

# CORRUPTION



## Impact Assessment Guidelines



**In collaboration**



# Corruption Impact Assessment Guidelines

## 1. Introduction

Corruption is a major obstacle to social and economic development and increases the cost of doing business.

Thailand scored 38 on the corruption perception index in 2014. The index indicates the perceived level of public sector corruption on a scale of 0 (highly corrupt) to 100 (very clean). Thailand's low score affects its ability to attract foreign investment, to provide equal opportunities for its citizens to develop and access business and employment opportunities, and to improve the standard of living.

APEC Leaders acknowledged the threat that corruption poses to good governance and economic growth in the Asia-Pacific when they met in Santiago, Chile in 2004. They agreed that APEC economies should nurture and sustain good governance, economic development and prosperity by working together to fight corruption and ensure transparency.

APEC Leaders endorsed the Santiago Commitment to Fight Corruption and Ensure Transparency. This commitment noted the important role of the United Nations Convention against Corruption as the first legally binding global instrument specifically targeted to fight the scourge of corruption.

Article 5 of the United Nations Convention Against Corruption is pertinent to preventing corruption emanating from legislation and supporting institutional arrangements.

### *Article 5. Preventive anti-corruption policies and practices*

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.
2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.
3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.

The Thailand Government is committed to the implementation of Corruption Impact Assessment as a key mechanism to identify and remove corruption-causing factors in legislation and supporting institutional arrangements.

## 2. Purpose

The corruption impact assessment is designed to examine, evaluate and remove, where appropriate, corruption-causing factors in laws, regulations and other legal instruments.

The Guidelines are designed to assist government agencies with identifying corruption-causing factors in legislation, regulations and other legal instruments and the supporting institutional arrangements, and to develop and implement appropriate strategies to remove identified corruption-causing factors.

Poorly designed legislation with ill-defined administrative discretionary powers together with inaccessible information about administrative procedures reduces government accountability and transparency. This can lead to inconsistent approaches and the potential for corrupt decisions that favor some individuals, businesses and organizations to the detriment of society.

People, businesses and organizations need certainty, clarity and access to the law so that they know their rights and obligations. Government agencies responsible for the administration of legislation, regulation and other legal instruments need the law to provide clear direction, guidance, scope and boundaries to prevent unfettered and potential abuse of discretionary powers. Appropriate checks and balances, specifically internal and external review mechanisms, are required to ensure responsible government agencies are held accountable.

The corruption impact assessment is based on South Korea's corruption impact assessment approach. The Guidelines outline the appropriate, and in some cases, the inappropriate approach to designing legislative and supporting institutional arrangements to prevent corrupt behavior. The guidance draws upon examples from Thailand and Australian legislation and institutional arrangements.

The contents of the Guidelines include:

- Section 3 Corruption-Causing Factors
- Section 4 Application and Scope for Reform
- Section 5 Evaluation Process and Reporting
- Section 6 Evaluation of Ease of Compliance
- Section 7 Evaluation of Propriety of Discretionary Powers
- Section 8 Evaluation of Transparency of Administrative Procedures
- Section 9 Evaluation Checklist

### 3. Corruption Causing Factors

There are three broad categories of corruption---causing factors:

- Ease of compliance with laws and regulations
- Propriety of administrative discretion
- Transparency of administrative procedures

Table 1 below provides the corruption---causing factors and the criteria used to determine whether the potential for corrupt behavior exists.

**Table 1: Corruption--causing factors and criteria**

Corruption---causing factors	Criteria
Ease of compliance	---Adequacy of the compliance burden ---Adequacy of the level of sanctions ---Possibility of preferential treatment
Propriety of administrative discretion	---Clearness of discretionary power ---Appropriateness of the scope of discretionary power ---Concreteness and objectiveness of discretionary standards
Transparency of administrative procedure	---Accessibility and openness ---Predictability ---Corruption control system

### 4. Application and Scope for Reform

The corruption impact assessment guidelines apply to all laws, regulations and other legal instruments.

Table 2 below shows which of the criteria for each corruption---causing factor is targeted at legislative or institutional reform.

All three corruption---causing factors should be evaluated for new and amending laws, regulations and other legal instruments. All of the criteria for the propriety of administrative discretion and the level of sanctions are relatively straightforward assessments and should not impose a burden on government agencies. The adequacy of the compliance burden may require more time and effort to make an assessment.

Institutional reforms can be made to existing laws, regulations and other legal instruments. Government agencies should develop annual plans to prioritize the review of existing legislation, regulations and other legal instruments to ascertain whether improvements can be made to facilitate:

- objectiveness of discretionary standards;
- accessibility and openness;
- predictability; and,
- corruption control system.

These reviews should also identify any matters that can be removed or improved in respect to the ease of compliance and propriety of administrative discretion so that they can be introduced when these laws, regulations or other legal instruments are eventually amended.

Each government department should submit an annual plan to the Office of XXXXX advising of the legislation and the supporting institutional arrangements that will be reviewed over the next 12 months.

**Table 2: Scope for Legislative or Institutional Reform**

<b>Factors</b>	<b>Criteria</b>	<b>Legislative or Institutional</b>
Ease of Compliance	Adequacy of the compliance burden	Legislative
	Adequacy of the level of sanctions	Legislative
	Possibility of preferential treatment	Institutional
Propriety of administrative discretion	Clearness of discretionary powers	Legislative
	Appropriateness of the scope of discretionary power	Legislative
	Concreteness and objectiveness of discretionary standards	Legislative and/or Institutional
Transparency of administrative procedure	Accessibility and openness	Institutional
	Predictability	Institutional
	Corruption control system	Institutional

## **5. Evaluation Process & Reporting**

The evaluation process for the three categories of corruption---causing factors is discussed in sections 6, 7 & 8.

In each section, the evaluation provides a series of questions and guidance on the appropriate, and in some cases, the inappropriate approach to designing legislative and the supporting institutional arrangements to prevent corruptive behavior. The guidance draws upon examples from Thailand and Australian legislation and institutional arrangements.

