

[Act 1998 No 161]



New South Wales

## Fair Trading Tribunal Bill 1998

### Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.\*  
The *Consumer Claims Bill 1998* is cognate with this Bill.

The object of this Bill is to establish a Fair Trading Tribunal and to provide for its powers and procedures. The Bill provides for the phasing out of:

- the Commercial Tribunal constituted under the *Commercial Tribunal Act 1984*, and
- disputes committees constituted under section 34 of the *Motor Dealers Act 1974*, and
- the Motor Vehicle Repair Disputes Committee constituted under the *Motor Vehicle Repairs Act 1980*,

the functions of which will be exercised by the Tribunal.

The Bill provides for the repeal of the *Commercial Tribunal Act 1984* and for the amendment of other Acts that conferred jurisdiction on the Commercial Tribunal and those disputes committees.

The Bill also provides for the transfer to the Fair Trading Tribunal of the powers and functions of the Director-General of the Department of Fair Trading under section 42A of the *Property, Stock and Business Agents Act 1941*.

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\* Amended in committee—see table at end of volume.

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## Outline of provisions

### **Part 1 Preliminary**

**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** specifies the objects of the proposed Act.

**Clause 4** defines certain words and expressions used in the proposed Act.

**Clause 5** provides that notes included in the proposed Act are explanatory notes and do not form part of the proposed Act.

### **Part 2 Establishment of Tribunal**

#### **Division 1 Establishment and functions**

**Clause 6** establishes the Tribunal.

**Clause 7** provides that the Tribunal is to be constituted by a Chairperson, one or more Deputy Chairpersons, senior members and other members.

#### **Division 2 Membership of Tribunal**

**Clause 8** provides for the appointment of members of the Tribunal. A member may be appointed on a full-time or part-time basis.

**Clause 9** prescribes the requisite qualifications for membership of the Tribunal. The Chairperson or a Deputy Chairperson must be qualified for appointment as a District Court Judge. Senior members must be legally qualified. Other members must have appropriate specialist knowledge and skills. The clause gives effect to a Schedule that prescribes the terms of office of the members and makes provision for such matters as the remuneration and seniority of members and the circumstances that give rise to a vacancy of office.

**Clause 10** describes the responsibilities of the Chairperson in ensuring the proper functioning of the Tribunal, and empowers the Chairperson to give directions in connection with a range of matters concerning the business of the Tribunal. The Chairperson's functions may be performed under delegated authority by staff or other members of the Tribunal.

**Clause 11** provides that members of the Tribunal generally have the functions assigned to them under the proposed Act or other laws.

### **Division 3 Organisation**

**Clause 12** enables the Tribunal to exercise its functions in specialist Divisions.

**Clause 13** confers power on the Chairperson to determine the constitution of the Tribunal for the purposes of different classes of matters before it, and provides for the reconstitution of the Tribunal proceedings if a member should die or be otherwise unavailable or cease to be a member.

**Clause 14** provides for simultaneous sitting of the Tribunal or of its Divisions.

**Clause 15** provides for an annual report to be submitted to Parliament concerning the work and activities of the Tribunal.

### **Division 4 Assessors**

**Clause 16** provides for the appointment of assessors with specialist knowledge in any of the areas over which the Tribunal exercises jurisdiction.

**Clause 17** provides for assessors to be commissioned to inquire into and report on a matter concerning the business of the Tribunal.

**Clause 18** enables assessors to provide other advice and assistance to the Tribunal.

### **Division 5 Registrar and staff**

**Clause 19** provides for the appointment of a Registrar. Deputy Registrars and staff to assist the Tribunal in the exercise of its functions.

**Clause 20** describes the functions of the Registrar and Deputy Registrars. The Registrar, in particular, is responsible for assisting the Chairperson in managing the affairs of the Tribunal.

## **Part 3 Jurisdiction of Tribunal**

**Clause 21** describes the jurisdiction of the Tribunal. In general, the Tribunal exercises any jurisdiction conferred on it by or under other enactments. When the proposed Act has commenced, this jurisdiction will consist of the jurisdiction now exercised by the Commercial Tribunal, the consumer claims tribunals and other persons and bodies exercising functions under the Acts amended by Schedule 4. Other laws enacted from time to time may confer further jurisdiction on the Tribunal.

