

# Consumer Claims Act 1998 No 162

[1998-162]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**
  - [Legal Profession Act 2004 No 112](#) (not commenced)
  - [Civil Procedure Act 2005 No 28](#) (not commenced)

### Authorisation

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# Consumer Claims Act 1998 No 162



New South Wales

An Act to provide certain remedies to consumers concerning the supply of goods and services; to repeal the *Consumer Claims Tribunals Act 1987* and to amend certain Acts consequentially; and for other purposes.

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Consumer Claims Act 1998*.

### 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

### 3 Definitions (cf Act No 206 of 1987, sec 3)

(1) In this Act:

**banker** includes a building society, credit union and any other person who carries on the ordinary business of banking.

**business** includes:

- (a) a business not carried on for profit, and
- (b) a trade or profession.

**consumer** means:

- (a) a natural person, or
- (b) a firm, or
- (c) a small proprietary company, or
- (d) an owners corporation constituted under the *Strata Schemes Management Act 1996*, or
- (e) a company that owns an interest in land and has a memorandum or articles of association conferring on each owner of shares in the company a right to occupy

under a lease or licence a part or parts of a building erected on the land, or

- (f) an incorporated association, or
- (g) an unincorporated body whose members are associated for a common purpose, or
- (h) a company limited by guarantee (not being a company limited both by shares and by guarantee),

to whom or to which a supplier has supplied or agreed to supply goods or services, whether under a contract or not, or with whom or which a supplier has entered into a contract that is collateral to a contract for the supply of goods or services.

**consumer claim** means:

- (a) a claim by a consumer for the payment of a specified sum of money, or
- (b) a claim by a consumer for the supply of specified services, or
- (c) a claim by a consumer for relief from payment of a specified sum of money, or
- (d) a claim by a consumer for the delivery, return or replacement of specified goods or goods of a specified description, or
- (e) a claim by a consumer for a combination of two or more of the remedies referred to in paragraphs (a)-(d),

that arises from a supply of goods or services by a supplier to the consumer, whether under a contract or not, or that arises under a contract that is collateral to a contract for the supply of goods or services.

**Director-General** means the Director-General of the Department of Fair Trading holding office as such under Part 2 of the *Public Sector Management Act 1988*.

**firm** has the same meaning as it has in the *Partnership Act 1892*.

**goods** means any tangible thing that is or may be the subject of trade or commerce, but does not include money or an interest in land.

**services** includes any rights (including rights in relation to, and interests in, property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce and, without limiting the generality of the foregoing, includes:

- (a) the performance of work (including work of a professional nature), whether with or without the supply of goods,
- (b) the provision of gas or electricity or the provision of any other form of energy,
- (c) the provision, or the making available for use, of facilities for amusement,

entertainment, recreation or instruction,

- (d) the letting of premises for vacation or recreational purposes,
- (e) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction,
- (f) the provision of insurance cover (but not assurance cover in respect of a person's life),
- (g) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking,
- (h) the provision of credit,

but does not include rights or benefits being the supply of goods or the performance of work under a contract of employment.

**supplier** means a person who, in the course of carrying on, or purporting to carry on, a business, supplies goods or services.

**supply:**

- (a) in relation to goods, includes supply goods by way of a contract for the sale, exchange, lease, hire or hire-purchase of goods or an alleged contract for the sale, exchange, lease, hire or hire-purchase of goods, and
- (b) in relation to services, includes provide, grant or render services for valuable consideration under a contract or for valuable consideration claimed to have been agreed to under an alleged contract.

**trade or commerce** includes any business or professional activity.

**Tribunal** means the Consumer, Trader and Tenancy Tribunal established by the [Consumer, Trader and Tenancy Tribunal Act 2001](#).

(2) In this Act:

- (a) a reference to supply in relation to goods includes a reference to resupply, and
- (b) a reference to the supply of goods includes a reference to agreeing to supply goods, and
- (c) a reference to the supply of services includes a reference to agreeing to supply services, and
- (d) a reference to the supply of goods includes a reference to the supply of goods together with services, and

(e) a reference to the supply of services includes a reference to the supply of services together with goods.

(3) In this Act, a reference to a small proprietary company is a reference to such a company as defined in section 9 of the *Corporations Act 2001* of the Commonwealth.

