

Passed by both Houses



New South Wales

# Fair Trading Amendment (Australian Consumer Law) Bill 2010

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*I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.*

*Clerk of the Legislative Assembly.  
Legislative Assembly,  
Sydney, , 2010*



New South Wales

## **Fair Trading Amendment (Australian Consumer Law) Bill 2010**

Act No , 2010

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An Act to apply the Australian Consumer Law as a law of New South Wales and to amend the *Fair Trading Act 1987* and other legislation consequentially; and for other purposes.

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*I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.*

*Assistant Speaker of the Legislative Assembly.*

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Fair Trading Amendment (Australian Consumer Law) Act 2010*.

**2 Commencement**

This Act commences on 1 January 2011.

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## Schedule 1      Amendment of Fair Trading Act 1987 No 68

**[1] Section 3 Extent to which Act binds the Crown**

Insert “(other than the ACL)” after “This Act” in section 3 (1).

**[2] Section 3, note**

Insert at the end of the section:

**Note.** Division 4 of Part 3 provides for the application of the ACL to the Crown.

**[3] Section 4 Definitions**

Omit “except in so far as the context or subject-matter otherwise indicates or requires” from section 4 (1).

Insert instead “except the ACL”.

**[4] Section 4 (1), definition of “advisory council”**

Omit “Divisions 5–7 or 9 of Part 2”. Insert instead “Divisions 2–5 of Part 2B”.

**[5] Section 4 (1)**

Omit the definitions of *banning order*, *consumer*, *document*, *goods*, *product information standard*, *product safety standard*, *send*, *unsolicited goods* and *unsolicited services*.

**[6] Section 4 (1)**

Insert in alphabetical order:

*consumer* has the same meaning as in section 3 of the ACL.

*consumer contract* has the same meaning as in section 2 (1) of the ACL.

*consumer goods* has the same meaning as in section 2 (1) of the ACL.

*defective goods action* has the same meaning as in section 2 (1) of the ACL.

*document* has the same meaning as in section 2 (1) of the ACL.

*embargo notice* means a notice given under section 23D.

*goods* has the same meaning as in section 2 (1) of the ACL.

*interim ban* has the same meaning as in section 2 (1) of the ACL.

*permanent ban* has the same meaning as in section 2 (1) of the ACL.

**product related service** has the same meaning as in section 2 (1) of the ACL.

**recall notice** has the same meaning as in section 2 (1) of the ACL.

**rely on** has the same meaning as in section 2 (1) of the ACL.

**safety warning notice** means a notice published under section 129 of the ACL.

**the ACL** means the *Australian Consumer Law (NSW)*.

**unsafe consumer goods** means consumer goods that will or may cause injury to any person or a foreseeable use (or misuse) of which will or may cause injury to any person.

**unsafe product related services** means product related services of a particular kind supplied in trade or commerce, a result of the supply of which is that:

- (a) any consumer goods will or may cause injury to any person, or
- (b) a reasonably foreseeable use (including misuse) of any consumer goods will or may cause injury to any person.

**[7] Section 4 (2)**

Omit the subsection. Insert instead:

- (2) Sections 2 (2) (Definitions), 11 (References to acquisition, supply and re-supply) and 13 (Loss or damage to include injury) of the ACL apply to all of the provisions of this Act in the same way as those sections apply to the provisions of the ACL.

**[8] Section 4 (3)–(5)**

Omit the subsections.

**[9] Section 4 (6)**

Insert “(other than the ACL)” after “this Act”.

**[10] Section 4 (9) and (10)**

Insert after section 4 (8):

- (9) In this Act, a reference to a particular section of this Act does not include a reference to the same section of the ACL.

**Note.** For example, a reference to section 66 of this Act does not include a reference to section 66 of the ACL.

- (10) Notes included in this Act do not form part of this Act.

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**[11] Section 5 Meaning of “consumer”**

Omit the section.

**[12] Section 9 Functions of Director-General**

Insert after section 9 (3):

- (4) The Director-General is to have regard, in carrying out his or her functions under this Act, to the need for communication, co-operation and co-ordination in relation to relevant co-operative legislative schemes.

**[13] Section 9A Exchange of information**

Insert in alphabetical order in section 9A (7):

*information* includes reports, recommendations, opinions, assessments and operational plans.

**[14] Part 2, Division 3, heading**

Omit the heading. Insert instead:

**Part 2A Provisions relating to investigations**

**Division 1 Powers relating to investigations**

**[15] Section 19 Powers of entry**

Omit “or” where lastly occurring in section 19 (3) (c) and insert at the end of section 19 (3) (d):

, or

- (e) film, photograph, videotape or otherwise record a still or moving image of any thing (other than a document) for the purpose of the investigation of any matter relating to consumer goods or product related services.

**[16] Section 19A**

Omit section 19A. Insert instead:

**19A Powers of search and seizure under search warrant**

- (1) In this section:

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

*place* includes a vehicle, vessel or aircraft.

- (2) An investigator may apply to an authorised officer for the issue of a search warrant if the investigator believes on reasonable grounds that:
- (a) there is evidence of a contravention of a provision of this Act on any place or land, or
  - (b) there are consumer goods of a particular kind being supplied in trade or commerce in or from any place or land that will or may cause injury to any person or a reasonably foreseeable use (or misuse) of which will or may cause injury to any person, or
  - (c) there are product related services of a particular kind being supplied in trade or commerce in or from any place or land and, as a result of those services being supplied:
    - (i) any consumer goods will or may cause injury to any person, or
    - (ii) a reasonably foreseeable use (including misuse) of any consumer goods will or may cause injury to any person.
- (3) An authorised officer 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 any of the matters referred to in subsection (2), 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 any of the matters referred to in subsection (2), and
  - (b) seize anything (whether or not specified in the warrant) that the investigator believes on reasonable grounds is connected with any of the matters referred to in subsection (2).
- (5) The power to seize anything that is connected with a matter referred to in subsection (2) includes a power to seize anything that will provide evidence of that matter.

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- (6) An investigator who seizes any consumer goods, or equipment used in the manufacturing, processing or storage of consumer goods, under this section must provide a receipt for the goods or equipment.
  - (7) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* 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 Part.

**[17] Section 20 Power to obtain information, documents and evidence**

Insert at the end of section 20 (1) (d):

, or

- (e) unsafe consumer goods, or
- (f) unsafe product related services.

**[18] Section 21 Inspection of documents by Director-General and others**

Omit “section 20 or 23A” wherever occurring.

Insert instead “section 20 of this Act or section 219 of the ACL”.

**[19] Section 22 Preservation of secrecy**

Omit “section 20 or 23A” wherever occurring.

Insert instead “section 20 of this Act or section 219 of the ACL”.

**[20] Part 2A, Divisions 2 and 3**

Omit Division 3A of Part 2. Insert instead:

**Division 2      Seized property and disposal of certain property**

**23A    Dealing with seized property**

- (1) This section applies to anything seized under the authority of a search warrant issued for the purposes of section 19A.
- (2) Anything seized 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.

- (3) The Director-General may order that anything seized 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 this 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.
- (4) 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.
- (5) This section does not apply to the following consumer goods:
  - (a) consumer goods that are the subject of an application under section 23B that has not been determined,
  - (b) consumer goods that are the subject of an order under that section authorising their disposal,
  - (c) consumer goods which the Director-General is satisfied are unsafe consumer goods.

**23B Court orders relating to disposal of certain consumer goods**

- (1) This section applies to consumer goods if:
  - (a) the consumer goods do not comply with a safety standard that is in force for consumer goods of that kind and the cause of that non-compliance cannot be remedied, or
  - (b) a permanent ban on consumer goods of that kind is in force, or
  - (c) a recall notice for consumer goods of that kind is in force and a defect or dangerous characteristic of such consumer goods identified in the notice cannot be remedied, or
  - (d) the consumer goods are unsafe consumer goods.
- (2) A court may make an order under this section only on the application of the Director-General.
- (3) If the court is satisfied that a person possesses or has control of consumer goods of a particular kind to which this section applies for the purposes of trade or commerce, the court may make an order authorising one or more investigators to do the following in accordance with any requirements specified in the order:
  - (a) to enter the premises of the person that are specified in the order,

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- (b) to search the premises for consumer goods of a kind specified in the order and seize any such consumer goods that are found at those premises,
    - (c) to destroy or otherwise dispose of any such consumer goods that are so seized.
  - (4) The court may make an order authorising an investigator to destroy or otherwise dispose of any consumer goods to which this section applies that have been seized by an investigator under the authority of a search warrant issued under section 19A.
  - (5) Before making an application under this section, the Director-General must:
    - (a) take reasonable steps to discover who has an interest in the consumer goods, and
    - (b) if it is practicable to do so, notify each person whom the Director-General believes to have such an interest of the proposed application.
  - (6) The Director-General must, in the application, identify each person who the Director-General believes has an interest in the consumer goods concerned and whom it was not considered practicable to notify.
  - (7) A person who establishes to the satisfaction of the court that he or she has an interest in the consumer goods concerned is entitled to be heard in relation to the application.
  - (8) If goods are seized and disposed of by an investigator in accordance with an order under this section, the person from whom the goods were seized or, if that person was not entitled to possession of the goods, the owner of the goods is liable to pay the costs reasonably incurred by the investigator in seizing and disposing of the goods.
  - (9) An amount payable by a person under this section may be recovered as a debt due to the Crown in a court of competent jurisdiction.

