

Fair Trading Prosecution Guidelines¹



Fair
Trading

1. Introduction

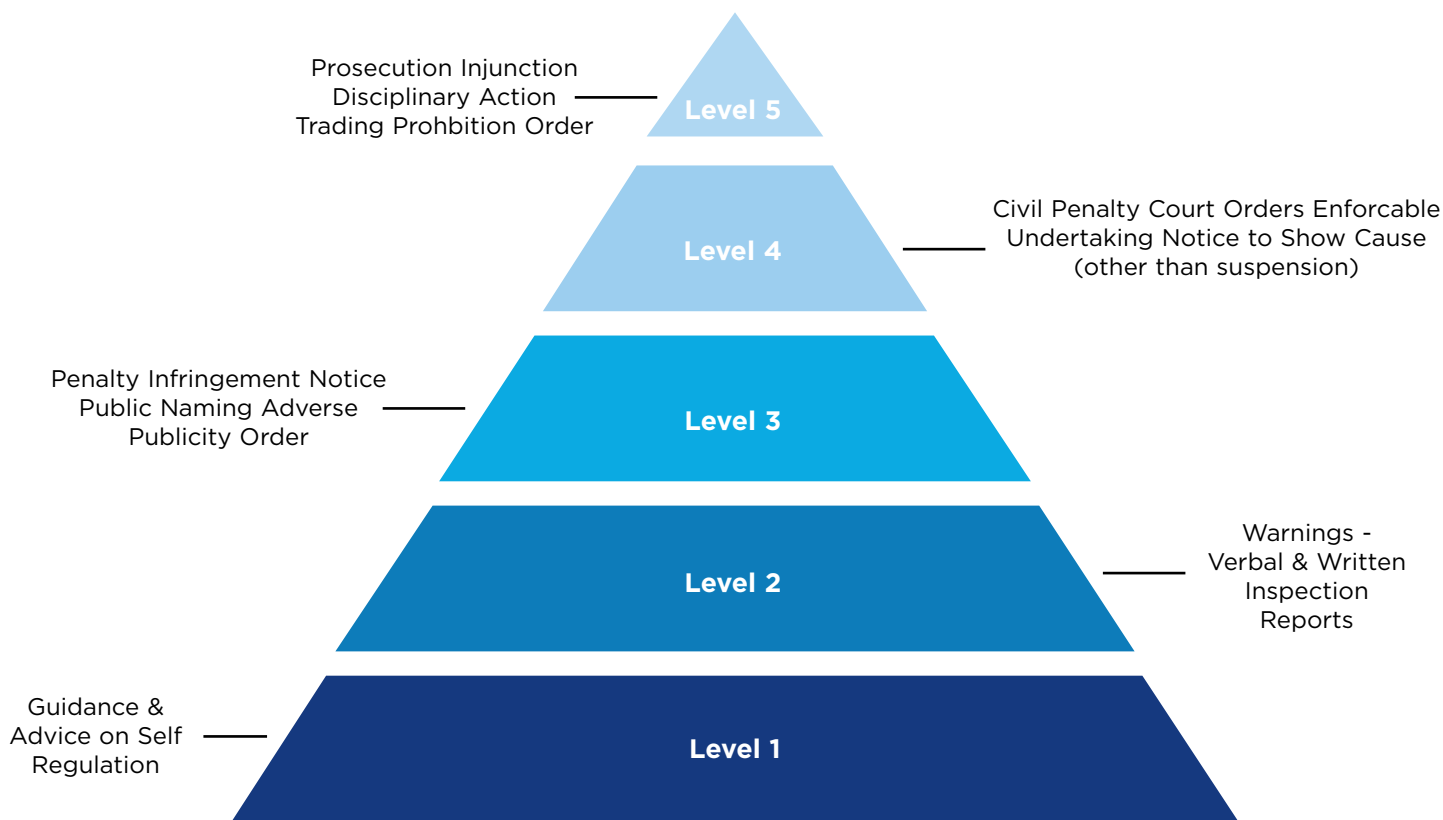
- 1.1 NSW Fair Trading is the NSW Government's consumer protection agency that safeguards consumer rights, regulates specific industries and occupations, and advises traders on fair and ethical business practices.
- 1.2 NSW Fair Trading is committed to serving the consumers and traders of NSW and aims to achieve an ethical, fair and efficient marketplace for all. NSW Fair Trading aims to make sure its regulatory approaches promote a competitive, confident and protected NSW. NSW Fair Trading investigates unfair practices and works to ensure that the products sold in NSW are safe and meet regulations and safety standards.
- 1.3 NSW Fair Trading is committed to providing a transparent and consistent approach to its compliance and prosecution activities in relation to consumer rights, business practices and the specific industries and occupations that it regulates.
- 1.4 Legislation administered by NSW Fair Trading frequently confers its regulatory, compliance and enforcement functions on the Commissioner for Fair Trading, with the capacity for the Commissioner to delegate those functions to staff of the agency.
- 1.5 The legislation under which NSW Fair Trading exercises functions as prosecutor is listed in Appendix A, which includes:
 - *Fair Trading Act 1987*, incorporating the Australian Consumer Law.
 - *Property and Stock Agents Act 2002*.
 - *Motor Dealers and Repairers Act 2013*.
 - *Home Building Act 1989*.