(4) In this Act:

(a) a reference to a function includes a reference to a power, authority and duty, and

(b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

#### **4 Persons presumed to be consumers** (cf Act No 206 of 1987, sec 3 (5))

For the purposes of this Act, a person who claims to be a consumer is to be presumed to be one until the contrary is proved, and in any legal proceedings (including proceedings before the Tribunal), the onus of proving that a person who claims to be a consumer is not a consumer is on the party who seeks to establish that fact.

#### **5 Notes**

Notes included in the text of this Act do not form part of this Act.

### **Part 2 Consumer claims**

#### **6 Application for determination**

Any consumer may apply to the Tribunal, in accordance with the regulations, for determination of a consumer claim.

#### **7 Jurisdiction in respect of consumer claims** (cf Act No 206 of 1987, sec 10)

(1) The Tribunal has jurisdiction to hear and determine any consumer claim brought before it under this Part, whether or not the matter to which the claim relates arose before or after the commencement of this Part, except as otherwise provided by this section.

(2) The Tribunal does not have jurisdiction in respect of a consumer claim relating to goods or services that have been supplied to or for the claimant if the date on which the supply was made (or, if made in instalments, the date on which the supply was last made) was more than 3 years before the date on which the claim was lodged.

(3) The Tribunal does not have jurisdiction in respect of a consumer claim relating to goods or services that are required under a contract to be supplied to or for the claimant on or by a specified date or within a specified period but which have not been so supplied if the date on or by which the supply was required under the contract to be made was more than 3 years before the date on which the claim was lodged.

- (4) The Tribunal does not have jurisdiction in respect of a consumer claim relating to:
- (a) a contract for the supply of goods or services to which neither subsection (2) nor (3) applies, or
  - (b) a collateral contract,
- if the date on which the contract was entered into was more than 3 years before the date on which the claim was lodged.
- (5) A matter arising in relation to the fairness or reasonableness of the costs charged by a barrister or solicitor for an item of business transacted by the barrister or solicitor is not within the jurisdiction of the Tribunal.

**8 Tribunal orders** (cf Act No 206 of 1987, sec 30)

- (1) In determining a consumer claim wholly or partly in favour of a claimant, the Tribunal may, subject to this Part, make such one or more of the following orders as it considers appropriate:
- (a) an order that requires a respondent to pay to the claimant a specified amount of money,
  - (b) an order that requires a respondent to perform specified work in order to rectify a defect in goods or services to which the claim relates,
  - (c) an order that requires a respondent to supply to the claimant specified services other than work,
  - (d) in the case of a claim for relief from payment of money, an order declaring that a specified amount of money is not due or owing by the claimant to a respondent,
  - (e) an order that requires a respondent to deliver to the claimant goods of a specified description,
  - (f) an order that requires a respondent to return to the claimant specified goods which are in the possession or under the control of that respondent, whether the property in the goods has passed or not,
  - (g) an order that requires a respondent to replace goods to which the claim relates.
- (2) In determining a consumer claim wholly or partly in favour of a respondent to the claim, the Tribunal may make such one or more of the following orders as it considers appropriate:
- (a) an order dismissing the claim or a part of the claim,
  - (b) an order that requires the claimant to pay to the respondent a specified amount of money,



(c) an order that requires the claimant to return to the respondent specified goods which are in the possession or under the control of the claimant, whether the property in the goods has passed or not.

(3) In making an order under this section requiring a party to a consumer claim to pay a specified amount of money or to take any other specified action, the Tribunal must, unless it has good reason to the contrary, specify a period within which the money must be paid or the action must be taken.

**9 Conditional orders** (cf Act No 206 of 1987, sec 30 (6))

The Tribunal may impose such conditions on an order under this Part as it considers appropriate.

**10 Interim and ancillary orders** (cf Act No 206 of 1987, sec 30 (4) and (5))

(1) In the course of hearing a consumer claim, the Tribunal may make any interim order that appears to the Tribunal desirable to be made pending final determination of the claim.

(2) When making an order for the determination of a consumer claim, the Tribunal may make such ancillary orders as it considers necessary for the purpose of enabling the order to have full effect.

**11 Suspension of orders** (cf Act No 206 of 1987, sec 30 (7))

(1) If the Tribunal has made an order under this Part which has not yet ceased to have effect, the Tribunal may, on the application of the person against whom or in whose favour the order was made or of its own motion, make a further order suspending the operation of the first-mentioned order:

(a) for such reasons and for such period, or

(b) until the happening of such event or the fulfilment of such condition,

as the Tribunal specifies in the further order.

