



# **Consumer Affairs Victoria – Regulatory Approach and Compliance Policy**

Consumer Affairs Victoria acknowledges the Aboriginal and Torres Strait Islander people as the Traditional Custodians of the land. The department also acknowledges and pays respect to their Elders, past and present.

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### **Accessibility**

If you would like to receive this publication in an accessible format, please visit the [Consumer Affairs Victoria website](#) or call 1300 55 81 81.

### **Other information**

This document is intended to satisfy the following performance improvement measure that the Minister for Consumer Affairs, Gaming & Liquor Regulation set out in her 2016–17 Statement of Expectations for Consumer Affairs Victoria (CAV):

“Inform business and consumers about CAV’s regulatory approach to risk, enforcement and regulatory action”.

You can read more about the Minister’s 2016–17 Statement of Expectations for Consumer Affairs Victoria (CAV), as well as the Director of CAV’s response to this, in [Statement of expectations section of the Consumer Affairs Victoria website](#).

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# 1 Introduction

This policy sets out how Consumer Affairs Victoria (CAV) ensures compliance with consumer laws and makes its regulatory decisions. It provides the public with clear information on the objectives and decision-making principles that guide our compliance and enforcement activity.

## 1.1 CAV's role

### Department of Justice and Regulation (DJR)

DJR is one of seven government departments within the Victorian public sector. The Regulation Division of DJR combines consumer protection with assurance functions consisting of CAV, the Office of Correctional Services Review, the Inspector-General for Emergency Management, and Domestic Building Dispute Resolution Victoria.

DJR promotes and embraces the values of: *working together, making it happen, respecting other people, serving the community and acting with integrity.*

At CAV, DJR's values are the basis for the way we do business and are demonstrated every day through the actions of our staff, whether they are working in regional areas or metropolitan offices.

Our commitment to these values is further evidenced through our approach to cultural diversity for an inclusive justice system that enables culturally and linguistically diverse communities to fulfil their potential as equal citizens.

These values shape and influence our ongoing training and development of staff, performance planning, recruitment and relationships with stakeholders.

### Who are we and what we do

CAV defines itself as a risk based, intelligence-led and outcome-focused consumer regulator.

CAV is led and overseen by the Director of Consumer Affairs (Director), which is a statutory office created under the *Australian Consumer Law and Fair Trading Act 2012* (ACLFTA). Under Sections 109 and 110 of this Act, the Director has significant powers and functions. These predominantly cover operational matters including education, compliance monitoring and enforcement. Simon Cohen is the current Director and is also the Deputy Secretary of the Regulation Division.

Our vision is for a fair and competitive marketplace in Victoria.

Our goals are to ensure:

- businesses are compliant with consumer laws
- Victorians exercise their consumer rights
- a fair and safe rental market for Victorians
- a modern and effective consumer law framework
- a sustainable and innovative regulator.

Our key functions are to:

- provide information and advice to consumers, tenants, businesses and landlords on their rights, responsibilities and changes to relevant laws
- register and license certain businesses and occupations
- enforce and ensure compliance with consumer laws

- review and advise the Victorian Government on the consumer protection framework.

### JURISDICTION

CAV’s jurisdiction spans the general and industry-specific regulatory schemes that make up Victoria’s consumer protection system. It includes a range of industry specific legislation that affects consumers, not-for-profit organisations, tenants and establishes occupational licensing and registration schemes.

At the basis of CAV’s general regulatory jurisdiction is the ACLFTA, which applies the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010* (Cwth)) as a law of Victoria, known as the Australian Consumer Law (Victoria) or ACL). This is a national, uniform law that operates under a ‘one law, multiple regulators’ model by the Commonwealth, and all States and Territories. The ACL applies equally to all businesses, Australia-wide. It covers general standards of business conduct, prohibits unfair trading practices, regulates specific types of business-to-consumer transactions, provides basic consumer guarantees for goods and services, and regulates the safety of consumer products and product-related services.

CAV legislation can be found in the [Legislation section of the Consumer Affairs Victoria website](#).

## 2 CAV’s Regulatory Approach

For CAV, regulation includes the implementation and enforcement of laws in order to steer the behaviour of regulated entities, with the objective of ensuring a safe and competitive Victorian marketplace, where businesses comply with laws and consumers exercise their rights.

CAV’s regulatory approach is intelligence-led, risk-based and outcome-focused. This is described in further detail below and illustrated in Figure 1.

**Figure 1: CAV’s approach to managing regulatory risks**



Our regulatory approach enables us to target the conduct which poses the highest risk to Victorians, while making the best use of our available resources.