2. Compliance policy

- 2.1 NSW Fair Trading operates under the [NSW Fair Trading Compliance and Enforcement Policy \(July 2013\)](#) the **(Compliance Policy)**
- 2.2 NSW Fair Trading promotes a fair marketplace for consumers and traders by maximising traders' compliance with regulatory requirements. NSW Fair Trading safeguards consumer rights and investigates alleged breaches of the legislation we administer. In doing so, NSW Fair Trading also seeks to educate and engage with both consumers and traders on issues that affect their rights and obligations. As a regulator, the main concern is to minimise any direct financial or material harm or detriment to a consumer from a business that fails to comply with the law.

¹Version as at 5 March 2020

- 2.3 NSW Fair Trading has a range of compliance and enforcement options available to achieve compliance with the law and enhance consumer protection.
- 2.4 NSW Fair Trading intends to ensure that consumers are empowered and protected, that businesses comply with the laws, and that NSW Fair Trading is a trusted regulator. Our approach to compliance and enforcement remedies is summarised in the compliance pyramid below.



Summary of the Fair Trading Compliance & Enforcement Approach

- 2.5 NSW Fair Trading also works with consumer protection agencies around Australia. Under legislation it administers, including section 9A of the *Fair Trading Act 1986*, NSW Fair Trading may share information and complaints and can jointly investigate matters with other agencies.

3. Prosecution guidelines

- 3.1 NSW Fair Trading (Fair Trading) adopts and applies the Prosecution Guidelines of the NSW Office of the Director of Public Prosecutions² (the ODPP Guidelines), unless otherwise noted. These Prosecution Guidelines supplement the ODPP Guidelines with respect to the decision to prosecute by Fair Trading.

The decision to prosecute

- 3.2 Prosecution for an offence is one of several options available to Fair Trading under the legislation it administers. It is a discretionary action. Not every breach of the law proceeds to a criminal prosecution. The dominant consideration in deciding whether to prosecute is the public interest.

²For more information: Refer to the ODPP Guidelines available at www.odpp.nsw.gov.au/prosecution-guidelines

- 3.3 By commencing a prosecution, Fair Trading aims to promote a fair marketplace and safeguard consumer rights by deterring further offending conduct. Prosecution in appropriate circumstances sends a message to the community that failure to adhere to legislative requirements safeguarding consumers and traders in Fair Trading's remit will be enforced through the courts. The decision to prosecute is based on the applicable law at the time, the public interest, and the careful consideration and application of these Guidelines.

Factors taken into account

- 3.4 The general public interest is the paramount consideration to be taken into account in the decision to prosecute. The question of whether the public interest requires that a matter be prosecuted is resolved by determining:
1. Whether or not the admissible evidence available is capable of establishing each element of the offence (the prima facie case test).
 2. Whether or not it can be said that there is no reasonable prospect of conviction; and if not,
 3. Whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

Prima facie case

- 3.5 Before any prosecution is considered, there must be enough evidence to establish a prima facie case against the alleged offender.

Reasonable prospect of conviction

- 3.6 The decision as to whether there is no reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in Court and will depend on the weight of available evidence and the persuasive strength of the prosecution case in light of the anticipated course of proceedings, including the circumstances in which they will take place. Factors relevant to his consideration may include:
- (a) lines of defence that are plainly open to, or have been indicated by, an alleged offender;
 - (b) the likelihood that any of the evidence may be excluded based on the common law or statute;
 - (c) the reliability of any admissions, having regard to the age, intelligence and apparent understanding of the defendant;
 - (d) the reliability of any evidence given by witnesses;
 - (e) the credibility of any witnesses;
 - (f) the availability and willingness of witnesses; and
 - (g) the competence and compellability of any witnesses.

