

**Submission
No 20**

COSMETIC HEALTH SERVICE COMPLAINTS IN NEW SOUTH WALES

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NSW Government Submission: Inquiry into Cosmetic Health Service Complaints

1. INTRODUCTION

The NSW Government welcomes the Joint Parliamentary Committee on the Health Care Complaints Commission's Inquiry into Cosmetic Health Services Complaints.

Since 2016 NSW Health has enhanced the oversight of cosmetic health service providers and has increased regulatory compliance activity in conjunction with other state and federal agencies.

"Cosmetic health services" is a broad term with no generally accepted meaning, but would be expected to capture a wide range of services, from major surgical procedures, such as breast augmentation, to the use of prescription only drugs, such as botulinum toxin or dermal fillers, for cosmetic purposes through to minor procedures such as mole removal for cosmetic purposes. In addition, there is a fine line between cosmetic health services and beauty procedures that are carried out in beauty or cosmetic clinics and do not involve oversight by a health practitioner. The risks associated with cosmetic health services vary greatly depending on a range of factors including the service in question, the skills and qualifications of the person undertaking the particular procedure, the premises in which a service is undertaken and the risk profile of the patient. High risk cosmetic services are generally surgical procedures that use high levels of anaesthesia and sedation and/or carry risks of significant complications. Low risk services can include minor surgical procedures where low levels of anaesthesia and sedation are used and/or that do not carry risks of significant complications.

Data on cosmetic health services provided in NSW is not readily available to agencies like NSW Health for a range of reasons. Cosmetic health services carried out by registered health practitioners generally do not attract a Medicare rebate and may not be covered by private health insurance policies. Data is not collected in respect of cosmetic health services provided by non-registered health practitioners. Accordingly, information available to NSW Government agencies, such as NSW Health, often comes from alternative sources, such as investigations following serious incidents, information arising from complaints and concerns raised by professional organisations and members of the public.

NSW Health's key learnings over the past two years include, but are not limited to, the following:

- *The procedures of most concern to Australian regulatory bodies are high risk surgical procedures undertaken in unlicensed premises.* For example, in 2015 NSW Health was made aware of an incident involving a patient who suffered a cardiac arrest while undergoing a full breast enhancement. The procedure was conducted using local anaesthetic in an unlicensed clinic. While undertaken by a registered medical practitioner, reliance on local anaesthetic meant the clinic was not (as the law was at the time) subject to private health facility licensing arrangements.

- *Procedures can involve access to and (mis)use of high risk drugs.* Some cosmetic procedures rely on the use of prescription drugs, which require oversight by a medical practitioner or appropriately trained nurse. Investigations undertaken by NSW Health have identified failures in medical oversight, including lack of appropriate health assessments prior to providing prescription drugs, reliance on imported, unregulated and sometimes wrongly labelled products of unknown quality, safety and efficacy, and consequential breaches of both state and federal therapeutic goods laws.
- *Lack of community awareness of the risks involved in procedures.* Cosmetic health services can be advertised in ways that overemphasise the efficacy of treatments while downplaying the risks associated with the treatment. This has led to NSW Health having concerns about a lack of understanding across the community of the risks associated with some cosmetic procedures.
- *Some procedures involve breaches of professional conduct rules by registered practitioners,* including the medical, pharmacy and nursing professions. These are managed through the NSW co-regulatory regime involving the Health Care Complaints Commission (HCCC) and relevant Health Professional Councils. Some procedures may also involve breaches of the Code of Conduct for non-registered health practitioners.
- *Some conduct raises issues for a range of different state and federal agencies.* The nature of cosmetic health services raises a variety of issues involving conduct of health practitioners, mis(use) of prescription only medicines, importation of medicines, and claims about efficacy of treatment. These issues fall within the jurisdiction of different state agencies (NSW Health, HCCC, NSW Health Professional Councils, NSW Fair Trading, NSW Police) and national agencies (Therapeutic Goods Administration (TGA), Australian Competition and Consumer Commission (ACCC), Australian Health Practitioner Regulation Agency (AHPRA) and national health practitioner boards). A coordinated approach by these agencies will be a critical in managing the associated risks of cosmetic health services in NSW.
- *Balancing the response:* As noted above, the risks of cosmetic health services range from low risk procedures (such as mole removal for a cosmetic purpose) to high risk procedures (such as breast augmentation surgery). There is a fine line between cosmetic health services and beauty procedures that are carried out in beauty or cosmetic clinics, such as hair removal. Regulatory initiatives need to be commensurate to the risk and resources focussed on the high risk areas.

