

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to apply, as a law of New South Wales forming part of the *Fair Trading Act 1987* (the **Principal Act**), the Australian Consumer Law comprising Schedule 2 to the *Trade Practices Act 1974* of the Commonwealth. The Australian Consumer Law on its commencement will contain uniform national consumer protection laws, many provisions of which are based on current provisions in the *Trade Practices Act 1974* of the Commonwealth and are reflected in the existing *Fair Trading Act 1987*.

The Australian Consumer Law includes provisions dealing with misleading and deceptive conduct, unconscionable conduct, unfair contract terms, unfair practices, consumer guarantees and unsolicited consumer agreements. It sets out new enforcement and redress powers and establishes a new national product safety regime. An explanation of the provisions of the Australian Consumer Law is contained in the Explanatory Memorandum for the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* of the Commonwealth (which inserted new Schedule 2 into the *Trade Practices Act 1974* of the Commonwealth) at www.comlaw.gov.au.

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The Bill also contains consequential amendments to the existing provisions of the *Fair Trading Act 1987* and other New South Wales legislation and extends certain provisions in the Australian Consumer Law to certain matters that are regulated by the *Fair Trading Act 1987* but are not included in the national scheme.

In this Explanatory Note, the letters "FTA" indicate that a provision is based on a current provision of the *Fair Trading Act 1987*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on 1 January 2011.

Schedule 1 Amendment of Fair Trading Act 1987

No 68

Application of Australian Consumer Law as a law of New South Wales

Schedule 1 [24] inserts new Part 3 into the Principal Act which contains the following provisions:

Part 3 The Australian Consumer Law

Division 1 Definitions

Proposed section 26 defines certain terms used in the proposed Part.

Division 2 Application of Australian Consumer Law

Proposed section 27 states that the Australian Consumer Law text consists of Schedule 2 to the *Competition and Consumer Act 2010* of the Commonwealth (that is, the *Trade Practices Act 1974* which from 1 January 2011 will be renamed by the Commonwealth) and the regulations made under section 139G of that Act.

Proposed section 28 applies the Australian Consumer Law text, as in force from time to time, as a law of New South Wales that may be cited as the *Australian Consumer Law (NSW)* (**the ACL**) and that forms part of the *Fair Trading Act 1987*.

Proposed section 29 provides that modifications to the Australian Consumer Law text by the Commonwealth may be excluded by a New South Wales proclamation from having operation in New South Wales.

Proposed section 30 defines certain terms for the purposes of the ACL and specifies the jurisdiction of the courts and the Consumer, Trader and Tenancy Tribunal in relation to the provisions of the ACL.

Proposed section 31 applies the *Acts Interpretation Act 1901* of the Commonwealth

to the ACL.

Proposed section 32 provides that the ACL applies to persons carrying on business in New South Wales, bodies corporate incorporated or registered in New South

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Wales, persons ordinarily resident in New South Wales and persons otherwise connected with New South Wales.

Division 3 References to Australian Consumer Law

Proposed sections 33 and 34 provide a system for referring to the Australian Consumer Law of the participating jurisdictions within Australia.

Division 4 Application of Australian Consumer Law to Crown

Proposed section 35 provides that the proposed Division does not apply to the Commonwealth.

Proposed section 36 provides that the provisions of the Principal Act that apply the ACL as a law of New South Wales, and the ACL, bind the Crown in right of New South Wales and of each other Australian jurisdiction, but only to the extent that the Crown carries on a business.

Proposed section 37 provides that the Australian Consumer Law applied by other jurisdictions binds the Crown in right of New South Wales to the extent that it carries on a business.

Proposed section 38 specifies activities that do not amount to the Crown carrying on a business, for example, imposing and collecting taxes and fees or granting authorisations.

Proposed section 39 provides that the Crown in any capacity is not liable to a pecuniary penalty or to be prosecuted for an offence under the provisions of the Principal Act that apply the ACL as a law of New South Wales or the ACL.

Division 5 Miscellaneous

Proposed section 40 confers functions on Commonwealth officers and authorities under the ACL.

Proposed section 41 provides that a person is not liable to be punished for an offence against the Australian Consumer Law of another jurisdiction and the Australian Consumer Law of New South Wales, or to pay pecuniary penalties, in respect of the same conduct.

Provisions relating to investigations

Schedule 1 [15] amends section 19 of the Principal Act to expand the powers that an investigator has when entering premises to include the power to film, photograph, videotape or otherwise take still or moving images of any thing (other than a document) for the purposes of an investigation.

Schedule 1 [16] substitutes section 19A of the Principal Act (which currently deals with powers of search and seizure under a search warrant for the purposes of the investigation of a contravention of a provision of the Principal Act) to extend that

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section to circumstances where an investigator believes on reasonable grounds that unsafe consumer goods or unsafe product related services are being supplied from premises in trade or commerce.