**Clause 22** provides for determining the proper forum when another court or tribunal has concurrent jurisdiction with the Tribunal in a particular matter. A person bringing a claim or seeking to have the Tribunal review the decision of any person or body may generally choose whichever forum the person prefers, the proper forum being determined by where the proceedings are first commenced.

**Clause 23** provides for the transfer of proceedings from the Tribunal to a court that has jurisdiction in the matter or from a court to the Tribunal, if it has jurisdiction.

#### **Part 4 Procedure of Tribunal**

**Clause 24** describes the general procedure for bringing matters before the Tribunal.

**Clause 25** requires notice of an application lodged with the Tribunal to be served by the Registrar on other parties to the proceedings.

**Clause 26** determines what member presides in proceedings before the Tribunal when it is constituted by two or more persons.

**Clause 27** describes the general features of proceedings before the Tribunal. The Tribunal is not bound by the rules of evidence and is to conduct its business with minimum formality. It has a duty to assist the understanding of the parties before it as to the significance of any aspect of the proceedings and to deal with matters as quickly as practicable. The clause confers various powers on the Tribunal in connection with proceedings before it.

**Clause 28** allows the member presiding at a sitting of the Tribunal to give procedural directions that appear to the member to be cost-effective and expeditious.

**Clause 29** allow the Tribunal, if it thinks fit, to allow errors or omissions in pleadings or other documents filed in connection with proceedings to be corrected and to cure irregularities in connection with the commencement or conduct of proceedings.

**Clause 30** provides that hearings before the Tribunal are generally to be in public, but confers discretion on the Tribunal to order a private or partly private hearing and empowers it to make orders for the suppression of names and facts involved in the proceedings.

**Clause 31** allows the Tribunal, in an appropriate case, to dispense with a hearing of any matter and to decide the matter by a review of documentary evidence.

**Clause 32** imposes a duty on the Tribunal to afford the parties to a dispute before it a reasonable opportunity to present their cases and to make submissions to the Tribunal.

**Clause 33** deals with representation of parties before the Tribunal. The general rule is that the parties to proceedings must present their own cases, but in circumstances prescribed by the regulations the Tribunal may by order allow a party to be represented by someone else. The Tribunal may itself appoint a person to represent an incapacitated person.

**Clause 34** provides for the use of interpreters to assist the Tribunal.

**Clause 35** allows the Tribunal to take evidence by telephone or closed-circuit television or other means.

**Clause 36** allows the Tribunal to call evidence of its own motion, to administer oaths and examine and summon witnesses.

**Clause 37** empowers the Registrar to issue summonses to compel the attendance of witnesses or the production of documentary or other evidence.

**Clause 38** allows the apprehension by warrant of witnesses who fail to obey a summons.

**Clause 39** defines what constitutes contempt of the Tribunal and provides for its punishment.

**Clause 40** affords to legal practitioners and other persons appearing or testifying before the Tribunal the same protections and immunities as when they appear or testify before the Supreme Court.

**Clause 41** determines the decision of the Tribunal, when constituted by two or more persons, on a matter where opinion is divided.

**Clause 42** allows the Tribunal to reserve its decision on a matter before it. (subject to time limits imposed by regulations under proposed section 45).

**Clause 43** confers a general power on the Tribunal, in making any order it is otherwise empowered to make, to attach conditions to the order.

**Clause 44** allows the Tribunal to give effect to agreements between the parties for the settlement of matters before it.

**Clause 45** requires the Tribunal to serve notice of its decisions on the parties to the relevant proceedings and to give reasons in writing (if it has not already done so) at the request of either party.

**Clause 46** enables the Tribunal to correct any error discovered in the text of its judgments or statements.

**Clause 47** provides that an order made by the Tribunal for the payment of money is, when its particulars are certified by the Registrar and the certificate filed with a court of competent jurisdiction, enforceable as a judgment of that court.

**Clause 48** provides for the award of costs in respect of proceedings before the Tribunal. Costs are to be awarded, in general, only if the parties were legally represented in the Commercial Division or the Home Building Division. but costs are available in circumstances to be determined by the regulations or in special circumstances recognised by the Tribunal in a particular case.

## **Part 5      Alternative dispute resolution**

### **Division 1      Conciliation and preliminary measures**

**Clause 49** imposes a duty on the Tribunal to attempt to bring the parties to a dispute to a settlement without the need for further proceedings.

**Clause 50** provides for the holding of preliminary conferences between the parties before the hearing of a matter before the Tribunal. as a means of attempting to achieve early settlement.