Section 9 provides an evaluation checklist that recaps all of the questions in sections 6 to 9.

A briefing should be prepared advising that the new or amending legislation, regulations or other legal instrument has been subject to a corruption impact assessment with a list of the provisions (sections, clauses etc) that have been evaluated, the criteria used, and whether it meets the criteria (yes or no). For those provisions where the answer is 'No', the government agency needs to provide an explanation for not improving the provision in accordance with the

Guidelines. A corruption impact assessment template with a few examples is provided in Table 3.

All of the legislative provisions that have been subject to an evaluation should be notated and a copy provided to the Office of XXXX together with the corruption impact assessment.

**Table 3: Corruption Impact Assessment Template**

Relevant legislative section	Type of Corruption---causing Criteria	Appropriate	Reason for not removing corruption---causing factor
Section 9	Clearness of discretionary powers	Yes	
Section 9	Appropriateness of the scope of discretionary power	Yes	
Section 9	Objectiveness of discretionary standards	No	The department proposes to develop and publish guidelines for the Minister's discretionary powers. It is considered that establishing statutory criteria in the legislation would restrict the Minister's discretionary powers where circumstances may change.
Section 15	Clearness of discretionary powers	Yes	
Section 15	Appropriateness of the scope of discretionary power	Yes	
Section 15	Objectiveness of discretionary standards	Yes	

A copy of the draft legislation, regulation or other legal instrument with the relevant provisions highlighted should be attached to the briefing and forwarded to the Office of XXXXXXXX for independent assessment.

The Office of XXXXXX will advise whether the corruption impact assessment is compliant with the Guidelines.

The Office of XXXXXX should prepare quarterly and an annual report to the Council of Ministers advising on the compliance level for each government department and highlighting any major concerns with specific legislation.

For reviews of legislation and supporting institutional arrangements that are undertaken under a departmental annual plan, the government agency should submit corruption impact assessments to the Office of XXXXXX for independent assessment for each review once completed.

The Office of XXXXXXXX will advise whether the corruption impact assessment is compliant with the Guidelines.

The Office of XXXXXX will prepare an annual report to the Council of Ministers advising on each government department's compliance with its annual plan, note a government department's commitment to introduce institutional reforms and highlight any major concerns with specific legislation or institutional arrangements.



## 6. Evaluation of Ease of Compliance

This section provides an explanation of how to evaluate each of the three criteria in respect to the ease of compliance.

**Table 4: Ease of Compliance**

Criteria	Contents
Adequacy of the compliance burden	Whether the level of expense and sacrifice borne by people, businesses, organizations to comply with legal responsibilities is appropriate and provides the best option at the least cost
Adequacy of the level of sanctions	Whether the content and level of penalties compared with those pursuant to similar laws are appropriate
Possibility of preferential treatment	Possibility of certain class, business, group or individual enjoying favor or benefit due to the application of laws

### 6.1 Adequacy of the compliance burden

Does the legislation provide the least cost option?

Has the responsible government agency considered other less burdensome compliance alternatives that meet the policy objective?

Has the responsible government agency undertaken an assessment of alternative compliance approaches?

The compliance burden should be proportionate to the objectives of the law. That is, burdens imposed should be reasonable and fair, in light of the stated objectives, with the compliance mechanisms proportionate and able to be clearly linked to achieving the objective.

Legislation, regulation and other legal instruments impose a broad range of compliance obligations on people, businesses and organizations. The following is a list of common compliance obligation subjects that are prescribed in legislation, regulation and other legal instruments:

- Authorities and Approval to supply goods or services to a third party
- Audits
- Annual returns
- Annual reports
- Prescribed Equipment
- Condition and repair of equipment
- Disclosure of information
- Financial assurances

- Retention of records
- Specifications and equipment
- Maintenance of equipment
- Inspection of equipment
- Protection of equipment
- Security of premises, equipment, processes and systems
- Method of payment
- Prescribed processes and systems
- Standards for the production of goods and services
- Material Safety Data Sheets
- Induction, information, training and supervision
- Hazard identification and analysis
- Risk assessment and control
- Investigation
- Packing, marking and labelling
- Notification of incidents
- Planning for emergencies
- Review processes and systems

Invariably, regulation involves several compliance mechanisms. For instance, licensing, specifications of equipment and record-keeping. Responsible government agencies need to justify each compliance mechanism and show that the compliance mechanism will be effective and play a role in reducing or preventing an economic, social or environmental problem.

Regulatory failure often occurs when government agencies take a risk-averse approach and impose a wide range of regulatory compliance mechanisms to cover every possible incident or event even where there is a low probability of occurrence. This invariably results in some of the compliance mechanisms being totally unnecessary and imposes unnecessary costs on people, business and organizations. These unnecessary compliance costs are often referred to as 'red tape' on the grounds that society at large cannot see any relationship with the compliance mechanism and the policy objective to address a specific economic, social or environmental problem.

Command and control type compliance regulations that have prescriptive requirements for inputs can have unreasonable compliance burdens and can be significantly reduced with alternative approaches without compromising the policy objective. Two examples are provided in Boxes 1 and below.

**Box 1: Taxi vehicle standards**

The taxi regulations prescribe vehicle standards to ensure public safety. The regulation prescribes a taxi vehicle to be no older than five years of age and would require affected stakeholders to replace their vehicles every five years. This would be deemed a significant compliance burden. An alternative approach that would still achieve the policy objective of protecting public safety would be to require the owners or operators of the taxi vehicle to have the vehicle serviced every 20,000 kilometres or be subject to annual roadworthiness inspections. The cost of the alternative approach would be considerably lower than the replacement of a motor vehicle every five years.

**Box 2: Occupational Regulation -- Minimum Employee Standards**

If a regulated occupation's qualifications are required to protect public safety from criminal behavior, a regulation that prescribes a minimum level of education is likely to exclude persons from employment in the regulated occupation and impose a significant compliance burden on owners and operators of a business that employ the regulated occupation in terms of verifying the educational qualifications of existing and prospective employees. In addition, it may lead to a shortage of labor if the minimum educational standard is set too high. An alternative approach that would still achieve the policy objective of protecting public safety would be to require owners and operators of the business to have existing and prospective employees subject to a police check. This would reduce the compliance burden and achieve the policy objective.

