



NSW Legislative Council Hansard

Fair Trading Amendment Bill

Extract from NSW Legislative Council Hansard and Papers Wednesday 6 September 2006.

Second Reading

The Hon. JOHN HATZISTERGOS (Minister for Health) [5.08 p.m.], on behalf of the Hon. John Della Bosca: I move:

That this bill be now read a second time.

I seek leave to have my second reading speech incorporated in *Hansard*.

Leave granted.

The bill I introduce today will make a number of amendments to the Fair Trading Act 1987 in order to improve the level of protection and information provided to New South Wales consumers, enable the Commissioner for Fair Trading to carry out her functions more effectively, and enhance the effectiveness and efficiency of Ministerial Advisory Councils.

The first amendment will extend the operation of the Fair Trading Act to conduct which occurs outside New South Wales but has a relevant link with New South Wales.

The amendment will bring the New South Wales Fair Trading Act into line with the Fair Trading Acts of the Australian Capital Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia, all of which have provisions giving them operation outside of State or Territory borders if there is a sufficient link with the State or Territory.

Currently, the Office of Fair Trading relies on Part 1A of the Crimes Act to take action against conduct occurring outside New South Wales.

Part 1A provides that offences in New South Wales legislation apply extraterritorially if the offence is committed wholly or partly in New South Wales, or the offence is committed wholly outside New South Wales but has an effect in New South Wales.

Part 1A does not, however, extend the application of the misleading, deceptive and unconscionable conduct provisions of the Fair Trading Act, as these provisions do not create offences.

Nor does it extend the provisions allowing the Commissioner for Fair Trading to seek an injunction to restrain unlawful conduct.

The Office of Fair Trading therefore cannot take action against misleading or deceptive conduct that occurs outside New South Wales, or seek an injunction against other unlawful conduct occurring outside the State.

These restrictions are significant because a large proportion of the Office of Fair Trading's law enforcement activity uses the misleading and deceptive conduct and injunction provisions.

The injunction provisions are particularly useful because they prevent traders from continuing unlawful conduct and can provide for compensation for affected consumers. Breach of an injunction can lead to imprisonment for contempt of court. In contrast, a prosecution may result in a trader simply paying a fine and continuing with unlawful conduct.

The limited territorial reach of the misleading and deceptive conduct and injunction provisions also hinders the Office of Fair Trading's participation in coordinated law enforcement action with other States and Territories.

With the increase in the number of traders operating across Australia, a trader who is engaging in unlawful conduct is likely to be doing so in several jurisdictions at once. Rather than each State taking separate action against the conduct which occurs in their jurisdiction, it is much more efficient for a single action to be taken against the trader.

While the Australian Competition and Consumer Commission takes action against national conduct, not all cases receive priority.

The States and Territories have therefore been developing cooperative strategies to deal with these cases

themselves. One such strategy is for one jurisdiction to take lead role in taking action against a trader and to seek orders which apply in all jurisdictions.

In one such case, a trader engaging in unlawful practices had an address in Sydney but traded in all States. In taking action against the trader, the New South Wales Office of Fair Trading sought to obtain an injunction with national application, but, as the Fair Trading Act was interpreted as only applying to New South Wales, the injunction granted was limited to New South Wales.

Proposed section 5A will make it clear that the Fair Trading Act applies extraterritorially to the full extent of the Parliament's legislative power and that it extends to conduct either in or outside New South Wales that:

- is in connection with goods or services supplied in New South Wales, or
- affects a person in New South Wales, or
- results in loss or damage in New South Wales.

The second amendment will give the Commissioner for Fair Trading greater powers to obtain information, in order to effectively carry out her functions.

The functions of the Commissioner for Fair Trading are set out in section 9 of the Fair Trading Act and include:

- providing advice on consumer protection legislation;
- taking action to remedy breaches of consumer protection legislation;
- securing compliance with consumer protection legislation, whether on complaint or otherwise;
- making available information on matters affecting the interests of consumers;
- receiving complaints, investigating those complaints, and dealing with them in such manner as the Commissioner considers appropriate;
- keeping under critical examination, and reporting to the Minister on, the laws in force, and other matters, relating to the interests of consumers; and
- reporting to the Minister on matters relating to the interests of consumers that are referred to the Commissioner by the Minister.

To enable the Commissioner to carry out the function of taking action to remedy breaches of consumer protection legislation, the Fair Trading Act provides investigators appointed by the Commissioner with powers of entry, power of search and seizure under search warrant and power to obtain information, documents and evidence in relation to a possible contravention of any legislation administered by the Minister for Fair Trading.

The power to obtain information cannot be used in support of any of the other functions of the Commissioner. By contrast, the now repealed Consumer Protection Act 1969 allowed the Commissioner's delegate to require a person to provide information or documents which were believed on reasonable grounds to be relevant to the investigation of a complaint or an investigation into matters affecting the interests of consumers.

The proposed amendments to section 20 will permit the Commissioner to exercise the power to obtain information, documents and evidence in relation to matters that are the subject of a complaint received under section 9, or matters that are the subject of investigations into the laws in force and other matters relating to the interests of consumers, carried out in accordance with section 9.

The amendment will increase the efficiency and effectiveness of the work of the Office of Fair Trading with respect to investigating and resolving complaints and disputes that do not involve breaches of legislation, monitoring compliance with legislation, investigating matters that affect the interests of consumers, conducting reviews of current legislation and assessing the impact of regulatory proposals.