Public Interest discretionary factors

- 3.7 In considering whether it is in the public interest to commence a prosecution, the factors to be taken into account include the following:
- (a) the seriousness or triviality of the alleged offence and/or whether the breach is of a minor or technical nature only;
 - (b) the degree of control the alleged offender had over the causes of the offence;
 - (c) any mitigating or aggravating circumstances;
 - (d) the length of time since the alleged offence;
 - (e) the degree of culpability of the alleged offender in connection with the offence;
 - (f) whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute;
 - (g) the prevalence of the alleged offence and the need for deterrence both specific and general;
 - (h) any prior breaches of, or convictions under, the same legislation or for similar offences;
 - (i) whether the alleged offence is of considerable public concern;
 - (j) any precedent which may be set by not instituting proceedings;
 - (k) the age, physical or mental health or special vulnerability of the alleged offenders or witnesses or victims;
 - (l) the likely length and expense of a Court hearing;
 - (m) whether proceedings are to be instituted against others arising out of the same circumstances;
 - (n) the availability and efficacy of any alternatives to prosecution;
 - (o) whether another agency is taking legal action for the same matter;
 - (p) whether the consequence of any resulting conviction would be unduly harsh and oppressive;
 - (q) any entitlement of any person to compensation, reparation or forfeiture if prosecution action is taken;
 - (r) the attitude of the victim of the alleged offence to a prosecution;
 - (s) the actual or potential harm, occasioned to an individual or to consumers generally or to the market; and
 - (t) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the Court.
- 3.8 The applicability of, and weight to be given to, these and other factors will vary and depend on the particular circumstances of each case.
- 3.9 While many public interest factors weigh against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution. In this regard, generally speaking, the more serious the offence the more likely it will be in the public interest that a prosecution be pursued.

3.10 The resources available to Fair Trading to conduct prosecutions are finite. They will not be expended in pursuing cases that do not meet these Guidelines. Resources will be prioritised to prosecutions that have the highest strategic value in achieving the regulatory goals of Fair Trading.

Improper considerations

- 3.11 Fair Trading adopts the principle that a prosecution must not be brought for improper purposes. A decision whether to prosecute must not be influenced by:
- (a) the race, religion, gender, sexual orientation, national origin or political associations, activities, or beliefs of the alleged offender or any other person involved; or
 - (b) personal feelings concerning the alleged offender or the victim; or
 - (c) the political or other affiliations of those responsible for the prosecution decision; or
 - (d) possible political advantage or disadvantage to the government or any political party, group or individual.

Who may prosecute

- 3.12 For many, but not all, offences under the legislation administered by Fair Trading, proceedings may only be instituted by one or other of the following:
- (a) a person with the consent of the Minister or the Minister's delegate;
 - (b) the Secretary of the Department of Customer Service, or by delegation or authorisation of the Secretary;
 - (c) the Commissioner for Fair Trading, or by delegation or authorisation by the Commissioner.
- 3.13 For other legislation, Fair Trading may commence prosecution proceedings as a common informer under section 14 of the Criminal Procedure Act 1986. Fair Trading may also commence proceedings under the Crimes Act 1900, for instance in relation to fraudulent conduct.
- 3.14 Other agencies may have prosecution functions under the legislation Fair Trading administers, such as the NSW Police.

Defendants

General principles

- 3.15 Persons conducting a business, including those that manage a business or other employees, or that are involved in the supply, manufacture or storage of goods and/or services, can be defendants. This means that a number of persons can concurrently commit offences arising out of the same circumstances. Both individuals and corporations may be defendants.
- 3.16 In addition, general considerations that may be taken into account in choosing the appropriate defendant/s in a particular case are:
- (a) who is primarily responsible for the alleged offence, that is, who is primarily responsible for the acts or omissions giving rise to the alleged offence or the material circumstances leading to the alleged offence or who formed any relevant intention;
 - (b) in relation to (a) above, what is the culpability of the alleged offender/s; and
 - (c) the likely effectiveness of any Court order that might be made against the alleged offender/s.

Public authorities

- 3.17 The legislation administered by Fair Trading binds the Crown and Government authorities. The law applies with equal force to both the private and public sectors.
- 3.18 Fair Trading recognises that deciding whether to prosecute public authorities for breaches of legislation administered by it attracts specific public interest considerations. There are two competing public interests in relation to the prosecution of public authorities being that:
- (a) the public has an interest in Government authorities abiding by the law; and
 - (b) it is the taxpayer that bears the cost of any prosecution of public authorities. Such expenditure needs to be justified on the basis that it is in the public interest.
- 3.19 Public authorities are usually under the control and direction of a Minister who can direct compliance with legislation if necessary. However, this position does not always achieve the requisite compliance. In the interests of general deterrence there will be instances where it is important that a failure to comply attracts an enforcement response including prosecution.
- 3.20 In prosecuting Government authorities, the current Premier's Memorandum No. 97-26: *"Guidelines for litigation involving or between Government departments and authorities"*, applies to the parties because they are both Government agencies. This procedure is designed to minimise the adversarial nature of those proceedings by, for example, requiring the resolution of factual and legal issues between the parties, and promoting opportunities for open and frank discussion.

