



## POLICY ON THE PUBLIC NAMING OF TRADERS

<b>Objective</b>	The objective of this policy is to establish clear guidelines governing how CPD handles the naming of traders.
<b>Scope</b>	This policy applies to every state government public officer who is empowered to carry out functions with respect to the legislation administered by CPD.
<b>Delegations</b>	The Commissioner for Consumer Protection is responsible for the application of this policy.
<b>Definitions</b>	<p><b>DoC:</b> the Department of Commerce</p> <p><b>CPD:</b> the Consumer Protection Division of the Department of Commerce</p> <p><b>Policy:</b> the Policy on the Public Naming of Traders</p> <p><b>CPD Legislation</b> the legislation administered by CPD</p> <p><b>Commissioner:</b> the Commissioner for Consumer Protection</p>
<b>Policy headings</b>	<p>Explanatory Notes</p> <p>Naming</p> <p>Procedures for Naming</p>

<b>Approving Authority:</b> Commissioner for Consumer Protection		<b>Business Unit Responsible:</b> Consumer Protection Legal Unit	
<b>Effective Date:</b> February 2010	<b>Endorsement Date:</b> February 2010	<b>Review Date:</b> February 2011	
<b>This policy replaces</b>			
<b>Policy type and category</b>			
<b>Insert hyperlinks to other relevant policies, guides, procedures, plans</b>			
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## **1. EXPLANATORY NOTES**

### **1.1 Organisational Background**

The Department of Commerce (**DoC**) is the state government department responsible for providing services relating to consumer protection, energy and work place safety, labour relations, science and innovation, corporate services and the Office of the Director General.

The mission of the Consumer Protection Division (**CPD**) of DoC is to promote consumer protection and fair trading in Western Australia.

The key responsibilities of CPD include providing information and assistance to consumers and traders about their rights and responsibilities; helping consumers resolve disputes with traders; monitoring compliance with consumer protection legislation; investigating complaints about unfair trading practices; prosecution and other enforcement action against traders who breach CPD Legislation; regulating and licensing a range of occupational activities and developing, reviewing and amending legislation that protects consumers.

The legislation administered by CPD (**CPD Legislation**) varies from time to time. It includes but is not limited to the legislation listed at:

[http://www.slp.wa.gov.au/legislation/agency.nsf/docep\\_menu.htmlx&category=1](http://www.slp.wa.gov.au/legislation/agency.nsf/docep_menu.htmlx&category=1)

The legislation includes the *Consumer Affairs Act 1971* and the *Fair Trading Act 1987*. They give the Commissioner for Consumer Protection (**Commissioner**) the power to publish warnings about unsatisfactory or dangerous goods and services and the traders who supply them.

This policy on the public naming of traders (**Policy**) applies to every state government public officer who is empowered to carry out functions with respect to the legislation administered by CPD.

A reference to CPD in this Policy includes a reference to the Commissioner.

### **1.2 When did this Policy Come into Operation?**

This Policy came into effect on February 2010.

### **1.3 What does this Policy Achieve?**

This Policy promotes a consistent approach to the manner in which CPD handles the public naming of traders. This Policy should be read in conjunction with the following CPD policies:

- 1.3a Enforcement and Prosecution Policy;
- 1.3b Media Policy; and
- 1.3c Disclosure Policy.

### **1.4 What is the Purpose of this Policy?**

The purpose of this Policy is to:



- 1.4a ensure that traders are named only where the truth of allegations against them is reasonably established and/or it is in the public interest, and
- 1.4b balance the risks to the public from unfair and illegal practices of traders against the need to safeguard against traders' reputations being unjustifiably damaged.

## **1.5 To whom does this Policy Relate?**

This Policy relates to CPD's dealings with the public as a whole in respect of the matters that it regulates in Western Australia. This Policy is relevant to the community as a whole including:

- 1.5a consumers;
- 1.5b complainants to CPD about contraventions of CPD legislation;
- 1.5c persons suspected of contraventions of CPD legislation;
- 1.5d persons engaging in occupational, trade, commercial and business enterprises, whether regulated or unregulated;
- 1.5e Federal, State and local government agencies;
- 1.5f non-government organisations and interest groups;
- 1.5g the media;
- 1.5h legal practitioners; and
- 1.5i DoC/CPD staff.

## **1.6 What is the Legal Status of this Policy?**

This Policy provides general information and guidance about CPD's approach to the disclosure of information. This policy:

- 1.6a is not legally binding on CPD, any other division within DoC, DoC, other organisations (such as other government agencies) or statutory bodies empowered to regulate occupations in this State;
- 1.6b is general in nature and does not exhaustively address all the specific statutory limitations and considerations that may be relevant under the CPD legislation;
- 1.6c does not confine, restrain or limit the discretion of CPD to take any action; and
- 1.6d is not intended as a substitute for legal advice, legal processes or the professional judgment of CPD's officers.

