

Act No. 68

FAIR TRADING BILL 1987

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The Auctioneers and Agents (Finance) Amendment Bill 1987 is cognate with this Bill.

The object of this Bill is to repeal the Consumer Protection Act 1969, the Pyramid Sales Act 1974, the Unsolicited Goods and Services Act 1974 and the Referral Selling Act 1974, and to include the substance of those Acts, with amendments, in a modern statute. The Bill also includes (in Parts 5 and 6) certain provisions of the Trade Practices Act 1974 of the Commonwealth that are to be uniformly adopted by the States. Some other provisions are also based on provisions of that Commonwealth Act.

In this Explanatory Note and in headnotes in the Bill, the letters "TPA" indicate that the provision is based on the Commonwealth Act.

PART 1—PRELIMINARY

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act will, with minor exceptions, commence on a day to be appointed by the Governor-in-Council.

Clause 3 provides for the proposed Act to bind the Crown in so far as the Crown carries on a business but not to the extent of rendering the Crown liable to prosecution.

Clause 4 provides for the interpretation of the proposed Act.

Clause 5 specifies the circumstances in which a person is a consumer for the purposes of the Act.

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PART 2—DEPARTMENT OF CONSUMER AFFAIRS

DIVISION 1—*Commissioner for Consumer Affairs*

Clause 6 authorises the appointment under the Public Service Act 1979 of a Commissioner for Consumer Affairs.

Clause 7 authorises the appointment or employment under the Public Service Act 1979 of the officers and temporary employees necessary for the administration of the proposed Act and enables the Commissioner to make use of the staff or facilities of a public authority and to engage consultants.

Clause 8 enables the Commissioner to delegate the exercise of any of the functions of the Commissioner.

Clause 9—

- (a) confers functions on the Commissioner, including functions with respect to giving advice, enforcing legislation and receiving and investigating complaints, conducting research and disseminating information; and
- (b) requires the Commissioner to examine critically, and make reports to the Minister on, the laws affecting consumers.

Clause 10 exonerates the Commissioner and other persons engaged in the administration of the proposed Act from personal liability for acts done in good faith in the course of that administration.

Clause 11 requires the Commissioner to submit an annual report to the Minister for presentation to Parliament.

DIVISION 2—*Legal assistance*

Clause 12 enables a consumer to apply for legal assistance.

Clause 13 prescribes the basis upon which the Commissioner may, with the approval of the Minister, grant legal assistance to a consumer.

Clause 14 enables the Commissioner to assign the case of an assisted person—

- (a) with the consent of the Legal Aid Commission—to the Director of that Commission or a member of the staff of that Commission;
- (b) to a solicitor employed in the Department of Consumer Affairs;
- (c) with the consent of the Department Head of another Department—to a solicitor employed in that Department; or
- (d) to a solicitor practising on his or her own account.

Clause 15 prescribes the procedure to be followed by a solicitor to whom the case of an assisted person has been assigned.

Clause 16 deals with the payment of legal costs incurred or recoverable in the case of an assisted person.

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Clause 17 preserves as between an assisted person, the Commissioner and an assigned solicitor, the privileges arising from the relationship of solicitor and client.

DIVISION 3—*Investigators*

Clause 18 provides for the appointment and identification of investigators.

Clause 19 confers certain powers on an investigator with respect to entry on premises and land, inspection of articles and documents and the making of inquiries.

Clause 20 confers certain powers on an investigator with respect to obtaining information and evidence, and the production of documents.

Clause 21 confers certain powers on the Commissioner, a person authorised by the Commissioner or an investigator with respect to the making of copies of, or the taking of extracts from, a document produced as required by an investigator and sets out the conditions on which possession of such a document may be retained by the Commissioner or an investigator.

Clause 22 makes provision for the preservation of secrecy in relation to information obtained in the course of the administration of the proposed Act.

Clause 23 penalises the obstructing or assaulting of an officer in the performance of his or her duties.

DIVISION 4—*Products Safety Committee and advisory committees*

Clause 24 provides for the Minister to appoint a Products Safety Committee consisting of a Chairperson, an Executive Officer and such other persons as, in the opinion of the Minister, have expertise in product safety.

Clause 25 authorises the Minister to appoint committees to advise the Minister in relation to reports to be made to the Minister on critical examinations of laws affecting consumers and matters referred by the Minister.

PART 3—SAFE DESIGN AND CONSTRUCTION OF GOODS

DIVISION 1—*Safety standards*

Clause 26 authorises the making of regulations prescribing safety standards for goods.

Clause 27 prohibits the supply of goods to which a product safety standard referred to in clause 26 relates unless the goods comply with the standard.