### Intelligence-led

A core element of CAV’s regulatory approach is the effective use of intelligence to inform decision making about how to manage key compliance risks.

Intelligence gathered in the course of our regulatory operations is supplemented by multiple other sources including, national information shared among ACL regulators, information from local councils, state regulators, law enforcement and industry stakeholders, online forums and social media. For example, information provided from auditors reports on estate agents

trust accounts alerts us to businesses who may have problematic practices so we can prioritise inspection activity.

In addition to the information sources above, CAV receives a large number of reports from consumers about business conduct or potential breaches of the law. While we do not pursue all of these individually, we use them as an important source of information that helps us assess risks and take action as appropriate.

### **Risk-based**

Where possible we aim to identify and treat risks before they lead to actual consumer harm.

Regulatory risks are market behaviours that:

- represent non-compliance with the laws we administer
- present potential or realised consumer harm
- impact our ability to be an effective regulator
- require a regulatory response due to public concern.

We put our effort where it counts and target the areas of greatest risk of consumer harm.

CAV monitors markets, and uses evidence to shape a targeted compliance program, focusing on those issues that pose the highest risk to Victorians. Levels of risk are determined according to evidence or likelihood of consumer harm. Risks can take many forms, for example, risks posed by a particular product; by the conduct of an individual business; by a new or emerging business practice; or by the conduct or business model of an entire industry.

### **Outcome-focused**

Our use of a range of compliance tools is underpinned by a compliance strategy that ultimately seeks to effect market outcomes. We make decisions on compliance actions in order to achieve outcomes that deter unlawful conduct, and promote future compliance.

CAV takes enforcement action to serve the public interest. We exercise discretion to focus on those actions that can bring beneficial outcomes to all consumers. We do not take action on behalf of individuals to obtain redress. Section 3.5 outlines the types of factors considered in establishing public interest.

The nature of the problem and the desired outcome drives the decision on which of our broad range of compliance and enforcement tools to use. Given that our key objective is voluntary compliance, wherever possible, the vast majority of engagements with business will be for the purposes of compliance assistance and education.

However, where the issue is high risk or requires urgent action to stop the conduct, we may move straight to court action. For systemic issues, a multi-faceted compliance strategy, using several tools in combination, may be used to target an entire industry. Section 3.4 outlines CAV's compliance options.

## 3 CAV's Compliance Policy

### 3.1 Our compliance objectives

As a market regulator, we work to prevent harm to consumers and businesses through a compliance approach that strongly emphasises prevention and careful targeting of enforcement action.

By using a risk-based, intelligence-led and outcomes focused approach to compliance decisions, we can allocate our resources more efficiently, to **target those that do the most harm**. This enables us to act quickly against those that present the highest risk to Victorians and achieve more sustainable outcomes.

Our key objective is **voluntary compliance**. We proactively engage with business to inform them of their responsibilities, and assist them to make sure they know how to comply. We work to ensure the law is clear, keeps pace with changing markets, and does not impose unnecessary red-tape.

### 3.2 Our information services to support compliance

To support voluntary compliance CAV uses a range of mediums to inform businesses, consumers, landlords and tenants about their responsibilities and rights. We use digital, telephone and face-to-face channels to achieve this.

This is further outlined in the following Information services and Dispute services sections.

#### Information services

CAV is committed to making its services available through digital platforms, and will ensure the ongoing development and innovation of these services to meet the needs of all Victorians.

Our extensive [Consumer Affairs Victoria website](#) is supported by a suite of apps and online educational tools, including MyShopRights, RentRight, and the consumer building tool, which encourage consumers and businesses to proactively seek solutions to disputes and allows consumers to exercise their rights.

Where businesses and consumers need dispute assistance, CAV's telephone-based information services are focused on areas within CAV's direct responsibility, and form an important part of our risk-based approach to regulation. Where appropriate, CAV will refer businesses and consumers to the organisation best suitable to deal with their matter. A list of other organisations that may assist in certain circumstances can found at the [Who to go to for help page on the Consumer Affairs Victoria website](#).

Well-informed and empowered consumers and tenants drive compliance with consumer laws. CAV provides consumers with information and advice on their rights under the legislation CAV administers, and strategies to assist in exercising those rights. Similarly, businesses are advised of their obligations under the legislation that CAV administers, and given appropriate support to assist them in meeting their obligations.

It is important to note that as an impartial regulator, CAV is unable to provide legal advice to either consumers or businesses.