Individuals/corporations/others should obtain independent legal advice on their legal rights and obligations.

## **2. NAMING**

### **2.1 What is Naming?**

Section 17 of the *Consumer Affairs Act 1971* gives the Commissioner the power to publish a statement identifying and giving warnings or information about:

- 2.1a goods or services that are unsatisfactory or dangerous and traders who supply or are likely to supply them; and/or



- 2.1b unfair business practices and traders who engage or are likely to engage in them; and/or
- 2.1c any other matter which adversely affects or may adversely affect the interests of consumers in connection with the acquisition by them of goods or services.

The Commissioner may not make a statement unless it is in the public interest to do so.

Naming is commonly used when the public or section/s of the public need to be informed immediately about a trader to protect them from personal or financial harm.

## **2.2 How Does Naming Occur?**

Naming may occur in a media release, interview, Annual Report, Parliamentary statements or responses to the general public.

## **2.3 The Purpose of Naming**

Naming is an enforcement method available to CPD. It can be used to:

- 2.3a influence problem traders to remedy their unfair practices or comply with specific legislative protections;
- 2.3b deter other traders from adopting such practices;
- 2.3c warn the public about particular unsatisfactory traders, goods or services; or
- 2.3d provide information to the public about ways to deal with problem traders and how to obtain any redress to which they may be entitled.

CPD's objective in naming is to ensure a fair and informed marketplace.

## **2.4 Considerations When Naming**

Care must be taking when deciding to name a trader to ensure that it is done responsibly. A trader who is named may go out of business as a result of the naming.

While s. 17 of the *Consumer Affairs Act 1971* protects the Commissioner when naming, its use must still be considered carefully. A trader whose reputation is injured as a result of inaccurate information used when named by CPD may be able to bring an action for defamation to recover compensation for any loss suffered as a result of any defamatory statement.

The naming of traders in media releases and other non-Parliamentary circumstances will only be protected in an action for defamation if the statement can be proven to be true, if it is made in good faith or if other defences set out in the *Defamation Act 2005* apply. The circumstances in which these defences apply vary and need to be assessed on a case-by-case basis.

## **2.5 Statutory Considerations**

The power to name a trader should be considered as an exception to section 24 of the *Consumer Affairs Act 1971* which requires that information officially obtained by CPD be



kept confidential. This is because section 24(2)(b) allows information to be disclosed where an Act specifically allows it e.g. under a naming provision.

Section 25 of the *Consumer Affairs Act 1971* provides that the Commissioner and CPD officers are not liable for any statements issued in good faith in the course of administering the Act. However, it is necessary to carefully check all information before this protection will apply.

In matters of product safety, it should be noted that section 49(1) of the *Fair Trading Act 1987* contains a power that allows the Commissioner to take whatever action the Commissioner considers necessary to warn the public of the dangers associated with any dangerous goods or goods that do not comply with product safety standards. These warnings can include the names of manufacturers and suppliers if the Commissioner considers it desirable.

Many of the same principles will apply to the Commissioner when considering warnings about specific products under the *Fair Trading Act 1987* as apply to naming traders under this Policy.

### **3. PROCEDURES FOR NAMING**

#### **3.1 Who Decides to Name?**

All decisions about naming are the responsibility of the Commissioner.

CPD officers must take care not to make statements to the media or public about particular traders who have not already been named unless expressly authorised by the Commissioner to do so.

While the Commissioner must make the decision to name, the Commissioner may have regard to the views of others, such as CPD officers and lawyers, before making the decision.

The Commissioner has a wide discretion when deciding to name. However, a decision to name has a significant impact on a trader. Therefore, the Commissioner must exercise his or her discretion reasonably, in good faith and with sufficient care.

Matters to be considered before deciding to name a trader are outlined below. It is important to ensure that all relevant issues are considered and documented before any decision to name is made.

#### **3.2 General Principles**

The following general principles apply when considering whether to name a trader:

- 3.2a The decision to name a trader can have serious consequences for his or her livelihood. Indeed, it may be a far more damaging (and effective) sanction than a monetary fine or suspension imposed by a court or tribunal.
- 3.2b Consideration must also be given to the likely detriment to the public should a trader not be named. A failure to warn or a warning issued too late may cause physical injury, extensive loss or inconvenience to members of the public and, as a result expose the Minister or Commissioner to serious criticism.
- 3.2c The naming of traders is often regarded as a measure of last resort. However, this is not always appropriate: in some circumstances naming may



be the quickest and most effective method of dealing with a problem, but it must be properly assessed along with other enforcement options available.