2. THE ROLES AND RESPONSIBILITIES OF THE HEALTH CARE COMPLAINTS COMMISSION RELATIVE TO THE ROLES AND RESPONSIBILITIES OF COMMONWEALTH AND OTHER STATE REGULATORY AGENCIES

As noted above, issues relating to cosmetic health services fall within the jurisdiction of a range of different state and national agencies. A summary of the role of various state agencies and the regulatory schemes that apply are set out below.

Health Care Complaints Commission

The HCCC is established as an independent body under the Health Care Complaints Act 1993 and protects public health and safety through dealing with complaints about health

service providers in NSW. The HCCC has a remit to investigate registered health practitioners, non-registered health practitioners and other health service providers.

The HCCC has a range of powers relevant to cosmetic health procedures, which include:

- investigation of registered health practitioners, non-registered health practitioners and health organisations who are considered to be delivering a health service and who have been named in a complaint as alleging that the care or conduct is seen to be posing a risk to public health and safety;
- own motion power to initiate an investigation without a prior complaint;
- issuing an order prohibiting a non-registered health service provider from providing health services, or placing conditions on them, or issuing a public warning about such a practitioner; and
- issuing a public warning about health treatment or services.

NSW Health

NSW Health is responsible for the administration of health legislation that regulates cosmetic health services, including undertaking compliance activities and investigations.

Over the last 12 months, NSW Health has commenced both random and targeted inspections and investigations where there is suspicion that a clinic is undertaking procedures on unlicensed premises or is unlawfully supplying or holding prescription drugs. Visits to clinics have uncovered issues with imported botulinum toxin, dermal fillers, local anaesthetics and other prescription medicines not listed by the TGA on the Australian Register of Therapeutic Goods (ARTG) as well as issues with record keeping and supervision by medical practitioners associated with the clinics.

A number of these compliance activities have been undertaken jointly with the HCCC to, among other objectives, understand more fully the business models of these clinics, the nature and extent of the risks posed and the most appropriate regulatory responses to these risks. To date, action taken as a result of these activities has included:

- referral of registered practitioners, including medical practitioners and registered nurses to NSW Health professional councils;
- referral of possible breaches of the offence provisions under the Health Practitioner Regulation National Law to AHPRA;
- confiscation of illegally acquired or held medicines; and
- the issuing of two public warnings by the HCCC.

Inquiries are ongoing and further action in some cases is pending.

Regulatory regimes

The regulatory regimes relevant to the provision of cosmetic health services are set out below.

Private Health Facilities Act 2007 and Private Health Facilities Regulation 2017

The Private Health Facilities Act and Regulation provide the framework for regulating private hospitals in NSW. It operates through setting standards for different “Classes” of licenced private health facilities and requiring that procedures covered by those standards must be

carried out in a licenced facility. The Classes include, for example, Surgical (general), Cardiac Surgery, Intensive Care, Maternity, Mental Health and Radiotherapy. One facility can be licenced in a number of classes. Conducting a private health facility without a licence is an offence, and can attract a penalty of up to \$550,000.

Standards for each Class are designed to protect patients, and cover:

- *Safety of the premises*: compliance with relevant requirements of the Building Code of Australia and Australasian Health Facility Guidelines (which include requirements for maintenance of buildings, provision of equipment such as resuscitation equipment, fire safety and emergency);
- *Clinical care and patient safety*: including issues such as infection control policies and procedures, maintenance of clinical records, admission and discharge policies, incident and adverse clinical event management, risk and safety program and participating in the Australian Health Service Safety and Quality Accreditation Scheme which provides for the national coordination of accreditation processes and supports the National Safety and Quality Health Service Standards; and
- *Clinical standards*: including accreditation of practitioners to provide services at the facility and delineation of clinical privileges of practitioners, and ensuring appropriate protocols are in place to support transfer of patients who require higher levels of care, staffing requirements and appropriate equipment.

Procedures such as surgical breast enhancement would have been expected to be undertaken in a surgical class facility, as the legislation requires surgery using general, epidural or major regional anaesthetic or sedation that results in “deeper than conscious sedation” must be performed in a Surgical Class facility. The use of these types of general or major regional anaesthesia can create significant risks to patients, associated with airway management (in the case of general anaesthesia) and/or risks associated with the immobility of the patient. These risks can only be appropriately addressed by way of licensing requirements.