**23C Disposal of property**

- (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:

- (a) the thing is not required to be retained as evidence in proceedings for an offence against this 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.
- (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.

### **Division 3 Embargo notices**

#### **23D Embargo notices**

- (1) An investigator who enters premises under a search warrant may give an embargo notice to the occupier of the premises if the investigator reasonably believes that:
  - (a) unsafe consumer goods or unsafe product related services are being supplied from the premises in trade or commerce, and
  - (b) it is not practicable to seize and remove:
    - (i) those unsafe consumer goods or equipment used in the manufacturing, processing or storage of those unsafe consumer goods, or
    - (ii) equipment used in connection with the supply of those unsafe product related services.
- (2) An embargo notice may do any one or more of the following:
  - (a) require that specified consumer goods must not be:
    - (i) supplied in or from the premises, or
    - (ii) transferred, moved, altered, destroyed or otherwise interfered with,during the period specified in the notice,
  - (b) require that specified equipment:
    - (i) used in the manufacturing, processing or storage of specified consumer goods, or

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- (ii) used in connection with the supply of specified product related services, must not be transferred, moved, altered, destroyed or otherwise interfered with during the period specified in the notice,
    - (c) require that specified product related services must not be supplied in or from the premises during the period specified in the notice.
  - (3) An embargo notice must:
    - (a) be in writing, and
    - (b) explain the effect of section 23G.
  - (4) The investigator may give an embargo notice to the occupier of the premises:
    - (a) by causing a copy of the notice to be served on the occupier, or
    - (b) if the occupier cannot be located after reasonable steps have been taken to do so, by causing a copy of the notice:
      - (i) to be served on a person on the premises who is reasonably believed to be in regular contact with the occupier, or
      - (ii) to be affixed to the premises, or to a thing on the premises, in a prominent position.
  - (5) Despite anything in any other law, a contract for a supply of consumer goods or product related services that is prohibited by an embargo notice is void.
  - (6) If consumer goods are supplied in contravention of an embargo notice:
    - (a) the supplier must immediately return or refund to the person who acquired the goods any consideration (or the value of any consideration) that that person gave:
      - (i) under an agreement for the supply, or
      - (ii) under a related contract or instrument, and
    - (b) if the goods have been removed from the premises in which they were subject to the embargo notice, the person who acquired the goods must:
      - (i) return the goods to the premises, or
      - (ii) notify the supplier of the place where the supplier may collect the goods, and

- (c) if paragraph (b) (ii) applies, the supplier must collect the goods from the place notified to the supplier and return them to the premises.

**23E Embargo period for embargo notices**

- (1) The embargo period specified in an embargo notice must not be longer than:
  - (a) in a case where the investigator giving the notice secures consumer goods or equipment under this Division—24 hours, or
  - (b) in any other case—28 days.
- (2) However, an investigator may, before the embargo period ends, apply to a Magistrate for an extension of the period.
- (3) If an investigator intends to make an application to extend the embargo period, the investigator must, before making the application, notify the occupier of the premises to which the embargo notice relates of that intention.
- (4) The occupier of the premises is entitled to be heard in relation to the application.
- (5) The Magistrate may extend the embargo period for a specified period if satisfied that the extension is necessary in all the circumstances.

**23F Multiple embargo notices for the same consumer goods or product related services**

An investigator must not give an embargo notice in relation to consumer goods, equipment or product related services of a particular kind if:

- (a) an embargo notice has already been given in relation to consumer goods, equipment or product related services of that kind, and
- (b) the embargo period for the embargo notice that has been given ended less than 5 days earlier.

**23G Powers of investigators to secure consumer goods**

- (1) This section applies if:
  - (a) an embargo notice has been issued in relation to consumer goods or equipment, and
  - (b) the investigator who gave the notice believes on reasonable grounds that it is necessary to secure the

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consumer goods or equipment in order to ensure that the notice is complied with.

- (2) The investigator may, during the embargo period for the embargo notice, do anything that the investigator thinks is necessary to secure those consumer goods or that equipment (whether by locking them up, placing a guard or otherwise).

**23H Consent to deal with embargoed consumer goods or equipment or supply product related services**

- (1) If an embargo notice relating to consumer goods or equipment has been given, the owner of the goods or equipment or another person who has an interest in the goods or equipment may, in writing, request consent to do any of the following:
- (a) to supply the goods,
  - (b) to transfer, move, alter, destroy or otherwise interfere with the goods or equipment.
- (2) If an embargo notice relating to product related services has been given, the following persons may, in writing, request consent to supply the services:
- (a) the person who would, but for the embargo notice, supply the services,
  - (b) another person whose interests would be affected if the services were not supplied.
- (3) Consent under this section may only be given by the Minister, the Director-General or an investigator and must be in writing.

**23I Compliance with embargo notices**

- (1) A person must not knowingly cause or permit anything to be done in contravention of an embargo notice.
- Maximum penalty:
- (a) in the case of a person other than a body corporate—40 penalty units, or
  - (b) in the case of a body corporate—200 penalty units.
- (2) Subsection (1) does not apply in relation to:
- (a) an act done in accordance with a consent given under section 23H, or
  - (b) if the embargo notice relates to consumer goods or equipment, an act done for the purpose of protecting or preserving the consumer goods or equipment.

**[21] Part 2, Division 4, heading**

Omit the heading. Insert instead:

**Part 2B Products Safety Committee and advisory bodies**

**Division 1 Products Safety Committee and advisory committees**

**[22] Section 24 Products Safety Committee**

Omit section 24 (1A). Insert instead:

- (1A) Without limiting subsection (1), the Products Safety Committee has the function of considering any questions referred to the Committee under section 42.

**[23] Part 2B, Divisions 2–5**

Renumber Divisions 5, 6, 7 and 9 of Part 2 as Divisions 2, 3, 4 and 5 of Part 2B and renumber sections 25M–25O as sections 25J–25L, respectively.

**[24] New Part 3**

Insert after section 25L (as renumbered by this Schedule):

**Part 3 The Australian Consumer Law**

**Division 1 Definitions**

**26 Definitions**

- (1) In this Part, unless the contrary intention appears:
- application law* means:
- (a) a law of a participating jurisdiction that applies the Australian Consumer Law, either with or without modifications, as a law of the participating jurisdiction, or
  - (b) any regulations or other legislative instrument made under a law described in paragraph (a), or
  - (c) the Australian Consumer Law, applying as a law of the participating jurisdiction, either with or without modifications.

*Australian Consumer Law* means (according to the context):

- (a) the Australian Consumer Law text, or

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- (b) the Australian Consumer Law text, applying as a law of a participating jurisdiction, either with or without modifications.

**Australian Consumer Law text** means the text described in section 27.

**instrument** means any document whatever, including the following:

- (a) an Act or an instrument made under an Act,
- (b) a law of this jurisdiction or an instrument made under such a law,
- (c) an award or other industrial determination or order, or an industrial agreement,
- (d) any other order (whether executive, judicial or otherwise),
- (e) a notice, certificate or licence,
- (f) an agreement,
- (g) an application made, information or complaint laid, affidavit sworn, or warrant issued, for any purpose,
- (h) an indictment, presentment, summons or writ,
- (i) any other pleading in, or process issued in connection with, a legal or other proceeding.

**Intergovernmental Agreement** means the Intergovernmental Agreement for the Australian Consumer Law made on 2 July 2009 between the Commonwealth, the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory and the Northern Territory of Australia, as in force for the time being.

**jurisdiction** means a State or the Commonwealth.

**law**, in relation to a Territory, means a law of, or in force in, that Territory.

**modifications** includes additions, omissions and substitutions.

**month** means a period commencing at the beginning of a day of one of the 12 months of the year and ending immediately before the beginning of the corresponding day of the next month or, if there is no such corresponding day, ending at the expiration of the next month.

**participating jurisdiction** means a jurisdiction that is a party to the Intergovernmental Agreement and applies the Australian Consumer Law as a law of the jurisdiction, either with or without modifications.