- 3.2d In order to help ensure that statements issued are not defamatory, a decision to name a trader must be made on fair and reasonable and accurate information. In addition, the statement published must accurately reflect and not embellish that information.
- 3.2e It is important, where time permits, to give traders the right to respond to the proposed statement in draft. Not only is this in accordance with the principles of natural justice but it can help to ensure the accuracy of any proposed statement.
- 3.2f It is essential that recommendations and decisions to name traders are made in good faith and that they are free from bias. A CPD officer who believes he or she may face a possible conflict of interest in considering whether a trader should be named should not participate in the process. CPD officers are referred to DoC's Code of Conduct and the Code of Ethics issued by the Public Sector Standards Commission regarding dealing with conflict of interest.
- 3.2g If legal action against a trader is under way, or contemplated, consideration should be given to the potential impact on that action of naming the trader. Public discussion of issues that are before the courts, or subject to legal or disciplinary proceedings, may prejudice the action and lead to contempt of court.
- 3.2h Consideration should be given to seeking legal advice at an early stage to establish whether naming is an appropriate option.

### **3.3 Alternatives to Naming**

As an alternative to naming traders, consideration may also be given to industry-wide warnings. Such warnings could be considered where:

- 3.3a the practice concerned is confined to one industry and is not widespread;
- 3.3b more than one trader is engaging in the practice concerned;
- 3.3c it is not appropriate to single out or name any particular trader; or
- 3.3d the warning is expressed in general terms.

Where an undesirable industry practice is engaged in only by traders whose identity will be clearly apparent from an industry warning, it is possible that they may be named by implication. Care should be taken with the wording of such statements to avoid the possibility of such statements effectively naming traders without undertaking the due process and complying with the notice requirements set out in this Policy.

### **3.4 Before Naming**

Before naming can be considered, CPD officers must be sure that the circumstances of the case fall within one of the categories set out in section 17 of the *Consumer Affairs Act 1971*. Once this has been confirmed, CPD officers can go on to consider the factors set out below.



### **3.5 Factors to Take Into Account**

Some of the factors to consider when deciding whether or not to name a trader may include:

- 3.5a do the goods/services/business practices/other matters endanger the health or safety of the public?
- 3.5b are the goods/services/business practices/other matters likely to cause significant loss to or adversely affect the public?
- 3.5c is there an imminent danger to the public from the goods/services/business practices/other matters?
- 3.5d is there reasonable information to support the allegations being made if the trader is named?
- 3.5e have there been complaints from the public?
- 3.5f who has been/will be affected by the conduct? Are they a specially disadvantaged group (e.g. elderly, migrants, children etc)? Do these persons have any practical, timely and effective means of obtaining redress of their own accord?
- 3.5g what action has CPD taken to address the conduct?
- 3.5h has there been a full investigation of the trader?
- 3.5i have there been any attempts to resolve disputes with consumers?
- 3.5j if so, has the trader co-operated?
- 3.5k are there any other options available to CPD apart from naming? If so, what is the likely effectiveness of these?
- 3.5l is any action against the trader already underway in a court or tribunal?
- 3.5m what will be the consequences of naming/not naming?
- 3.5n what will be the likely benefit to the public if the trader is named or detriment if not named?
- 3.5o what will be the effect of naming on the trader's industry group/trade association?
- 3.5p has the trader previously been named either by CPD or by a consumer protection agency in another jurisdiction?
- 3.5q has the conduct been drawn to the trader's attention?
- 3.5r are there any mitigating or aggravating circumstances?

It is good practice to record the reasons for a decision to name in writing.

### **3.6 Naming Before the Completion of an Investigation**

It is clearly preferable that a full investigation is undertaken before a decision is made to name a trader, to ensure that the trader's offending behaviour against section 17 of the *Consumer Affairs Act 1971* can be proved to the criminal standard of proof i.e. beyond reasonable doubt.

However, from time to time circumstances may arise where it is in the public interest to name a trader before an investigation is concluded.



Factors to consider when making a decision to name before the completion of an investigation include:

- 3.5a is there a risk to the health and safety of the public?
- 3.5b is there an imminent danger of significant loss or detriment to the public?
- 3.5c how can the facts on which the naming is to be based be ascertained?

### **3.7 Natural Justice Considerations**

It is important, when naming is being considered, to give the trader a copy of the proposed statement and a reasonable time to respond. The amount of time that is reasonable will depend on the circumstances in each particular case.

It is also important for CPD officers to consider any response received from the trader before proceeding with a recommendation to the Commissioner to name the trader.

In some circumstances it may not be appropriate or possible to give a trader the right to respond to the proposed statement. Such circumstances may include:

- 3.5d the risk to the public is too great to delay naming;
- 3.5e the trader cannot be identified e.g. an itinerant trader; or
- 3.5f the trader cannot be contacted.

### **3.8 Accuracy**

CPD officers must take care that a statement that names a trader is accurate.

In particular, the trader's personal and business names must be correct.

### **3.9 Legal Advice**

In almost all circumstances it will be appropriate for the Commissioner to seek legal advice before a final decision to name a trader is made. Ideally, legal advice should be sought at an early stage in the process.