



New South Wales

Fair Trading Amendment Bill 2006

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to make miscellaneous amendments to the *Fair Trading Act 1987* (the **Principal Act**) and certain related legislation.

Outline of provisions

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 is a formal provision that gives effect to the amendments to the *Fair Trading Act 1987* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the consequential amendments to the *Motor Vehicle Repairs Act 1980* set out in Schedule 2.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Fair Trading Act 1987

Schedule 1 [1] inserts proposed section 5A into the Principal Act to make it clear that the Principal Act is intended to have extraterritorial application in so far as the legislative powers of the State permit. The proposed section also makes it clear that the Principal Act extends to conduct either in or outside the State that:

- (a) is in connection with goods or services supplied in the State, or
- (b) affects a person in the State, or
- (c) results in loss or damage in the State.

Schedule 1 [2] inserts proposed section 19A (6A) into the Principal Act to provide that the Director-General (see note below) may order that anything seized by an investigator under the authority of a search warrant issued under section 19A be sold, destroyed or otherwise disposed of, if:

- (a) the thing is no longer required to be retained as evidence in proceedings for an offence against the Principal Act or any other Act, and
- (b) the person who had lawful possession of the thing before it was seized cannot be found or does not wish to have the thing returned.

If the thing is disposed of by way of sale, the proceeds of sale are to be paid to the Treasurer for payment into the Consolidated Fund.

Note. In section 4 (1) of the Principal Act, *Director-General* is defined to mean:

- (a) the Commissioner for Fair Trading, Department of Commerce, or
- (b) if there is no such position in the Department—the Director-General of the Department.

(See also the related amendment inserting proposed section 93 into the Principal Act by **Schedule 1 [20]** below.)

Schedule 1 [3] amends section 20 (Power to obtain information, documents and evidence) of the Principal Act to provide that the power in that section to obtain information, documents and evidence may be used in relation to:

- (a) matters that are the subject of a complaint received by the Director-General under section 9 (1) (c) of the Principal Act, and
- (b) matters that are the subject of an investigation by the Director-General under section 9 (2) of the Principal Act (being investigations into the laws in force, and other matters, relating to the interests of consumers and other matters relating to the interests of consumers that are referred to the Director-General by the Minister for Fair Trading).

Schedule 1 [4] and [5] amend section 20 (2) of the Principal Act to provide that the functions under that subsection may be exercised by the Director-General.

Schedule 1 [6] inserts proposed section 20 (6) and (7) into the Principal Act to provide that:

- (a) the Director-General may only delegate his or her functions under section 20 to a person who is an officer within the meaning of the Principal Act (basically, a public servant or other person engaged by the Director-General), and
- (b) if requested to do so by a person required to comply with a notice given under section 20 by a delegate of the Director-General, the delegate must provide the person with evidence of that person's identity and evidence of the delegation that enables the delegate to give the notice.

Schedule 1 [7] and [8] amend section 25B of the Principal Act to provide that the Fair Trading Advisory Council is to consist of not less than 6, but not more than 16, members of whom one is to be the Director-General (or a nominee of the Director-General) and not less than 5, but not more than 15, are to be appointed by the Minister for Commerce as having, in the opinion of the Minister, expertise or qualifications appropriate to the Council's functions (as consumer or industry representatives or otherwise).

Schedule 1 [9] and [10] amend various provisions in Division 6 of Part 2 of the Principal Act to change the name of the Motor Trade Advisory Council to the Motor Vehicle Industry Advisory Council. (See also the abolition of the Council of the Motor Vehicle Repair Industry Authority by **Schedule 2** below).

Schedule 1 [11] and [12] amend section 25E of the Principal Act to provide that the Motor Vehicle Industry Advisory Council is to consist of not less than 6, but not more than 16, members of whom one is to be the Director-General (or a nominee of the Director-General) and not less than 5, but not more than 15, are to be appointed by the Minister for Commerce as having, in the opinion of the Minister, expertise or qualifications appropriate to the Council's functions (as consumer or industry representatives or otherwise).

Schedule 1 [13] and [14] amend section 25H of the Principal Act to provide that the Property Services Advisory Council is to consist of not less than 6, but not more than 16, members of whom one is to be the Director-General (or a nominee of the Director-General) and not less than 5, but not more than 15, are to be appointed by the Minister for Commerce as having, in the opinion of the Minister, expertise or qualifications appropriate to the Council's functions (as consumer or industry representatives or otherwise).