### **Division 2      Mediation and neutral evaluation**

**Clause 51** defines *mediation session*, *mediator*, *neutral evaluation session* and *neutral evaluator* for the purposes of the proposed Division.

**Clause 52** specifies the difference between *mediation* and *neutral evaluation*. In a mediation. the mediator presides over a negotiation process in which the parties are encouraged to come to a resolution of their dispute, In a neutral evaluation, the evaluator attempts to simplify the issues, isolate the relevant principles that will determine the outcome of the dispute and evaluate each party's probability of success.

**Clause 53** provides for the appointment of the persons who will conduct mediation sessions and neutral evaluation sessions.

**Clause 54** allows the Tribunal to refer any matter arising in proceedings before it for mediation or neutral evaluation.

**Clause 55** enables the regulations to require the costs of mediation or neutral evaluation to be borne by the parties to the dispute.

**Clause 56** permits the Tribunal to make orders giving effect to any compromise arrived at in a mediation or neutral evaluation of a dispute.

**Clause 57** extends to mediations and neutral evaluations the same privilege with regard to defamation as exists in relation to legal proceedings.

**Clause 58** restricts the disclosure, by a mediator or neutral evaluator, of information obtained in a mediation or neutral evaluation.

**Clause 59** provides that nothing in the proposed Division precludes the parties to proceedings from seeking other means of resolving their dispute.

## **Part 6 Appeals and rehearings**

**Clause 60** provides that there is no appeal from the Tribunal by proceedings in the nature of the prerogative writs or by proceedings in equity except to the extent that the Tribunal's jurisdiction is disputed.

**Clause 61** affords a right of appeal to the Supreme Court on a matter of law in certain cases.

**Clause 62** allows the Tribunal to refer any matter of law to the Supreme Court for determination.

**Clause 63** provides for a limited right to have a matter reheard by the Tribunal in a case where the Chairperson is satisfied that an injustice has been done.

**Clause 64** provides that an appeal under this Part does not stay the decision against which the appeal is brought unless the Chairperson or the Supreme Court hearing the appeal otherwise orders or other provision is made by another law.

## **Part 7 Miscellaneous**

**Clause 65** applies certain provisions of the *Evidence Act 1995* to the Tribunal in connection with the production of documents.

**Clause 66** prohibits the disclosure, by persons employed or acting for the purposes of the proposed Act, of information that comes to their knowledge while so employed or acting

**Clause 67** provides that the proposed Act is to bind the Crown.

**Clause 68** provides for a seal of the Tribunal, of which judicial notice may be taken.

**Clause 69** provides for the authentication of documents of the Tribunal (otherwise than by its seal) by signature of the Chairperson, Deputy Chairperson, senior member or Registrar, of whose signatures judicial notice may be taken.

**Clause 70** creates a presumption in legal proceedings that the constitution and decisions of the Tribunal, and the appointment or holding of office by its members, are not irregular.

**Clause 71** provides for the giving of notices and lodgment of documents for the purposes of the proposed Act.

**Clause 72** provides for the return to their rightful owners of documents used in evidence before the Tribunal.

**Clause 73** provides for witnesses' expenses.

**Clause 74** provides that proceedings for an offence against the proposed Act or the regulations are to be taken before a Local Court.

**Clause 75** affords to members of the Tribunal, the Registrar and Deputy Registrars protection from liability for acts and omissions in the exercise of their respective functions.

**Clause 76** allows the Chairperson to report to the Minister or to the Director-General of the Department of Fair Trading concerning matters arising under the administration of the proposed Act or affecting the jurisdiction of the Tribunal.

**Clause 77** allows regulations to be made in aid of the proposed Act.

**Clause 78** provides for the form of documents to be used for the purposes of the proposed Act.

**Clause 79** repeals the *Commercial Tribunal Act 1984*.

**Clause 80** gives effect to a schedule of consequential amendments to other Acts.

**Clause 81** gives effect to a schedule of savings, transitional and other provisions.

**Clause 82** requires a review of the Act to be undertaken after 2 years of operation.



## **Schedules**

**Schedule 1** contains additional provisions relating to members of the Tribunal.

**Schedule 2** contains additional provisions relating to assessors of the Tribunal.

**Schedule 3** contains additional provisions relating to mediators and neutral evaluators.

**Schedule 4** contains consequential amendments to certain Acts.

**Schedule 5** contains savings, transitional and other provisions.