(2) Nothing in this section limits the operation of section 43 (2) of the [Interpretation Act 1987](#).

**12 Joint liability** (cf Act No 206 of 1987, sec 30 (8))

Section 97 of the [Supreme Court Act 1970](#) applies to and in respect of an order of the Tribunal under this Part as if such an order were a judgment of the Supreme Court.

**13 Matters to be taken into account by Tribunal when making orders under this Part** (cf Act No 206 of 1987, sec 31)

(1) When making an order or orders under this Part, the Tribunal must make such orders

as, in its opinion, will be fair and equitable to all the parties to the claim.

- (2) Without limiting subsection (1), when the Tribunal is considering whether or not to make an order or orders under this Part, the following factors are relevant, so far as they are material to the particular circumstances of the case:
- (a) whether or not there was any material inequality in bargaining power between the parties to the claim,
  - (b) whether or not:
    - (i) any party to the claim was not reasonably able to protect the party's interest, or
    - (ii) any person who represented any of the parties to the claim was not reasonably able to protect the interests of any party represented by that person, because of the age or physical or mental capacity of that party or person,
  - (c) the relative economic circumstances, educational background and literacy of:
    - (i) the parties to the claim, and
    - (ii) any person who represented any of those parties,
  - (d) whether or not and when independent legal or other expert advice was obtained by the claimant,
  - (e) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the claimant:
    - (i) by any other party to the claim, or
    - (ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the claim, or
    - (iii) by any person to the knowledge of any other party to the claim or of any person acting or appearing or purporting to act for or on behalf of any other party to the claim,
  - (f) the conduct of the parties to the claim in relation to similar transactions to which any of them has been a party,
  - (g) where the subject of the claim is a contract for the supply of goods or services or a contract collateral to such a contract:
    - (i) whether or not before or at the time when the contract was made its provisions were the subject of negotiation, and

- (ii) whether or not it was reasonably practicable for the claimant to negotiate for the alteration of or to reject any of the provisions of the contract, and
  - (iii) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the claim, and
  - (iv) if the contract is wholly or partly in writing, the physical form of the contract and the intelligibility of the language in which it is expressed, and
  - (v) the extent (if any) to which the provisions of the contract and their legal effect were accurately explained by any person to the claimant and whether or not the claimant understood the provisions and their effect, and
  - (vi) the commercial or other setting, purpose and effect of the contract.
- (3) Without limiting subsection (1), when the Tribunal is considering whether or not to make an order or orders under section 8, it is appropriate for the Tribunal to take into account, so far as material to the particular circumstances of the case:
- (a) any code of practice for fair dealing prescribed under Part 7 of the *Fair Trading Act 1987*, and
  - (b) where the Director-General has brought to the attention of the Tribunal any other code of practice, whether or not prescribed by or under any other Act—that code of practice.

**14 Limitation on Tribunal's jurisdiction to make orders** (cf Act No 206 of 1987, sec 32)

- (1) The Tribunal has no jurisdiction to make in respect of a particular consumer claim an order or orders in favour of the claimant or, where there are two or more claimants, in favour of those claimants if the total of:
- (a) the amount or amounts (if any) of money to be paid, and
  - (b) the value or values (if any) of the work to be performed, or the services to be supplied, and
  - (c) the amount or amounts (if any) of money to be declared not to be due or owing, and
  - (d) the value or values of goods (if any) to be delivered or replaced,
- under or by virtue of the order or orders would exceed the amount prescribed by the regulations in respect of claims of that class or description.
- (2) The Tribunal has no jurisdiction to make in respect of a particular consumer claim an order or orders in favour of the respondent to the claim or, where there are two or more respondents to the claim, in favour of those respondents if the amount or the

total of the amounts (if any) to be paid under or by virtue of the order or orders would exceed the amount prescribed by the regulations in respect of claims of that class or description.

(3) Subsections (1) and (2) do not apply in relation to a consumer claim arising from the supply of a new motor vehicle that is used substantially for private purposes within the meaning of the *Motor Vehicles Taxation Act 1988*.

(4) For the purposes of subsection (3):

**new motor vehicle** means a motor vehicle that is not a second-hand motor vehicle within the meaning of the *Motor Dealers Act 1974*.