**proclamation** means a proclamation of the Governor published on the NSW legislation website.

**State** includes a Territory.

**Territory** means the Australian Capital Territory or the Northern Territory of Australia.

**this jurisdiction** means New South Wales.

- (2) Terms used in this Part and also in the *Australian Consumer Law (NSW)* have the same meanings in this Part as they have in that Law.
- (3) For the purposes of this Part:
  - (a) a jurisdiction is taken to have applied the Australian Consumer Law as a law of the jurisdiction if a law of the jurisdiction substantially corresponds to the provisions of the Australian Consumer Law text, as in force from time to time, and
  - (b) that corresponding law is taken to be the Australian Consumer Law, or the Australian Consumer Law text, applying as a law of that jurisdiction.

## **Division 2 Application of Australian Consumer Law**

### **27 The Australian Consumer Law text**

The Australian Consumer Law text consists of:

- (a) Schedule 2 to the *Competition and Consumer Act 2010* of the Commonwealth, and
- (b) the regulations under section 139G of that Act.

### **28 Application of Australian Consumer Law**

- (1) The Australian Consumer Law text, as in force from time to time:
  - (a) applies as a law of this jurisdiction, and
  - (b) as so applying may be referred to as the *Australian Consumer Law (NSW)*, and
  - (c) as so applying is a part of this Act.
- (2) This section has effect subject to sections 29, 30 and 31.

### **29 Future modifications of Australian Consumer Law text**

- (1) A modification made by a Commonwealth law to the Australian Consumer Law text after the commencement of this section does not apply under section 28 if the modification is declared by a proclamation to be excluded from the operation of that section.

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- (2) A proclamation under subsection (1) has effect only if published or notified no later than 2 months after the date of the modification.
  - (3) Subsection (1) ceases to apply to the modification if a further proclamation so provides.
  - (4) For the purposes of this section, the date of the modification is the date on which the Commonwealth Act effecting the modification receives the Royal Assent or the regulation effecting the modification is registered under the *Legislative Instruments Act 2003* of the Commonwealth.

**30 Meaning of generic terms in Australian Consumer Law for purposes of this jurisdiction**

- (1) In the *Australian Consumer Law (NSW)*:  
**regulator** means the Director-General.
- (2) For the purposes of the application of the *Australian Consumer Law (NSW)*, **court** means, unless otherwise expressly provided by this Act:
  - (a) the Local Court, or
  - (b) the District Court, or
  - (c) the Supreme Court.
- (3) In the following provisions of the *Australian Consumer Law (NSW)*, **court** means the Supreme Court:
  - (a) section 218,
  - (b) Division 2 of Part 5-2,
  - (c) Division 4 of Part 5-2,
  - (d) sections 246, 247, 248 and 250.
- (4) In Part 2-3 of the *Australian Consumer Law (NSW)*, **court** includes the Tribunal.
- (5) Subsections (2)–(4) are subject to any jurisdictional limits on the court concerned or the Tribunal imposed by any other Act.

**31 Interpretation of Australian Consumer Law**

- (1) The *Acts Interpretation Act 1901* of the Commonwealth applies as a law of this jurisdiction to the *Australian Consumer Law (NSW)*.

- (2) For the purposes of subsection (1), the Commonwealth Act mentioned in that subsection applies as if:
  - (a) the statutory provisions in the *Australian Consumer Law (NSW)* were a Commonwealth Act, and
  - (b) the regulations in the *Australian Consumer Law (NSW)* or instruments under that Law were regulations or instruments under a Commonwealth Act.
- (3) The *Interpretation Act 1987* of New South Wales does not apply to:
  - (a) the *Australian Consumer Law (NSW)*, or
  - (b) any instrument under that Law.

**32 Application of Australian Consumer Law**

- (1) The *Australian Consumer Law (NSW)* applies to and in relation to:
  - (a) persons carrying on business within this jurisdiction, or
  - (b) bodies corporate incorporated or registered under the law of this jurisdiction, or
  - (c) persons ordinarily resident in this jurisdiction, or
  - (d) persons otherwise connected with this jurisdiction.
- (2) Subject to subsection (1), the *Australian Consumer Law (NSW)* extends to conduct, and other acts, matters and things, occurring or existing outside or partly outside this jurisdiction (whether within or outside Australia).

**Division 3 References to Australian Consumer Law**

**33 References to Australian Consumer Law**

- (1) A reference in any instrument to the Australian Consumer Law is a reference to the Australian Consumer Law of any or all of the participating jurisdictions.
- (2) Subsection (1) has effect except so far as the contrary intention appears in the instrument or the context of the reference otherwise requires.

**34 References to Australian Consumer Law of other jurisdictions**

- (1) This section has effect for the purposes of an Act, a law of this jurisdiction or an instrument under an Act or such a law.
- (2) If a law of a participating jurisdiction other than this jurisdiction provides that the Australian Consumer Law text as in force for

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the time being applies as a law of that jurisdiction, the Australian Consumer Law of that jurisdiction is the Australian Consumer Law text, applying as a law of that jurisdiction.

#### **Division 4      Application of Australian Consumer Law to Crown**

##### **35      Division does not apply to Commonwealth**

In this Division, *participating jurisdiction* or *other jurisdiction* does not include the Commonwealth.

##### **36      Application law of this jurisdiction**

The application law of this jurisdiction binds (so far as the legislative power of Parliament permits) the Crown in right of this jurisdiction and of each other jurisdiction, so far as the Crown carries on a business, either directly or by an authority of the jurisdiction concerned.

##### **37      Application law of other jurisdictions**

- (1) The application law of each participating jurisdiction other than this jurisdiction binds the Crown in right of this jurisdiction, so far as the Crown carries on a business, either directly or by an authority of this jurisdiction.
- (2) If, because of this Part, a provision of the law of another participating jurisdiction binds the Crown in right of this jurisdiction, the Crown in that right is subject to that provision despite any prerogative right or privilege.

##### **38      Activities that are not business**

- (1) For the purposes of sections 36 and 37, the following do not amount to carrying on a business:
  - (a) imposing or collecting:
    - (i) taxes, or
    - (ii) levies, or
    - (iii) fees for authorisations,
  - (b) granting, refusing to grant, revoking, suspending or varying authorisations (whether or not they are subject to conditions),

- (c) a transaction involving:
    - (i) only persons who are all acting for the Crown in the same right (and none of whom is an authority of a State), or
    - (ii) only persons who are all acting for the same authority of a State, or
    - (iii) only the Crown in right of a State and one or more non-commercial authorities of that State, or
    - (iv) only non-commercial authorities of the same State,
  - (d) the acquisition of primary products by a government body under legislation, unless the acquisition occurs because:
    - (i) the body chooses to acquire the products, or
    - (ii) the body has not exercised a discretion that it has under the legislation that would allow it not to acquire the products.
- (2) Subsection (1) does not limit the things that do not amount to carrying on a business for the purposes of sections 36 and 37.
- (3) In this section:
- acquisition of primary products by a government body under legislation*** includes vesting of ownership of primary products in a government body by legislation.
- authorisation*** means a licence, permit, certificate or other authorisation that allows the holder of the authorisation to supply goods or services.
- government body*** means a State or an authority of a State.
- primary products*** means:
- (a) agricultural or horticultural produce, or
  - (b) crops, whether on or attached to the land or not, or
  - (c) animals (whether dead or alive), or
  - (d) the bodily produce (including natural increase) of animals.
- (4) For the purposes of this section, an authority of a State is ***non-commercial*** if:
- (a) it is constituted by only one person, and
  - (b) it is neither a trading corporation nor a financial corporation.

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**39 Crown not liable to pecuniary penalty or prosecution**

- (1) Nothing in the application law of this jurisdiction makes the Crown in any capacity liable to a pecuniary penalty or to be prosecuted for an offence.
- (2) Without limiting subsection (1), nothing in the application law of a participating jurisdiction makes the Crown in right of this jurisdiction liable to a pecuniary penalty or to be prosecuted for an offence.
- (3) The protection in subsection (1) or (2) does not apply to an authority of any jurisdiction.

**Division 5 Miscellaneous**

**40 Conferral of functions and powers on certain bodies**

- (1) The authorities and officers of the Commonwealth referred to in the *Australian Consumer Law (NSW)* have the functions and powers conferred or expressed to be conferred on them under the *Australian Consumer Law (NSW)*.
- (2) In addition to the powers mentioned in subsection (1), the authorities and officers referred to in that subsection have power to do all things necessary or convenient to be done in connection with the performance of the functions and exercise of the powers referred to in that subsection.

**41 No doubling-up of liabilities**

- (1) If:
  - (a) an act or omission is an offence against the *Australian Consumer Law (NSW)* and is also an offence against an application law of another participating jurisdiction, and
  - (b) the offender has been punished for the offence under the application law of the other jurisdiction,the offender is not liable to be punished for the offence against the *Australian Consumer Law (NSW)*.
- (2) If a person has been ordered to pay a pecuniary penalty under the application law of another participating jurisdiction, the person is not liable to a pecuniary penalty under the *Australian Consumer Law (NSW)* in respect of the same conduct.