**6.2 Adequacy of the level of sanctions**

Has the responsible government agency compared the level of sanction on a like---for---like basis with similar laws?

In principle, the level of a penalty should be consistent with the penalties applied in other legislation for offences of a similar nature or a similar seriousness. There may be exceptional circumstances that require different levels of penalties to apply to offences of a similar kind. In these cases, a clear justification needs to be provided for a different penalty regime.

Responsible government agencies should undertake penalty benchmarking to identify penalties applied in other legislation for offences of a similar nature or similar seriousness.

Responsible government agencies should also ensure the penalties are relative to the nature of offence and the seriousness of the offence. Box 3 provides an example of penalties relative to the seriousness of the offence.

**Box 3: Example of Penalties relative to the seriousness of the offence**

Operating without licence, permit, registration, certification, accreditation---100 penalty units

Fraudulent nature ---100 penalty units

Non---compliance with licence or permit conditions ---10 penalty units

Relating to false information – 20 penalty units

Disclosure of information ---10 penalty units

Failure to obey order ---20 penalty units

Failure to obey a directive ---20 penalty units

Failure to keep records ---5 penalty units

There may be circumstances due to the nature of the risk involved that justifies a higher penalty for an offence. For example, the risk to the community of a person operating as a medical practitioner without a licence would be greater than a person operating as a teacher without a licence. However, it would be expected that the offence for operating without a licence would be the same for similar type professions: doctors, surgeons, dentists and pharmacists.

### 6.3 Possibility of preferential treatment

Does the legislation exclude a certain class, business, group or individual from undertaking a regulatory activity or participating in a regulated market?

Is the exclusion of a particular group justified in accordance with the policy objective to prevent or reduce an economic, social or environmental problem?

Legislation that is drafted in such a way that it benefits or favors a certain class, business, group or individual can restrict competition, increase costs to other businesses and consumers, and prevent business investment and employment opportunities.

By way of example, Australia had legislation that benefited accountants affiliated with two professional associations to the detriment of accountants affiliated with the third professional association. In Australia, there are three accounting profession associations: CPA Australia, Accounting and Finance Association of Australia and New Zealand and the Institute of Public Accountants (IPA).

It is common practice for many pieces of legislation to require a particular regulatory function or compliance matter to be audited by an accountant. Up until about 2000, most legislation only referenced accountants who were members of CPA Australia or AFAANZ.

A review of the stock of legislation revealed that many pieces of legislation were capable of allowing accountants who were members of IPA. Accordingly, legislative reforms were introduced to enable members of IPA to be recognized in pieces of legislation where they were qualified to undertake the prescribed accounting or auditing function.

## 7. Evaluation of Propriety of Administrative Discretion

This section provides an explanation of how to evaluate each of the three criteria in respect to the propriety of administrative discretion.

Criteria	Contents
Clearness of discretionary powers	Whether discretion (who has it, the scope of it, process to exercise it) is clearly and firmly defined
Appropriateness of the scope of discretionary power	Whether the scope of discretion given is appropriate in light of international and domestic norm
Concreteness and objectiveness of discretionary standards	Whether discretion related criteria or requirement to exercise it is specific enough to be applied to reality and objective enough to be translated as the same by the third person

### 7.1 Clearness of discretionary powers

Does the legislation define who has the administrative discretionary power?

Does the legislation define the scope of the administrative discretionary power?

Does the legislation define the process for exercising the administrative discretionary power?

A wide range of decision-making powers can be granted under Thailand laws. These include decisions to

- grant, vary or deny a right, entitlement or benefit;
- to impose or refuse to impose an obligation or requirement;
- that give a direction and
- that make a valuation or declaration.

The two main types of administrative decisions to which administrative law relates are:

Mandatory --- for example, if the provision says that, if x occurs, y must decide in a certain way, and

Discretionary – for example, the Minister may decide to grant a licence to an applicant.

Legislation should clearly identify the position that has the discretionary power. For example, the Minister, Secretary-General, a regulatory body or an official.

Legislation may permit a decision-maker to delegate administrative discretionary powers to a third party. For example, *“The Minister may, in writing,*

*delegate his or her powers under this Act to an employee performing duties in the Department”.*

Where the decision-maker decides to delegate his or hers powers, the decision-maker:

- will need to make a formal instrument of delegation specifying who can exercise the power being delegated;
- identify delegates by job title and name;
- may impose conditions on exercising the delegated powers

The legislation should identify the position to have the discretionary powers. Box 4 below defines who has the discretionary power (the Minister), the scope (national security, prevention and remedy on fuel shortage and determination and control of fuel quality) but does not define the process.

**Box 4: Fuel Trade Act, B.E 2543 (2000)  
Chapter 1 Fuel Trade and Transportation**

**Section 8.** In issuance of the license under Section7, the Minister may set forth conditions relating any trading operation, as he thinks fit. In necessary circumstance relating national security, prevention and remedy on fuel shortage, as well as determination and control of fuel quality, the Minister may issue alteration, change or additional conditions to the conditions that already have been prescribed. In case there is no condition set, the Minister may set forth conditions, as he thinks fit.

As can be seen in Box 5, the legislation does not define the position of who has discretionary power. A competent official is too broad. The legislation does define the scope and process.

**Box 5: Machinery Registration Act, B.E 2514 (1971)**

**SECTION 9.** In conducting machinery registration, the competent official shall be empowered to inquire into facts, and to require an applicant to submit and pertinent document or evidence, or summon any person concerned to appear before him for giving statement as may be necessary.

## **7.2 Appropriateness of the scope of discretionary power**

Is the scope of administrative discretionary power appropriate for the responsibility?