Schedule 1 [17] amends section 20 of the Principal Act to extend the current power of the Director-General or an investigator under that section to require a person to produce information, documents or evidence in connection with a contravention of the Principal Act or an investigation under that Act so as to enable the Director-General or an investigator to exercise that power in relation to information, documents or evidence relating to unsafe consumer goods or product related

services.

Schedule 1 [20] inserts proposed Divisions 2 and 3 into new Part 2A of the Principal Act. Those Divisions contain the following provisions:

Division 2 Seized property and disposal of certain property

Proposed section 23A provides for the manner in which things seized under a search warrant issued under proposed section 19A of the Principal Act are to be dealt with.

The proposed section mirrors current section 19A (6)–(6B) of the Principal Act but does not apply to consumer goods that are the subject of an application under proposed section 23B or are subject to an order for their disposal under that section or are unsafe.

Proposed section 23B enables the Director-General to make an application to a court to authorise an investigator to enter and search premises for consumer goods that are in a person's possession for the purposes of trade or commerce and that do not comply with safety standards or have been permanently banned or recalled or are unsafe. The court may make an order for the destruction or other disposal of any such goods.

Proposed section 23C enables the Director-General to order the disposal of certain things obtained during an investigation if they are no longer required to be retained and the lawful owner cannot be found or does not wish for their return.

Division 3 Embargo notices

Proposed section 23D enables an investigator who enters premises under a search warrant and finds unsafe consumer goods, or equipment used to supply unsafe product related services, to issue an embargo notice if it is not practicable to seize and remove the goods or equipment. An embargo notice can prevent the supply of the relevant goods or services from the premises and the removal of the relevant goods and equipment during the period for which it remains in force.

Proposed section 23E provides for the period for which an embargo notice remains in force. That period is 28 days or, if the goods or equipment to which it relates are secured under proposed section 23G, 24 hours.

Proposed section 23F prevents the issue of an embargo notice within 5 days of the expiry of another embargo notice that was issued in respect of the same goods, equipment or services.

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Proposed section 23G enables an investigator to secure goods or equipment to which an embargo notice relates (for example, by locking them up or placing a guard) if the investigator considers it necessary to ensure the embargo notice is complied with.

Proposed section 23H enables an application to be made to the Minister, the Director-General or an investigator for consent to do something that is prevented by an embargo notice.

Proposed section 23I creates an offence of knowingly causing or permitting something to be done in contravention of an embargo notice.

Enforcement provisions and remedies

Schedule 1 [55] substitutes Part 6 of the Principal Act which contains provisions relating to the enforcement of the provisions of the Principal Act and remedies in relation to contraventions of that Act. Many of the current provisions will now be covered by the Australian Consumer Law. The proposed Part contains the following provisions:

Part 6 Enforcement and remedies

Division 1 Interpretation and application

Proposed section 61 contains interpretation provisions for the purposes of the proposed Part. (section 61, FTA)

Division 2 Enforcement provisions applying to ACL offences and local offences

Proposed section 62 specifies enforcement provisions of the ACL that extend to certain offences against the Principal Act that are not part of the Australian Consumer Law scheme.

Proposed section 63 provides for what constitutes an offence against the Principal Act. (section 62 (1), FTA)

Proposed section 64 provides for the imposition of additional penalties for a second or subsequent offence against certain provisions of the ACL. (section 62 (2A), FTA)

Proposed section 65 enables the Local Court to order a person convicted of an offence against the Principal Act or the regulations to pay compensation for loss or damage caused to another person. (section 63A, FTA)

Proposed section 66 enables the Local Court to order that unpaid fines and other amounts in connection with an offence against the Principal Act be recoverable as a debt due to the Crown and also enables a court to order a person convicted of an offence against the Principal Act to reimburse the government for the costs of purchasing or testing goods to which the offence relates. (section 62 (7), FTA)

Proposed section 67 enables a penalty notice to be served on a person in relation to an offence against the Principal Act or the regulations that is prescribed by the regulations as a penalty notice offence. (section 64, FTA)

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Proposed section 68 deals with proceedings for offences. (section 63, FTA)

Division 3 Enforcement provisions applying to local offences only

Proposed section 69 specifies the maximum penalties for offences against the Principal Act (other than the ACL) for which penalties are not otherwise provided. (section 62 (2), FTA)

Division 4 Remedies applying to ACL matters and local matters

Proposed section 70 specifies provisions of the ACL dealing with remedies available for contraventions of the ACL that extend to certain contraventions of provisions of the Principal Act that are not part of the Australian Consumer Law scheme.