**[25] Existing Part 3, heading**

Omit the heading. Insert instead:

**Part 4 NSW consumer safety and information requirements**

**Note.** The provisions of this Part supplement the provisions of Part 3-3 of the ACL. Part 3-3 of the ACL deals with the safety of consumer goods and product related services and includes provisions relating to safety standards, bans on the supply of certain consumer goods and product related services for safety reasons, recall of consumer goods, safety warning notices and reporting by suppliers of death, serious injury or illness associated with consumer goods or product related services.

**Division 1 Provisions relating to supply of unsafe goods and services**

**[26] Existing Part 3, Divisions 1 and 2**

Omit the Divisions, except sections 28 and 29, and renumber those sections as sections 42 and 43, respectively, under Division 1 of new Part 4 (as inserted by item [25]).

**[27] Section 42 (as renumbered by this Schedule)**

Omit section 42 (1). Insert instead:

- (1) The Minister, or the Director-General with the approval of the Minister, may refer to the Products Safety Committee for consideration any of the following questions:
  - (a) whether consumer goods of a particular kind supplied in trade or commerce, or a reasonably foreseeable use (or misuse) of any such goods, will or may cause injury to any person,
  - (b) whether, as a result of the supply of product related services of a particular kind in trade or commerce, any consumer goods, or a reasonably foreseeable use (or misuse) of any such goods, will or may cause injury to any person,
  - (c) whether a compulsory recall notice in relation to specified consumer goods should be issued,
  - (d) whether an interim or permanent ban on specified consumer goods or product related services should be imposed,
  - (e) whether a safety warning notice in relation to specified consumer goods or product related services should be published,

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- (f) whether any other action should be taken in relation to the supply of consumer goods or product related services.

**[28] Section 42 (2) (as renumbered by this Schedule)**

Insert “or services” after “goods”.

**[29] Section 42 (4) (as renumbered by this Schedule)**

Omit the subsection.

**[30] Section 42 (6) (as renumbered by this Schedule)**

Omit “making under section 30 of an interim order prohibiting or restricting supply of the goods”.

Insert instead “imposition of an interim ban in relation to the goods or services”.

**[31] Section 42 (as renumbered by this Schedule)**

Insert after section 42 (11):

- (12) For the avoidance of doubt, the Minister may issue an interim ban in relation to consumer goods or product related services:
- (a) even if the matter has not been referred to the Products Safety Committee for consideration, or
  - (b) even if the matter has been referred to the Products Safety Committee for consideration but it has not made its report, or
  - (c) on the recommendation of the Products Safety Committee, whether or not it has made a report.
- (13) The Minister may refer any report or recommendation of the Products Safety Committee made under this section to the Commonwealth Minister (within the meaning of the ACL) for information or if satisfied that the report or recommendation relates to a matter that could be dealt with more appropriately by the Commonwealth Minister.

**Note.** There are certain powers under the ACL that may only be exercised by the Commonwealth Minister, for example, the imposition of permanent bans and the making of safety standards.

**[32] Section 44**

Insert after section 43 (as renumbered by this Schedule):

**44 Method of notifying safety warning notices**

In addition to being published on the internet, a safety warning notice may be published in any other manner that the Minister considers appropriate.

**[33] Existing Part 3, Division 3**

Renumber the Division as Division 2 of new Part 4.

**[34] Existing sections 34–36D**

Omit the sections.

**[35] Existing sections 36E–37**

Renumber those sections as sections 45–47.

**[36] Section 45 (as renumbered by this Schedule)**

Omit “a recall order or are voluntarily recalled under section 36D”.

Insert instead “a recall notice”.

**[37] Section 46 (as renumbered by this Schedule)**

Omit “section 35 (1) (c)” wherever occurring.

Insert instead “section 123 (1) (c) of the ACL”.

**[38] Section 46 (3) (as renumbered by this Schedule)**

Omit “recall order” wherever occurring. Insert instead “recall notice”.

**[39] Existing Part 4 Consumer protection**

Omit the Part.

**[40] Part 5 Fair trading**

Omit the Part.

**[41] Part 5A Trading stamp schemes and similar schemes**

Omit the Part.

**[42] Part 5B Lay-by sales**

Omit the Part.

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[43] **Part 5C, heading**

Omit the heading. Insert instead:

**Division 3      Employment placement services**

[44] **Part 5C**

Renumber sections 60P–60R as sections 48–50, respectively, of Division 3 of new Part 4.

[45] **Part 5D Pyramid selling**

Omit the Part.

[46] **Part 5E, heading**

Omit the heading. Insert instead:

**Division 4      Industry code for motor vehicle insurers and  
                    repairers**

[47] **Part 5E**

Renumber sections 60V–60Y as sections 51–54, respectively, of Division 4 of new Part 4.

[48] **Section 51 (as renumbered by this Schedule)**

Omit “section 60X (1)” from the definition of *applicable industry code of conduct*.

Insert instead “section 53 (1)”.

[49] **Part 5F, heading**

Omit the heading. Insert instead:

**Division 5      Funeral goods and services**

[50] **Part 5F**

Renumber sections 60Z–60ZB as sections 55–57, respectively, of Division 5 of new Part 4.

[51] **Section 55 (as renumbered by this Schedule)**

Omit section 55 (4). Insert instead:

- (4) This section does not limit section 134 (Making information standards for goods and services) of the ACL.

**[52] Section 56 (as renumbered by this Schedule)**

Omit “section 60Z” from section 56 (1). Insert instead “section 55”.

**[53] New Part 4, Divisions 3, 4 and 5**

Omit “Part” wherever occurring except wherever occurring in section 54 (2), (3) and (4).

Insert instead “Division”.

**[54] Part 5G Unfair contract terms**

Omit the Part.

**[55] Parts 6 and 7**

Omit Part 6 (except sections 64A and 70). Insert instead:

## **Part 6 Enforcement and remedies**

### **Division 1 Interpretation and application**

#### **61 Interpretation**

- (1) In this Part:  
*local contravention* means a contravention of Part 4 or section 87 (1).
- (2) A reference in this Part to a person involved in a contravention of a provision of this Act is a reference to a person who:
  - (a) has aided, abetted, counselled or procured the contravention, or
  - (b) has induced, whether by threats or promises or otherwise, the contravention, or
  - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention, or
  - (d) has conspired with others to effect the contravention.
- (3) A reference in this Part to a contravention of Part 2-3 of the ACL (or a provision of that Part) is a reference to applying or relying on, or purporting to apply or rely on, a term of a consumer contract that the Supreme Court has declared under section 250 of the ACL to be an unfair term.

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## **Division 2      Enforcement provisions applying to ACL offences and local offences**

### **62      Enforcement provisions of ACL that extend to local offences**

- (1) The following provisions of the ACL apply to an offence against a provision of Part 4 or section 87 (1) of this Act in the same way as they apply to a contravention of, or an offence against, a provision of Chapter 4 of the ACL:
  - (a) section 207 (Reasonable mistake of fact),
  - (b) section 208 (Act or default of another person etc.),
  - (c) section 209 (Publication of advertisements in the ordinary course of business),
  - (d) section 216 (Granting of injunctions etc.).
- (2) The following provisions of the ACL apply to an offence against section 20 (3), 22, 23, Part 4 or section 87 (1) of this Act in the same way as they apply to a contravention of, or an offence against, a provision of Chapter 4 of the ACL:
  - (a) section 212 (Prosecutions to be commenced within 3 years),
  - (b) section 214 (Penalties for contraventions of the same nature etc.),
  - (c) section 215 (Penalties for previous contraventions of the same nature etc.).

### **63      Offences against this Act**

- (1) A person is guilty of an offence against this Act if the person:
  - (a) contravenes a provision of this Act, or
  - (b) attempts to contravene a provision of this Act, or
  - (c) aids, abets, counsels or procures another person to contravene a provision of this Act, or
  - (d) induces, or attempts to induce, another person, whether by threats or promises or otherwise, to contravene a provision of this Act, or
  - (e) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by another person of a provision of this Act, or
  - (f) conspires with others to contravene a provision of this Act.
- (2) Subsection (1) does not apply to a contravention of section 54 of this Act or Chapter 2 or 3 of the ACL.

**64 Penalties for contraventions**

- (1) A person who is convicted of a second or subsequent offence against Division 1, 2 or 5 of Part 4-1 of the ACL is, in addition to, or as an alternative to, any monetary penalty that may be imposed in relation to the offence, liable to imprisonment for a term not exceeding 3 years.
- (2) However, the maximum term of imprisonment that the Local Court may impose for any such second or subsequent offence is 2 years.