DIVISION 2—*Prohibition or restriction on supply of dangerous goods*

Clause 28 enables the Minister, or the Commissioner with the approval of the Minister, to refer to the Products Safety Committee questions as to whether—

- (a) the supply of a specified class of goods should be prohibited because the goods are a source of danger or be allowed subject to conditions or restrictions; and

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(b) a specified kind of goods should be recalled by the supplier of the goods.

Clause 29 enables the Committee, when investigating a matter referred to it, to require the attendance of witnesses, to take evidence and to require the production of goods and documents.

Clause 30 enables the Minister, in the interests of public safety, to make an interim order prohibiting, absolutely or subject to conditions, the supply of goods in relation to which a question has been, or is proposed to be, referred to the Products Safety Committee or in relation to which a similar interim order is in force elsewhere in Australia.

Clause 31 authorises the Minister to make an order prohibiting, absolutely or conditionally, the supply of goods—

- (a) that are the subject of a report by the Products Safety Committee or by an authority of the State; or
- (b) that are the subject of a like order under another law of the State or a law in force elsewhere in Australia.

Clause 32 penalises a contravention of an order referred to in clause 30 or 31.

Clause 33 enables a person to recover money paid for goods supplied in contravention of product safety standards or an order referred to in clause 30 or 31.

DIVISION 3—*Product recall etc.*

Clause 34 enables the Minister to make an order requiring a supplier of defective or dangerous goods—

- (a) to recall the goods;
- (b) to disclose to the public the defect or danger attributable to the goods; or
- (c) to repair the goods (unless the goods are dangerous) or replace the goods or refund the purchase price,

and requires a supplier to notify the Commissioner of a voluntary recall of defective or dangerous goods.

Clause 35 provides a procedure whereby a supplier of goods is enabled to confer with the Products Safety Committee where the goods are the subject of a recall order or the Minister has under consideration a draft of any order referred to in clause 34.

Clause 36 provides for remedies against a supplier who fails to observe an undertaking to refund the price of defective goods, or to repair or replace defective goods.

Clause 37 relates to the liability of an insurer where goods are defective.

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PART 4—CONSUMER PROTECTION

DIVISION 1—*Product information*

Clause 38 authorises the making of regulations prescribing standards to be observed in order to give information relating to goods.

Clause 39 requires a supplier of goods, where a product information standard for the goods is in force, to provide information relating to the goods in compliance with the standard.

DIVISION 2—*Dual pricing*

Clause 40 prohibits a supplier from selling goods at a price greater than the lower, or lowest, of the prices appended to the goods.

PART 5—FAIR TRADING

Clause 41 provides for the interpretation of Part 5 (TPA s. 51A).

Clause 42 prohibits misleading or deceptive conduct in trade or commerce (TPA s. 52).

Clause 43 relates to the control of unconscionable conduct in trade or commerce (TPA s. 52A).

Clause 44 prohibits the making of certain specified false or misleading representations in relation to the supply of goods or services (TPA s. 53).

Clause 45 prohibits the making of certain specified representations in relation to the sale or grant of an interest in land (TPA s. 53A).

Clause 46 prohibits, in relation to an offer of employment, conduct liable to mislead persons seeking the employment (TPA s. 53B).

Clause 47 prohibits a person from stating a part of the price for a supply of goods or services unless the full cash price of the goods or services is also stated (TPA s. 53C).

Clause 48 prohibits a person from offering gifts, prizes or other free items in connection with the supply of goods or services with the intention of not providing them or of not providing them as offered (TPA s. 54).

Clause 49 prohibits a person from engaging, in trade or commerce, in certain other misleading conduct relating to goods (TPA s. 55).

Clause 50 prohibits a person from engaging, in trade or commerce, in certain other misleading conduct in relation to services (TPA s. 55A).

Clause 51 prohibits a person from engaging in the practice known as “bait advertising” whereby goods or services are advertised at a particular price but the person has grounds for believing that the goods or services will not be able to be supplied in reasonable quantities (TPA s. 56).

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Clause 52 prohibits a vendor of goods or services from engaging in the practice known as "referral selling" whereby a purchaser of the goods or services provides the vendor with the name of another person in return for a promise of a reward contingent upon the vendor making a subsequent sale to that other person (TPA s. 57).

Clause 53 prohibits a person from accepting payment for goods or services while intending not to supply the goods or services or intending to supply materially different goods or services (TPA s. 58).

Clause 54 prohibits a person from making a false or misleading representation concerning a business represented as being able to be carried on at or from a place of residence (TPA s. 59).

Clause 55 prohibits the use of physical force or undue harassment or coercion in connection with the supply of goods or services (TPA s. 60).

Clause 56 prohibits schemes such as pyramid selling schemes and chain letters (TPA s. 61).

Clause 57 prohibits the distribution of unsolicited credit and debit cards (TPA s. 63A).

Clause 58 prohibits a person from asserting a right to payment for unsolicited goods or services, or from making, without authority, an entry in a directory (TPA s. 64).

