the full truth?
- Are there matters that might enable the defence to attack the credibility of the witness?
- What impression will the witness make to the court?
- Does the evidence contain material contradictions that may undermine the action?
- Is it likely that the evidence from witnesses is contrived or false?
- Are all necessary witnesses available and competent to give evidence?
- Where two or more defendants are charged together, is there a chance that the proceedings could be severed? Is the case sufficiently proved against each defendant should separate trials be ordered?

This is not an exhaustive list of matters to be considered. The matters that are taken into account will depend on the circumstances of each case.

## Negotiations about Plea

Negotiations between the defence and OCBA on a prosecution may result in the alleged offender pleading guilty to fewer than all the charges or to a lesser charge, with the remaining charges not being proceeded with or taken into account without proceeding to conviction.

Arrangements as to charges and pleas can be made, provided that:

- it is initiated by the defence;
- the charges proceeded with bear a reasonable relationship to the conduct alleged;
- those charges proceeded with are adequate for an appropriate penalty or sentence in all the circumstances of the case;
- there is sufficient evidence to support the charges; and
- the defendant does not maintain his/her innocence on the matters to which he/she pleads guilty.

OCBA is not obliged to agree to any proposal and may refuse to agree to a proposal in any case even though all of the matters in the above list may not have been addressed. Any decision to agree to a proposal must take into account all the circumstances of the case and the public interest.

Negotiations may occur in civil and disciplinary actions as for prosecutions.

## Civil Action

Under section 76 of the *Fair Trading Act 1987*, OCBA may on behalf of a consumer institute proceedings provided:

- the case raises issues of law affecting the interests of consumers generally, or a class of consumers, or is in the public interest;
- OCBA has written irrevocable consent from the consumer and consent from the Minister;
- where OCBA would be acting for a purchaser of premises, the amount of the claim should not be more than \$100,000;
- where OCBA would be acting for a mortgagor of premises, the amount of the claim should not be more than \$50,000; and
- the amount of any other claim is not more than \$25,000.

Where OCBA acts under section 76:

- OCBA has the same rights as the consumer would have;
- OCBA may conduct the proceedings as it thinks fit;
- any money (excluding costs) recovered by OCBA is paid to the consumer;
- any amount (excluding costs) awarded against the consumer is recoverable against the consumer provided they have not given OCBA written notice of a desire to settle;
- costs will be borne by or paid to OCBA; and
- unrelated counter-claims can be the subject of an application for a separate hearing.

It is not OCBA's role to take civil action on behalf of consumers or others simply because that is more convenient to the consumer. There are well-established court processes available to consumers to seek enforcement of their rights. It is only in special circumstances that OCBA would seek to take civil action on behalf of others and the discretion to use this course of action would depend on the number and type of consumers affected, the level of consumer detriment and how widespread the conduct is.

## Cooperating with Others

It is appropriate to refer matters to other agencies where OCBA has no jurisdiction (eg interstate or overseas conduct) or where another agency has expressed the wish to pursue such matters vigorously or exclusively (eg the Australian Competition and Consumer Commission on its programmed activities) or where the States have agreed that one State should enforce their laws.

It is also appropriate to refer matters to the South Australian Police where the criminal law has been breached and it has been agreed that there is no role for OCBA.

If the evidence suggests possible breaches of legislation not administered by OCBA, and that a matter is more appropriately pursued by another enforcement body (eg South Australian Police or the Director of Public Prosecutions) then the matter will be referred to that enforcer.

Where several possible causes of action may be available under legislation administered by OCBA and other enforcement bodies, OCBA will exercise a discretion as to when matters should be referred to another appropriate enforcement or prosecutorial bodies. After consultation with other enforcement or prosecutorial bodies, it may be appropriate for OCBA to proceed.

## Intervening in Proceedings Relating to Co-operatives

Under section 94 and 95 of the *Co-operatives Act 1997* OCBA may either bring proceedings or intervene in actions on behalf of a co-operative with leave of the Supreme Court.

## Civil Penalties for Co-operatives

OCBA may also seek a pecuniary penalty order under the *Co-operatives Act 1997* civil penalties provisions about co-operatives' financial reports and audits.

# Dealing with OCBA

## Conducting Investigations

OCBA 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; and
- will maintain the integrity of evidence.

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

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

When a complaint is received, OCBA will acknowledge receipt of the complaint and advise the complainant as far as possible whether it will be investigated.

When an investigation is completed, OCBA will inform the complainant and the alleged offender of the outcome.

Section II of the *Fair Trading Act 1987* prevents OCBA providing information about investigations or complaints to a third party except in particular situations.

## Co-operation by Alleged Offenders

Without in any way limiting OCBA's ability to deal appropriately with any illegal activity, it may be appropriate to deal leniently with a person who co-operates with OCBA in its investigations or court actions. Such leniency may take the form of complete or partial immunity from action, agreed submissions to court on penalty, or 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 OCBA is otherwise unaware or has insufficient evidence to initiate proceedings;
- provide OCBA 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 that the conduct is not repeated;
- undertake rectification or restitution or both for victims of the illegal conduct;
- undertake to co-operate throughout OCBA's 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 OCBA.

## Without Prejudice Communications

OCBA will not generally engage widely in 'without prejudice' discussions or correspondence. However, OCBA 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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### Trade Measurement

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### Translating and Interpreting Service (TIS)

Telephone 131 450

### Regional Offices

OCBA provides services at the following regional locations:

- Berri
- Mount Gambier
- Port Augusta
- Port Pirie
- Port Lincoln, and
- Whyalla.

Telephone 131 882