**65 Compensation orders by Local Court on conviction of person**

- (1) If a person is convicted by the Local Court of an offence against this Act or the regulations and the Court is satisfied that another person has sustained loss or damage as a result of the conduct of the convicted person, the Court may, in addition to any penalty it may impose in respect of the offence, order the convicted person to compensate the other person for the loss or damage.
- (2) The compensation that the Local Court may order to be paid under this section is not to exceed the jurisdictional limit of the Local Court when sitting in its General Division within the meaning of the *Local Court Act 2007*.
- (3) In this section:
  - (a) a reference to the conviction of a person includes a reference to the making of an order in respect of a person under section 10 of the *Crimes (Sentencing Procedure) Act 1999*, and
  - (b) a reference to loss or damage does not, if the loss or damage arises from a contravention of Part 2-1, 3-1 or 4-1 of the ACL, include a reference to:
    - (i) the death of a person, or
    - (ii) personal injury to a person (including any pre-natal injury, any impairment of the person's physical or mental condition and any disease).

**66 Other orders that may be made by court on conviction**

- (1) If a person is, by any conviction or order of the Local Court, required to pay a fine, penalty, sum of money or costs in respect of an offence against this Act, the Court may, on the application of the Minister or the Director-General, order that the amount unpaid be recoverable as a judgment debt due to the Crown.

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- (2) If an order is made under subsection (1):
    - (a) the order has effect according to its tenor, and
    - (b) the conviction or order ceases to be enforceable by imprisonment.
  - (3) If a person is convicted of an offence against this Act, the convicting court may order the offender to reimburse the Department for the cost of purchasing or testing any goods to which the conviction relates.

**67 Penalty notices**

- (1) An authorised officer may serve a penalty notice on a person if it appears to the officer that the person has committed an offence against this Act or the regulations, being an offence prescribed by the regulations as a penalty notice offence.
- (2) A penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person can pay, within the time and to the person specified in the notice, the amount of the penalty prescribed by the regulations for the offence if dealt with under this section.
- (3) A penalty notice under this section is declared to be a penalty notice for the purposes of the *Fines Act 1996*.
- (4) A penalty notice may be served personally or by post.
- (5) If the amount of penalty prescribed for an alleged offence is paid under this section, no person is liable to any further proceedings for the alleged offence.
- (6) For the avoidance of doubt, a reference to any further proceedings for the alleged offence in subsection (5) includes a reference to any further proceedings under section 224 of the ACL for a contravention of a provision of the ACL that has the same elements as the elements for the alleged offence.
- (7) Payment under this section is not to be regarded as an admission of liability for the purpose of, and does not in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence.
- (8) The regulations may:
  - (a) prescribe an offence for the purposes of this section by specifying the offence or by referring to the provision creating the offence, and
  - (b) prescribe the amount of penalty payable for the offence if dealt with under this section, and

- (c) prescribe different amounts of penalties for different offences or classes of offences.
- (9) The amount of a penalty prescribed under this section for an offence is not to exceed the maximum amount of penalty that could be imposed for the offence by a court.
- (10) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.
- (11) In this section:
  - authorised officer* means:
    - (a) the Director-General, or
    - (b) an investigator, or
    - (c) a person appointed in writing by the Director-General as an authorised officer for the purposes of this section.

**68 Proceedings for offences**

- (1) Proceedings for an offence against this Act may be taken and prosecuted only by the Director-General or, in the name of the Director-General, by a person acting with the authority of the Director-General.
- (2) Proceedings for an offence under this Act or the regulations may be dealt with:
  - (a) summarily before the Local Court, or
  - (b) summarily before the Supreme Court in its summary jurisdiction.
- (3) If proceedings are brought in the Local Court, the maximum monetary penalty that the Local Court may impose for the offence is 100 penalty units, despite any higher maximum monetary penalty provided in respect of the offence.
- (4) In proceedings for an offence against this Act, an authority to prosecute purporting to have been signed by the Director-General is evidence of that authority without proof of the signature of the Director-General.

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### **Division 3      Enforcement provisions applying to local offences only**

#### **69      Penalties for offences against this Act**

A person guilty of an offence against this Act (except the ACL) for which a penalty is not otherwise provided is liable:

- (a) in the case of a person other than a body corporate—to a penalty not exceeding 200 penalty units, or
- (b) in the case of a body corporate—to a penalty not exceeding 1,000 penalty units.

### **Division 4      Remedies applying to ACL matters and local matters**

#### **70      Remedy provisions of ACL that extend to local matters**

- (1) Section 218 (Regulator may accept undertakings) of the ACL applies to a matter in relation to which the Minister or the Director-General has a function under this Act in the same way as it applies to a matter in relation to which the regulator has a power or function under the ACL.
- (2) The following provisions of the ACL apply to a local contravention in the same way as they apply to a contravention of the ACL specified in those provisions:
  - (a) Division 2 (Injunctions) of Part 5-2,
  - (b) Division 3 (Damages) of Part 5-2,
  - (c) Subdivision A (Compensation orders etc. for injured persons) of Division 4 of Part 5-2,
  - (d) section 246 (other than subsection (2) (a) and (b)) (Non-punitive orders),
  - (e) section 247 (Adverse publicity orders),
  - (f) section 251 (Publication of advertisement in the ordinary course of business).

#### **71      Declarations by Supreme Court concerning unfair contract terms**

- (1) An application for a declaration under section 250 of the ACL may be made only by the Director-General or, with the leave of the Supreme Court, by a party to a consumer contract that is a standard form contract.

**Note.** Section 86 enables the Minister to intervene in proceedings brought before the Supreme Court under this Act.

- (2) A declaration made under section 250 of the ACL that a particular term of a consumer contract that is a standard form contract is unfair binds all parties to consumer contracts of that kind, unless the Supreme Court orders otherwise.
- (3) This section does not:
  - (a) limit any other power of the Supreme Court to make declarations, or
  - (b) prevent a party to a consumer contract that is a standard form contract from bringing proceedings in a court or tribunal of competent jurisdiction for relief in respect of a term of a consumer contract that is void because it is unfair.

**Note.** Section 23 of the ACL provides that an unfair term in a consumer contract that is a standard form contract is void, although the contract continues to bind the parties if it is capable of operating without the unfair term. If a contract claim in relation to a consumer contract containing such an unfair term is brought before a court or tribunal (such as the Consumer, Trader and Tenancy Tribunal) having jurisdiction to deal with the claim, the court or tribunal will be required to treat the term as being void.

- (4) In this section, *consumer contract*, *standard form contract* and *unfair* have the same meanings as they have in the ACL.

## 72 Show cause action may be taken by Director-General

- (1) In this section, *unlawful conduct* means any conduct that constitutes a contravention of a provision of this Act other than Part 2-3 of the ACL (or would constitute such a contravention if the conduct occurred in New South Wales), whether or not any proceedings have been brought in respect of the contravention.
- (2) If the Director-General is satisfied that a person has, in trade or commerce, engaged in any unlawful conduct on more than one occasion (whether in New South Wales or in any other place), the Director-General may, by notice in writing served on the person, call on the person to show cause why the person should not, for the reason specified in the notice, be prevented from carrying on a business of supplying goods or services.
- (3) The notice must specify the period (being at least 14 days after the notice is served) in which the person may show cause.
- (4) The person on whom a notice to show cause has been served under this section may, within the period specified in the notice, make a written submission in relation to the matters to which the notice relates.

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- (5) The Director-General:
    - (a) is to consider any such submission, and
    - (b) may conduct such inquiries, or make such investigations, in relation to the matters to which the notice relates as the Director-General thinks appropriate.
  - (6) This section does not limit the operation of section 79 of this Act or Division 2 of Part 5-2 of the ACL.

### **73 Trading prohibition orders**

- (1) The Director-General may, after serving a notice on a person under section 72 and taking into consideration any submissions made in relation to the matter, apply to the Supreme Court for an order under this section in respect of the person if the Director-General is of the opinion that the person is likely to engage again, or to continue to engage, in any unlawful conduct within the meaning of that section.
- (2) The Supreme Court may, on application by the Director-General under this section, make an order prohibiting the person who is the subject of the application (*the relevant person*) from carrying on a business of supplying goods or services (whether or not as part of, or incidental to, the carrying on of another business) for an indefinite period or for a period specified in the order.
- (3) In making any such order, the Supreme Court may, if the Court is satisfied that a person has sustained loss or damage as a result of the unlawful conduct of the relevant person, order the relevant person to compensate the other person for the loss or damage.
- (4) A reference in subsection (3) to loss or damage does not, if the loss or damage arises from a contravention of Part 2-1, 3-1 or 4-1 of the ACL, include a reference to:
  - (a) the death of a person, or
  - (b) personal injury to a person (including any pre-natal injury, any impairment of the person's physical or mental condition and any disease).
- (5) This section does not limit the operation of section 79 of this Act or Division 2 of Part 5-2 of the ACL.

