

Guidelines for Determining a Disciplinary Action Outcome

DISCIPLINARY ACTION UNIT, NSW FAIR TRADING

Purpose of Disciplinary Action

The purpose of Disciplinary Action is to be protective rather than punitive. The main objective is to protect the public and their interests with the additional objective of protecting the integrity of the industry as well as the interests of the Licensee. This must be considered during the disciplinary process.

When to Use the Guidelines

These Guidelines are to be consulted when determining whether Disciplinary Action should be taken. They should be used after the Disciplinary Action Unit (**DAU**) has issued a Notice to Show Cause (**NTSC**) to the Licensee and considered any submissions made in response. The Guidelines should **only** be consulted once the Secretary's delegate is satisfied that there are one or more grounds on which Disciplinary Action may be taken.

Application

In exercising their delegated authority, Decision Makers still retain discretion when it comes to determining the appropriate Disciplinary Action. These Guidelines are not binding, and no decision is invalidated by failure to adhere to one or more aspects of the Guidelines. However, it is important that Decision Makers consider the Guidelines as they promote greater consistency in decision making, strike a good balance between intuitive and analytical thinking, and provide a detailed 5-step process for determining the most appropriate Disciplinary Action.

These Guidelines must be read in conjunction with the following document:

Schedule 1 (Legislation): Guidance for All DAU Administered Legislation

Determining a Disciplinary Action Outcome in a 5 Step Process

Step 1 – Assess the Severity of the Conduct

Determine the levels of harm and culpability involved in the conduct and, therefore, the overall level of severity.

Step 2 – Propose a Disciplinary Action

Using the severity assessment, consider the recommended Disciplinary Action under the relevant legislation as outlined in Schedule 1.

Step 3 – Consider Subjective Factors

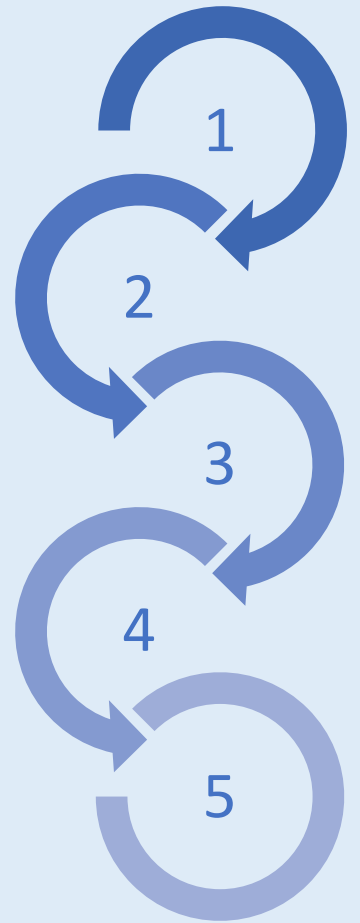
Identify any factors which could decrease or increase the proposed Disciplinary Action and how much weight they have.

Step 4 – Apply an Adjustment if appropriate

Following consideration of relevant subjective factors, determine if any adjustment to monetary values, time periods or the proposed Disciplinary Action is required. This could also include determining to take No Further Action.

Step 5 – Determine a Disciplinary Action Outcome

After all the previous steps are completed, determine the Disciplinary Action outcome to be taken.



Interpretation

The following terms are taken to mean the following for the purposes of these Guidelines:

Breach – Any offence against, or contravention of, legislation administered by NSW Fair Trading by the holder of an authority, licence, permit or certificate. In some cases, this will also include breaches under the *Crimes Act 1900* (NSW) and other relevant legislation.

Conduct – Any Breach or behaviour that establishes the grounds set out in legislation administered by NSW Fair Trading. Under the *Motor Dealers and Repairers Act 2013* (NSW), conduct also refers to the likelihood that a Breach or behaviour that establishes the grounds will occur. In some cases, conduct that has contravened legislation not administered by Fair Trading will also be used to establish grounds.

Consumer – Any person who acquires goods or services for their own use, and/or engages another person to acquire goods or services on their behalf. This includes any member of the general public who could potentially acquire goods or services for their own use, and/or potentially engage another person to acquire goods or services on their behalf. The term consumer also includes any member of the general public who is employed by or directly engaged in the operations of a business.

Decision Maker – Any person who is in a position that has an exercise of power under an express delegation. Also known as the Secretary's delegate.

Disciplinary Action – A form of enforcement action taken by the Secretary (or Secretary's delegate) against the holder of a licence, certificate, permit or authority with the purpose of protecting the public. This can include a disqualification, cancellation, suspension, monetary penalty, licence condition, reprimand or no further action.

