

Fair Trading Amendment Bill 2003

Explanatory note

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

Overview of Bill

The object of this Bill is to amend the *Fair Trading Act 1987* (**the Principal Act**) as follows:

- (a) to create an offence in the case where a trader, who has been notified by the Commissioner for Fair Trading in the Department of Commerce (referred to in the Principal Act and in this Bill as “the Director-General”) to substantiate a claim or representation made by the trader, fails to substantiate the claim or representation,
- (b) to enable the Director-General to make mandatory recall orders in relation to defective goods and to provide that such orders are reviewable by the Products Safety Committee,
- (c) to insert direct commerce provisions that will cover both traditional doorto-door sales as well as telemarketing contracts,
- (d) to mirror the provisions of the *Trade Practices Act 1974* of the Commonwealth (**the TPA**) that relate to warranties in consumer transactions and to actions against manufacturers and importers of goods of a kind ordinarily acquired for personal, domestic or household use or consumption,
- (e) to extend and clarify the operation of section 43 of the Principal Act (which relates to unconscionable conduct in trade or commerce) and to insert provisions (based on the TPA provisions) in relation to country of origin representations,
- (f) to enable a court to impose a term of imprisonment (not exceeding 3 years) on a person who is convicted of a second or subsequent offence under Part 5 of the Principal Act (which relates to unfair practices such as false representations),
- (g) to extend, from 3 to 6 years, the period within which action may be taken to recover the amount of loss or damage caused by a contravention of the Principal Act,
- (h) to enable a Local Court to make orders compensating a person for loss or damage sustained as the result of the conduct of a person who has been convicted of an offence under the Principal Act,
- (i) to increase the maximum monetary penalty that a Local Court may impose for an offence under the Principal Act from 50 penalty units to 100 penalty units,
- (j) to provide that the Director-General may request a person who has engaged in unlawful trading conduct on more than one occasion to show cause why the person should not be prohibited from trading and to provide for the Director-General to apply to the Supreme Court for an order to prohibit such a person from carrying on a business of supplying goods or services,
- (k) to repeal Part 7 of the Principal Act which currently provides for the making of codes of practice,
- (l) to make a number of other miscellaneous amendments of a minor or consequential nature.

The Bill also:

- (a) repeals the *Door-to-Door Sales Act 1967* as a consequence of the insertion of the direct commerce provisions in the Principal Act, and
- (b) repeals the *Mock Auctions Act 1973* and inserts a new provision in the

Principal Act to prohibit mock auctions.

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.

Clause 3 is a formal provision giving effect to the amendments to the *Fair Trading Act 1987* set out in Schedule 1.

Clause 4 repeals the *Door-to-Door Sales Act 1967*.

Clause 5 repeals the *Mock Auctions Act 1973*.

Schedule 1 Amendments

Substantiation of claims and representations

Schedule 1 [8] amends section 23C of the Principal Act to provide that, if a person has, under section 23A, been notified by the Director-General to provide proof of a claim or representation made by the person in trade and commerce, the person commits an offence if the person fails to provide proof to support the claim or representation, or if the person fails to provide proof within the time specified in the notice or provides information that is false or misleading in response to the notice. **Schedule 1 [6], [7], [9] and [10]** are consequential amendments.

Product recall orders by Director-General

Schedule 1 [16] omits sections 34–36 of the Principal Act (which presently enable the Minister to make orders in relation to the recall of defective goods) and provides instead for such orders to be made by the Director-General. However, such orders will be subject to review by the Products Safety Committee established under the Principal Act (which will no longer have the function of inquiring into whether certain goods should be subject to a recall order before such an order is made) and must be confirmed by the Minister. In recasting the existing provisions, the provisions relating to notification of voluntary recall by suppliers have been separated from the mandatory recall provisions. **Schedule 1 [11]–[14], [28] and [42]** are consequential amendments.