As a matter of principle, discretionary powers that have far-reaching impacts should be confined to a Minister. For instance, where the discretionary powers need to take into consideration matters of national security. By way of example, Box 6 below shows the Minister responsible for the Fuel Trade Act (2000) may issue alteration, change or additional conditions to the conditions that already

have been prescribed in circumstances relating to national security, prevention and remedy on fuel shortage, as well as determination and control of fuel quality.

**Box 6: Fuel Trade Act, B.E 2543 (2000)**  
**Chapter 1 Fuel Trade and Transportation**

**Section 8.** In issuance of the license under Section 7, the Minister may set forth conditions relating any trading operation, as he thinks fit. In necessary circumstance relating national security, prevention and remedy on fuel shortage, as well as determination and control of fuel quality, the Minister may issue alteration, change or additional conditions to the conditions that already have been prescribed. In case there is no condition set, the Minister may set forth conditions, as he thinks fit.

For decisions that affect the ability of a person, business or organization to access a regulated market, profession or occupation, discretionary powers should reside with the Secretary---General, an independent regulator/ authority/registrar. Box 7 below defines the Authority to have discretionary power in relation to approving an application for a motor car traders licence.

**Box 7: Motor Car Traders Act 1986 (State of Victoria, Australia)**  
Section 12 Consideration of application

- (1) In considering an application for a licence, the Authority may—
  - (a) conduct any inquiries it thinks fit;
  - (b) require an applicant to provide any further information that the Authority thinks fit in the manner required by the Authority;
  - (c) seek advice and information on the application from any other person or body or source as it thinks fit.
- (2) The Authority may engage or appoint any person or body to assist it in considering an application.
- (3) The Authority may refuse to grant a licence to an applicant if the applicant does not provide the further information required within a reasonable time of the requirement being made.

Similarly, in Box 8 below, the registrar has discretionary powers to refuse registration of machinery. The Registrar (and not a competent official) should also have the discretionary power to inquire into facts, and to require an applicant to submit pertinent document or evidence, or summon any person concerned to appear before him for giving statement as may be necessary. For practicable reasons, the Registrar may want to delegate some of these powers to an official but proper delegation and accountability documentation should be signed off by the Registrar.

**Box 8: Machinery Registration Act, B.E 2514 (1971)**

**SECTION 8.** The principles, procedures and forms of machinery registration as well as the affixing or marking of seal of registration on machinery, and the issue of certificate of machinery registration shall be in accordance with that prescribed in the Ministerial Regulations.

**SECTION 9.** In conducting machinery registration, the competent official shall be empowered to inquire into facts, and to require an applicant to submit and pertinent document or evidence, or summon any person concerned to appear before him for giving statement as may be necessary. If there is a reason to believe that such application for registration is not correct, the Registrar may refuse such registration by informing the applicant of the reason thereof in writing.

The scope of enforcement discretionary powers should be confined to an authorized officer or an inspector/auditor. These enforcement officers should not in most cases issue fines. Instead, enforcement officers should document and report a breach to an enforcement committee within the responsible government agency. The enforcement committee should be comprised with senior officials and consider the facts of the breach, the culpability and history of compliance by the alleged offender and decide on the appropriate enforcement action. This provides quality assurance for the enforcement process and prevents over-zealous enforcement officers abusing their position.

**7.3 Concreteness and objectiveness of discretionary standards**

Does the legislation provide statutory criteria to guide the exercise of administrative discretionary power?

If not, has the responsible government agency developed a policy document to provide guidance to decision-makers in exercising their administrative powers?

If yes, is the policy document published and available to the public?

Where administrative discretion is considered necessary in legislation, regulations and other legal instruments the following practices should be considered:

Statutory criteria in the legislation to provide guidance to the decision-maker on those matters that are to be considered in exercising administrative discretion.

If statutory criteria is not included in the legislation, the responsible government agency should consider the establishment of policies that provide guidance to decision-makers in exercising their administrative discretionary powers appropriately, consistently and fairly.

The policy document should be available to the public to ensure the decision-making process is transparent and accountable.



By way of example, the Energy Regulatory Commission has broad powers under section 11 of the Energy Industry Act 2007 to make regulations. As can be seen in Box 9 below, section 64 requires the Minister with the consent of the NEPC to establish policy and guidelines on the tariff determination in the energy industry and section 65 requires the Energy Regulatory commission to establish criteria for determining tariffs based on the specified factors in section 65(1) to (7). These factors provide guidance to the ERC in the exercise of its administrative discretionary powers to determine tariffs.

**Box 9: Energy Industry Act, B.E (2007)**

**PART 2 TARIFFS FOR THE ENERGY INDUSTRY OPERATION**

**Section 64:**

The Minister, by and with consent of the NEPC, shall set the policy and guidelines on the tariff determination in the energy industry operation.

**Section 65:**

Under the policy and guidelines approved by the NEPC, the ERC shall establish the criteria for determining the tariffs of licensees under each category, based on the following approaches that:

- (1) should reflect the actual costs and take into account the appropriate return on investment capital of efficient energy industry operation;
  - (2) should be at the rates that enhance efficient and adequate energy supply to satisfy the domestic energy demand;
  - (3) should induce efficiency improvement in the energy industry operation;
  - (4) take into account fairness for both energy consumers and licensees;
  - (5) take into account the assistance to the underprivileged power consumers or the electricity supply in order to decentralize prosperity to provincial areas;
  - (6) have an explicit and transparent tariff calculation and make public the tariffs;
- and
- (7) do not exert unjust discrimination against energy consumers or those who wish to use energy.

**Section 66:**

The ERC shall regulate the tariffs set by the licensees to ensure their compliance with the policy and guidelines as approved under Section 64 and pursuant to the criteria under Section 65.

In the event that the tariffs are at the rates generally enforced, the ERC shall disclose the formula or the methodology used in the tariff calculation, including the information about the variables used in the tariff calculation, except for the case that the ERC considers such variables are commercially confidential information of the licensees.

Box 10 below provides an example where the Minister for Commerce is provided administrative discretionary powers under the Export and Import of Goods Act (1979) to regulate any of the matters prescribed in section 5 (1) to (6) and to prescribe rates of surcharge for exports and imports. Note the Act provides high level statutory criteria (economic stability, public benefit, public health, national security, public orders or good morals) without any policy guidelines to assist the Minister to determine what constitutes economic stability, public health etc).