To ensure that CAV's services reach all facets of consumers within the community, including the most vulnerable and disadvantaged, CAV financially supports a number of community agencies to provide more individually tailored advocacy services. This is in line with the Government's recognition that some of Victoria's most vulnerable and disadvantaged citizens require additional support to access the justice system. These services are provided through a number of programs, including the Tenancy and Consumer Program and the Financial Counselling Program. More information about these programs can be found in the [Grants section of the Consumer Affairs Victoria website](#).

CAV's publications provide information and advice to consumers and businesses about the legislation we administer. To download these publications, view the [Forms and publications page on the Consumer Affairs Victoria website](#).

CAV continues to produce hard copy publications, particularly in those instances where there exist legislative requirements to do so.

Information gathered during our interactions with consumers and businesses during the provision of information services is a valuable source of intelligence about potential non-compliance with consumer laws.

### **Dispute services**

In addition to its information services, in certain circumstances CAV provides dispute services.

These dispute services have a compliance orientation and are focused on obtaining an outcome that is consistent with the law. CAV seeks to obtain voluntary compliance in its dispute services; it does not have binding decision making powers, nor does it have the ability to make people participate.

Our primary dispute service offering is delivered by telephone with the aim of obtaining a timely resolution. In limited circumstances, a more tailored conciliation service may be offered, based on specific legislative provisions and case complexity.

When deciding whether to offer a dispute service, CAV considers a range of factors, including but not limited to the following:

- Is there a likely breach of legislation administered by CAV or a failure to comply with legal obligations?
- Is the enquiry better handled by another jurisdiction or regulator?
- Has the consumer attempted to appropriately resolve the matter themselves?
- Does the consumer detriment justify CAV involvement?
- Is the consumer vulnerable and disadvantaged?
- Are there other or better ways to deal with the issue?
- Has the issue already been dealt with by CAV or VCAT?
- Is the issue reasonably likely to be resolved?

Information gathered during our interactions with consumers and businesses during the provision of dispute services is another valuable source of intelligence about potential non-compliance with consumer laws.

### 3.3 Our options to address non-compliance

CAV has a range of options to address non-compliance under the ACLFTA, ACL and other consumer Acts. These range from warning letters and infringement notices through to court action for the most serious matters. The tools can also be used in combination. The broad range of tools ensures that CAV has the flexibility to respond in a way that is both targeted and proportionate to the seriousness of the problem.

#### Education letter

We may send an education letter when there is evidence that a business, which may be in breach of the law, is unaware of its obligations and has generally been cooperative during interactions with the regulator.

#### Without prejudice discussions

CAV may hold an informal discussion with the business about alleged non-compliance to resolve a matter promptly, without resorting to Court or Tribunal involvement.

#### Business improvement engagement

CAV targets those businesses that generate a high or disproportionate number of contacts to CAV for intensive compliance assistance, through our Better Business Initiative (BBI).

#### **BUSINESS IMPROVEMENT – THE BETTER BUSINESS INITIATIVE**

The BBI is a compliance program that targets those businesses that have attracted a high or disproportionate number of contacts to CAV or other ACL regulators. Businesses that have the potential to generate contacts such as global companies new to Australia are also proactively targeted.

The voluntary program helps businesses become and stay compliant. High or disproportionate contacts are considered with reference to business size and market share, and comparison with contacts generated by the nearest competitors. CAV is more likely to target those businesses with inadequate complaints handling or which raises other systemic issues.

CAV conducts a thorough analysis of contact data over time to identify issues with business conduct and their potential root causes. Face-to-face engagement with the business helps to identify changes to business practice that are likely to have an ongoing impact. The onus for making the improvements rests with the business, through an agreed action plan. CAV will continue to engage with the business to see the plan through.

#### **Compliance monitoring inspection**

An inspection aims to detect whether there are breaches of the law. Inspections are used to determine whether enforcement action is required. CAV conducts a planned and targeted state-wide inspection program based on compliance and enforcement priorities.

## **Warning letter**

A warning letter may be issued when there is evidence that a law has been broken and the business can be reasonably expected to know of and understand their obligations.

## **Infringement notice**

This is a notice asserting a breach of the law and imposing a financial penalty. This allows straightforward breaches of the law to be dealt with by payment of a fine, rather than court proceedings.

## **Public statements**

The Director has the power to make public warnings about consumer risks from unsatisfactory goods and services or unfair business practices, and a general power to educate and inform people on fair trading issues. This includes identifying individuals or businesses, where this is in the public interest. Public statements can take a variety of forms including:

- consumer warning notices concerning particular products, sectors, practices, businesses or other consumer risks
- industry warning notices outlining CAV's intentions for compliance activities
- reporting contacts, disputes, infringements or other data and information held by CAV
- public notification of the commencement of court proceedings or the outcomes of proceedings.