Schedule 1 [15] and [16] amend section 25N of the Principal Act to provide that the Retirement Villages Advisory Council is to consist of not less than 6, but not more than 16, members of whom one is to be the Director-General (or a nominee of the Director-General) and not less than 5, but not more than 15, are to be appointed by the Minister for Fair Trading as having, in the opinion of the Minister, expertise or qualifications appropriate to the Council's functions (as consumer or industry representatives or otherwise).

Schedule 1 [17] and [18] amend section 58 of the Principal Act (that relates to demands for unsolicited goods or unsolicited services or entries in directories) to provide that, for the purposes of that section, a person is taken to assert a right to payment for unsolicited goods or unsolicited services, or of a charge for the making of an entry in a directory, if the person sends any invoice or other document stating the amount of the payment or setting out the price of the goods or services or the charge for the making of the entry and does not include in the invoice or document a warning statement that:

- (a) is printed in upper case and a type not smaller than 18 point and is located at the top of the first page of the invoice or document, and
- (b) states “THIS IS NOT A BILL. YOU ARE NOT REQUIRED TO PAY ANY MONEY.”.

Schedule 1 [19] inserts proposed section 58A into the Principal Act to provide that it is an offence to assert a right to payment for certain unauthorised advertisements. The proposed section is similar to the current provisions of section 58 of the Principal Act that prohibit a person asserting a right to payment for unauthorised entries in directories. The proposed section will not apply to publications published by:

- (a) a large proprietary company or a subsidiary of such a company or a listed corporation or a subsidiary of such a corporation, or
- (b) the publisher of any publication which has an audited circulation of 10,000 copies or more per week, or a person which is a related body corporate to such a person, or
- (c) a servant of the Crown, a body corporate which represents the Crown or a local council, or
- (d) any other person prescribed by the regulations under the Principal Act.

Contravention of the proposed section will be an offence (see section 62 of the Principal Act) carrying a maximum penalty of:

- (a) in the case of a person other than a body corporate—200 penalty units (currently \$22,000), or
- (b) in the case of a body corporate—1,000 penalty units (currently \$110,000).

Contravention of the proposed section may also give rise to civil remedies (see section 68 of the Principal Act).

Schedule 1 [20] inserts proposed section 93 into the Principal Act to provide that the Director-General may order that anything that the Director-General has obtained in the course of an investigation under the Principal Act (other than anything seized by an investigator under the authority of a search warrant issued under section 19A) be sold, destroyed or otherwise disposed of, if:

- (a) the thing is not required to be retained as evidence in proceedings for an offence against the Principal Act or any other Act, and

- (b) the person who had lawful possession of the thing before it came into the Director-General's possession cannot be found or does not wish to have the thing returned.

If the thing is disposed of by way of sale, the proceeds of sale are to be paid to the Treasurer for payment into the Consolidated Fund.

Schedule 1 [21] inserts proposed clause 11G into Schedule 5 (Savings and transitional provisions) to the Principal Act to provide that:

- (a) a person who, immediately before the amendment of Division 6 of Part 2 of the Principal Act by this proposed Act, held office as a member of the former Motor Trade Advisory Council ceases to hold office on that amendment, and
- (b) a member who ceases to hold office because of this proposed clause is not entitled to any remuneration or compensation because of so ceasing to hold office.

Schedule 1 [22] amends clause 12 (1) of Schedule 5 (Savings and transitional provisions) to the Principal Act to enable regulations of a savings and transitional nature consequent on the enactment of the proposed Act to be made.

Schedule 2 Amendment of Motor Vehicle Repairs Act 1980

Schedule 2 [1]–[5] amend various provisions of the *Motor Vehicle Repairs Act 1980* to abolish the Council of the Motor Vehicle Repair Industry Authority.

Schedule 2 [6] amends clause 1 (1) of Schedule 5 (Savings and transitional provisions) to the *Motor Vehicle Repairs Act 1980* to enable regulations of a savings and transitional nature consequent on the enactment of the proposed Act to be made (but only to the extent that it amends the *Motor Vehicle Repairs Act 1980*).

Schedule 2 [7] inserts proposed clause 14 into Schedule 5 (Savings and transitional provisions) to the *Motor Vehicle Repairs Act 1980* to deal with certain savings and transitional issues consequent on the abolition of the Council of the Motor Vehicle Repair Industry Authority.

