



New South Wales

Fair Trading Amendment Act 2004 No 21

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New South Wales

Fair Trading Amendment Act 2004 No 21

Act No 21, 2004

An Act to amend the *Fair Trading Act 1987* to make further provision with respect to the powers of investigators, the exchange of information and the regulation of pyramid selling schemes; and for other purposes. [Assented to 16 April 2004]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Fair Trading Amendment Act 2004*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Fair Trading Act 1987 No 68

The *Fair Trading Act 1987* is amended as set out in Schedule 1.

4 Amendment of other Acts

Each Act specified in Schedule 2 is amended as set out in that Schedule.

Schedule 1 Amendment of Fair Trading Act 1987

(Section 3)

[1] Section 9A

Insert after section 9:

9A Exchange of information

- (1) The Director-General may enter into an arrangement (an *information sharing arrangement*) with a relevant agency for the purposes of sharing or exchanging information held by the Director-General and the agency.
- (2) The information to which an information sharing arrangement may relate is limited to the following:
 - (a) information concerning investigations, law enforcement, assessment of complaints, licensing or disciplinary matters,
 - (b) probity assessments and reference checks concerning persons who provide, or propose to provide, goods or services to consumers,
 - (c) any other information affecting the interests of consumers.
- (3) Under an information sharing arrangement, the Director-General and the relevant agency are, despite any other Act or law of the State, authorised:
 - (a) to request and receive information held by the other party to the arrangement, and
 - (b) to disclose information to the other party,but only to the extent that the information is reasonably necessary to assist in the exercise of functions under this Act (or any other Act administered by the Minister for Fair Trading, whether solely or jointly with another Minister) or the functions of the relevant agency concerned.
- (4) The Director-General may also (whether as part of an information sharing arrangement or otherwise):
 - (a) refer any matter (including any complaint) with respect to fair trading or that affects the interests of consumers to a fair trading agency or law enforcement agency, and

- (b) receive any such matter from a fair trading agency or law enforcement agency, and
 - (c) conduct a joint investigation into any such matter with a fair trading agency or law enforcement agency.
- (5) Any such fair trading agency or law enforcement agency is, despite any other Act or law of the State, authorised to refer such a matter to the Director-General or to conduct an investigation into the matter jointly with the Director-General.
- (6) This section does not limit:
- (a) the functions that may be exercised by the Director-General under section 9, or
 - (b) the operation of any other Act under which a relevant agency is authorised or required to disclose information to another person or body.

- (7) In this section:

fair trading agency means an agency of the State, or of the Commonwealth, another State or Territory or an overseas jurisdiction, that exercises functions under an enactment with respect to fair trading.

law enforcement agency means:

- (a) NSW Police or the police force of another State or Territory or of an overseas jurisdiction, or
- (b) the Australian Federal Police, or
- (c) the New South Wales Crime Commission, or
- (d) the Australian Crime Commission, or
- (e) any other authority or person responsible for the investigation or prosecution of offences against the laws of the State or of the Commonwealth, another State or Territory or an overseas jurisdiction.

relevant agency means:

- (a) a fair trading agency, or
- (b) a law enforcement agency, or
- (c) any other agency of the State or of the Commonwealth, another State or Territory or an overseas jurisdiction, or

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- (d) any other person or body that exercises functions, in the public interest, that involve protecting the interests of consumers.

[2] Section 18 Office and identification of investigator

Insert “, 19A” after “section 19” in section 18 (2).

[3] Section 19A

Insert after section 19:

19A Powers of search and seizure under search warrant

- (1) In this section:
- authorised justice* means an authorised justice within the meaning of the *Search Warrants Act 1985*.
- place* includes a vehicle, vessel or aircraft.
- (2) An investigator may apply to an authorised justice for the issue of a search warrant if the investigator believes on reasonable grounds that there is evidence of a contravention of a provision of this Act on any place or land.
- (3) An authorised justice to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising any investigator:
- (a) to enter the place or land specified in the warrant, and
- (b) to search for evidence of a contravention of a provision of this Act, and
- (c) to exercise the powers of an investigator under subsection (4).
- (4) An investigator executing a search warrant issued under this section may:
- (a) examine anything (whether or not specified in the warrant) that the investigator believes on reasonable grounds may provide evidence of a contravention of a provision of this Act, and
- (b) seize anything (whether or not specified in the warrant) that the investigator believes on reasonable grounds is connected with a contravention of a provision of this Act.

- (5) The power to seize anything that is connected with a contravention of a provision of this Act includes a power to seize anything that will provide evidence of the contravention.
- (6) Anything seized by an investigator under the authority of a search warrant issued under this section must be returned to the person who had lawful possession of the thing before it was seized if its retention as evidence in proceedings for an offence against this or any other Act is not required.
- (7) Part 3 of the *Search Warrants Act 1985* applies to a search warrant issued under this section.
- (8) Nothing in this section limits any of the other functions that may be exercised by an investigator under this Division.

[4] Section 56 Pyramid selling etc

Omit the section.