Public statements are a particularly timely and effective tool to prevent ongoing consumer harm where the issue is widespread, and in instances where CAV has issued court proceedings which can be lengthy. A public statement

provides an immediate option for both informing consumers and deterring businesses from engaging in similar conduct.

## **Enforceable undertaking**

This is an administrative alternative to court action. An undertaking is a document offered to the Director of Consumer Affairs Victoria by the business. It generally contains an acknowledgement of the offending conduct, and remedial measures such as publicity orders and compliance programs. The undertaking is enforceable in a court.

## **Asset freezing order**

A court may make an order that restrains a person from dealing with their assets or those held on behalf of others, until proceedings before the court are resolved and it releases the assets.

## **Disciplinary action**

The Director may take disciplinary action against a person or business operating under a licensing regime, which may result in the cancellation or suspension of an occupational licence, the imposition of conditions on a licence, or fines.

## **Civil proceedings**

The Director may commence civil proceedings in a range of jurisdictions. Civil remedies available to CAV include injunctions relating to specific behaviours, 'cease trading' injunctions, requiring a business to cease trading altogether or to trade subject to court order conditions, adverse publicity orders, compensation orders, disqualification of directors and civil pecuniary penalties. These are particularly effective in achieving specific conduct outcomes.

## Criminal prosecution

The Director may institute proceedings in courts on behalf of the public for the conviction and punishment of a party under the criminal provisions of the ACL and associated consumer Acts.

### 3.4 Choosing a compliance option

In order to be effective, the spectrum of options to achieve compliance are wide and not only include legal actions, but all the activities a regulator uses to encourage compliance. CAV can use these if businesses choose not to cooperate, or where there is a serious contravention of administered legislation.

The base section of the pyramid, as shown in Figure 2 below, represents most of the activities CAV undertakes. These are less resource intensive and thus are used more frequently to address the risk of non-compliance. These actions are premised on the assumption that most business want to act fairly and are willing to comply with the law. Many minor breaches of the law are caused by a lack of knowledge or capacity, and as such, CAV directs its resources to educate and work with businesses to improve their conduct.

The peak section of the pyramid represents the activities that CAV undertakes the least: criminal and civil court actions. These activities are extremely resource intensive and reserved for matters posing the highest risk, particularly if the conduct is blatant and ongoing.

Figure 2: Pyramid of compliance options



### 3.5 Considering the public interest

CAV exercises its regulatory powers in the public interest. In enforcing compliance with consumer laws, CAV aims to serve the public at large by pursuing outcomes that maintain competitive and fair markets for all consumers. For this reason, there must be a public benefit for every enforcement action. We do not act for an individual person solely to obtain redress on their behalf. CAV's objectives in taking an enforcement action include to:

- stop the unlawful conduct
- ensure future compliance
- raise awareness of the law
- deter and punish wrongdoers.

A consideration for public interest is also the efficient use of public resources such that:

- the resource cost of a particular action is relevant
- the use of lower cost compliance tools will be favoured where these can address non-compliant conduct effectively without resorting to more costly court action
- a broad legislative or regulatory response may be more appropriate.

#### **Exercising discretion on case selection**

In selecting matters appropriate for enforcement action, CAV exercises discretion, taking into account the merits and circumstances of the case, whether it is within CAV's jurisdiction and/or enforcement priorities, and the likelihood of a conviction.

Factors that make enforcement action likely include:

- the seriousness of the conduct – where there is evidence of, or potential for, significant consumer harm, and particularly where this conduct is ongoing
- a blatant disregard for the law, or pattern of deliberate non-compliance by the business that suggests a risk of future misconduct
- special circumstances, such as conduct affecting vulnerable or disadvantaged groups
- if the conduct is industry-wide, or involves a new or emerging issue or has a significant impact on market integrity
- if enforcement action is likely to have a worthwhile educative or deterrent effect
- if court action would be advantageous in determining the extent of jurisdiction, meaning or application of the law
- if other enforcement options are not considered to be appropriate to address the alleged conduct.

Examples of what we usually do not act on include:

- one-off, isolated events of low detriment
- matters that are more effectively dealt with by another agency
- matters of individual redress that are better dealt with between the parties through a private right of action or under an industry dispute resolution option.

## **Exercising discretion on jurisdiction**

The Director also has discretion to choose the jurisdiction in which to commence an enforcement action.

This discretion arises from direct powers to commence legal action under the ACLFTA, ACL and industry-specific legislation, as well as from the Director's general powers to commence proceedings.