The Act also does not provide any guidance on the methodology that should be adopted to determine rates of surcharges for exports and imports.

The Act does make the Minister for Commerce accountable to the Council of Ministers. However, the Council of Ministers consideration and deliberation of the Minister for Commerce's proposed notifications would be made in confidence.

The application of regulatory impact assessment to the provisions in sections 5 & 6 would improve the accountability and transparency of the Minister's administrative discretionary powers. Where the Minister needed to make a notification in an emergency situation to protect public health or national security for example, the Act could require the Minister to publish the reasons for his or her decision and to prepare a regulatory impact assessment within 12 months of making the notification. This would enable the Minister to take decisive action in appropriate circumstances but still hold the Minister accountable for his or her decision.

**Box 10: Export and Import of Goods Act, B.E 2522 (1979)**

Section 5. In the case where it is necessary or appropriate for economic stability, public benefit, public health, national security, public orders or good morals, or other benefits of the State, the Minister of Commerce shall, with the approval of the Council of Ministers, have the power to issue Notifications in the Government Gazette on any of the following matters:

- (1) specifying any goods to be prohibited for export or import;
- (2) specifying any goods which require a licence prior to the export or import;
- (3) specifying the categories, kinds, quality, standards, quantity, volume, size, weight, prices, trade names, sign, trade marks, origin for the goods to be exported or imported as well as the countries to or from which the goods are exported or imported;
- (4) specifying the categories and kinds of goods liable to export or import surcharge;
- (5) specifying the goods to be exported or imported to have a certificate of origin, certificate of quality or other certificates pursuant to international conventions or trade practices;
- (6) specifying other matters for the benefit of laying down regulations on the export and import under this Act.

The provisions of paragraph one shall apply mutatis mutandis to any amendment or repeal of the Notifications under this section.

Section 6. The Minister of Commerce shall, with the approval of the Council of Ministers, have the power to prescribe the rates of surcharge including the power to revise, amend or repeal the rates of surcharges for exports or imports. The surcharges may be prescribed to be payable in cash or other properties.

## 8. Evaluation of Transparency of Administrative Procedure

Criteria	Contents
Accessibility and openness	Whether participation by people, businesses, organizations in the exercise of discretion or performance of duties is guaranteed, and there is special system for related information disclosure
Predictability	Whether required papers and steps, administrative handling process, period and results are easy to know and predictable
Corruption control system	Whether a special system to control corruption exists such as one to regulate corruption coming from efforts to avoid compliance burden or to seek favor, coming from face to face encounter during working

### 8.1 Accessibility and openness

Does the responsible government agency provide guidance documents to enable persons, business and organizations to understand the scope of the administrative discretionary powers?

If yes, is the policy document published and available to the public?

Where administrative discretion is exercised does the law enable participation by people, businesses and organizations?

For example, the motor car traders legislation requires a number of requirements to be met to enable a person or business to obtain a licence to operate as a motor care trader. Some of these requirements include matters that require the decision-maker to exercise administrative discretion.

Section 8 (2) of the Motor Car traders Act 1986 sets out the information to be provided in an application for a licence. Section 8(2)(f) states, “ *the application must specify the type of trade in motor cars which the applicant proposes to conduct and the financial resources of the applicant to conduct that type of business*”.

Consumer Affairs Victoria (CAV) is the government agency responsible for the administration of the Motor Car Traders Act 1986. To enable participation by people, businesses and organizations, CAV has provided a template document on its website specifying the information on the applicant’s proposed business plan and declaration of personal finances. This enables people, businesses and organizations to know exactly the information that is required to accompany an application and the information that CAV will draw upon to exercise its

administrative discretion in determining “*the financial resources of the applicant to conduct that type of business*”.

The template document outlines the following requirements

- a copy of a the business plan;
- objective and mission statement;
- background history in the motor car trading industry;
- internal business organization chart;
- business model;
- advertising strategy;
- source of start---up capital;
- amount of start---up capital;
- list of start---up costs;
- declaration of personal finances;
- statement of assets and liabilities; and,
- personal income and expenses

## 8.2 Predictability

Does the legislation and the responsible government agency provide information on the papers and steps required to persons, business and organizations?

Does the legislation or regulations clearly specify what a person, business or organization needs to provide, the process that will be applied by the responsible government agency, the timeframe that prescribed matters must be completed and the expected outcomes.

The Motor Car Traders Act 1986 is used again to illustrate each of these requirements. Box 11 below provides an example of the required papers and steps for an application for a motor car traders licence.

### **Box 11: Example of required papers and steps**

#### **8 Application for licence**

- (1) An application for a licence may be made to the Authority by—
  - (a) a person of or over the age of 18 years; (b) a partnership; or
  - (c) a body corporate.
- (2) The application must be in the form approved by the Authority and must be signed—
  - (a) if the application is made by a natural person—by that person; or
  - (b) if the application is made by a partnership— by one of the partners who has the authority of the other partners to sign on behalf of those partners; or
  - (c) if the application is made by a body corporate—by a director of the body corporate who has the authority of the other directors to sign on behalf of the body corporate.
- (3) An application must be accompanied by the prescribed fee for the application and may be accompanied by the first annual fee for the licence.
- (5) An application must specify—
  - (a) the name and address—
    - (i) if the application is made by a natural person—of that person; or

- (ii) if the application is made by a partnership—of each partner; or
- (iii) if the application is made by a body corporate—of each director of the body corporate; and
- (b) if the application is made by a body corporate—the date and place of incorporation of the body corporate, its corporate name and address of its registered office; and
- (c) the date upon which the applicant intends to commence trading in motor cars; and
- (d) the address of the place that, if a licence were granted pursuant to the application, would be the principal place of business of the licensee and the address of each other place at which the licensee proposes to carry on business; and
- (e) whether any previous applications for a licence had been made or whether the applicant has been a licensed motor car trader or been employed by a motor car trader; and
- (f) the type of trade in motor cars which the applicant proposes to conduct and the financial resources of the applicant to conduct that type of business; and
- (g) such other matters as may be prescribed.