[5] Part 5D

Insert after Part 5C:

Part 5D Pyramid selling

60S Definitions

In this Part:

new participant, in a pyramid selling scheme, includes a person who has applied, or been invited, to participate in the scheme.

participant in a pyramid selling scheme means a person who participates in the scheme.

participate in a pyramid selling scheme means:

- (a) establish or promote the scheme (whether alone or together with another person), or
- (b) take part in the scheme in any capacity (whether or not as an employee or agent of a person who establishes or promotes the scheme, or otherwise takes part in the scheme).

payment, to a person or received by a person, means:

- (a) the provision of a financial or non-financial benefit to or for the benefit of the person, or
- (b) the provision of a financial or non-financial benefit partly to or for the benefit of the person, and partly to or for the benefit of someone else.

pyramid selling scheme—see section 60T.

60T Meaning of “pyramid selling scheme”

- (1) For the purposes of this Part, a *pyramid selling scheme* is a scheme that has both of the following characteristics:
 - (a) to take part in the scheme, some or all new participants must make a payment (a *participation payment*) to another participant or participants in the scheme,
 - (b) the participation payments are entirely or substantially induced by the prospect held out to new participants that they will be entitled to a payment (a *recruitment payment*) in relation to the introduction to the scheme of further new participants.
- (2) A scheme may be a pyramid selling scheme:
 - (a) no matter who holds out to new participants the prospect of entitlement to recruitment payments, and
 - (b) no matter who is to make recruitment payments to new participants, and
 - (c) no matter who is to make introductions to the scheme of further new participants.
- (3) A scheme may be a pyramid selling scheme even if it has any or all of the following characteristics:
 - (a) the participation payments may (or must) be made after the new participants begin to take part in the scheme,
 - (b) making a participation payment is not the only requirement for taking part in the scheme,
 - (c) the holding out of the prospect of entitlement to recruitment payments does not give any new participant a legally enforceable right,
 - (d) arrangements for the scheme are not recorded in writing (whether entirely or partly),

- (e) the scheme involves the marketing of goods or services (or both).
- (4) In deciding whether a scheme that involves the marketing of goods or services (or both) is a pyramid selling scheme, a court may have regard to the following matters in working out whether participation payments under the scheme are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments:
 - (a) the extent to which the participation payments bear a reasonable relationship to the value of the goods or services that participants are entitled to be supplied under the scheme (as assessed, if appropriate, by reference to the price of comparable goods or services available elsewhere),
 - (b) the emphasis given in the promotion of the scheme to the entitlement of participants to the supply of goods and services by comparison with the emphasis given to their entitlement to recruitment payments.
- (5) Subsection (4) does not limit the matters to which the court may have regard in deciding whether participation payments are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments.

60U Prohibition on participating in pyramid selling scheme

- (1) A person must not participate in a pyramid selling scheme.
- (2) A person must not induce, or attempt to induce, a person to participate in a pyramid selling scheme.

[6] Sections 62 (6), 65 (1) (a), 66 (1) (a) (i), 67, 71 (1) and 72 (1)–(4)

Insert “, 5D” after “5C” wherever occurring.

[7] Sections 68 (1) and 69

Omit “or 5C” wherever occurring. Insert instead “, 5C or 5D”.

[8] Section 71 Defences

Omit section 71 (1) (a) and (b). Insert instead:

- (a) that the contravention in respect of which the proceedings were instituted was caused by a reasonable mistake of fact, including a mistake of fact caused by reasonable reliance on information supplied by another person, or

[9] Section 71 (2)

Omit “(b) and (c)”.

[10] Schedule 5 Savings and transitional provisions

Insert after clause 11D:

11E Fair Trading Amendment Act 2004

- (1) In this clause, *amending Act* means the *Fair Trading Amendment Act 2004*.
- (2) Part 5D, as inserted by the amending Act, applies only to conduct engaged in after the commencement of that Part.
- (3) Section 71 (1) (a), as substituted by the amending Act, applies only in relation to a contravention that occurs after the commencement of that amendment.

[11] Schedule 5, clause 12 (1)

Insert at the end of the subclause:

Fair Trading Amendment Act 2004

Schedule 2 Amendment of other Acts

(Section 4)

2.1 Law Enforcement (Powers and Responsibilities) Act 2002 No 103

[1] Schedule 2 Search warrants under other Acts

Insert in alphabetical order:

Fair Trading Act 1987, section 19A

[2] Schedule 4 Amendments of other Acts and instrument

Insert after Schedule 4.33:

4.33A Fair Trading Act 1987 No 68

[1] Section 19A Powers of search and seizure under search warrant

Omit the definition of *authorised justice* from section 19A (1).

Insert instead:

authorised officer has the same meaning as in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

[2] Section 19A (2) and (3)

Omit “authorised justice” wherever occurring.

Insert instead “authorised officer”.

[3] Section 19A (7)

Omit “Part 3 of the *Search Warrants Act 1985*”.

Insert instead “Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*”.

2.2 Search Warrants Act 1985 No 37

Section 10 Definitions

Insert in alphabetical order of Acts in the definition of *search warrant*:
section 19A of the *Fair Trading Act 1987*,

[Second reading speech made in—
Legislative Assembly on 12 March 2004
Legislative Council on 31 March 2004]

BY AUTHORITY