The Director will determine the course of action that has the best chance of effectively achieving CAV's objectives for the given matter. Other considerations are the cost and legal process requirements involved. There are three (at times overlapping) dimensions to this discretion:

### **Civil action and/or criminal prosecution**

Key consumer protection legislation, including the ACL, creates both civil obligations and criminal offences, with considerable overlap between the two.

Current CAV practice is to make extensive use of the civil jurisdiction because it enables us to obtain a broad range of orders such as disqualification of directors, corrective advertising, declarations and civil pecuniary penalties. Under the ACL we can often obtain the same penalty for a civil pecuniary penalty offence with civil action as we could with criminal prosecution.

We will make use of the criminal jurisdiction when it is the most effective option, including considering whether a conviction, a fine, or imprisonment (where available) is appropriate.

### **The choice to commence action under State or Commonwealth law**

In the context of a national consumer protection framework, there is a priority on pursuing action in the Commonwealth jurisdiction, under the ACL. This achieves national consistency and benefits for consumers in all states. Joint action in collaboration with other ACL regulators can achieve effective outcomes where businesses operate across multiple jurisdictions, or different businesses are engaging in the same conduct in multiple jurisdictions.

### **The court or tribunal in which to commence actions**

Courts and tribunals differ in the sanctions and remedies they are able to impose. Action in higher courts may be more appropriate where there is a need to establish precedent, where the consumer detriment is substantial, or where more severe penalties are sought. Other considerations include differences in the cost, time and expense involved in taking action, and whether a high public profile is sought for a matter.

## 4 Our future direction

CAV will continue to focus on making intelligence-based regulatory and compliance decisions that have regard to the available evidence, level of risk and the outcome to be achieved.

We will also ensure an ongoing and substantial capacity to respond to urgent consumer issues impacting the Victorian community. More broadly, CAV is committed to a continuum of service excellence, which includes:

- Improved business compliance through effective enforcement
- Accessible and accurate information via our digital platforms
- Tailored one-on-one advice to consumers via our telephone service.

We believe that more confident Victorian consumers operating in a well-regulated market, where businesses understand their obligations, will in turn allow us to focus our efforts on the most vulnerable and disadvantaged in our community.

## 5 Feedback and review

There are mechanisms and contacts provided below which provide oversight of CAV's enforcement activity.

### The courts

The criminal and civil remedies accessible to the Director under administered legislation and in particular, the ACLFTA, are available only from the courts and the Victorian Civil and Administrative Tribunal. In addition, many of the investigative tools available to CAV staff, for example search warrants, are accessible only by court order.

For a full list of Courts and contacts details please see the [Victorian Courts and Tribunals page on the Court Services Victoria website](#).

### The Director of Consumer Affairs Victoria

Section 178 of the ACLFTA provides that CAV must maintain a register of the exercise of powers of entry under that part.

Section 179 of the ACLFTA provides that a person may complain to the Director about the exercise of a power by an inspector under Part 6.4. The Director must investigate any complaints made and provide a written report to the complainant on the results of the investigation.

You can submit feedback:

- online via our [Online feedback form on the Consumer Affairs Victoria website](#).
- via email to [cav-executive-services@justice.vic.gov.au](mailto:cav-executive-services@justice.vic.gov.au) – please type 'Feedback' in your subject line
- by telephone: 1800 00 81 94
- by post: Customer Feedback  
Consumer Affairs Victoria  
PO Box 123  
Melbourne 3001

## Secretary, Department of Justice and Regulation

Section 313 of the ACLFTA provides that a person may complain to the Secretary of the Department of Justice about the exercise of a power by the Director under Part 6.2, Division 3 (licence suspension).

You can contact the Secretary via:

GPO Box 4356  
Melbourne VIC 3000  
03 8684 0000  
1300 365 111 (Regional)

## Victorian Ombudsman

The Victorian Ombudsman has the power to investigate complaints about State and local government authorities.

You can contact the Ombudsman via:

Level 1 North Tower  
459 Collins Street  
Melbourne VIC 3000  
03 9613 6222  
1800 806 314 (Regional)

## Other agencies

Certain compliance and enforcement activities and decisions are subject to review and comment by a range of other bodies such as the Privacy Commissioner or Civic Compliance Victoria.

## Approval by Director

This CAV Compliance Policy was approved by the Director of Consumer Affairs Victoria to come into effect from 1 July 2017.

	
_____ Simon Cohen Director, Consumer Affairs Victoria	
Date	<u>1 / July / 2017</u>