Grounds – The disciplinary grounds referred to in legislation administered by NSW Fair Trading.

Guidelines – Guidelines for Determining a Disciplinary Action Outcome (this document).

Licensee – The holder or former holder of a licence, certificate, permit or authority issued under legislation administered by NSW Fair Trading. This generic term also includes an individual who is a member of a partnership or an officer of a corporation that is the holder of a licence, if the legislation permits the taking Disciplinary Action against these individuals.

Penalty units – Some legislation uses penalty units to determine maximum fines. As of July 2020, each unit is \$110, as defined in [section 17](#) of the *Crimes (Sentencing Procedure) Act 1999* (NSW):

*“Unless the contrary intention appears, a reference in any Act or statutory rule to a number of penalty units (whether fractional or whole) is taken to be a reference to an amount of money equal to the amount obtained by multiplying **\$110** by that number of penalty units.”*

Secretary – The Commissioner for Fair Trading or the Secretary of the Department of Customer Service.

Step 1: Assess the Severity of the Conduct

The goal of this step is to assess the overall level of severity of the conduct.

- After examining all the facts and considering any submissions provided by the Licensee, undertake a full severity assessment of the conduct.
- The following tables provide a wide range of factors relevant to harm and culpability, which can be used to determine the overall severity.
- The damage and loss caused or potentially caused by the conduct constitutes the harm, while the Licensee's role and level of intention constitutes the culpability.
- This step does **not** consider the Licensee's compliance history or record with Fair Trading and other government authorities.
- NSW legislation and decisions from Courts and Tribunals may provide additional guidance on how culpability should be assessed under specific circumstances.

Assessing Harm

The following factors relate to the nature, width and extent of the conduct under the relevant legislation, and the actual or potential harm caused as a result of the conduct. If more than one category of harm is selected from the below, the highest level of harm applies. While the table below refers to actual harm, the **potential** to cause harm can also be considered.

MINOR	MAJOR	EXTENSIVE
<input type="checkbox"/> Single consumer impacted by the Licensee's behaviour	<input type="checkbox"/> Several consumers impacted by the Licensee's behaviour	<input type="checkbox"/> Large number of consumers impacted by the Licensee's behaviour
<input type="checkbox"/> Minor consumer detriment caused resulting in minor damage/loss	<input type="checkbox"/> Some consumer detriment caused resulting in moderate damage/loss	<input type="checkbox"/> Significant consumer detriment caused resulting in extensive damage/loss
<input type="checkbox"/> Minor consumer detriment resulting in claims on compensation funds	<input type="checkbox"/> Some consumer detriment resulting in numerous claims on compensation funds	<input type="checkbox"/> Significant consumer detriment resulting in extensive claims on compensation funds
<input type="checkbox"/> No risk to the integrity of the industry or licensing system	<input type="checkbox"/> Risk to the integrity of the industry or licensing system	<input type="checkbox"/> High risk to the integrity of the industry of licensing system
<input type="checkbox"/> No risk to public safety	<input type="checkbox"/> Risk to public safety	<input type="checkbox"/> High risk to public safety
<input type="checkbox"/> Vulnerable consumers were not involved	<input type="checkbox"/> Vulnerable consumers were involved	<input type="checkbox"/> Vulnerable consumers were directly targeted

Assessing Culpability

The following factors relate to the level of negligence, recklessness or intention involved in the conduct and the role of the Licensee. If more than one category of culpability is selected from the below, the highest level of culpability applies.

NEGLIGENT OR RECKLESS		DELIBERATE
<input type="checkbox"/> The conduct was negligent, and Licensee failed to take the necessary steps to avoid the outcome	<input type="checkbox"/> The conduct was a result of the Licensee engaging in reckless behaviour	<input type="checkbox"/> The conduct was a display of deliberate, fraudulent and/or corrupt behaviour
<input type="checkbox"/> The Licensee did not attempt or intend to mislead or take advantage of consumers	<input type="checkbox"/> Some planning was involved, and consumers were inadvertently disadvantaged	<input type="checkbox"/> A high level of planning was involved, and consumers were deliberately disadvantaged
<input type="checkbox"/> The Licensee fell short of the standards expected by members of the public	<input type="checkbox"/> The Licensee displayed a high level of disregard for the standards expected by members of the public	<input type="checkbox"/> The Licensee displayed intentional disregard for the standards expected by members of the public
<input type="checkbox"/> The Licensee received no apparent gain or advantage	<input type="checkbox"/> The Licensee received inadvertent gain or advantage	<input type="checkbox"/> The Licensee sought and/or received gain or advantage

Assessing Severity

Using the harm and culpability levels assessed above, determine the overall severity of the conduct in the table below. If the conduct resulted in death or bodily harm (regardless of the level of culpability) then the matter should be categorised as ‘Extreme Severity’.