2016 Amendments to the Private Health Facilities legislation

The Private Health Facilities Regulation was amended in 2016 to create a new “Cosmetic Surgical” Class of private health facilities. The changes mean that facilities where defined cosmetic surgical procedures are performed must be licensed and generally comply with the same standards as Surgery Class Facilities and Anaesthesia Class facilities. NSW was the first jurisdiction in Australia to introduce specific regulation of cosmetic surgical procedures.

Since March 2017, when the changes came into effect, facilities where “cosmetic surgery” is performed must be licenced. The cosmetic surgical procedures now captured as a result of this change in the law are:

- a) *any cosmetic surgical procedure that is intended to alter or modify a person’s appearance or body and that involves anaesthesia (including a Biers Block), or*
- b) *any of the following surgical procedures (however described):*
 - (i) *abdominoplasty (tummy tuck),*
 - (ii) *belt lipectomy,*
 - (iii) *brachioplasty (armlift),*

- (iv) *breast augmentation or reduction,*
- (v) *buttock augmentation, reduction or lift,*
- (vi) *calf implants,*
- (vii) *facial implants that involve inserting an implant on the bone or surgical exposure to deep tissue,*
- (viii) *fat transfer that involves the transfer of more than 2.5 litres of lipoaspirate,*
- (ix) *liposuction that involves the removal of more than 2.5 litres of lipoaspirate,*
- (x) *mastopexy or mastopexy augmentation,*
- (xi) *necklift,*
- (xii) *pectoral implants,*
- (xiii) *penis augmentation,*
- (xiv) *rhinoplasty,*
- (xv) *superficial musculoaponeurotic system facelift (SMAS facelift),*
- (xvi) *vaginoplasty or labiaplasty,*

The Class is therefore defined by reference to both the use of high levels of anaesthesia/more than conscious sedation, and to a specific list of procedures that are so inherently risky they must be undertaken at licensed premises irrespective of the level of anaesthesia or sedation.

This current list of procedures was settled in 2016 following consultation with stakeholders such as medical colleges and professional groups and private health facilities, having regard to:

- the risk of the procedure itself (such as the inherent risks of the procedure e.g. risk of significant blood loss or other complications, whether there are significant risks the patient may need to be transferred to a higher level of care facility and whether the type of procedure is likely to mean that a patient would be non-ambulatory if they needed to be evacuated during an emergency); and
- the risk that the procedure will require high levels of anaesthesia or sedation such that there is a significant risk of the patient inadvertently becoming unconscious and/or significant risk of local anaesthesia toxicity.

NSW Health recognises that as the definition of “cosmetic surgery” relies on a list of specific procedures, the types of procedures may change over time, the risks of a procedure can change, and new procedures may be introduced. For this reason, NSW Health is keeping the definition under review to ensure that the list remains appropriate and current.

Medicines and Poisons Regulation

Medicines and medical devices containing prescription only substances are used in many cosmetic surgical and non-surgical procedures, most commonly local anaesthetics, botulinum toxins (medicines) and substances in dermal fillers (medical devices), in an injectable form. As such, the regulatory regime for medicines and poisons is relevant to complaints about cosmetic health procedures that involve the use of these products.

The prescribing, supply and administration of prescription medicines and medical devices are regulated under the NSW Poisons and Therapeutic Goods Act 1966 and the Commonwealth Therapeutic Goods Act 1989 and the respective subordinate legislation.

Under the operation of these laws:

- Prescription medicines and medical devices must generally only be prescribed by medical practitioners. Whilst some other health practitioners such as dentists, nurse practitioners and optometrists, may legally prescribe these, they may only do so within the scope of their professional practice.
- Authorised practitioners must only prescribe or supply in a quantity, or for a purpose, that accords with the recognised therapeutic standard of what is appropriate in the circumstances.
- Similarly, a pharmacist must only dispense in a quantity, or for a purpose, that accords with the recognised therapeutic standard of what is appropriate in the circumstances.
- Prescription medicines and medical devices must be supplied by the prescriber, or dispensed by a pharmacist on prescription. A medical practitioner may administer these themselves, or they may supervise another appropriately trained health practitioner to administer these on their behalf.
- Medicines and medical devices used in Australia must be registered on the ARTG by the TGA, unless otherwise exempted or approved by the TGA for use as an unregistered good.
- It is an offence to supply medicines that are not registered on the ARTG or otherwise approved.
- The TGA approves the labelling and packaging of ARTG medicines and medical devices for marketing, including labelling in compliance with the Poisons Standard in the case of medicines.
- NSW enforces the labelling and packaging requirements of goods for supply in accordance with the Poisons Standard approved by the Commonwealth Department of Health.

