



Fair Trading (General) Amendment (Direct Commerce) Regulation 2004

under the

Fair Trading Act 1987

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Fair Trading Act 1987*.

REBA PAIGE MEAGHER, MP.,
Minister for Fair Trading

Explanatory note

The objects of this Regulation are as follows:

- (a) to provide that a notice of cancellation of a direct commerce contract under Division 3 of Part 4 of the *Fair Trading Act 1987* (*the Act*) may be given by sending the notice by electronic means to the supplier's email address as provided by the supplier or dealer,
- (b) to exclude certain direct commerce contracts from the operation of Division 3 of Part 4 of the Act entirely (namely, customer supply contracts for electricity and gas, contracts arising out of charitable fundraising appeals, contracts for the supply of certain financial products or managed investment schemes under the *Corporations Act 2001* of the Commonwealth and contracts for the supply of goods or services that are the same as those supplied under an existing contract),
- (c) to exclude credit contracts from most of the provisions of Division 3 of Part 4 of the Act,
- (d) to exclude direct commerce contracts for the supply of services on a continuing basis (eg contracts relating to loyalty club membership schemes) from section 40H of the Act (which prohibits the supplier or dealer from collecting fees for services provided during the cooling-off period),
- (e) to exclude direct commerce contracts for the supply of classified advertising in certain circumstances from some of the provisions of Division 3 of Part 4 (including section 40H) of the Act,

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- (f) to require, in the case of a direct commerce contract under which fees for services that are provided during the cooling-off period are permitted to be collected, the supplier or dealer to refund (if the consumer cancels the contract) any amount paid by the consumer for unused services during the cooling-off period.

This Regulation is made under the *Fair Trading Act 1987*, including sections 40B (2) and (2A), 40E (2) (d) and 92 (the general regulation-making power).

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1 Name of Regulation

This Regulation is the *Fair Trading (General) Amendment (Direct Commerce) Regulation 2004*.

2 Commencement

This Regulation commences on 30 August 2004.

3 Amendment of Fair Trading (General) Regulation 2002

The *Fair Trading (General) Regulation 2002* is amended as set out in Schedule 1.

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Schedule 1 Amendment

Schedule 1 Amendment

(Clause 3)

Part 4A

Insert after Part 4:

Part 4A Direct commerce provisions

88A Notice of cancellation of direct commerce contract

For the purposes of section 40E (2) (d) of the Act, a notice of cancellation by a consumer of a direct commerce contract may be given by sending the notice by electronic communication to the supplier's email address as provided by the supplier or dealer.

Note. Under section 40E (1) (b) of the Act, the 5-day cooling-off period for a direct commerce contract made over the telephone is triggered by the supplier giving the consumer the cooling-off information (as required under section 40D) in writing. If the information is posted to the consumer, section 76 of the *Interpretation Act 1987* provides that service of the letter is taken to have been effected on the fourth working day after it was posted.

88B Exclusion of certain contracts from direct commerce provisions

- (1) The following kinds of contracts are, in accordance with section 40B (2) of the Act, excluded from the operation of Division 3 of Part 4 of the Act:
 - (a) a customer supply contract (within the meaning of the *Electricity Supply Act 1995*) entered into with a person who is a small retail customer for the purposes of that Act,
 - (b) a customer supply contract (within the meaning of the *Gas Supply (Natural Gas Retail Competition) Regulation 2001*) entered into with a person who is a small retail customer for the purposes of the *Gas Supply Act 1996*,
 - (c) a contract arising out of the conduct of a fundraising appeal within the meaning of the *Charitable Fundraising Act 1991*,

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- (d) a contract for the supply of a financial product, or a managed investment scheme, within the meaning of the *Corporations Act 2001* of the Commonwealth,

Note. The hawking of certain financial products and managed investment products is prohibited under the *Corporations Act 2001*—see sections 992A and 992AA of that Act.