HARM	CULPABILITY	
	NEGLIGENT OR RECKLESS	DELIBERATE
MINOR	Minor Severity	Moderate Severity
MAJOR	Moderate Severity	Major Severity
EXTENSIVE	Major Severity	Extreme Severity
DEATH OR BODILY HARM	Extreme Severity	Extreme Severity

Step 2: Propose a Disciplinary Action

The goal of this step is to determine the proposed Disciplinary Action.

- This step is based on the overall assessment of the severity of the conduct considered in Step 1.
- The types of Disciplinary Action that can be imposed (and the language used to describe those actions) are unique for each piece of legislation.
- Schedule 1 provides the recommended Disciplinary Action for minor, moderate, major and extreme levels of severity, specific to each piece of legislation that the DAU administers.
- Some legislation includes mandatory Disciplinary Action that must be taken under certain circumstances. These provisions are highlighted in **yellow** in the Schedule.
- The objective of the legislation may also be a consideration when determining the Disciplinary Action — this is sometimes contained in the section of the legislation titled Objects of the Act.
- To determine the proposed Disciplinary Action, match the severity level outcome from Step 1 to the relevant legislation in Schedule 1 to this document. Depending on the type of Disciplinary Action proposed, the matching severity level in Schedule 1 will determine the recommended Disciplinary Action (if any).
- The matching severity in Schedule 1 can be found in the far-left column of the relevant table. All actions within the corresponding row can be considered (excluding boxes marked with a red cross, if relevant).

Legislation Administered by the DAU

Schedule 1 (Legislation) provides the recommended Disciplinary Action options for different levels of severity, for all the legislation currently administered by the DAU. The Disciplinary Officer should use the severity assessment from Step 1 to determine the Disciplinary Action range in Schedule 1.



[Building and Development Certifiers Act 2018 \(NSW\)](#)



[Conveyancers Licensing Act 2003 \(NSW\)](#)



[Home Building Act 1989 \(NSW\)](#)



[Motor Dealers and Repairers Act 2013 \(NSW\)](#)



[Paintball Act 2018 \(NSW\)](#)



[Pawnbrokers and Second-hand Dealers Act 1996 \(NSW\)](#)



[Property and Stock Agents Act 2002 \(NSW\)](#)



[Tow Truck Industry Act 1998 \(NSW\)](#)



[Design and Building Practitioners Act 2020 \(NSW\)](#)

Step 3: Consider Subjective Factors

The goal of this step is to determine if the proposed Disciplinary Action should be adjusted following consideration of any relevant subjective factors.

- Subjective factors with a mitigating effect may decrease the proposed Disciplinary Action, while those with an aggravating effect may increase the proposed Disciplinary Action. This can result in the Disciplinary Action being adjusted accordingly.
- A broad range of subjective factors to consider are listed below. Identify which are relevant, if any, then consider whether there is sufficient evidence to support each factor.
- The list is not exhaustive. Other factors may be identified and may be considered if relevant.
- It is the Decision Maker's discretion to determine how much weight each subjective factor (or a combination of subjective factors) has on the proposed Disciplinary Action.

Subjective Factors

The subjective factors listed in the table (on the next page) may be considered by the Decision Maker, as they have previously been held as relevant in determining a disciplinary decision in the following cases:

- *Director General, Department of Fair Trading v Cohen* [2000] NSWFTT 3
- *Calcaro v Chief Commissioner of State Revenue* [2004] NSWADT 158
- *EBP v Commissioner for Fair Trading, Department of Finance, Services and Innovation* [2019] NSWCATOD 157
- *Pobjie v Commissioner of Fair Trading, NSW Office of Fair Trading (No 2)* [2008] NSWADT 39
- *Freixas v Commissioner for Fair Trading, Department of Customer Service (No 2)* [2020] NSWCATOD 78
- *Keogh v Commissioner for Fair Trading* [2021] NSWCATOD 30
- *Younan v Commissioner for Fair Trading, NSW Office of Fair Trading* [2007] NSWADT 170
- *Harb & Anor v Commissioner for Fair Trading, NSW Office of Fair Trading* [2007] NSWADT 175
- *Magerovski v Commissioner for Fair Trading, Department of Finance, Services and Innovation; Service Today NSW v Commissioner for Fair Trading, Department of Finance, Services and Innovation* [2018] NSWCATAD 192
- *Maher v Department of Fair Trading* [2019] NSWCATOD 21
- *HSL Group Pty Ltd v Department of Finance, Services and Innovation* [2020] NSWCATOD 125
- *Dassouki v Department of Fair Trading* [2019] NSWCATOD 14
- *Edward Lees Imports Pty Ltd v Department of Finance Services and Innovation t/as Commissioner of Fair Trading* [2020] NSWSC 256
- *Stephens v Director General, Department of Fair Trading* [2003] NSWADT 173

