

CONSUMER PROTECTION (AMENDMENT) ACT.

New South Wales



ANNO UNDEVICESIMO

ELIZABETHÆ II REGINÆ

Act No. 81, 1970.

An Act to make further provisions with respect to trade descriptions of goods and certain trade practices; for this and other purposes to amend the Consumer Protection Act, 1969; and for purposes connected therewith. [Assented to, 9th December, 1970.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the "Consumer Protection Short title. (Amendment) Act, 1970".

2.

No. 81, 1970Amendment of Act No. 28, 1969.
Sec. 4.

(Construction and operation of this Act.)

Further amendment of Act No. 28, 1969.

Sec. 5.
(Definitions.)Sec. 19.
(Definitions.)**2.** The Consumer Protection Act, 1969, is amended by inserting in subsection two of section four after the words "Local Government Act, 1919," the words "Auctioneers, Stock and Station and Real Estate Agents Act, 1941, Weights and Measures Act, 1915,".

(a) by inserting in the definition of "sell" in section five after the word "advertisement" the word ", manufacture";

(b) by inserting in section nineteen after the definition of "prescribed goods" the following new definition :—

"services" includes, without limiting the generality of the expression, the rights or benefits that are to be provided under an agreement for—

(a) the performance of work (otherwise than under a contract of service), whether with or without the supply of goods;

(b) the provision of, or the use or enjoyment of, facilities for amusement, entertainment, recreation or instruction; or

(c) the conferring of rights or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;

(c)

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(c) (i) by inserting in paragraph (a) of the definition **No. 81, 1970** of "trade description" in section nineteen after the word "purity," the word "characteristics,";

(ii) by inserting next after the same paragraph the following new paragraph :—

(al) the suitability for any purpose of the goods;

(d) by inserting in subsection one of section twenty-one Sec. 21. after the word "label" the word ", reel,"; (Trade description to be appended to certain goods.)

(e) (i) by inserting in subsection one of section Sec. 26. twenty-six after the word "label," wherever (Appending trade description.) occurring the word "reel,";

(ii) by inserting in the same subsection after the words "printed on" the words "or otherwise applied to";

(iii) by inserting in subsection two of the same section after the word "label" the word ", reel,".

4. The Consumer Protection Act, 1969, is further ^{Further} amended by inserting in paragraph (a) of subsection one of amendment section thirty-two after the word "goods" the words "or to 28, 1969. induce any other person to make use, on payment of a fee Sec. 32. or other consideration, of any services".

(Penalty for publishing or causing to be published any false advertisement to promote the sale of goods.)

No. 81, 1970 5. The Consumer Protection Act, 1969, is further amended—

Further amendment of Act No. 28, 1969.

Sec. 42.
(Definitions.)

- (a) (i) by omitting from the definition of "auction" in subsection one of section forty-two the word "an" and by inserting in lieu thereof the words "a public";
- (ii) by omitting from the same subsection the definition of "Court";
- (iii) by inserting in the definition of "Industrial Commission" in the same subsection after the words " 'Industrial Commission' " the words "or 'Commission' ";
- (iv) by inserting in the definition of "services" in the same subsection after the word "includes" the words ", without limiting the generality of the expression,";
- (v) by inserting in the definition of "tender" in the same subsection after the word "offer" the words "in writing";
- (vi) by inserting in the same definition after the words "an invitation" the words "that is published or contained in a newspaper or in any other document that is publicly exhibited or that is distributed or circulated to or among the public, whether on payment of a charge or not";

New secs.
49A-49F.

- (b) by inserting next after section forty-nine the following new sections :—

Commissioner to serve notices.

49A. (1) Where the Commissioner is of the opinion that a person has committed an offence (in this Part referred to as the "alleged collusive practices offence")—

- (a) under section forty-three of this Act; or
- (b)

Consumer Protection (Amendment).

(b) under section forty-nine of this Act in relation to the commission of an offence under section forty-three of this Act,

he shall, before laying an information for the offence, by a notice (in this Part referred to as a "preliminary notice") served on that person—

(c) inform that person that the Commissioner is of that opinion; and

(d) invite him to confer with the Commissioner, within a period specified in the notice, in relation to the alleged collusive practices offence.

(2) The notice shall specify particulars of the alleged collusive practices offence, including a description of the agreement in respect of which the offence is alleged to have been committed, but need not recite the terms of that agreement.