### **74 Actions for damages and compensation orders**

- (1) Sections 236 (2) and 237 (3) of the ACL do not apply to a cause of action to which Division 6 of Part 2 of the *Limitation Act 1969* applies.

- (2) The powers conferred on the Supreme Court under section 237, 238 or 243 of the ACL in relation to a contract or arrangement do not affect any powers that another court may have in relation to the contract or arrangement in proceedings instituted in that other court in respect of the contract or arrangement.
- (3) The Tribunal may decide the matter of whether a person has suffered loss or damage because of the conduct of another person that constitutes a local contravention or a contravention of Chapter 2 or 3 of the ACL if that matter arises in connection with another matter the subject of proceedings in the Tribunal. In deciding the matter of loss or damage, the Tribunal may award such sum, and make such ancillary orders, as it thinks fit.
- (4) A reference to loss or damage in section 236, 237 or 238 of the ACL and in this section does not, if the loss or damage arises from a contravention of Part 2-1, 3-1 or 4-1 of the ACL, include a reference to:
  - (a) the death of a person, or
  - (b) personal injury to a person (including any pre-natal injury, any impairment of the person's physical or mental condition and any disease).

**75 Contributory acts or omissions to reduce compensation in defective goods actions**

- (1) If the loss or damage to which a defective goods action under section 138 or 139 of the ACL relates was caused by both:
  - (a) an act or omission of the individual who suffers the injuries referred to in that section or a person for whom that individual is responsible, and
  - (b) a safety defect of the goods to which the action relates, the amount of the loss or damage is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to that individual's share in the responsibility for the loss or damage.
- (2) If the loss or damage to which a defective goods action under section 140 or 141 of the ACL relates was caused by both:
  - (a) an act or omission of the person who suffered the loss or damage or another person for whom that person is responsible, and
  - (b) a safety defect of the goods to which the action relates, the amount of the loss or damage is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to that person's share in the responsibility for the loss or damage.

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**76 Compensation orders etc arising out of unfair contract terms**

In determining whether to make an order under section 237 (1) or 238 (1) of the ACL in relation to:

- (a) a contravention of a provision of Part 2-2 of the ACL, or
- (b) a term of a consumer contract that has been declared under section 250 of the ACL to be an unfair term,

the court may have regard to the conduct of the parties to the proceeding referred to in that subsection since the contravention occurred or the declaration was made.

**77 Remedy for supply of goods in contravention of certain provisions**

- (1) This section applies if:
  - (a) goods are supplied to a person in contravention of section 106 or 118 of the ACL, or
  - (b) goods are supplied to a person and the supply of the goods is an offence under section 194 or 197 of the ACL (whether or not there has been a conviction for the offence).
- (2) The person to whom the goods were supplied may recover from the supplier as a debt any money paid for the goods.
- (3) If judgment is given for the plaintiff in an action under subsection (2), the judgment debt may, if the court so directs, be satisfied by repair or modification of the goods in such a manner that:
  - (a) the contravention relied on by the plaintiff would not have occurred if the goods had been supplied as repaired or modified, or
  - (b) the repaired or modified goods are accepted by the plaintiff on or before a day specified in the direction.

**78 Court may make orders for the purpose of preserving money or other property held by a person**

- (1) The Supreme Court may, on the application of the Minister or the Director-General, make an order or orders referred to in subsection (3) if:
  - (a) proceedings of a kind referred to in subsection (2) have been taken against a person, or proceedings of a kind referred to in subsection (2) (e) or (f) may be taken against a person, and
  - (b) the Court is satisfied that it is necessary or desirable to make the order or orders for the purpose of preserving

money or other property held by, or on behalf of, the person if the person is liable, or may become liable, under this Act:

- (i) to pay money by way of a fine, damages, compensation, refund or otherwise, or
  - (ii) to transfer, sell or refund other property, and
- (c) the Court is satisfied that the making of such an order or orders will not unduly prejudice the rights and interests of any other person.
- (2) For the purposes of subsection (1) (a), the kinds of proceedings taken against the person are:
- (a) proceedings against the person for an offence against this Act, or
  - (b) an application under section 232 of the ACL for an injunction against the person in relation to:
    - (i) a local contravention or a contravention of a provision of Chapter 2, 3 or 4 of the ACL, or
    - (ii) a term of a consumer contract in relation to which a declaration under section 250 of the ACL has been made, or
  - (c) an application under section 79 for an injunction against a person in relation to a contravention referred to in that section, or
  - (d) an action under section 236 (1) of the ACL against the person in relation to a local contravention or a contravention of a provision of Chapter 2 or 3 of the ACL, or
  - (e) an application for an order under section 237 (1) or 239 (1) of the ACL against the person in relation to:
    - (i) a contravention of a provision of Chapter 2, 3 or 4 of the ACL, or
    - (ii) a term of a consumer contract in relation to which a declaration under section 250 of the ACL has been made, or
  - (f) an application for an order under section 237 (1) of the ACL in relation to a local contravention, or
  - (g) an application for an order under section 73 in relation to the person.

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- (3) The Supreme Court may make the following orders under subsection (1) in relation to money or other property held by, or on behalf of, a person (*the respondent*):
- (a) an order prohibiting, either absolutely or subject to conditions, a person who is indebted to the respondent, or to an associate of the respondent, from making a payment, in total or partial discharge of the debt:
    - (i) to the respondent, or
    - (ii) to another person at the direction or request of the respondent,
  - (b) an order prohibiting, either absolutely or subject to conditions, a person who is holding money or other property on behalf of the respondent, or on behalf of an associate of the respondent:
    - (i) from paying all or any of the money to the respondent, or to another person at the direction or request of the respondent, or
    - (ii) from transferring the other property to the respondent, or to another person at the direction or request of the respondent, or otherwise parting with possession of that property,
  - (c) an order prohibiting, either absolutely or subject to conditions, the taking or sending by any person of money of the respondent, or of an associate of the respondent, to a place outside the State or Territory in which the money is held,
  - (d) an order prohibiting, either absolutely or subject to conditions, the taking, sending or transfer by any person of other property of the respondent, or of an associate of the respondent, to a place outside the State or Territory in which that property is located,
  - (e) if the respondent is a natural person—an order appointing a receiver or trustee of the property, or of part of the property, of the respondent with such powers as are specified in the order.
- (4) If the Supreme Court makes such an order, the order operates:
- (a) for the period specified in the order (which must not be longer than 30 days if the application for the order was an *ex parte* application), or
  - (b) if proceedings in relation to which the order is made are concluded before the end of that period—until the conclusion of those proceedings.

- (5) A person who contravenes an order by the Supreme Court under this section that is applicable to the person is guilty of an offence punishable on conviction:
  - (a) in the case of a person other than a body corporate—by a fine not exceeding 200 penalty units, or
  - (b) in the case of a body corporate—by a fine not exceeding 1,000 penalty units.
- (6) This section does not affect any other powers of the Supreme Court.
- (7) A reference in this section to a person who is an associate of a respondent is a reference to:
  - (a) a person holding money or other property on behalf of the respondent, or
  - (b) if the respondent is a body corporate—a wholly owned subsidiary (within the meaning of the *Corporations Act 2001* of the Commonwealth) of the respondent.

## **Division 5 Remedies applying to local matters only**

### **79 Other injunctions**

- (1) The Supreme Court may grant an injunction in such terms as the Court determines to be appropriate if satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes, or would constitute:
  - (a) a contravention of:
    - (i) section 20 (3), 22 or 23 of this Act, or
    - (ii) a provision of the *Fitness Services (Pre-paid Fees) Act 2000*, or
    - (iii) a provision of any other legislation administered by the Minister or of an order made under any such legislation, or
  - (b) attempting to contravene such a provision, or
  - (c) aiding, abetting, counselling or procuring a person to contravene such a provision, or
  - (d) inducing, or attempting to induce, whether by threats or promises or otherwise, a person to contravene such a provision, or
  - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision, or

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- (f) conspiring with others to contravene such a provision.
  - (2) The Supreme Court may grant an injunction under this section only on the application of the Director-General made with the consent of the Minister.
  - (3) An injunction may be granted under this section as an interim injunction without an undertaking being required as to damages or costs or may be granted as a permanent injunction.