### **Administrative Handling Process**

Has the responsible government agency provided all of the information required in the predictability section in plain language on their website or brochures?

The legislation should provide guidance on the administrative handling process to enable persons, businesses and organizations to know what is involved in the consideration of a particular matter. Where the legislation is silent, the responsible government agency should publish information on the administrative handling process to provide transparency and certainty to the public.

Box 12 below shows that an application for a motor car traders licence is likely to be forwarded to the Director of Consumer Affairs Victoria and the Chief Commissioner of Police for them to conduct inquiries and report findings that may include recommendations to the Authority. Applicants may also be required to provide the Authority with any consent required by another person or body to verify information relevant to the application. Section 12 of the Act also provides the Authority with broad discretionary powers to conduct any inquiries it thinks fit in considering an application.

The legislative provisions pertaining to an application for a motor car traders licence clearly shows to potential applicants that the administrative handling process may be lengthy and involve consideration by several agencies. This is important information as it signals that the application will not be approved automatically until as such time all of the claims made in an application are confirmed by other bodies.

## **Box 12: Example of Administrative handling process**

### **11 Notice of application**

(1) Where an application for a licence is made in accordance with section 8, the Authority must, except in the prescribed circumstances, give any details of the application that the Authority considers relevant to the Director and the Chief Commissioner of Police.

(2) The Director and the Chief Commissioner of Police, upon receiving details of the application, must make such inquiries in relation to the application as the Director or the Chief Commissioner of Police considers appropriate.

(3) The Director and the Chief Commissioner of Police, after receiving the results of the inquiries, must report to the Authority.

(4) A report may include recommendations.

### **11A Consent to disclosure of information**

(1) The Authority may require a licensee or an applicant for a motor car trader's licence to provide the Authority, at the time of submitting the application or at any time during the currency of the licence, with any consent required by another person or body to enable the Authority to check or confirm information relevant to the licence or application.

### **12 Consideration of application**

(1) In considering an application for a licence, the Authority may—

(a) conduct any inquiries it thinks fit;

(b) require an applicant to provide any further information that the Authority thinks fit in the manner required by the Authority;

(c) seek advice and information on the application from any other person or body or source as it thinks fit.

(2) The Authority may engage or appoint any person or body to assist it in considering an application.

(3) The Authority may refuse to grant a licence to an applicant if the applicant does not provide the further information required within a reasonable time of the requirement being made.

## **Period**

Does the legislation or the responsible government agency prescribe periods for which matters must be decided upon?

The Motor Car Traders Act 1986 does not impose an obligation on the Authority to complete its decision on an application for the motor care traders licence within a specified time. However, the CAV website states that the Authority seeks to make a decision on an application within six weeks. This appears a reasonable timeframe given that the Authority may need to wait for reports from the Director of CAV, the Chief Commissioner of Police or any other person or body.

The disclosure of the timeframe for consideration of an application provides clear information to any person, business or organization considering making an application that the application decision---making process cannot be completed quickly and may involve further investigation with other government agencies.

## Results

Does the legislation or the responsible government agency provide clear direction on the matters that determine results or outcomes?

Box 13 below shows the requirements for the results; specifically that the Authority must grant a licence if certain conditions are met (section 13(1)) and that the Authority must refuse an application for a licence if certain conditions have not been met (section 13 (2)) and the matters that determine an application for a licence must be refused (section 13 (4)).

The legislation enables a person, business or organization to clearly understand the matters that are pertinent for the Authority's decision in either granting or refusing an application for a motor car traders licence.

### **Box 13: Example of results**

#### **13 Grant or refusal of licence**

- (1) The Authority must grant a licence to an applicant if it is satisfied that—
  - (a) the application complies with this Act; and
  - (b) the prescribed fee for the application has been paid; and
  - (c) any required information has been provided by the applicant under section 12; and
  - (d) there are no grounds for refusal of the application under subsection (4) or (6).
- (2) The Authority must refuse an application for a licence if it is satisfied that—
  - (a) the application does not comply with this Act; or
  - (b) the prescribed fee for the application has not been paid; or
  - (c) any required information has not been provided by the applicant under section 12; or
  - (d) a ground for refusal of the application exists under subsection (4) or (6).
- (3) The Authority is not required to conduct an oral hearing to determine whether to grant a licence or refuse an application for a licence.
- (4) An application for a licence made by a natural person must be refused if it appears to the Authority—
  - (a) the applicant has not attained the age of 18 years; or
  - (b) the applicant is disqualified from holding a licence under this Act or an Act providing for the licensing of motor car traders in any other State or in a Territory; or
  - (c) the applicant is an insolvent under administration; or
  - (d) the applicant does not have, or is not likely to continue to have, sufficient financial resources to carry on the business of trading in motor cars proposed by the applicant; or
  - (e) the applicant is not a person likely to carry on such a business honestly and fairly; or
  - (f) the applicant does not have sufficient expertise or knowledge of this Act and regulations to enable the applicant to carry on such a business; or
  - (g) the applicant is in any other way not a fit and proper person to be a licensee; or
  - (h) the applicant does not have, or is not likely to have, premises in which the applicant can lawfully carry on such a business; or
  - (i) the applicant is not likely to maintain effective control of such a business; or

- (j) the applicant is a director or officer of a corporation that is disqualified from holding a licence or was a director or officer of such a corporation when the corporation was disqualified; or
- (k) the applicant is a represented person within the meaning of the Guardianship and Administration Board Act 1986; or
- (l) the applicant has been convicted or been found guilty of a serious offence (whether or not a conviction was recorded) within the last 10 years (unless the applicant has obtained permission under section 29B); or
- (m) the applicant has had a claim admitted against the Fund (unless the applicant has obtained permission under section 29A);

### **8.3 Corruption control system**

Does the responsible government agency undertake random and independent audits/monitoring of enforcement outcomes to detect potential preferential treatment?