(3) The Commissioner, after the expiration of the period specified in the preliminary notice served on a person in respect of an alleged collusive practices offence and after considering any explanation made by, and having regard to any action taken or undertaking given by that person, shall by notice in writing served on that person, inform him that proceedings will or, as the case may be, will not be taken against him for the alleged collusive practices offence referred to in the preliminary notice.

(4) A notice under subsection three of this section informing a person that proceedings will be taken against him for an alleged collusive practices offence shall not be served except with the approval of the Minister.

(5)

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(5) A notice under this section may be served—

- (a) by posting it, by prepaid certified mail, to the person to whom it is directed at his last known place of business or abode; or
- (b) by delivering it to him personally.

**Application
to Com-
mission by
person
notified.**

49B. (1) A person on whom a notice under subsection three of section 49A of this Act has been served informing him that proceedings will be taken against him for an alleged collusive practices offence may, within the prescribed period after service of the notice on him, make an application to the Industrial Commission requesting that the Commission make a declaration determining the question whether or not the agreement described in the preliminary notice was, on the date on which the offence is alleged to have been committed, contrary to the public interest.

(2) The Commissioner may intervene in the application.

(3) Any party to the agreement may join with the person referred to in subsection one of this section in the making of the application, or, with the consent of the Commission, intervene in and become a party to the application at any stage.

(4) The Commission may order that a copy of the application be served on any party to the agreement who is not a party to the application, and a person so served shall thereupon be deemed to be a party to the application.

(5) The onus of establishing that an agreement is not contrary to the public interest shall be upon the parties to the application.

(6)

Consumer Protection (Amendment).

(6) The prescribed period referred to in No. 81, 1970 subsection one of this section is a period of thirty days, or such longer period as the Commission, on application made before or after the expiration of that firstmentioned period, may allow.

(7) An application under subsection one, three or six of this section shall be made by notice of motion filed in the office of the Industrial Registrar, who shall cause a copy of the application to be served on the Commissioner.

49C. (1) The Commission shall hear and determine any application made under subsection one of section 49B of this Act and shall make a declaration determining the question referred to in subsection one of section 49B of this Act in relation to the agreement the subject of the application.

(2) Where the Commission, on an application referred to in subsection one of this section, determines that an agreement was contrary to the public interest—

(a) the Commission may do any one or more of the following things :—

(i) the Commission may order any party to the agreement and to the application to cease to be a party to the agreement on and from a date specified in the order;

(ii) the Commission may, by order, vary, in the manner specified in the order, or determine the agreement, as on and from a date specified in the order;

(iii) the Commission may accept an undertaking from any person in relation to the agreement;

(iv)

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(iv) the Commission may make such other orders in the matter as it thinks fit;

(b) where it makes an order under subparagraph (i) of paragraph (a) of this subsection against any person, the Commission may also restrain him, by injunction, from becoming a party to any agreement of such a kind, or having such purposes or effect, as is described in the injunction; or

(c) the Commission may refrain from making any order.

(3) The Commission shall not make an order under subparagraph (i) of paragraph (a) of subsection two of this section or an order under subparagraph (ii) of that paragraph determining an agreement unless every party to the agreement in respect of which the order is proposed to be made is or has been made a party to the application relating to the agreement.

(4) Where the Commission makes an order under subparagraph (i) of paragraph (a) of subsection two of this section—

(a) the party to the agreement to whom the order is directed shall, on and from the date specified in the order, be deemed not to be a party to the agreement;

(b) the agreement shall, subject to any subsequent order made by the Commission under this section, continue to be binding on the remaining parties to it as if it had been entered into between them alone; and

(c) the party to the agreement to whom the order is directed shall not, by reason of his ceasing to be a party to the agreement in accordance with the order, be subject to any penalty or forfeiture under the terms of the agreement or otherwise.

(5)

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(5) Where the Commission makes an **No. 81, 1970** order under subparagraph (ii) of paragraph (a) of subsection two of this section varying an agreement—

- (a) the agreement shall, as on and from the date specified in the order, be deemed to be varied in the manner so specified;
- (b) the agreement as so varied shall, subject to any subsequent order made by the Commission under this section, continue to be binding on the parties to it as if they had entered into the agreement as so varied; and
- (c) a party to the agreement shall not, by reason of the variation, be subject to any penalty or forfeiture under the terms of the agreement or otherwise.