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No. , 2006

A Bill for

An Act to amend the *Fair Trading Act 1987* to make further provision with respect to the extraterritorial application of that Act, advertising, false billing, the powers of the Commissioner for Fair Trading and Advisory Councils; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Fair Trading Amendment Act 2006</i> .	3
2 Commencement	4
This Act commences on a day or days to be appointed by proclamation.	5
3 Amendment of Fair Trading Act 1987 No 68	6
The <i>Fair Trading Act 1987</i> is amended as set out in Schedule 1.	7
4 Amendment of Motor Vehicle Repairs Act 1980 No 71	8
The <i>Motor Vehicle Repairs Act 1980</i> is amended as set out in Schedule 2.	9 10
5 Repeal of Act	11
(1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.	12 13
(2) The repeal of this Act does not, because of the operation of section 30 of the <i>Interpretation Act 1987</i> , affect any amendment made by this Act.	14 15

Schedule 1	Amendment of Fair Trading Act 1987	1
	(Section 3)	2
[1] Section 5A		3
Insert after section 5:		4
5A Extraterritorial application		5
(1) This Act is intended to have extraterritorial application in so far as the legislative powers of the State permit.		6 7
(2) Without limiting subsection (1), this Act extends to conduct either in or outside the State that:		8 9
(a) is in connection with goods or services supplied in the State, or		10 11
(b) affects a person in the State, or		12
(c) results in loss or damage in the State.		13
[2] Section 19A Powers of search and seizure under search warrant		14
Insert after section 19A (6):		15
(6A) The Director-General may order that anything seized by an investigator under the authority of a search warrant issued under this section be sold, destroyed or otherwise disposed of, if:		16 17 18
(a) the thing is no longer required to be retained as evidence in proceedings for an offence against this or any other Act, and		19 20 21
(b) the person who had lawful possession of the thing before it was seized cannot be found or does not wish to have the thing returned.		22 23 24
(6B) If the thing is disposed of by way of sale, the proceeds of sale are to be paid to the Treasurer for payment into the Consolidated Fund.		25 26 27
[3] Section 20 Power to obtain information, documents and evidence		28
Insert at the end of section 20 (1) (b):		29
, or		30
(c) a matter that is the subject of a complaint received by the Director-General under section 9 (1) (c), or		31 32
(d) a matter that is the subject of an investigation by the Director-General under section 9 (2).		33 34

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Schedule 1 Amendment of Fair Trading Act 1987

[4] Section 20 (2)	1
Insert “or the Director-General” after “An investigator”.	2
[5] Section 20 (2) (a) and (b)	3
Insert “or the Director-General” after “an investigator” wherever occurring.	4
[6] Section 20 (6) and (7)	5
Insert after section 20 (5):	6
(6) Despite section 8 of this Act, the Director-General may only delegate his or her functions under this section to a person who is an officer.	7 8 9
(7) If requested to do so by a person required to comply with a notice given under this section by a delegate of the Director-General, the delegate must provide the person with evidence of that person’s identity and evidence of the delegation that enables the delegate to give the notice.	10 11 12 13 14
[7] Section 25B Membership	15
Insert “not less than 6, but not more than” before “16 members” in section 25B (1).	16 17
[8] Section 25B (2) (b)	18
Insert “not less than 5, but not more than” before “15 persons”.	19
[9] Part 2, Division 6, heading	20
Omit “Trade” from the heading to Division 6 of Part 2.	21
Insert instead “Vehicle Industry”.	22
[10] Part 2, Division 6	23
Omit “Trade” wherever occurring from the Division.	24
Insert instead “Vehicle Industry”.	25
[11] Section 25E Membership	26
Insert “not less than 6, but not more than” before “16 members” in section 25E (1).	27 28
[12] Section 25E (2) (b)	29
Insert “not less than 5, but not more than” before “15 other persons”.	30