Clause 59 specifies the circumstances in which a recipient of unsolicited goods is exonerated from any liability to pay for the goods and any liability for loss of, or damage to, the goods (TPA s. 65).

Clause 60 provides in certain circumstances an exoneration from liability under certain provisions of Part 5 relating to the making of false or misleading representations by a person carrying on a business of providing information (TPA s. 65A).

PART 6—ENFORCEMENT AND REMEDIES

Clause 61 provides for the interpretation of Part 6 by including, as a person involved in a contravention of the proposed Act, a person who aids, abets, counsels, procures or induces the contravention, a person who is knowingly concerned in the contravention and a person who conspires to effect the contravention (TPA s. 75B).

Clause 62 (TPA s. 79)—

- (a) penalises a person who contravenes a provision of the proposed Act other than clauses 42 (Misleading or deceptive conduct) and 43 (Unconscionable conduct) and a person who, as referred to in clause 61, is involved in such a contravention;
- (b) makes provision for avoiding double jeopardy by reason of a law of the Commonwealth, or another State, or of a Territory;
- (c) in relation to contraventions of the proposed Act—limits to the amount of the maximum penalty for a single contravention the total amount of the fines that may be imposed for a number of contraventions that are substantially the same; and

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- (d) enables the Supreme Court, in proceedings in its summary jurisdiction for a contravention of Part 3, 4, 5 or 8, to restrain by injunction a further contravention of the Part.

Clause 63 provides that—

- (a) proceedings for an offence against the proposed Act may be taken and prosecuted only by the Commissioner or by a person acting with the authority of the Commissioner;
- (b) those proceedings may be taken before a Local Court or the Supreme Court in its summary jurisdiction;
- (c) the maximum penalty that may be imposed by a Local Court is \$5,000; and
- (d) a prosecution for an offence may be commenced within 3 years after the alleged commission of the offence.

Clause 64 provides for the introduction of a system of penalty (“on-the-spot”) notices in relation to certain offences against the proposed Act.

Clause 65 enables the Supreme Court to grant an injunction in appropriate terms where a person has engaged or been involved in, or proposes to engage or be involved in, conduct constituting a contravention of Part 3, 4, 5 or 8 (TPA s. 80).

Clause 66 enables the Supreme Court to grant an injunction in appropriate terms where a person has engaged or been involved in, or proposes to engage or be involved in, conduct constituting a contravention of any other legislation administered by the Minister or certain contraventions in relation to a code of practice.

Clause 67 (TPA s. 80A) provides that, where the Supreme Court is satisfied that a person has engaged in conduct in contravention of Part 3, 4, 5 or 8, the Court may make one, or both, of the following orders:

- (a) an order to disclose specified information to the public or to a specified person or persons;
- (b) an order to publish advertisements in specified terms.

Clause 68 provides for civil actions to recover damages for loss or damage suffered by a person by reason of the contravention by another person of Part 3 (Safe design and construction of goods), Part 4 (Consumer protection) or Part 5 (Fair trading) (TPA s. 82).

Clause 69 enables a finding of fact by a court in certain proceedings under the proposed Act to be admitted in evidence in certain other proceedings under the proposed Act (TPA s. 83).

Clause 70 provides for proof of the “state of mind” of a body corporate and others (TPA s. 84).

Clause 71 provides certain defences in prosecutions for a contravention of Part 3, 4, 5 or 8 (TPA s. 85).

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Clause 72 enables the Supreme Court to make certain orders for compensation for loss or damage, including orders avoiding or varying contracts, orders for the payment or refund of money or the return of property, orders for the repair of goods or the supply of services and orders for the execution of instruments relating to an interest in land (TPA s. 87).

Clause 73 enables the Supreme Court, in the course of other proceedings under the proposed Act, to make orders to prevent the transfer of money or property where a person involved in the proceedings is, or may become, liable to pay money by way of a fine, damages, compensation, refund or otherwise or to transfer, sell or return other property (TPA s. 87A).

PART 7—CODES OF PRACTICE

Clause 74 enables the Commissioner to submit for consideration by the Minister a code of practice relating to fair dealing between consumers and a particular class of suppliers.

Clause 75 authorises the prescription by regulation of a code of practice for a specified class of persons dealing with consumers.

Clause 76 enables the Commissioner to request a person to whom a prescribed code of practice is applicable to execute a deed containing undertakings by the person as to future adherence to the code and as to rectification of past breaches of the code.

Clause 77—

- (a) requires the Commissioner to keep a Register of Undertakings and to register all deeds executed as referred to in clause 76; and
- (b) permits inspection by any person of the Register of Undertakings.

Clause 78 enables the Commercial Tribunal to order a person—

- (a) where the person has failed to comply with a request by the Commissioner to give an undertaking—to act in a manner that would have been required, or to refrain from acting in a manner that would have been prohibited, by the undertaking if it had been given; or
- (b) where the supplier is in breach of an undertaking—to observe the undertaking.