## **Part 7 NSW Consumer Law Fund**

### **79B NSW Consumer Law Fund**

- (1) There is to be established in the Special Deposits Account a NSW Consumer Law Fund (*the Fund*).
- (2) There is payable into the Fund:
  - (a) any pecuniary penalty ordered by a court under section 224 of the ACL to be paid to the State, and
  - (b) any amount ordered by a court under section 239 (1) of the ACL to be paid into the Fund, and
  - (c) the proceeds of the investment of money in the Fund, and
  - (d) any money directed to be paid into the Fund by or under this or any other Act.
- (3) There is payable out of the Fund:
  - (a) money to non-party consumers in accordance with an order under section 239 (1) of the ACL, and
  - (b) special purpose grants for improving consumer well-being, consumer protection or fair trading, and
  - (c) administrative expenses incurred in relation to the Fund, and
  - (d) money that is directed to be paid from the Fund by or under this or any other Act.
- (4) Subject to the regulations, money is to be paid out of the Fund in accordance with the directions of the Minister made on the recommendation of the Director-General.
- (5) Any amount ordered by a court under section 239 (1) of the ACL to be paid into the Fund must not be paid out of the Fund except in accordance with the terms of the order.

- (6) The Minister may, on the recommendation of the Director-General, invest money in the Fund in such manner as may be authorised by the *Public Authorities (Financial Arrangements) Act 1987*.

**[56] Existing section 64A**

Renumber the section as section 79A and insert at the end of Division 5 of Part 6 (as substituted by this Schedule).

**[57] Existing section 70**

Renumber the section as section 87A and insert after section 87.

**[58] Section 81**

Omit the section. Insert instead:

**81 Allegation of consumer**

Section 3 (10) of the ACL extends to proceedings under provisions of this Act apart from the ACL in the same way as it applies to proceedings under the ACL.

**[59] Section 84 Evidence as to certain matters**

Omit “section 64” from section 84 (a) (ii). Insert instead “section 67”.

**[60] Section 85A**

Insert after section 85:

**85A Findings in certain proceedings to be evidence**

- (1) In proceedings under section 236, 237 or 239 of the ACL or section 77 of this Act, or in an application under section 73 of this Act for an order against a person:
  - (a) a finding of fact by a court to which this section applies is evidence of that fact, and
  - (b) the finding may be proved by production of a document under the seal of the court from which the finding appears.
- (2) This section applies to a finding of fact by a court in proceedings under section 228, 232, 246, 247 or 248 of the ACL or section 79 of this Act, or for an offence against this Act (other than the ACL) or Chapter 4 of the ACL, in which the person has been found:
  - (a) to have contravened a provision of this Act (other than the ACL) or of Chapter 2, 3 or 4 of the ACL, or
  - (b) to have attempted to contravene such a provision, or

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- (c) to have aided, abetted, counselled or procured a person to contravene such a provision, or
  - (d) to have induced or attempted to induce a person, whether by threats or promises or otherwise, to contravene such a provision, or
  - (e) to have been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision, or
  - (f) to have conspired with others to contravene such a provision.

**[61] Section 86**

Omit the section. Insert instead:

**86 Intervention by Minister or Director-General**

- (1) This section applies to proceedings brought before a court or tribunal under this Act or any other legislation administered by the Minister.
- (2) The Minister may, at any stage of proceedings to which this section applies, intervene in the proceedings.
- (3) The Director-General may, at any stage of proceedings to which this section applies, intervene in the proceedings but only if the Director-General is of the opinion that it would be in the public interest to do so.
- (4) The Director-General must intervene in proceedings to which this section applies if directed to do so by the Minister.
- (5) If the Minister or Director-General intervenes in proceedings, he or she:
  - (a) becomes a party to the proceedings, and
  - (b) has all the rights, including rights of appeal, of a party to the proceedings.

**[62] Section 86A Public warning statements**

Omit “Part 5G” from section 86A (1) (c).

Insert instead “Part 2-3 of the ACL”.

**[63] Section 86B**

Insert after section 86A:

**86B Register of undertakings**

- (1) The Director-General is to maintain a register that includes the following in relation to each undertaking accepted under section 218 of the ACL:
  - (a) a copy of the undertaking,
  - (b) a copy of each variation of the undertaking,
  - (c) the name and address of the person who gave the undertaking,
  - (d) the date of the undertaking.
- (2) The register is to be amended to remove information relating to undertakings that have been withdrawn.
- (3) The register is to be kept in the head office of the Department and is to be available for inspection during ordinary business hours free of charge.
- (4) The register may also be made available in electronic form.

**[64] Section 87A (as renumbered by this Schedule)**

Omit "Part" wherever occurring. Insert instead "Act".

**[65] Section 88A**

Insert after section 88:

**88A Relationship with certain provisions of other Acts**

- (1) Section 64 (Guarantees not to be excluded etc. by contract) of the ACL is, with respect to a term of a contract for the supply of recreation services within the meaning of section 5N of the *Civil Liability Act 2002*, subject to that section of that Act.
- (2) Section 101 (Consumer may request an itemised bill) of the ACL does not apply to a bill within the meaning of Part 3.2 of the *Legal Profession Act 2004*.

**[66] Section 89 Saving of rights and remedies**

Omit section 89 (2). Insert instead:

- (2) Section 16 (Severability) of the ACL applies to a contravention of a provision of this Act (other than the ACL) in the same way as it applies to a contravention of the ACL and as so applying is

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to be read as if a reference in that section to this Schedule were a reference to this Act.

**[67] Section 90 Repeals**

Omit the section.

**[68] Section 92 Regulations**

Omit section 92 (1A). Insert instead:

(1A) Without limiting subsection (1), the regulations may make provision for or with respect to the following:

- (a) the calling and holding of meetings of an advisory council,
- (b) varying the times referred to in section 73 (1) of the ACL,
- (c) the payment of money out of the NSW Consumer Law Fund established under section 79B.

**Note.** Section 73 (1) of the ACL specifies the times at which a dealer must not call on a person to negotiate an unsolicited consumer agreement or for related purposes. Section 131C (2) of the *Competition and Consumer Act 2010* of the Commonwealth winds back the operation of section 73 of the ACL to the extent that it is inconsistent with a provision of a State law.

**[69] Section 93 Disposal of property**

Omit the section.

**[70] Schedule 2**

Omit the heading and source reference. Insert instead:

**Schedule 2      Acts prohibiting or regulating  
supply of goods or services**

(Section 42)

**[71] Schedule 3 Repeals**

Omit the Schedule.

**[72] Schedule 4 Provisions applicable to Products Safety Committee**

Omit clause 3 (1). Insert instead:

- (1) The Committee, after having obtained the approval of the Minister, may co-opt any person who, in its opinion, has expertise in relation to a question referred to it under section 42.

**[73] Schedule 4A Provisions relating to advisory councils**

Omit “, 25N” from the source reference.

**[74] Schedule 5 Savings and transitional provisions**

Insert before clause 1:

## **Part 1 Preliminary**

### **1A Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:  
this Act  
*Fair Trading (Lay-by) Amendment Act 1993*  
*Fair Trading Amendment Act 1995*  
*Fair Trading Legislation Amendment Act 1997*  
*Fair Trading Amendment (Employment Placement Services) Act 2002*  
*Fair Trading Amendment Act 2003*  
*Fair Trading Amendment Act 2004*  
*Fair Trading Amendment Act 2006* (but only to the extent that it amends this Act)  
*Fair Trading Amendment (Motor Vehicle Insurance and Repair Industries) Act 2006*  
*Fair Trading Amendment (Funeral Goods and Services) Act 2007*  
*Fair Trading Amendment (Unfair Contract Terms) Act 2010*  
*Fair Trading Amendment (Australian Consumer Law) Act 2010*
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

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- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.
- (4) For the avoidance of doubt, any provision of the regulations made for the purposes of this clause may, if the regulations so provide, have effect despite any specified provision of this Act (including a provision of this Schedule).

## **Part 2 Provisions consequent on enactment of this Act**

**[75] Schedule 5, Part 3**

Insert before clause 11A:

## **Part 3 Provisions consequent on enactment of certain other Acts**

**[76] Schedule 5, clause 11I (1)**

Insert “but before the day on which that Part is repealed by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*” after “*(the commencement day)*”.

**[77] Schedule 5, clause 11I (3) and (4)**

Insert “but before the day on which Part 5G is repealed by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*” after “the commencement day” wherever occurring.

**[78] Schedule 5, clause 11I (4)**

Insert “but before the day on which Part 5G is repealed by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*” after “on or after the variation day”.

**[79] Schedule 5**

Omit clause 12. Insert instead:

**Part 4 Provisions consequent on enactment of  
Fair Trading Amendment (Australian  
Consumer Law) Act 2010**

**12 Definitions**

In this Part:

*amending Act* means the *Fair Trading Amendment (Australian Consumer Law) Act 2010*.

*commencement of the ACL* means 1 January 2011.

**13 References to Trade Practices Act 1974 of the Commonwealth**

On and from the commencement of item 2 of Schedule 5 to the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* of the Commonwealth, a reference in any Act or instrument (other than this Schedule) to the *Trade Practices Act 1974* of the Commonwealth is to be read as a reference to the *Competition and Consumer Act 2010* of the Commonwealth.