- (e) if a contract for the supply of goods or services exists between a consumer and a supplier—a contract between the consumer and the supplier for the supply of goods or services that are of the same kind as those supplied under the existing contract.

Note. An example of such an excluded contract is where the consumer has joined a scheme (such as a wine society or club) and agrees to allow the supplier to subsequently offer to the consumer products or services in connection with the scheme. In such a case, the subsequent offering by a dealer or supplier to the consumer of those products or services would not trigger the direct commerce provisions.

However, the exemption under this paragraph does not apply if the supplier subsequently offers different kinds of goods or services to those supplied under the existing contract. For example, if the supplier of telecommunications services, who has an existing contract with a consumer for the supply of a landline phone service, contacts the consumer for the purpose of negotiating a contract for the supply of a mobile phone or an Internet service, the contract for the supply of those other services would not be an excluded contract.

- (2) To avoid any doubt, if:
- (a) a contract for the supply of goods or services exists between a consumer and a supplier, and
- (b) the supplier subsequently makes contact with the consumer for the purposes of maintaining the goods or services provided under the existing contract (such as the rectification of a fault) or for the purposes of making a minor change to the terms of the existing contract,

any contract for those purposes between the consumer and the supplier that results from that subsequent contact is not a direct commerce contract.

Note. One of the elements of the definition of a **direct commerce contract** in section 40B of the Act is that it is made in the course of direct commerce (ie the practice in which a person goes from place to place, or makes telephone calls, seeking out persons who may be prepared to enter, as consumers, into contracts for the supply of goods or services). Another element of the definition is that the contact with the consumer, or the telephone call, is unsolicited.

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Schedule 1 Amendment

A direct commerce contract essentially involves the practice of “cold calling” of potential customers. In the case of an existing contract, this practice would not generally be applicable (unless the customer is subsequently contacted for the purpose of negotiating a contract for the supply of different kinds of goods or services to those supplied under the existing contract—see the note following subclause (1) (e)).

88C Partial exclusion of certain contracts from direct commerce provisions

In accordance with section 40B (2A) of the Act:

- (a) sections 40C–40G and 40K of the Act do not apply to or in respect of a credit contract within the meaning of the *Consumer Credit (New South Wales) Code*, and
- (b) section 40H of the Act does not apply to or in respect of any direct commerce contract for services that are supplied to the consumer on a continuing basis.

Note. An example of such a contract is a loyalty club membership scheme that is accepted by the consumer by the use of a membership card or discount vouchers and where the services accessed by the card or vouchers are supplied over a certain period. It does not include a contract for the supply of services (eg the carrying out of repairs) that are supplied entirely on a one-off basis or are capable of being wholly supplied during the 5-day cooling-off period.

88D Special provisions relating to contracts for classified advertising

In accordance with section 40B (2A) of the Act:

- (a) section 40D (3) (b) of the Act does not apply to or in respect of a contract for the supply of classified advertising (unless the contract is for the supply of a series of advertisements over a period of time), and
- (b) section 40E of the Act does not apply to or in respect of a contract for the supply of classified advertising once the publication deadline in relation to the advertisement has passed, and
- (c) section 40H of the Act does not apply to or in respect of a contract for the supply of classified advertising.

88E Requirement to refund fees collected during cooling-off period for unused services

- (1) This clause applies to the following kinds of direct commerce contracts:
 - (a) a contract that is for the supply of services on a continuing basis,
 - (b) a contract that is for the supply of classified advertising (but only if a cooling-off period is applicable to the contract).
- (2) If, in relation to a direct commerce contract to which this clause applies, the supplier or dealer collects any fees from the consumer during the cooling-off period for services provided during that period, the supplier or dealer must, if the consumer cancels the contract during the cooling-off period in accordance with section 40E of the Act, refund within 7 days of the cancellation of the contract any amount paid by the consumer for services that have not been used by the consumer.

Maximum penalty: 10 penalty units.