(6) Where the Commission makes an order under subparagraph (ii) of paragraph (a) of subsection two of this section determining an agreement—

- (a) the agreement shall, as on and from the date specified in the order, be deemed to be determined; and
- (b) a party to the agreement shall not, by reason of the determination, be subject to any penalty or forfeiture under the terms of the agreement or otherwise.

(7) In proceedings taken under this section the Commission shall take such steps as it considers necessary to prevent the disclosure of trade secrets or the publication of evidence as to any matter if it is satisfied that the disclosure or publication would cause harm to any party to the agreement or to any witness and that the harm would outweigh the benefit to the public of the disclosure or publication.

(8)

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(8) A party ordered by the Commission, under this section, to take any action, or who has given an undertaking that has been accepted by the Commission under this section, shall on complying with or observing the order or undertaking, immediately notify the Industrial Registrar that he has done so and is, if he fails to so notify the Industrial Registrar, guilty of an offence against this Act.

(9) A person who contravenes or fails to comply with an order (not being an order made under subparagraph (i) or (ii) of paragraph (a) of subsection two of this section) or an injunction made or issued by, or to observe an undertaking accepted by, the Commission under this section is guilty of an offence against this Act and liable to a penalty not exceeding four thousand dollars or to imprisonment for a period not exceeding twelve months or to both such penalty and imprisonment.

**Applications
by Commiss-
sioner.**

49D. (1) Where—

- (a) the Commission has, on an application made under subsection one of section 49B of this Act, declared that an agreement was not, at the time of the alleged collusive practices offence referred to in the application, contrary to the public interest; and
- (b) the Commissioner is of the opinion that since that time the matters specified in subsection two of section 49E of this Act that were required to be taken into account for the purpose of determining the application, have so changed that the agreement is contrary to the public interest,

the Commissioner may, with the approval of the Minister, make an application to the Commission for a declaration that the agreement is contrary to the public interest.

(2)

Consumer Protection (Amendment).

(2) An application under subsection one No. 81, 1970 of this section shall be made by notice of motion filed in the office of the Industrial Registrar.

(3) Every party to an agreement the subject of an application under subsection one of this section shall be given notice of the application in accordance with the regulations and may, at the hearing of the application, oppose the application.

(4) On an application made under subsection one of this section, the onus of establishing that an agreement is contrary to the public interest shall be upon the Commissioner.

(5) The Commission shall hear and determine any application made under subsection one of this section and make a declaration whether or not the agreement the subject of the application is contrary to the public interest.

49E. (1) In considering for any purposes of Public interest, this Part whether any agreement is contrary to the interest. Cth. Act No. 111 of 1965, public interest, the Industrial Commission shall take as the basis of its consideration the principle s. 50 (1) and (2). that the preservation and encouragement of competition are desirable in the public interest, but shall weigh against the detriment constituted by any proved restriction of, or tendency to restrict, competition any effect of the agreement as regards any of the matters referred to in subsection two of this section if that effect tends to establish that, on balance, the agreement is not contrary to the public interest.

(2) The matters that are to be taken into account in accordance with subsection one of this section are :—

(a) the needs and interests of consumers, employees, producers, distributors, importers, exporters, proprietors and investors;

(b)

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- (b) the needs and interests of small businesses;
- (c) the promotion of new enterprises;
- (d) the need to achieve the full and efficient use and distribution of labour, capital, materials, industrial capacity, industrial know-how and other resources;
- (e) the need to achieve the production, provision, treatment and distribution, by efficient and economical means, of goods and services of such quality, quantity and price as will best meet the requirements of domestic and overseas markets; and
- (f) the ability of New South Wales producers and exporters to compete in overseas and interstate markets.

Defences.