Direct commerce practices

Schedule 1 [17] inserts a new Division 3 of Part 4 (proposed sections 40A–40K) to deal with direct commerce practices (ie traditional door-to-door sales as well as telemarketing). Under the new Division, a cooling-off period of 5 business days is provided with respect to direct commerce contracts (ie unsolicited sales that are more than \$100 in value) and during this period the consumer has the right to cancel the contract. Dealers who negotiate direct commerce contracts must inform consumers in writing of their right to cancel during the cooling-off period and must not collect any fees during the cooling-off period for services provided during that period. Provision is also made to regulate the conduct of dealers in relation to direct commerce practices (eg dealers must not solicit business after 8 pm and before 9 am, and must cease contact with prospective consumers when requested to do so).

Express consumer trade warranties

Schedule 1 [17] also inserts new Divisions 4 and 5 of Part 4 (proposed sections 40L–40ZC) which are based on the provisions of the TPA relating to conditions and warranties in consumer transactions (being Divisions 2 and 3 of Part V of the TPA) and to actions against manufacturers and importers of goods (Division 2A of Part V of the TPA). The new provisions relate to such matters as inherent rights of merchantable quality and fitness for use.

Unconscionable conduct and country of origin representations

Schedule 1 [18]–[20] extends the scope of section 43 of the Principal Act (which prevents a supplier from engaging in unconscionable conduct) so that it will apply to all transactions in trade and commerce (and not just transactions

involving goods or services for personal, domestic or household use or consumption). **Schedule 1 [4]** is a consequential amendment.

Schedule 1 [21] inserts proposed section 44A in the Principal Act to mirror the TPA provisions in relation to country of origin representations. The new section provides a test for determining whether a representation as to where goods have come from contravenes section 42 (which relates to misleading or deceptive conduct) or 44 (i) (which relates to false representations about the place of origin of goods) of the Principal Act.

Mock auctions

Schedule 1 [22] prohibits the conduct of mock auctions (which involve goods only) in a similar manner as they have been prohibited under the *Mock Auctions Act 1973*. An example of such an auction is where goods are sold to a person at a price lower than the highest bid for the goods, or where part of the price for the sale of goods is repaid or credited to the buyer.

Amendments relating to enforcement and penalties

Schedule 1 [23] enables a court, in addition to (or as an alternative to) any monetary penalty, to impose a term of imprisonment (not exceeding 3 years, or 2 years in the case of a Local Court) on a person who is convicted of a second or subsequent offence under Part 5 of the Principal Act.

Schedule 1 [25] increases the maximum monetary penalty that a Local Court may impose for an offence under the Principal Act from 50 penalty units to 100 penalty units.

Schedule 1 [26] enables a Local Court to order a person who is convicted of an offence to compensate a person who has sustained loss or damage as a result of the conduct of the convicted person.

Schedule 1 [31] inserts proposed sections 66A and 66B in the Principal Act. Under proposed section 66A, the Director-General may, 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, ask the person to show cause why the person should not be prevented from carrying on a business of supplying goods or services. Under proposed section 66B, the Director-General may then apply to the Supreme Court for an order prohibiting the person from trading for a specified period. **Schedule 1 [35] and [37]–[39]** are consequential amendments.

Schedule 1 [33] provides that proceedings for taking action to recover the amount of loss or damage caused by conduct in contravention of the Principal Act may be commenced within 6 years after the cause of action that relates to the conduct accrued. The 6-year limitation period will not apply in the case of personal injury actions.

Schedule 1 [34] restates existing section 33 of the Principal Act (which is repealed by **Schedule 1 [15]**) in Part 6 of the Principal Act as that Part deals with remedies.

Schedule 1 [36] provides that an application to the Supreme Court under section 72 (2) of the Principal Act for an order to compensate a person for loss or damage caused by conduct in contravention of the Principal Act may be brought within 6 years after the cause of action that relates to the conduct arose. The 6-year limitation period will not apply in the case of personal injury actions.

Other amendments

Schedule 1 [1], [2], [24] and [32] update certain cross-references and other references.

Schedule 1 [3] and [5] are amendments consequential on the enactment of the *Public Sector Employment and Management Act 2002*.

Schedule 1 [41] repeals Part 7 of the Principal Act which provides for codes of practice for fair dealing between particular classes of suppliers and consumers or by particular classes of persons in relation to consumers. **Schedule 1 [29],**

[30] and [40] are consequential amendments.

Schedule 1 [43] inserts savings and transitional provisions and **Schedule 1 [44]** enables regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act.