SUBJECTIVE FACTORS

- The nature, width and extent of the conduct

- The loss or damage caused (or risk thereof) due to the conduct

- The circumstances in which the conduct took place, including the deliberateness of the conduct

- The degree of negligence and recklessness

- The Licensee's compliance history, including whether they have engaged in any similar conduct, have a history of breaches or any systematic behaviour

- The presence of fraudulent or dishonest conduct on the part of the Licensee

- The efforts made to correct the situation in a timely manner and the measures taken by the Licensee

- The Licensee's understanding of their obligations under the relevant legislation

- The personal impact upon the Licensee's livelihood, including their capacity to pay any monetary penalties

- The personal circumstances of the Licensee (e.g. mental health, family circumstances, etc.)

- The extent to which the Licensee has attempted to improve their conduct and/or operations for future compliance

- The maximum disciplinary outcomes available under the relevant legislation

- The deterrent effect of the penalty to the Licensee and the relevant industry

- The extent of remorse displayed by the Licensee

- Any gain made as a result of the conduct

- The degree of cooperation with the authorities

- The Licensee's role within their organisation (e.g. director, employee, etc.)

- The degree of due diligence exercised by the Licensee

Notes Specific to the Legislation

- Under section 48(2)(a) of the *Building and Development Certifiers Act 2018* (NSW), the Secretary **must take into account** any other Disciplinary Action taken against the registered certifier.
- Under section 44(2) of the *Paintball Act 2018* (NSW), the Secretary **must take into account** any other Disciplinary Action taken against the person.
- Under section 66(2) of the *Design and Building Practitioners Act 2020* (NSW), the Secretary **must take into account** any other Disciplinary Action taken against the person.

Step 4: Apply an Adjustment if appropriate

The goal of this step is to adjust the proposed Disciplinary Action if appropriate from Step 2 based on the mitigating or aggravating effects of the subjective factors identified in Step 3.

- After assessing any relevant subjective factors and their mitigating and aggravating effects, determine if Disciplinary Action is still required and, if so, should it be adjusted.
- An adjustment could include changing a **monetary value** or **period of time** in a downwards or upwards direction. An adjustment could also include adjusting the proposed Disciplinary Action to No Further Action.
- Depending on the overall mitigating and aggravating effect, there is a recommended percentage change for a decrease (-%) or an increase (+%) of the proposed Disciplinary Action. However, this is the discretion of the Decision Maker.
- If there are types of Disciplinary Action which cannot be quantified (such as licence conditions), it will be the Decision Maker’s discretion to determine an appropriate adjustment.
- There is no need to quantify each subjective factor, but the most significant ones should be outlined as they have the most weight on the Disciplinary Action.

Consideration be given to changing the Disciplinary Action (where appropriate)

OVERALL AGGRAVATING EFFECT (Recommended range)	OVERALL MITIGATING EFFECT (Recommended range)		
	None	Minor	Major
None	No Change	-25%	-50%
Minor	+25%	No Change	-25%
Major	+50%	+25%	No Change

Step 5: Determine a Disciplinary Action Outcome

The goal of this step is to determine the final Disciplinary Action outcome to be taken against the Licensee.

- After applying an adjustment to the Disciplinary Action (if appropriate), the Disciplinary Action outcome should be outlined in the DAU Decision documents.
- The Disciplinary Action outcome is the final outcome that has considered all the steps above, including a severity assessment, a proposed Disciplinary Action, subjective factors, and appropriate adjustments (if necessary).
- Where the proposed Disciplinary Action has been adjusted, the reasons should be made as explicit as possible in the Decision documents.
- If the adjusted Disciplinary Action gives an obscure value (e.g. 3.25 months suspension) then it can be rounded down so it can be recognised by the Public Register.
- Once all the relevant Decision documents are completed, reviewed, and approved by the Secretary's delegate, the Disciplinary Action outcome is then ready to be sent to the Licensee.