[13] Section 25H Membership	1
Insert “not less than 6, but not more than” before “16 members” in section 25H (1).	2 3
[14] Section 25H (2) (b)	4
Insert “not less than 5, but not more than” before “15 persons”.	5
[15] Section 25N Membership	6
Insert “not less than 6, but not more than” before “16 members” in section 25N (1).	7 8
[16] Section 25N (2) (b)	9
Insert “not less than 5, but not more than” before “15 persons”.	10
[17] Section 58 Assertion of right to payment for unsolicited goods or services, or for making entry in directory	11 12
Omit “and not stating as prominently (or more prominently) that no claim is made to the payment, or to payment of the price or charge, as the case may be” from section 58 (5) (e).	13 14 15
Insert instead “, and the invoice or document does not contain a warning statement complying with subsection (5A)”.	16 17
[18] Section 58 (5A)	18
Insert after section 58 (5):	19
(5A) For the purposes of subsection (5) (e), a warning statement must:	20
(a) be printed in upper case and a type not smaller than 18 point and be located at the top of the first page of the invoice or document, and	21 22 23
(b) state “THIS IS NOT A BILL. YOU ARE NOT REQUIRED TO PAY ANY MONEY.”.	24 25

[19] Section 58A	1
Insert after section 58:	2
58A Assertion of right to payment for unauthorised advertisements	3
(1) A person must not, in trade or commerce, assert a right to payment from another person for an advertisement relating to the other person, or the profession, business, trade or occupation of the other person placed in a publication, unless the person asserting the right knows, or has reasonable cause to believe, that the other person has authorised in writing the placement of the advertisement.	4 5 6 7 8 9 10
(2) A person is not liable to make any payment to another person, and is entitled to recover by action in a court of competent jurisdiction against another person any payment made by the person to the other person, in full or part satisfaction of a charge for the placement of any such advertisement unless the first-mentioned person has authorised in writing the placement of the advertisement.	11 12 13 14 15 16 17
(3) For the purposes of this section, a person is taken to assert a right to a payment if that person:	18 19
(a) makes a demand for the payment or asserts a present or prospective right to the payment, or	20 21
(b) threatens to bring any legal proceedings with a view to obtaining the payment, or	22 23
(c) places or causes to be placed on a list of debtors or defaulters the name of the person against whom the right to payment is being asserted, or threatens to do so, with a view to obtaining the payment, or	24 25 26 27
(d) invokes or causes to be invoked any other collection procedure, or threatens to do so, with a view to obtaining the payment, or	28 29 30
(e) sends any invoice or other document stating the amount of the payment or setting out the charge for the placing of the advertisement, and the invoice or document does not contain a warning statement complying with subsection (4).	31 32 33 34 35
(4) For the purposes of subsection (3) (e), a warning statement must:	36
(a) be printed in upper case and a type not smaller than 18 point and be located at the top of the first page of the invoice or document, and	37 38 39

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- (b) state “THIS IS NOT A BILL. YOU ARE NOT REQUIRED TO PAY ANY MONEY.”. 1
2
- (5) For the purposes of this section, a person is taken to have given 3
written authorisation for the placement of an advertisement only 4
if: 5
- (a) a document authorising the placing of the advertisement 6
has been signed by the person or by another person (not 7
being the publisher) authorised by that person, and 8
- (b) a copy of the signed document has been given to the person 9
before the right to payment of a charge is asserted, and 10
- (c) the document specifies: 11
- (i) the name of the publication, the area of circulation 12
of the publication and the total number of copies of 13
the publication to be circulated, and 14
- (ii) the name and business address of the publisher, and 15
- (iii) the name and address of the person on whose behalf 16
the publication is published, and 17
- (iv) particulars of the advertisement, and 18
- (v) the date or dates on which the advertisement is to 19
appear in the publication, and 20
- (vi) the amount of the charge for the placement of the 21
advertisement or the basis on which the charge is, or 22
is to be, calculated. 23
- (6) For the purposes of this section, an invoice or other document 24
purporting to have been sent by or on behalf of a person is taken 25
to have been sent by the person unless the contrary is established. 26
- (7) This section does not apply to a publication that is published by 27
a person if the person is: 28
- (a) a large proprietary company or a subsidiary of such a 29
company or a listed corporation or a subsidiary of such a 30
corporation, or 31
- (b) the publisher of any publication that has an audited 32
circulation of 10, 000 copies or more per week, or a person 33
which is a related body corporate to such a person, or 34
- (c) a servant of the Crown, a body corporate which represents 35
the Crown or a local council, or 36
- (d) any other person prescribed by the regulations. 37

