



New South Wales

# Fair Trading Legislation Amendment (Consumer Guarantee Directions) Bill 2018

## Explanatory note

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

## Overview of Bill

The objects of this Bill are:

- (a) to enable the Commissioner for Fair Trading to resolve certain small consumer claims disputes by way of a direction to repair or replace, or make a refund in relation to, the consumer good concerned (a *consumer guarantee direction*), and
- (b) to make further provision with respect to compliance and enforcement under the *Fair Trading Act 1987*, the *Plumbing and Drainage Act 2011* and the *Property, Stock and Business Agents Act 2002*.

## 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 a day or days to be appointed by proclamation.

## Schedule 1      **Amendment of Fair Trading Act 1987 No 68 relating to consumer guarantee directions**

**Schedule 1 [1]** inserts proposed Schedule 3 (Consumer guarantee directions) into the *Fair Trading Act 1987* (the *FT Act*) to give effect to paragraph (a) of the objects of the proposed Act.

**Clause 1** of the proposed Schedule contains certain interpretation and application provisions. It provides that the proposed Schedule is to apply to a consumer good:

- (a) that is of a kind prescribed by the regulations under the FT Act, and
- (b) that has been sold by a supplier to a consumer ordinarily resident in New South Wales, and
- (c) to which a consumer guarantee under sections 54–57 of the *Australian Consumer Law* applies, and
- (d) that is the subject of an unresolved dispute concerning the application of such a guarantee to the sale of the good.

Until the regulations otherwise prescribe, a consumer good is taken to be of a kind prescribed if the sale price of the good is \$25 or more but not more than \$3,000 (exclusive of GST), and the good is not:

- (a) a motor vehicle or a component part of a motor vehicle, or
- (b) a second-hand good, or
- (c) a solar battery, or
- (d) material to which a statutory warranty under Part 2C of the *Home Building Act 1989* applies, or
- (e) the subject of pending proceedings in the Civil and Administrative Tribunal (the *Tribunal*) or a court.

**Clause 2** of the proposed Schedule provides that a consumer may apply to the **Secretary** (being the Commissioner for Fair Trading or, if there is no person employed as Commissioner for Fair Trading, the Secretary of the Department of Finance, Services and Innovation) for a consumer guarantee direction in relation to the sale of a consumer good to which the proposed Schedule applies. The clause makes further provision dealing with such applications.

**Clause 3** of the proposed Schedule provides that the Secretary may resolve a dispute by making a consumer guarantee direction, being a direction to a supplier:

- (a) to repair a good, or
- (b) to replace a good, or
- (c) to refund to the consumer concerned any money paid by the consumer for a good and an amount that is equal to the value of any other consideration provided by the consumer for a good.

The clause makes further provision dealing with the making of such directions.

**Clause 4** of the proposed Schedule sets out the circumstances in which the Secretary may decline to accept an application for a consumer guarantee direction or refuse to make such a consumer guarantee direction.

**Clause 5** of the proposed Schedule provides that the Secretary is to give a copy of a consumer guarantee direction to the consumer concerned at the same time as the direction is given to the supplier.

**Clause 6** of the proposed Schedule contains further provisions dealing with the making of such consumer guarantee directions. The Secretary may determine to make a consumer guarantee direction if the Secretary is satisfied that there has been a failure to comply with a guarantee under section 54, 55, 56 or 57 of the ACL and it is fair and reasonable in all the circumstances to do so. The Secretary, in determining whether or not to make a consumer guarantee direction, is not bound by the rules of evidence, and may be informed in any manner that the Secretary thinks fit. Before making a consumer guarantee direction, the Secretary:

- (a) must give the consumer and the supplier an opportunity to make a written submission concerning the application, and
- (b) may give the consumer and the supplier the following:
  - (i) an opportunity to make an oral submission or give oral evidence concerning the application,

- (ii) a right of reply to the other party's submission and evidence (including the consumer's initial application),
- (iii) an opportunity to comment on the content of a proposed direction.

The rules of procedural fairness are not breached if the Secretary complies with this clause and the procedures for making consumer guarantee directions set out in the regulations under the FT Act (if any).