#### **Enforcement Performance Management & Audit**

Responsible government agencies should monitor, evaluate and review the performance of their agency staff that conduct inspections or other enforcement activities.

Data should be kept on each inspector/enforcement officer to identify the number of inspections/enforcements and the identity, location and history of compliance of the inspected person, business or organization. Comparative analysis of the performance of each inspector/enforcement officer will reveal different levels of work output and detection rates of offences. The difference in the detection of offences may be attributable to a range of plausible circumstances.

However, it does provide a starting point for further investigation. This could include using another inspector/enforcement officer, or an officer that is independent of the enforcement agency, to conduct random audits of those inspectors/enforcement officers that have abnormally below---average detection rates of offences. The random audit would involve selecting previously conducted inspections to ascertain whether these persons, businesses or organizations were in fact compliant at the time the inspector visited the premises. Where non---compliance is found, appropriate further investigation would need to be taken to determine whether the inspector/enforcement officer's work is performance related or is as a result of receiving a bribe or other inducement.



## Compliance and Enforcement Policy

Does the responsible government agency have a compliance and enforcement strategy?

A government agency publishing a compliance and enforcement policy provides the following advantages:

Enables affected stakeholders that need to comply of the enforcement approach  
Makes transparent the level of enforcement applied relative to the size of the offence, culpability and history of the alleged offender;

Box 14 shows excerpts from the key parts of Consumer Affairs Victoria's compliance and enforcement policy. These include a preference for promoting a range of compliance strategies and to use positive remedies (warnings/education) to seek behavioural changes and to only use penalties as a last resort for blatant and repeat offenders. Importantly, the policy also reveals the type of enforcement action that will be applied for low, medium and high breaches and the factors taken into consideration such as the seriousness of the offence and the culpability and history of the alleged offender. This policy provides a clear indication to those persons, businesses and organizations that need to comply of the way in which Consumer Affairs Victoria will administer enforcement.

### **Box 14: Consumer Affairs Victoria Compliance & Enforcement Policy (excerpts)**

Consumer Affairs Victoria will choose those enforcement options that best serve those objectives relevant in each case.

In order to achieve a fair approach to compliance and enforcement, and a strategic use of available resources, the following general criteria are applied to all enforcement activities:

#### **Proportionality**

Any enforcement action taken is proportionate to the consumer detriment and the seriousness of the breach.

#### **Consistency**

A consistent approach in similar circumstances will be taken to achieve consistent outcomes.

#### **Transparency**

So that business and consumers know what is expected of them and what they can expect in their dealings with us.

#### **Targeting**

Effective use of limited resources by targeting issues and traders in line with risks, new and emerging issues and enforcement priorities.

## **Outcomes focussed enforcement**

The use of the range of available administrative and civil remedies allows for a more balanced enforcement strategy between seeking behaviour change, including stopping ongoing conduct, and future compliance rather than simply punishing wrongdoing. For example, litigation is costly and not always effective in securing behavioural change compared to an enforceable undertaking, where a trader agrees to ongoing positive obligations.

Where breaches are blatant, repeated, and cause significant detriment, Consumer Affairs Victoria will target those traders for prosecution. However, we will also look at matters from the perspective of choosing those matters where action can have a broader market impact by increasing compliance in a particular industry sector.

## **Compliance strategies and options**

Consumer Affairs Victoria adopts an integrated, whole of organisation approach to promoting voluntary compliance with consumer regulation. Consumer Affairs Victoria publishes a range of industry guidelines on the requirements of consumer legislation.

The guidelines encourage greater levels of voluntary compliance as they illustrate both what is expected of traders, and the consequences of not complying.

An extensive strategy of awareness raising and negotiation has achieved improved compliance levels in various industries with the provisions regulating unfair contract terms.

Consumer Affairs Victoria also employs many other proactive compliance programs in other areas, which may include the following elements:

- Promoting self--regulation where appropriate, and industry compliance schemes.
- Trader information and education sessions.
- Trader visits, audits and monitoring.
- Industry newsletters.
- Engagement with businesses on compliance issues via conferences, forums, trade association liaison, industry newsletters.
- Trader awards programs.
- Consultation on legislative review and industry-specific issues.

Informed and empowered consumers also drive compliance with consumer law, by seeking redress when a transaction goes wrong. Consumer Affairs Victoria assists consumers to exercise their rights through the provision of extensive consumer information, advice and education.

## **Selection on matters for investigation and enforcement**

Consumer Affairs Victoria identifies far more issues and contraventions of legislation than it has resources to fully investigate. In light of this, resources must be allocated where we can best influence non-compliant conduct. In some cases, dispute resolution or low-level compliance activity may be pursued where this is likely to secure redress for the consumer. Similarly, enforcement action may be pursued where there is high likelihood of success.

This section sets out how Consumer Affairs Victoria selects matters for compliance and enforcement action. Matters may originate from consumer complaints, or from issues identified through market monitoring.

### **Initial Assessment**

Within Consumer Affairs Victoria's jurisdiction

Extent of consumer detriment

Seriousness of the conduct

If serious, is the conduct ongoing?

Consideration of Consumer Affairs Victoria's enforcement priorities

Culpability and history of alleged offender

Special circumstances including consumer vulnerability

If outside jurisdiction – refer to appropriate agency

If no breach, insufficient evidence, technical breach etc – refer to Consumer Affairs Victoria dispute resolution

### **Priority**

There are three priority levels: low medium and high.

For low priority cases, low-level compliance activities may occur.

For medium and high priority cases, an investigation may occur.

### **Enforcement Options**

Typically, enforcement options for low priority, low-level compliance include:

- Dispute resolution
- Formal written warning
- Trader meeting

Typically, enforcement options for medium priority investigations include:

- Public naming
- Infringement notice
- Adverse publicity order

Typically, enforcement options for high priority investigation include:

- Enforceable undertaking
- Other administrative remedies, such as:
  - Disciplinary action
  - Injunction
  - Asset freezing order
  - Cease trading injunction
  - Criminal prosecution

Source: [consumer.vic.gov.au](http://consumer.vic.gov.au)

## Code of Conduct

Has the responsible government agency established a code of conduct for enforcement staff?