Health Practitioner Regulation National Law

Medical practitioners and nurses are regulated by the Health Practitioner Regulation National Law (National Law). Medical practitioners must be registered with the Medical Board of Australia and comply with relevant standards, codes and guidelines issued by the Board.

The Medical Board's Code of Conduct for doctors in Australia relevantly requires medical practitioners to:

- recognise and work within the limits of their competence and scope of practice; and
- have adequate knowledge and skill to provide safe clinical care.

The Medical Board of Australia has also issued guidelines for cosmetic medical or surgical treatment. These guidelines cover matters such as:

- providing patients with a cooling off period for cosmetic surgery; and
- proper patient assessment and discussion of other options available.

The Medical Board has also issued guidelines for technology-based patient consultations. These guidelines cover the appropriateness of technology-based patient consultation and whether a direct physical examination is necessary.

Other registered health practitioners, such as nurses and dental practitioners, must comply with all standards, guidelines and codes of conduct issued by the relevant Board, such as the Nursing and Midwifery Board of Australia and the Dental Board of Australia. These can include standards of practice relating to prescribing of medicines.

Disciplinary and Complaints Processes

Complaints about NSW registered health practitioners are managed by NSW Profession-specific Councils established under the National Law and the HCCC.

The complaints process includes provision for investigation of complaints, performance oversight of practitioners, and, in cases affecting public health and safety, the Councils also have emergency suspension powers. Professional misconduct matters are prosecuted by the HCCC before the NSW Civil and Administrative Tribunal.

Offence Provisions

In addition to the disciplinary and complaints processes managed at state level, the National Law also includes offences enforced by AHPRA:

- it is an offence to use a reserved professional title (such as “medical practitioner” or “registered nurse”, or specialist titles, such as “specialist plastic surgeon”) unless the person is suitably qualified. The maximum penalty is a fine of \$30,000 (in the case of an individual) or \$60,000 (in the case of a body corporate). In August 2017, Health Ministers agreed to proceed with amendments to the National Law to increase the penalties for this offence; and
- It is an offence to advertise health services in a way that is or is likely to be false, misleading, or deceptive. The offence, which applies to both registered health practitioners and businesses providing regulated health service, attracts a penalty of up to \$5,000 (for an individual) or \$10,000 (for a body corporate).

Public Health Act 2010 and the Public Health Regulation 2012

The Public Health Act and Regulation addresses a number of areas impacting on public health, including:

- a Code of Conduct for non-registered health practitioners. The Code of Conduct mandates a number of standards, including:
 - maintaining the necessary competence in the practitioner’s field of practice;
 - not providing health care outside of the practitioner’s training or expertise;
 - encouraging clients to inform their treating medical practitioner of treatments they are receiving;
 - having a sound understanding of the adverse interactions between the therapies and treatments provided and other medication the client is taking;
 - not financially exploiting clients;
 - not engaging in any form of misinformation; and

- not engaging in any form of misrepresentation in relation to the products or services he or she provides or as to his or her qualifications, training or professional affiliations.

If a non-registered health practitioner breaches the Code of Conduct and poses a risk to public health or safety, the HCCC can issue a prohibition order requiring the practitioner to cease practising or placing conditions on their practice; and

- establishes infection control standards, with penalties for breaches, for premises where skin penetration procedures are conducted which aim to minimise the risk of the spread of blood borne viruses. These standards apply if the procedure is not undertaken by, or on behalf of, a registered health practitioner. The infection control standards in the Public Health Act and Regulation do not apply to registered health practitioners. Registered health practitioners are subject to infection control standards as part of their standards of practice under the National Law.

NSW Fair Trading

NSW Fair Trading is a consumer protection agency that aims to achieve an ethical, fair and efficient marketplace for all. NSW Fair Trading administers a wide variety of consumer protection legislation, including the Australian Consumer Law (ACL).

Consumer reports of problems with cosmetic and beauty services

In the Australian Consumer Survey 2016, beauty services ranked 19th in the list of industry sectors in which consumer respondents (n.5,408) reported experiencing a problem. According to the survey, approximately seven per cent of consumers who purchased a beauty service in the two years prior had experienced a problem with the service.