Proposed section 71 enables the Director-General or, with leave, a party to a consumer contract that is a standard form contract to apply to the Supreme Court for a declaration that a term in contracts of that kind is unfair. (section 64B, FTA)

Proposed section 72 enables the Director-General, if satisfied that a person has engaged in conduct on more than one occasion that is (or would be) a contravention of the Principal Act, to ask the person to show cause why the person should not be prevented from carrying on a business of supplying goods or services. (section 66A, FTA)

Proposed section 73 enables the Director-General to apply to the Supreme Court for an order prohibiting the person from trading for a specified period after issuing a show cause notice under proposed section 72 and considering any submissions made.

Proposed section 74 contains provisions interpreting or limiting the provisions in the ACL relating to actions for damages and compensation orders. (section 68 (1A) and (2A), FTA)

Proposed section 75 requires the court to reduce compensation for loss or damage in certain defective goods actions under the ACL if an act or omission of the individual who suffered the loss or damage, or a person for whom that individual is responsible, contributed to the loss or damage.

Proposed section 76 enables the court, in proceedings under the ACL for a compensation order in relation to loss or damage suffered due to a contravention of the ACL or the application of an unfair contract term, to have regard to the conduct

of the parties to the proceedings since the contravention occurred or the contract term was declared to be unfair.

Proposed section 77 enables a person to whom goods were supplied that do not comply with a safety standard or were supplied in contravention of an interim ban or permanent ban to recover as a debt any money paid for the goods. (section 68A, FTA)

Proposed section 78 enables the Supreme Court, in the course of other proceedings under the Principal Act, to make orders to prevent the transfer of money or property where a person involved in the proceedings is or may become liable to pay money by way of a fine, damages, compensation, refund or otherwise or to transfer, sell or return other property. (section 73, FTA)

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Division 5 Remedies applying to local matters only

Proposed section 79 enables the Supreme Court to grant an injunction if a person has engaged in or been involved in, or proposes to engage in or be involved in, a contravention of certain provisions of the Principal Act (other than the ACL) or other legislation administered by the Minister. (section 66, FTA)

NSW Consumer Law Fund

Schedule 1 [55] inserts new Part 7 into the Principal Act which consists of proposed section 79B. The proposed section establishes the NSW Consumer Law Fund in the Special Deposits Account and provides for the following to be paid into that Fund:

(a) pecuniary penalties under the ACL that are ordered by a court to be paid into the Fund,

(b) amounts ordered to be paid by a court on application by the Director-General to redress loss or damage suffered by a class of persons who have not taken proceedings ("non-party consumers") if the loss or damage is a result of a contravention by another person of certain provisions of the ACL or that other person being advantaged by an unfair contract term.

Money is to be paid out of that Fund in accordance with the relevant court orders and may be paid out of the Fund for other specified purposes, including special purpose grants for improving consumer well-being, consumer protection or fair trading.

Miscellaneous amendments

Schedule 1 [12] amends section 9 of the Principal Act to provide that the Director-General is to have regard, in carrying out his or her functions under the Principal Act, to the need for communication, co-operation and co-ordination in relation to relevant co-operative legislative schemes.

Schedule 1 [13] amends section 9A of the Principal Act to make it clear that information that may be exchanged by the Director-General with other relevant agencies includes reports, recommendations, opinions, assessments and operational plans.

Schedule 1 [27] amends section 28 of the Principal Act (which is renumbered by the proposed Act as section 42) to alter the functions of the Product Safety Committee so as to more closely align those functions with the Minister's functions under the Act.

Schedule 1 [32] inserts proposed section 44 into the Principal Act to enable the Minister to publish safety warning notices not only on the internet (as is required by the ACL) but in any other manner that the Minister considers appropriate.

Schedule 1 [61] substitutes section 86 of the Principal Act to provide that the Minister or the Director-General may intervene in proceedings before a court or tribunal under legislation administered by the Minister. Currently, that section provides that the Minister may intervene in court proceedings.

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Schedule 1 [63] inserts proposed section 86B into the Principal Act to require the Director-General to maintain a register of undertakings accepted by the Director-General under the ACL.

Schedule 1 [74]–[79] amend Schedule 5 to the Principal Act to provide for savings and transitional provisions consequent on the enactment of the proposed Act.

All the items of Schedule 1 that are not specifically referred to in this Outline contain consequential amendments to the Principal Act.

Schedule 2 Amendment of Fair Trading Regulation

2007

Schedule 2 amends the *Fair Trading Regulation 2007* as a consequence of the enactment of the proposed Act and, in particular, repeals certain prescribed product safety standards and product information standards that will be covered by the national scheme.

Schedule 3 Consequential amendment of other Acts and regulation

Schedule 3 amends the Acts and regulation specified in the Schedule as a consequence of the enactment of the proposed Act.