For more information refer to Premier's Memorandum No. 97-26 at: <https://arp.nsw.gov.au/m1997-26-litigation-involving-government-authorities>

Charges

General principle

- 3.21 The charges proceeded with must be chosen carefully to adequately reflect the nature and seriousness of the criminal conduct disclosed by the evidence. The charges selected and any statement of facts must provide the Court with an appropriate basis to impose a sentence that reflects the offending conduct in these matters. Duplicitous or unnecessary charges should be avoided.
- 3.22 There will be instances where the same conduct is prohibited by two pieces of legislation and an offence can be made out under each. The decision in relation to which offence should be charged in this circumstance is to be made in accordance with the general principle described above. Where there is another prosecuting authority involved, Fair Trading will liaise with the other authority to ensure appropriate charges are laid.

Charge negotiation

- 3.23 Charge negotiation involves negotiations between the defence and the prosecution in relation to the charges to be proceeded with. Charge negotiations may result in the defendant pleading guilty to fewer charges than those initially laid, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account by the court on sentence for one or more substantive offences.
- 3.24 Charge negotiations between the defence and the prosecution may occur at any stage of the prosecution process and may be initiated by either party. Charge negotiations between defence and the prosecution should adhere to the following constraints:

- (a) the charges to be proceeded with should adequately reflect the nature of the criminal conduct of the defendant;
- (b) the charges proceeded with should provide an adequate basis for an appropriate sentence in the circumstances of the case; and
- (c) there must be evidence to support the charges.

3.25 Any decision whether to agree to a charge negotiation proposal must take into account all the circumstances of the case and other relevant considerations including:

- (a) whether the defendant is willing to co-operate in the investigation or prosecution of others, or the extent to which the defendant has done so;
- (b) whether the sentence that is likely to be imposed if the charges are varied as proposed would be appropriate for the criminal conduct involved;
- (c) the desirability of prompt and certain finalisation of the case;
- (d) the defendant's antecedents;
- (e) the strength of the prosecution case;
- (f) the likelihood of adverse consequences to witnesses;
- (g) in cases where there has been a financial loss to the State or any person, whether the defendant has made restitution or arrangements for restitution; and
- (h) the time and expense involved in a hearing and any appeal proceedings.

Mode of trial

3.26 Some of the offences prosecuted by Fair Trading can be dealt with in the Local Court or the Supreme Court in its summary jurisdiction. There are also a number of indictable offences that Fair Trading will prosecute, primarily under the *Property Stock and Business Agents Act 2002* and the *Crimes Act 1900*. In those instances, a decision may need to be made as to whether Fair Trading elects to have the charges dealt with in the District Court rather than summarily in the Local Court. In determining whether a case is appropriate to be dealt with in a court of higher jurisdiction, regard should be had to the following factors:

- (a) legislative requirements;
- (b) the nature of the case, and whether the circumstances make the alleged offence one of a serious character;
- (c) the adequacy of sentencing options and available penalties if the case were determined in the Local Court;
- (d) any delay, cost and adverse effect upon witnesses likely to be occasioned by proceeding in the Supreme Court or the District Court;
- (e) in situations where a particular type of criminal activity is widespread, the desirability of a speedy resolution; and
- (f) the greater deterrent effect of a conviction and sentence imposed by a higher court.

If Fair Trading considers it appropriate to elect to have a relevant matter dealt with in the District Court rather than the Local Court, Fair Trading must refer the matter to the Director of Public Prosecutions for that Director's consideration.

Sentencing

3.27 In New South Wales, the purposes of sentencing are set out in sections 3A of the *Crimes (Sentencing Procedure) Act 1999* (the Sentencing Act) as follows:

- to ensure that the offender is adequately punished for the offence;
- to prevent crime by deterring the offender and other persons from committing similar offences;
- to protect the community from the offender;
- to promote the rehabilitation of the offender;
- to make the offender accountable for his or her actions;
- to denounce the conduct of the offender; and
- to recognise the harm done to the victim of the crime and the community.