Clause 79 enables the Commercial Tribunal to vary or discharge an order referred to in clause 78.

PART 8—GENERAL

DIVISION 1—*Evidence*

Clause 80 provides a rebuttable presumption of the identity of a person who causes to be published a statement intended to promote the supply or use of goods or services or the disposal of an interest in land.

Clause 81 provides a rebuttable presumption in proceedings under the proposed Act that a person alleged to be a consumer is a consumer.

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Clause 82 relates to the admission as evidence of a certificate by the Government Analyst or a like authority.

Clause 83 provides that a printed document that purports to be a standard, rule, code or specification of a particular body is evidence (which may be rebutted) that it is what it purports to be.

Clause 84 provides for the admission of evidence (which may be rebutted) of the identity of an investigator and of the legislation administered by the Minister and also provides a rebuttable presumption as to the opinion of the Commissioner in relation to matters arising under the proposed Act.

Clause 85 provides for the admission as evidence (which may be rebutted) of a certificate by the Minister or the Commissioner in relation to a permission or consent given by the Minister or the Commissioner.

DIVISION 2—Miscellaneous

Clause 86 enables the Minister to intervene in any legal proceedings under the proposed Act or any other legislation administered by the Minister.

Clause 87 prohibits publication without the consent of the Minister of a statement intended to promote the supply or use of goods or services, or the disposal of interests in land, if the statement refers to the Minister, the Department, the Commissioner or certain other persons.

Clause 88 prescribes the manner in which written notices and directions under the proposed Act may be served.

Clause 89 saves rights and remedies that a person would have had otherwise than by reason of the enactment of the proposed Act.

Clause 90 repeals the Consumer Protection Act 1969, the Pyramid Sales Act 1974, the Unsolicited Goods and Services Act 1974 and the Referral Selling Act 1974, and effects certain consequential repeals.

Clause 91 gives effect to Schedule 5 which contains savings and transitional provisions.

Clause 92 authorises the Governor to make regulations for the purposes of the proposed Act.

Clause 93 amends the Justices Act 1902 in relation to penalty notices referred to in clause 64.

SCHEDULE 1—PARAMOUNT LEGISLATION

This Schedule specifies the Acts that prevail over any inconsistent provisions of the proposed Act.

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SCHEDULE 2—ACTS PROHIBITING OR REGULATING THE SUPPLY OF GOODS

This Schedule specifies the Acts prohibiting or regulating the supply of goods that are accordingly excluded from the deliberations of the Products Safety Committee.

SCHEDULE 3—REPEALS

This Schedule specifies the enactments repealed by the proposed Act.

SCHEDULE 4—PROVISIONS APPLICABLE TO THE PRODUCTS SAFETY COMMITTEE

Clause 1 provides for the appointment and tenure of office of the members of the Committee.

Clause 2 enables the Minister to provide a temporary replacement for a member of the Committee.

Clause 3 enables a person to be co-opted as a member of the Committee.

Clause 4 provides for the remuneration of the members of the Committee.

Clause 5 enables the holder of another office to hold office also as a member of the Committee.

Clause 6 enables the Committee to determine its own procedure for the calling of meetings and the conduct of its business.

Clause 7 provides for decision by majority vote.

Clause 8 requires minutes to be kept of the proceedings at a meeting of the Committee.

SCHEDULE 5—SAVINGS AND TRANSITIONAL PROVISIONS

Clause 1 provides for the interpretation of the Schedule.

Clause 2 provides for the continuation in office for the purposes of the proposed Act of the Commissioner for Consumer Affairs holding office immediately before the proposed repeals.

Clause 3 continues in force delegations made under the Consumer Protection Act 1969.

Clause 4 continues in office as investigators the inspectors and investigating officers appointed under the Consumer Protection Act 1969.

Clause 5 continues in office the Chairperson and other members of the Products Safety Committee.

Clause 6 preserves for the enforcement by action for debt (instead of by committal to prison) of certain convictions or orders made before the repeals effected by the proposed Act.

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Clause 7 retains in force regulations and orders made under the Consumer Protection Act 1969 that could be made under the proposed Act.

Clause 8 preserves the statutory savings made by the Interpretation Act 1897 and the Interpretation Act 1987.

Clause 9 provides for a reference in another Act or instrument to a repealed Act to be read as a reference to the proposed Act.

Clause 10 preserves the effect of other things done or commenced under the Consumer Protection Act 1969 that could be done or commenced under the proposed Act.

Clause 11 provides for the laying before, and disallowance by Parliament, of certain orders under the proposed Act by reference to the present Interpretation Act 1897 pending commencement of the new Interpretation Act 1987.

Clause 12 authorises the making of regulations of a savings or transitional nature.