In 2017, NSW Fair Trading received 45,279 consumer complaints across all industry sectors, including retail, automotive, building and construction and residential tenancies. Beauty services contributed to 287 complaints or 0.06 per cent of all complaints. Dissatisfaction with the quality of services was the most common issue reported in consumer complaints related to beauty services.

Where complainants raised issues relating to professional conduct of health practitioners, NSW Fair Trading referred them to the HCCC.

The Australian Consumer Law

The ACL is a national consumer protection law which applies consistently across all States and Territories. In NSW, the ACL has been incorporated into the *Fair Trading Act 1987* (NSW) and is administered and enforced by Fair Trading.

The ACL includes general consumer protections that prohibit misleading, deceptive or unconscionable conduct and unfair terms in consumer contracts. In addition, the ACL protects consumers against specific business practices which include bait advertising, referral selling, harassment and coercion, and unsolicited supplies of goods and services.

The ACL also supports consumer purchases by creating consumer guarantees for goods or services. For example, the ACL consumer guarantees require that services be supplied with

due care and skill, fit for any purpose that a consumer and a business agreed, and within a reasonable time. If the business fails to comply with these consumer guarantees, the consumer can seek redress by cancelling the supply contract, compensation for any loss or damages or having the failure remedied by the business within a reasonable time.

In addition, the ACL provides NSW Fair Trading with a range of civil enforcement remedies, including injunction, declaration, civil pecuniary penalty, compensation order, disqualification order and non-punitive order. The enforcement remedy that Fair Trading seeks will depend on specific circumstances and the nature and extent of business' conduct. In determining whether to exercise its enforcement powers, Fair Trading takes into consideration various factors, including:

- the seriousness of the breach and/or consumer detriment or likelihood of achieving compliance using the level of enforcement undertaken;
- the available resources, and the cost benefit analysis of undertaking enforcement action and likelihood of a successful outcome; and
- whether the matter involves issues more effectively dealt by a specialist regulator.

Further information about Fair Trading's approach to compliance and enforcement, including guiding principles and strategic priorities is located at **Attachment A**.

Interaction between the Australian Consumer Law and industry-specific laws

As a general consumer protection law with broad application, the ACL allows a regulator to take a holistic approach to setting out acceptable standards of business conduct across various industries. However, the ACL is not always the most suitable regulatory regime to provide a singular or targeted focus on industry-specific issues. This is because the effective regulation of some industry-specific issues requires specialist knowledge and experience to scrutinise compliance with specific professional standards and/or safety requirements. For example, the provisions of the National Law prohibiting advertising of regulated health services in a way that is false, misleading or deceptive allows AHPRA, as a health agency, to investigate health services advertising.

The Commonwealth Productivity Commission acknowledged in its 2017 report on '*Consumer Law Enforcement and Administration*', that the ACL cannot be an alternative to intervention under specialist regulatory regimes as the ACL regulator does not have the same experience and technical expertise as the specialist regulator. In its submission to the Productivity Commission, the ACCC also noted the importance of specialist regulatory regimes and reinforced that the same level of attention and expertise cannot be expected from generalist regulators.

Current operations of NSW Fair Trading

NSW Fair Trading received referrals in late 2017 and in early 2018 from the HCCC and NSW Health regarding two cosmetic clinics. NSW Fair Trading will consider if there were any breaches of the Fair Trading Act 1987 and what the most appropriate compliance and enforcement action should be (if a breach is found).

Consumer education and dispute resolution

The NSW Fair Trading's free complaint handling aims to achieve a voluntary agreement between a consumer and a business by educating them about their rights and obligations under the relevant laws. It uses consumer complaints to identify potential misconduct of businesses, breaches of legislation, marketplace trends and emerging consumer protection issues. NSW Fair Trading also uses complaints data to develop education and engagement programs for consumers and businesses, and to consider further compliance and enforcement actions where necessary.

If a business receives six or more complaints within a six-month period, NSW Fair Trading engages that business through its Better Trader Program. The Program uses an intensive case management approach to promote better business practices and ongoing compliance by improving businesses' knowledge about their regulatory obligations.

Community Education and Engagement

NSW Fair Trading is developing an awareness raising campaign to inform the community about the risks associated with unsafe or illegal cosmetic procedures. This will build on existing efforts it makes through use of factsheets, social media campaigns and other online publications available on its website. These materials advise consumers about their rights under the ACL and aim to raise community awareness of false or misleading advertising about beauty products and services.

3. The adequacy of the power and functions of the Health Care Complaints Commission to improve the outcomes for the public in the cosmetic health service sector

The HCCC has a range of powers and functions to improve the outcomes for the public in relation to cosmetic health service providers, including investigation of complaints, issuing prohibition orders against non-registered health practitioners and issuing public warning about health treatments and services.