A government agency can establish a code of conduct to set out the ethical and professional dealings of its inspectors, auditors and other authorized personnel to conduct enforcement activities. In particular the code of conduct should cover conflict of interest and the acceptance of gifts or other inducements. The purpose of the code of conduct is to link it to an enforcement officer's employment agreement so that appropriate disciplinary action can be taken where breaches are detected and proved.

Box 15 below provides an example of the provisions pertaining to conflict of interest and acceptance of benefits in the New South Wales Food Authority's food safety auditor's code of conduct.

### **Box 15: Regulatory Food Safety Code of Conduct (excerpts)**

#### **Conflict of interest**

Auditors, must at all times, avoid conflicts of interest. In the event of an auditor learning that an actual or apparent conflict of interest exists, the auditor shall immediately inform the relevant officer within the Authority. After investigation, the relevant officer will advise the auditor whether they may continue to audit the food business. Following this, the matter must be detailed in writing by the auditor to the Authority.

Examples of situations that are considered to constitute an actual or apparent conflict of interest include:

- The auditing of a business where the auditor has provided specific direction to the business in how to manage food safety risks associated with its food safety program, this may or may not include drafting the business's food safety management system. Situations where a regulatory food safety auditor has provided general food safety advice to a business, providing this advice does not include or provide specific direction to the food business in how to manage a food safety risk associated with its food safety program, should not be considered a conflict of interest.
- Arranging food safety training or participating as a food safety trainer in sessions where company specific solutions to food safety risks associated with a company's food safety program are discussed or provided. It should be noted that discussing non-conformances discussed during an audit should not be considered a conflict of interest. It should be further noted that a conflict of interest is not considered to occur where such information is limited to general information freely available in the public domain, and company specific solutions are not provided or discussed.
- Food businesses where the regulatory food safety auditor has a direct financial interest. It should be noted that remuneration provided to an auditor for auditing a food business does not constitute a conflict of interest.

- Preferential treatment of a person, organisation or interest (including but not limited to pecuniary, commercial, political or religious interests) during a regulatory audit as a result of a regulatory auditors' previous association with that person, organisation or interest.
- Food businesses where the regulatory auditor, or a close family member or associate of the auditor, has a direct relationship with a direct competitor of the business being audited. In this situation, the proprietor of the food business should be notified of the relationship, and allowed to decide whether the regulatory auditor may continue the audit of their business. Should the proprietor refuse the auditor, the auditor should inform the appropriate the Authority, who will then decide on an appropriate course of action.

Failure to declare a conflict of interest may result in the suspension or cancellation of an auditor's approval by the Authority.

### **Acceptance of benefits**

Any auditor found to accept gifts will be subject to immediate investigation by the Authority that may lead to the suspension or cancellation of their approval. The investigation may lead to criminal prosecutions being commenced against the auditor.

This does not include refreshments such as tea and coffee or basic meals such as sandwiches provided to an auditor while conducting an audit of a food business. Any attempt made by a client to offer a gift to an auditor, where the intent of offering the gift may reasonably be perceived to be an attempt to influence an audit outcome, and/or a response to a non--- conformance finding, must be reported to the Authority as soon as possible.

Source: New South Wales Food Authority (Australia)

## 9. Evaluation Checklist

<b>Evaluation Checklist</b>	
<b>Corruption Causing Factors</b>	<b>Yes/No</b>
<b>Ease of Compliance</b>	
<b>1. Adequacy of the compliance burden</b>	
Does the legislation provide the least cost option?	
Has the responsible government agency considered other less burdensome compliance alternatives that meet the policy objective?	
Has the responsible government agency undertaken an assessment of alternative compliance approaches?	
<b>2. Adequacy of the level of sanctions</b>	
Has the responsible government agency compared the level of sanction on a like---for---like basis with similar laws?	
<b>3. Possibility of preferential treatment</b>	
Does the legislation exclude a certain class, business, group or individual from undertaking a regulatory activity or participating in a regulated market?	
Is the exclusion of a particular group justified in accordance with the policy objective to prevent or reduce an economic, social or environmental problem?	
<b>Propriety of Administrative Discretion</b>	
<b>4. Clearness of discretionary powers</b>	
Does the legislation define who has the administrative discretionary power?	
Does the legislation define the scope of the administrative discretionary power?	
Does the legislation define the process for exercising the administrative discretionary power?	
<b>5. Appropriateness of the scope of discretionary power</b>	
Is the scope of administrative	

discretionary power appropriate for the responsibility?	
<b>6. Concreteness and objectiveness of discretionary standards</b>	
Does the legislation provide statutory criteria to guide the exercise of administrative discretionary powers?	
If not, has the responsible government agency developed a policy document to provide guidance to decision-makers in exercising their administrative discretionary powers?	
If yes, is the policy document published and available to the public?	
<b>Transparency of Administrative Procedure</b>	
<b>7. Accountability and Openness</b>	
Does the responsible government agency provide guidance documents to enable persons, business and organizations to understand the scope of the administrative discretionary powers?	
If yes, is the policy document published and available to the public?	
<b>8. Predictability</b>	
(a) Does the legislation and the responsible government agency provide information on the papers and steps required to persons, businesses and organizations?	
(b) Does the legislation or the responsible government agency prescribe the administrative handling process?	
(c) Does the legislation or the responsible government agency prescribe periods for which matters must be decided upon?	
(d) Does the legislation or the responsible government agency provide clear direction on the matters that determine results or outcomes?	
Has the responsible government agency provided all of the information required in (a) to (d) in plain language on their website and/or brochures?	
<b>9. Corruption Control System</b>	

Does the responsible government agency undertake random and independent audits/monitoring of enforcement outcomes to detect potential preferential treatment?	
Does the responsible government agency have a compliance and enforcement strategy?	
Has the responsible government agency established a code of conduct for enforcement staff?	





# CORRUPTION



## Impact Assessment Guidelines

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