**Clause 7** of the proposed Schedule enables regulations to be made relating to consumer guarantee directions.

**Clause 8** of the proposed Schedule deals with the amendment of consumer guarantee directions.

**Clause 9** of the proposed Schedule provides that if a supplier fails to comply with a consumer guarantee direction, the amount directed to be refunded to the consumer may be registered as a judgment debt in a court of competent jurisdiction and is enforceable accordingly.

**Clause 10** of the proposed Schedule enables persons to apply to the Tribunal for a re-determination of the making of a consumer guarantee direction.

**Clause 11** of the proposed Schedule provides that the Tribunal is to deal with an application for re-determination as if it were an application by the consumer concerned for the determination of a consumer claim under Part 6A (Jurisdiction of Tribunal in relation to consumer claims) of the FT Act relating to the sale of the consumer good concerned. The parties to the proceedings are the consumer and the supplier concerned and not the Secretary. An application for re-determination is to be dealt with as a new hearing and evidence or information may be given in addition to, or in substitution for, the evidence or information given in relation to the making of the consumer guarantee direction concerned. The clause makes further provision dealing with such applications for re-determination.

**Clause 12** of the proposed Schedule requires the Tribunal to ensure that the Secretary is given notice of any decision that it makes in determining an application for re-determination. The clause also provides that if the Tribunal has provided a written statement of reasons for its decision in determining an application to a party to the proceedings, the Tribunal is also to provide a copy of that written statement of reasons to the Secretary. Further, the Secretary may, within 28 days of being given notice of a decision of the Tribunal, request the Tribunal to provide a written statement of reasons for its decision if a written statement of reasons has not been provided to the Secretary.

**Clause 13** of the proposed Schedule deals with competing proceedings in the Tribunal and applications before the Secretary on same subject-matter.

**Clause 14** of the proposed Schedule deals with the publication of information about consumer guarantee directions.

**Schedule 1 [2]** inserts a transitional provision into the FT Act to make it clear that proposed Schedule 3 extends to the sale of a consumer good that occurred before the commencement of that Schedule, but only if the formal complaint to the Secretary regarding that sale was first received by the Secretary after that commencement.

## **Schedule 2      Amendments relating to compliance and enforcement**

### **General**

**Schedule 2** makes amendments to the following Acts and regulation in relation to compliance and enforcement:

- (a) the *Fair Trading Act 1987*,
- (b) the *Plumbing and Drainage Act 2011*,

- (c) the *Plumbing and Drainage Regulation 2017*,
- (d) the *Property, Stock and Business Agents Act 2002*.

### **Amendments to Fair Trading Act 1987**

**Schedule 2.1 [1]–[16]** make amendments to the *Fair Trading Act 1987* that relate to powers of investigators under that Act.

**Schedule 2.1 [2] and [7]** move a definition of *place* so that it applies to all the provisions of Division 1 (Powers relating to investigations) of Part 2A of the FT Act. The definition provides that, in the Division, *place* includes a vehicle, vessel or aircraft.

**Schedule 2.1 [3]** provides that an investigator's power of entry extends to any place that the investigator believes on reasonable grounds to be a place where goods are stored (in addition to places where goods are manufactured, prepared or supplied).

**Schedule 2.1 [4]** provides that an investigator, after any such entry, may seize, detain or remove certain unsafe consumer goods in that place, namely goods that:

- (a) do not comply with a safety standard, or
- (b) are the subject of an interim or permanent ban, or
- (c) are the subject of a recall notice, or
- (d) the investigator has reasonable grounds to believe are or are likely to become unsafe.

**Schedule 2.1 [1], [5], [8] and [9]** extend certain powers of investigators to inspect, copy and seize documents, or search and seize under search warrant or otherwise obtain information, documents or evidence to circumstances involving the inclusion of unfair terms in consumer contracts and small business contracts. Currently such powers may only be exercised in relation to contraventions of the FT Act or any other legislation administered by the Minister.