(8)	In a proceeding against a person in respect of a contravention of this section, the burden lies on the defendant of proving that the defendant knew or had reasonable cause to believe that the other person had authorised the placement of the advertisement.	1 2 3 4
(9)	In this section: <i>audited circulation</i> in relation to a publication, means the circulation of that publication as confirmed by the most recent audit of the publication by a body approved by the Director-General. <i>large proprietary company</i> has the same meaning as in the <i>Corporations Act 2001</i> of the Commonwealth. <i>listed corporation</i> has the same meaning as in the <i>Corporations Act 2001</i> of the Commonwealth. <i>subsidiary</i> has the same meaning as in the <i>Corporations Act 2001</i> of the Commonwealth.	5 6 7 8 9 10 11 12 13 14 15
(10)	This section does not apply in relation to the making of an entry in a directory.	16 17
[20] Section 93		18
	Insert after section 92:	19
	93 Disposal of property	20
(1)	The Director-General may order that anything that the Director-General has obtained in the course of an investigation under this Act (other than anything seized by an investigator under the authority of a search warrant issued under section 19A) be sold, destroyed or otherwise disposed of, if:	21 22 23 24 25
(a)	the thing is not required to be retained as evidence in proceedings for an offence against this or any other Act, and	26 27 28
(b)	the person who had lawful possession of the thing before it came into the Director-General's possession cannot be found or does not wish to have the thing returned.	29 30 31
(2)	If the thing is disposed of by way of sale, the proceeds of sale are to be paid to the Treasurer for payment into the Consolidated Fund.	32 33 34

[21] Schedule 5 Savings and transitional provisions	1
Insert in appropriate order in the Schedule:	2
11G Fair Trading Amendment Act 2006	3
(1) A person who, immediately before the commencement of Schedule 1 [10] to the <i>Fair Trading Amendment Act 2006</i> , held office as a member of the Motor Trade Advisory Council ceases to hold office on that commencement.	4 5 6 7
(2) A person who ceases to hold office because of this clause is not entitled to any remuneration or compensation because of so ceasing to hold office.	8 9 10
(3) A reference in any Act (other than this Act) or in any instrument made under any Act to the Motor Trade Advisory Council is to be read as a reference to the Motor Vehicle Industry Advisory Council established under this Act.	11 12 13 14
[22] Schedule 5	15
Insert at the end of clause 12 (1) to the Schedule:	16
<i>Fair Trading Amendment Act 2006</i> (but only to the extent that it amends this Act)	17 18

Schedule 2	Amendment of Motor Vehicle Repairs Act 1980	1
		2
	(Section 4)	3
[1] Section 4 Definitions		4
	Omit the definitions of <i>committee</i> , <i>Council</i> and <i>member</i> from section 4 (1).	5
[2] Sections 9, 10, 13 and 84 (1) (b) and (c) and Schedule 1		6
	Omit the provisions.	7
[3] Section 70		8
	Omit the section. Insert instead:	9
	70 Delegation	10
	The Authority may delegate the exercise of any function of the Authority under this or any other Act (other than this power of delegation) to any person employed under Chapter 1A of the <i>Public Sector Employment and Management Act 2002</i> in the Government Service to enable the Authority to exercise its functions.	11 12 13 14 15 16
[4] Section 84 Protection from liability		17
	Omit “member,” from section 84 (1).	18
[5] Section 84 (3)		19
	Omit “member or other” wherever occurring.	20
[6] Schedule 5 Savings and transitional provisions		21
	Insert at the end of clause 1 (1) to the Schedule:	22
	<i>Fair Trading Amendment Act 2006</i> (but only to the extent that it amends this Act)	23 24

[7] Schedule 5, Part 5	1
Insert at the end of the Schedule:	2
Part 5 Provision consequent on enactment of Fair Trading Amendment Act 2006	3
	4
14 Provision consequent on Fair Trading Amendment Act 2006	5
(1) In this clause, <i>former Council</i> means the Council of the Motor Vehicle Repair Industry Authority as constituted under section 9 immediately before the repeal of that section by the <i>Fair Trading Amendment Act 2006</i> .	6
	7
	8
	9
(2) A person who, immediately before the repeal of section 9 of this Act by the <i>Fair Trading Amendment Act 2006</i> , held office as a member of the former Council ceases to hold office on that repeal.	10
	11
	12
	13
(3) A person who ceases to hold office because of this clause is not entitled to any remuneration or compensation because of so ceasing to hold office.	14
	15
	16
(4) Subject to the regulations, a reference in any Act (other than this Act) or in any instrument made under any Act to the former Council is to be read as a reference to the Motor Vehicle Industry Advisory Council established under the <i>Fair Trading Act 1987</i> .	17
	18
	19
	20