3.28 Section 21A of the Sentencing Act states that in determining the appropriate sentence the court is to take into account the aggravating and mitigating factors set out in that section, as well as any other objective or subjective factor that affects the relative seriousness of the offence. For further information refer to section 21A of the Sentencing Act.

Sentencing – role of the prosecutor

3.29 The role of the prosecutor in the sentencing process is set out in:

- Rule 29.12 of the [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#).
- Rule 95 of the [Legal Profession Uniform Conduct \(Barristers\) Rules 2015](#).

The relevant requirements are identical and state that a prosecutor:

- (a) must correct any error made by the opponent in address on sentence;
- (b) must inform the court of any relevant authority or legislation bearing on the appropriate sentence;
- (c) must assist the court to avoid appealable error on the issue of sentence, and
- (d) may submit that a custodial or non-custodial sentence is appropriate.

As part of its duty to assist the court and represent the public interest, Fair Trading will generally make submissions on sentence where it will assist the court, or if it is otherwise invited to do so. In making such submissions, Fair Trading takes into account the relevant sentencing principles, and its submissions cannot depart from those principles. Where appropriate Fair Trading may submit that an offence is at the upper or lower end of the range of seriousness.

Appeals

- 3.30 In deciding whether Fair Trading will appeal against a sentence, Fair Trading will apply the following general principles.
- 3.31 Where it appears to Fair Trading that the sentencing magistrate in the Local Court has made an error of law alone, Fair Trading may consider appealing to the Supreme Court.
- 3.32 Where Fair Trading wishes to apply to the Director of Public Prosecutions to appeal a sentence applied by the Local Court, or to the Attorney General or the Director of Public Prosecutions to appeal a sentence applied by the District Court or the Supreme Court in its summary jurisdiction, Fair Trading will be guided by relevant principles set out in the ODPP Guidelines. The key factors to be taken into account are:
- (a) appeals should only be brought to establish and maintain adequate standards of punishment for offences under legislation that Fair Trading administers, or to correct sentences that are so disproportionate to the seriousness of the offences as to lead to a loss of confidence in the administration of justice; and
 - (b) appellate courts will intervene only where it is clear that the sentencing judge has made a material error of fact or law or has imposed a sentence that is manifestly inadequate.
- 3.33 A prosecution appeal against sentence should also be instituted promptly, even where no time limit is imposed by the relevant legislation.

Conclusion

- 3.34 These Guidelines do not attempt to cover all questions that can arise in the prosecution process for breaches of the legislation administered by Fair Trading. They address those issues which Fair Trading considers are of immediate concern and in respect of which clarification is desirable.
- 3.35 These Guidelines are not legally binding on Fair Trading or any other organisation. They reflect the current policies of Fair Trading. Those policies will be kept under review and any changes will be notified publicly.

Appendix A: Legislation in relation to which Fair Trading exercises prosecution functions

1. Architects Act 2003.
2. Associations Incorporation Act 2009.
3. Biofuels Act 2007.
4. Building and Construction Industry Long Service Payments Act 1986.
5. Building and Construction Industry Security of Payment Act 1999.
6. Building Products (Safety) Act 2017.
7. Building and Development Certifiers Act 2018
8. Charitable Fundraising Act 1991.
9. Community Land Management Act 1989.
10. Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010.
11. Co-operatives (Adoption of National Law) Act 2012.
12. Crimes Act 1900.
13. Design and Building Practitioners Act 2020
14. Electricity Supply Act 1995.
15. Fair Trading Act 1987.
16. Funeral Funds Act 1979.
17. Gas and Electricity (Consumer Safety) Act 2017.
18. Hairdressers Act 2003.
19. Holiday Parks (Long-term Casual Occupation) Act 2002.
20. Home Building Act 1989.
21. Lotteries and Art Unions Act 1901.
22. Motor Dealers and Repairers Act 2013.
23. Paintball Act 2018.
24. Pawnbrokers and Second-hand Dealers Act 1996.
25. Plumbing and Drainage Act 2011.
26. Professional Standards Act 1994.
27. Property and Stock Agents Act 2002.
28. Residential Apartments Buildings (Compliance and Enforcement Powers) Act 2020.
29. Residential (Land Lease) Communities Act 2013.
30. Residential Tenancies Act 2010.
31. Retail Trading Act 2008.
32. Retirement Villages Act 1999.
33. Strata Schemes Management Act 2015.
34. Swimming Pools Act 1992.
35. Tattoo Parlours Act 2012.
36. Tow Truck Industry Act 1998.

³ This list is subject to change by administrative order. Other areas of NSW government may also have functions under the relevant Acts. A reference to an Act includes a reference to associated regulations.