49F. (1) It shall be a defence to proceedings for an alleged collusive practices offence that the proceedings were taken—

- (a) after the expiration of a period of twelve months after the commission of the offence, or a period of six months after the termination by dismissal, withdrawal or otherwise of any proceedings under section 49B or fifty-four of this Act in relation to the agreement in respect of which the offence was committed, whichever period expires the later;
- (b) without the Commissioner having, under section 49A of this Act, served on the defendant notices in relation to the offence;
- (c) after the Commissioner has, under section 49A of this Act, notified the defendant that proceedings will not be taken against him for the offence;
- (d)

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(d) within the prescribed period, referred to in No. 81, 1970 subsection one of section 49B of this Act, after the service of a notice on the defendant under subsection three of section 49A of this Act in relation to the offence; or

(e) during—

- (i) the pendency of an application under subsection one of section 49B of this Act to which the defendant is a party; or
- (ii) the time allowed for, or the pendency of, an appeal from a decision of the Industrial Commission made under section 49B of this Act,

in relation to the agreement in respect of which the offence is alleged to have been committed.

(2) No defect, in substance or form, in such a notice shall, for the purposes of paragraph (b) of subsection one of this section, vitiate the notice if the Commission is satisfied that the defendant was not, by reason of the defect, prejudiced in any material respect in or in relation to his defence or any application he made or might have made under subsection one of section 49B of this Act.

(3) Where an application pursuant to subsection one of section 49B of this Act is made in relation to any agreement, the hearing or further hearing of any proceedings taken against any person (whether the applicant or not) for an alleged collusive practices offence and which is alleged to have been committed in accordance with or in pursuance of the agreement shall be deferred

pending

No. 81, 1970

pending the hearing of the application and any appeal from the decision of a member of the Industrial Commission in the matter of the application.

(4) Subject to subsection five of this section, it shall be a defence to proceedings for an alleged collusive practices offence—

- (a) that the agreement in relation to which the offence is alleged to have been committed has been declared (whether before or after the date on which the offence is alleged to have been committed) by the Commission, on an application made under section 49B of this Act (whether made by the defendant or by any other person and whether arising from the offence or otherwise), not to have been contrary to the public interest on the date on which the offence is alleged to have been committed; or
- (b) that the agreement in relation to which the offence is alleged to have been committed—
 - (i) has substantially the same purposes and effect as an agreement in respect of which the Commission has made such a declaration; and
 - (ii) is not contrary to the public interest.

(5) The provisions of subsection four of this section do not apply where the offence referred to in that subsection was committed after a declaration, relating to the agreement referred to in that subsection, has been made under section 49D of this Act declaring that the agreement in respect of which the offence was committed is contrary to the public interest.

(6)

Consumer Protection (Amendment).

(6) Except as provided in subsection four No. 81, 1970 of this section, it is not a defence to proceedings for an alleged collusive practices offence that the agreement in relation to which the offence was committed is not or was not, on the date on which the offence is alleged to have been committed, contrary to the public interest.

- (c) (i) by inserting in subsection one of section fifty- Sec. 51. one after the words "this Part" the words (Evidentiary provisions.) ", and in any proceedings under section 49B or 49D of this Act,";
- (ii) by inserting in subsection two of the same section after the words "this Part" where firstly occurring the words ", and in any proceedings under section 49B or 49D of this Act,";
- (iii) by inserting in the same subsection after the word "offence" where secondly occurring the words "or, in the case of proceedings under section 49B or 49D of this Act, from the custody of a person alleged to have been a party to the collusive tendering agreement or collusive bidding agreement the subject of those proceedings";
- (d) by omitting subsection one of section fifty-three Sec. 53. and by inserting in lieu thereof the following (Proceedings for offences under this Part.) subsections :—
 - (1) All proceedings for offences against this Act arising under this Part shall be taken before the Industrial Commission and shall be commenced by information filed in the office of the Industrial Registrar.
 - (1A) Notwithstanding the provisions of the Industrial Arbitration Act, 1940, but subject to section fifty-four of this Act, the jurisdiction conferred on the Industrial Commission by this Part shall be exercised by a single member of the Commission.

(e)

No. 81, 1970 (e) by inserting next after section fifty-four the following new section :—

New sec.
54A.

Costs.

54A. The Industrial Commission may make such order as to the payment of costs in any proceedings under this Part, as may appear to it to be just and may assess the amount of such costs.

Sec. 56.
(Pro-
ceedings.)

(f) (i) by inserting in subsection one of section fifty-six after the words "against this Act" the words ", other than an offence arising under Part V of this Act,";

(ii) by inserting next after the same subsection the following new subsection :—

(1A) Proceedings for an offence arising under Part V of this Act may be taken and prosecuted by the Commissioner for Trade Practices appointed under that Part, acting with the authority of the Minister.