**14 Products Safety Committee and advisory councils**

- (1) Any question that was referred to the Products Safety Committee under section 28 before its amendment by the amending Act, and in respect of which a report or recommendation had not been made by the Committee before that amendment, may continue to be dealt with by the Committee as if it were a question referred under that section as so amended.
- (2) A renumbering of any provision by the amending Act does not affect the establishment of any advisory council or the membership of any advisory council or any other matter relating to an advisory council.

**15 Product bans**

- (1) An interim order made under section 30 before its repeal and re-enactment by the amending Act, and still in force immediately before that repeal, is taken to be an interim ban made under section 109 of the ACL.
- (2) A reference in section 111 (1) (a) of the ACL to the start day is taken, in relation to an interim order referred to in subclause (1), to be a reference to the day on which the order was published in

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the Gazette or, if the order was not published in the Gazette, the day on which it was given to the supplier concerned.

- (3) Any order made under section 31, and in force immediately before the repeal of that section by the amending Act, is revoked on that repeal.

**16 Conduct and other matters occurring or arising before commencement of ACL**

- (1) Subject to the other provisions of this Part and the regulations, this Act, as in force before the commencement of the ACL, continues to apply to:
- (a) acts or omissions that occurred before that commencement, and
  - (b) direct commerce contracts (within the meaning of Division 3 of Part 4 before its repeal by the amending Act) entered into before that commencement, and
  - (c) other contracts entered into before that commencement, and
  - (d) a lay-by (within the meaning of section 60E before its repeal by the amending Act) entered into before that commencement.
- (2) Section 101 of the ACL does not apply in relation to services to the extent that they were supplied before the commencement of the ACL.
- (3) The reference in section 224 (2) (c) of the ACL to proceedings under Chapter 4 or Part 5-2 includes a reference to proceedings commenced before the commencement of the ACL:
- (a) under or in relation to Part VC or VI of the *Trade Practices Act 1974* of the Commonwealth, or
  - (b) under Part 6 of this Act.

**17 Unfair contract terms**

- (1) Part 2-3 of the ACL applies to a contract entered into on or after the commencement of the ACL.
- (2) Except as provided by subclauses (3)–(5), Part 2-3 of the ACL does not apply to a contract entered into before the commencement of the ACL.

- (3) If a contract is renewed on or after the commencement of the ACL, Part 2-3 of the ACL applies to the contract as renewed, on and from the day (*the renewal day*) on which the renewal takes effect, in relation to conduct that occurs on or after the renewal day.
- (4) If a term of the contract is varied on or after the commencement of the ACL and subclause (3) has not already applied in relation to the contract, Part 2-3 applies to the term as varied, on and from the day (*the variation day*) on which the variation takes effect, in relation to conduct that occurs on or after the variation day.
- (5) If subclause (4) applies to a term of a contract, sections 23 (2) and 27 of the ACL apply to the contract.

**18 Product information standards**

- (1) Despite the repeal of section 38 by the amending Act, the regulations made under that section, and in force immediately before that repeal, continue in force and may be amended and repealed as if that section also continued in force.
- (2) Despite the repeal of section 39 by the amending Act, that section as in force before its repeal is taken to continue in force in relation to a product information standard prescribed by regulations referred to in subclause (1).

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## **Schedule 2    Amendment of Fair Trading Regulation 2007**

- [1] **Part 2 Product safety standards**  
Omit the Part.
- [2] **Part 3 Product information standards**  
Omit Division 3.
- [3] **Clause 101 Information standard for employment placement services**  
Omit “section 60R” from clause 101 (1). Insert instead “section 50”.
- [4] **Clause 101A Information standard for funeral goods and services**  
Omit “section 60Z”. Insert instead “section 55”.
- [5] **Clause 102 Penalty notice offences**  
Omit “section 64”. Insert instead “section 67”.
- [6] **Part 6 Direct commerce provisions**  
Omit the Part.
- [7] **Clause 108 Declaration of industry code of conduct in relation to motor vehicle insurers and repairers**  
Omit “section 60X (1)”, “section 60X (2) (a)” and “section 60X (2) (b)”.  
Insert instead, respectively, “section 53 (1)”, “section 53 (2) (a)” and “section 53 (2) (b)”.
- [8] **Schedule 1**  
Omit the Schedule. Insert instead:

### **Schedule 1    Penalty notice offences**

(Clause 102)

| <b>Column 1</b>                             | <b>Column 2</b> |
|---|-----------------|
| <b>Offences under the ACL</b>               |                 |
| Section 165 of the ACL                      | \$550           |
| Section 194 (1), (2), (3) or (5) of the ACL | \$550           |

Fair Trading Amendment (Australian Consumer Law) Bill 2010

Schedule 2      Amendment of Fair Trading Regulation 2007

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| <b>Column 1</b>  | <b>Column 2</b> |
|--|-----------------|
| Section 197 (1), (2), (3) or (5) of the ACL                          | \$550           |
| Section 201 (1) of the ACL   | \$550           |
| Section 203 (1), (2) or (3) of the ACL                               | \$550           |
| <b>Offences under the Fair Trading Act 1987 (other than the ACL)</b> |                 |
| Section 45   | \$550           |
| Section 49 (1)   | \$550           |
| Section 50 (3)   | \$550           |
| Section 56 (1)   | \$550           |

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## **Schedule 3 Consequential amendment of other Acts and regulation**

### **3.1 Building Professionals Regulation 2007**

#### **Clause 9 Definitions**

Omit paragraph (b) of the definition of *statutory liability*. Insert instead:

- (b) any conduct of the person that would constitute a breach of any of the following provisions or any failure by the person to comply with a guarantee that applies because of any of the following provisions:
  - (i) section 18, 29 or 30 or Subdivision B of Division 1 of Part 3-2 of the Australian Consumer Law of the Commonwealth,
  - (ii) any provision of the legislation of this or any other State or Territory that corresponds to a section referred to in subparagraph (i).

### **3.2 Civil Liability Act 2002 No 22**

#### **Section 34 Application of Part**

Omit section 34 (1) (b). Insert instead:

- (b) a claim for economic loss or damage to property in an action for damages under the *Fair Trading Act 1987* for a contravention of section 42 of that Act (as in force before its repeal by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*) or under the *Australian Consumer Law (NSW)* for a contravention of section 18 of that Law.

### **3.3 Commercial Agents and Private Inquiry Agents Act 2004 No 70**

#### **Section 4 Definitions**

Insert “(as in force before its repeal by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*), or under section 50 of the *Australian Consumer Law (NSW)*,” after “*Fair Trading Act 1987*” in paragraph (a) of the definition of *minor offence* in section 4 (1).

### **3.4 Consumer Claims Act 1998 No 162**

#### **Section 13 Matters to be taken into account by Tribunal when making orders under this Part**

Omit section 13 (3) (a). Insert instead:

- (a) any code of practice prescribed under the *Fair Trading Act 1987*, and

### **3.5 Contracts Review Act 1980 No 16**

#### **Section 22 Operation of other laws**

Omit “Part 5G of the *Fair Trading Act 1987*” from the note to the section.

Insert instead “Part 2-3 of the *Australian Consumer Law (NSW)*”.

### **3.6 Fitness Services (Pre-paid Fees) Act 2000 No 95**

#### **[1] Section 10 Pre-payment of fees where agreed service not provided within 3 months of payment**

Insert “(as in force before its repeal by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*), or under section 158 of the *Australian Consumer Law (NSW)*,” after “*Fair Trading Act 1987*” in section 10 (4).

#### **[2] Section 13 Application of certain enforcement provisions in Fair Trading Act 1987**

Omit “Division 3 (Investigators) of Part 2” from section 13 (1).

Insert instead “Part 2A (Provisions relating to investigations)”.

#### **[3] Section 13 (2)**

Omit the subsection. Insert instead:

- (2) Section 218 (Regulator may accept undertakings) of the *Australian Consumer Law (NSW)* applies to a matter in relation to which the Director-General has a function under this Act in the same way as it applies to a matter in relation to which the regulator has a power or function under the *Australian Consumer Law (NSW)*.

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### **3.7 Holiday Parks (Long-term Casual Occupation) Act 2002 No 88**

#### **Section 46A**

Insert after section 46:

#### **46A False or misleading information**

A park owner must not, in purported compliance with any requirement of this Act, give to any occupant or prospective occupant any information that the park owner knows to be false or misleading in a material particular.

Maximum penalty: 20 penalty units.

### **3.8 Motor Dealers Act 1974 No 52**

#### **[1] Section 6 Performance of Director-General's functions**

Omit the section.

#### **[2] Section 47 Certain misdescriptions prohibited**

Insert "(as in force before its repeal by the *Fair Trading Amendment (Australian Consumer Law) Act 2010*), or Part 4-1 of the *Australian Consumer Law (NSW)*" after "*Fair Trading Act 1987*" in section 47 (4).