4. The opportunities for collaboration with other agencies, organisation and levels of Government to improve outcomes for the public in the cosmetic health services sector

Greater collaboration between the relevant agencies is a key aspect of improving outcomes for the public in this area.

The NSW Ministry of Health chairs quarterly meetings of the NSW Health Regulators Forum, with a view to enabling consultation on relevant matters between various elements of health regulation within the Health Portfolio NSW, including the Pharmaceutical Regulation Unit, Health Protection, Regulation and Compliance, HCCC and Health Professional Councils.

The forum is an opportunity to discuss emerging risks to public health and safety and consider the respective roles, responsibilities and powers to address the risks.

As agencies have developed an operational response to the concerns raised by cosmetic health procedures, it is clear that greater effectiveness can be achieved by increased co-ordination with regulators outside NSW Health– including NSW Fair Trading (at the State level) and the TGA at the Commonwealth level. The TGA and NSW Fair Trading share the view that collaboration is imperative to address the risks associated with cosmetic procedures.

The compliance activities summarised at section 2 have increasingly relied on operational co-operation across jurisdictions and agencies, and further development of these linkages will ensure each agency makes the most effective use of their powers and resources and there is a co-ordination across all agencies. Key areas agencies are currently working on in this regard include:

- formalised engagement on operational policy and emerging issues;
- more structured information and data sharing;
- joint operational orders and co-ordination of inspections; and
- monitoring and reporting on operational outcomes.

A workshop involving NSW Health, HCCC, TGA and AHPRA was held on 17 January 2018, to explore how regulatory agencies could better coordinate their efforts. It was agreed there would be value in:

- formal engagement and coordination across agencies;
- at an operational level, to co-ordinate efforts in specific investigations to achieve best outcomes (form joint strike teams to investigate particular providers/services);
- at a strategic level, to identify emerging issues requiring a regulatory response; and
- at a corporate level develop tools for data and intelligence sharing to improve overall responses (ongoing mechanisms to share learnings and concerns).

5. ONGOING REFORM

The area of cosmetic health services is a constantly evolving area of health services with varying degrees of risks attached to the different cosmetic health services offered. NSW Health is now considering what changes, if any, could enhance the current regulatory regime.



Fair
Trading

Compliance and Enforcement Policy

July 2013

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.

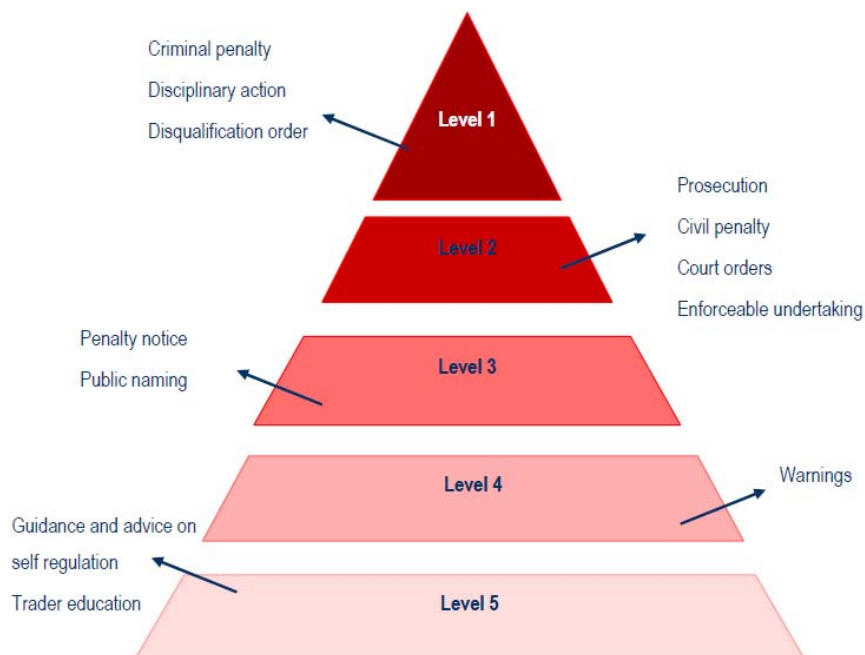
Fair Trading also publishes relevant information about compliance with specific laws, which should be read in conjunction with this policy. Our website contains all Fair Trading publications, including this policy.

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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