**Schedule 2.1 [6]** provides that an investigator who seizes, detains or removes any goods, or partly manufactured goods, must provide a receipt for the goods.

**Schedule 2.1 [10]–[14]** make consequential amendments to deal with property seized or otherwise obtained in the course of investigations under the FT Act.

**Schedule 2.1 [15]** amends provisions relating to embargo notices:

- (a) to remove the restriction that provided that such notices could only be issued where premises had been entered under a search warrant, and
- (b) to provide that such notices may be issued in relation to further types of unsafe consumer goods, being goods that:
  - (i) do not comply with a safety standard, or
  - (ii) are the subject of an interim or permanent ban, or
  - (iii) are the subject of a recall notice, or
  - (iv) are or are likely to become unsafe, and
- (c) to provide that such notices may be issued in relation to goods that are being manufactured, prepared or stored on the premises concerned (in addition to goods supplied from such premises).

**Schedule 2.1 [16]** provides that if a person is convicted of an offence against the FT Act or any other legislation administered by the Minister, the convicting court may order the offender to reimburse the Department of Finance, Services and Innovation for the costs and expenses reasonably incurred during the investigation of the offence.

### **Amendments to Plumbing and Drainage Act 2011**

**Schedule 2.2 [3]** of the proposed amendments to the *Plumbing and Drainage Act 2011* (the *PD Act*) clarifies the time within which a notice of work in relation to plumbing and drainage work must be pre-notified to the plumbing regulator. **Schedule 2.2 [1] and [2]** make consequential amendments.

**Schedule 2.2 [4]** makes it clear that, as part of an inspection of plumbing and drainage work, the plumbing regulator may inspect any documents in the possession of the plumbing regulator in connection with the plumbing and drainage work. The amendment also clarifies that the plumbing regulator may carry out more than one such inspection for the purpose of monitoring compliance with the PD Act if the regulator considers it necessary in the circumstances.

**Schedule 2.2 [5]** modifies the power of the plumbing regulator to direct the responsible person for plumbing and drainage work to disconnect the supply of water to premises, or part of premises, or a sanitary plumbing system or sanitary drainage system from a sewer, to circumstances where the plumbing regulator considers, on reasonable grounds, that a risk to public health exists.

**Schedule 2.2 [6]** gives the plumbing regulator further powers of direction in relation to the inspection of plumbing and drainage work.

**Schedule 2.2 [7]** provides that such directions must be complied with within the period specified in the written notice of direction.

**Schedule 2.2 [8]** contains consequential and law revision amendments relating to such directions.

**Schedule 2.2 [9]** clarifies the time within which certificates of compliance (or copies) in relation to plumbing and drainage work must be given to the plumbing regulator and the person for whom the work is carried out.

**Schedule 2.2 [11]** clarifies the time within which certain sanitary drainage system plans (or copies) in relation to plumbing and drainage work must be given to the plumbing regulator and the owner of the land concerned or the owner's agent. **Schedule 2.2 [10]** makes it clear that the obligation to provide such plans extends to any part of plumbing and drainage work that consists of or includes carrying out work on a sanitary drainage system (not merely where the whole of such work consists of or includes carrying out work on such a system).

**Schedule 2.2 [12]** inserts a machinery provision into the PD Act to deal with continuing offences.

### **Amendments to Plumbing and Drainage Regulation 2017**

**Schedule 2.3 [1]–[6]** of the proposed amendments make changes to the *Plumbing and Drainage Regulation 2017* consequent on the amendments in Schedule 2.2 [3], [4], [9] and [11] to the proposed Act. **Schedule 2.3 [7]** prescribes the penalty notice offence amount for a continuing contravention of the offence under proposed section 14 (2) (failure to comply with a direction within the specified time).

### **Amendment to Property, Stock and Business Agents Act 2002**

**Schedule 2.4** provides that authorised officers under the *Property, Stock and Business Agents Act 2002*, who generally are prohibited from entering residential parts of premises for the purposes of investigation and enforcement of that Act except with the consent of the occupier or under a search warrant, may enter such parts of premises when open for inspection in advance of, or in preparation for, an auction (in addition to during the actual auction).