The Bill provides that the Commissioner can only delegate these powers to an officer, defined by the Fair Trading Act to mean a public servant or person engaged by the Commissioner with the approval of the Minister.

The delegate must provide evidence of his or her identity and delegation if requested to do so by the person required to comply with the notice under section 20.

The Fair Trading Act establishes five statutory advisory bodies that provide policy advice to the Minister for Fair Trading with respect to key areas of her portfolio: fair trading generally, the motor trade, home building industry, property services industry and retirement villages industry.

In line with government policy, the Bill rationalises the number of statutory bodies in the Fair Trading portfolio.

The proposed amendments will retain three existing Advisory Councils, Fair Trading, Property Services and Retirement Villages, abolish the Council of the Motor Vehicle Repair Industry Authority and amalgamate that Council with the Motor Trade Advisory Council to form the Motor Vehicle Industry Advisory Council.

Membership numbers are also rationalised, with each advisory council to have not less than six and not more than sixteen members.

Once the Bill is enacted, amendments to the Home Building Act will commence to abolish the Home Building Advisory Council under the Fair Trading Act and create a new Council under the Home Building Act.

The practice of demanding payment for goods or services when the goods or services were not requested, or when the authority to supply the goods or services was obtained through fraudulent means, is referred to as false billing.

Most false billing complaints relate to demands for payment from small businesses for the provision of advertising services in directories, magazines, journals and similar publications.

False billing is a significant problem in New South Wales. Investigating and taking action against false Billers under the existing provisions of the Fair Trading Act requires considerable resources. The financial detriment suffered by small businesses stung by false billing is significant.

An internal report prepared by the Office of Fair Trading in May 2003 indicated that the Office had identified around 170 publication titles that were either known, or strongly suspected, to be linked to false billing activity. The Office obtained banking records for three false billing operators (either sole traders or family businesses) who published ten publications between them.

The combined annual income for the 2000—2001 financial year for these operators was estimated to be \$2.367 million, or \$236,000 per publication. If each of the 170 identified publications generated half this amount of income each year, this would amount to New South Wales small businesses being defrauded of \$20 million each year through false billing.

In an attempt to reduce the level of false billing and make prosecution of false Billers easier, Queensland and Victoria have amended their Fair Trading Acts to include provisions additional to those applying in New South Wales.

Section 58 makes it an offence to assert a right to payment for unsolicited goods or services or making an entry in a directory unless there is reasonable cause to believe there is a right to payment or that the directory entry had been authorised.

The proposed amendment to section 58 provides that a person shall be taken to be demanding payment if they send an invoice or other document stating the amount of a payment or the price of goods or services, unless the document contains a prescribed statement at the top of the first page, in upper case and not less than 18 point font, which states "THIS IS NOT A BILL. YOU ARE NOT REQUIRED TO PAY ANY MONEY."

Queensland has a similar requirement.

The inclusion of such a clear and prominent statement is expected to reduce the likelihood that small businesses will inadvertently pay for unsolicited goods or services or unauthorised directory entries and therefore act as a disincentive to false Billers.

The requirement to include the statement will also facilitate the prosecution of false Billers who fail to comply, by making it easier to prove that the false biller demanded payment for unsolicited goods and services or unauthorised directory entries.

The introduction in New South Wales of the requirement, also under section 58, to have written authority for placing an entry in a directory dramatically reduced the level of false billing in relation to directories. However, this requirement did not apply to the publishing of advertisements and false billers have taken advantage of this regulatory gap.

In 2003, Victoria closed this gap by aligning the requirements for publishing an advertisement with those for placing an entry in a directory.

Proposed section 58A will harmonise with the Victorian provisions by providing that it is an offence to assert the right to payment for certain unauthorised advertisements. Proposed section 58A mirrors the provisions in section 58 with regard to directory entries, so that a person is prohibited from demanding payment for

publication of an advertisement unless they have obtained written authority to publish.

Proposed section 58A contains the same exemptions as apply in Victoria. Large proprietary companies and their subsidiaries, listed corporations and their subsidiaries, publications which have an audited circulation of 10,000 copies or more per week, and their related bodies corporate, the Crown and other prescribed persons do not have to comply with proposed section 58A.

This will ensure that newspapers and other legitimate publications which carry large numbers of advertisements are not subject to time consuming written authority requirements.

Further amendments relate to the disposal of items seized or otherwise obtained by the Office of Fair Trading in the course of its work to protect consumers, encourage compliance with fair trading legislation and take action against unlawful conduct.

These items may be used for the purpose of investigations or as evidence in legal proceedings. They may have been seized under the Commissioner's seizure powers, or handed over voluntarily.

Once these items are no longer required as evidence, they are returned, if possible, to whomever had lawful possession of them. If it is not possible to return such items to the custody of any person, they are retained by the Office of Fair Trading. As there was no power to destroy or dispose of these items they could occupy considerable space, while serving no useful purpose.

Proposed section 19A provides for anything seized under the authority of a search warrant to be sold, destroyed or otherwise disposed of if it is not required as evidence and cannot be returned to someone who had lawful possession. The proceeds of any sale are to be paid to the Treasurer for payment into the Consolidated Fund.

Proposed section 93 contains the same provisions in respect to anything obtained in the course of an investigation (other than seized under a search warrant).

The Fair Trading Act is the principal statute that protects New South Wales consumers from deceptive and dishonest commercial conduct.

These amendments will enhance the work of the Commissioner and her staff and I commend them to the House.