### Part 3 Miscellaneous

#### 15 Certain matters to be reported to Chairperson of Tribunal or to Minister (cf Act No 206 of 1987, sec 41)

(1) Members of the Tribunal may submit a written report to the Chairperson of the Tribunal concerning:

- (a) any matter that arises out of the hearing or determination of a consumer claim by the Tribunal (constituted by those members) that they consider to be of importance as regards the relationship of consumer and supplier, or
- (b) any matter that, in their opinion, is relevant to the administration of this Act and should be brought to the attention of the Chairperson of the Tribunal.

(2) The Chairperson of the Tribunal may submit a written report to the Minister concerning:

- (a) any matter that arises out of the hearing or determination of a consumer claim by the Tribunal (constituted by the Chairperson) that the Chairperson considers to be of importance as regards the relationship of consumer and supplier, or
- (b) any matter that, in the opinion of the Chairperson, is relevant to the administration of this Act and should be brought to the attention of the Minister, or
- (c) any matter reported to the Chairperson by a member or members of the Tribunal in accordance with subsection (1) and which the Chairperson considers should be brought to the attention of the Minister.

(3) If, in the course of, or as a result of, the hearing of a consumer claim by the Tribunal, it appears to the Tribunal that a supplier has, in the course of the supplier's dealings with the claimant, engaged in conduct that should be brought to the attention of the Director-General, the Tribunal may make a report in writing on that conduct and transmit it to the Director-General.

- (4) If a report transmitted to the Director-General under subsection (3) relates to a supplier who appears to the Director-General to be:
- (a) as a supplier of goods or services, required by law to be the holder of a licence, certificate of registration, practising certificate, permit or other authority, or
  - (b) a member of a trade organisation comprised of persons or mostly of persons who supply goods or services of the kind supplied by the supplier,
- the Director-General may transmit a copy of the report, or any information contained in the report, to the authority responsible for the administration of the law or that trade organisation.
- (5) The Director-General has qualified privilege in proceedings for defamation arising out of a communication made under this section.

**16 Power of Director-General to establish and maintain list of unsatisfactory suppliers** (cf Act No 206 of 1987, sec 42)

- (1) Subject to this section, the Director-General may establish and maintain for the purposes of this Act a list to be known as the unsatisfactory suppliers list.
- (2) The Director-General may enter in the unsatisfactory suppliers list the name and other prescribed particulars (if any) of:
- (a) any supplier who has been the subject of an adverse report made under section 15,
  - (b) any supplier who has failed to comply with the requirements of an order of the Tribunal within the period specified in the order, or
  - (c) any supplier against whom more than the prescribed number of orders has been made under this Act during the period prescribed for the purposes of this paragraph.
- (3) The Director-General must not enter the name and other particulars of a supplier in the unsatisfactory suppliers list unless the supplier has first been given an opportunity to show cause as to why the name and particulars of the supplier should not be entered in the list and, having been given such an opportunity, has not shown cause within such period (being not less than 7 days after the opportunity was given) as the Director-General may allow.
- (4) The Director-General must remove the name and other prescribed particulars of a supplier from the unsatisfactory suppliers list at the end of the prescribed period, on the happening of a prescribed event or on fulfilment of prescribed conditions.
- (5) The Director-General may from time to time publish in such manner as the Director-General thinks fit a copy of the unsatisfactory suppliers list or of any particulars

currently entered in the list.

- (6) The Director-General has qualified privilege in proceedings for defamation arising out of a publication made in accordance with subsection (5).

## **17 Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

## **18 Repeal of [Consumer Claims Tribunals Act 1987 No 206](#)**

The [Consumer Claims Tribunals Act 1987](#) is repealed.

## **19 Savings and transitional provisions**

Schedule 1 has effect.

## **20 (Repealed)**

## **21 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the commencement of section 6.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

## **Schedule 1 Savings and transitional provisions**

(Section 19)

### **Part 1 Regulations**

#### **1 Regulations may contain savings and transitional provisions**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act.
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to this Act 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 in the Gazette, 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

- (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.

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

### **2 Definitions**

- (1) In this Part, **former Act** means the *Consumer Claims Tribunals Act 1987*.
- (2) A reference in this Part to a consumer claims tribunal includes a reference to such a tribunal under the name "building disputes tribunal".

### **3-6 (Repealed)**

### **7 References to consumer claims tribunals**

A reference in another Act, in an instrument made under an Act or in any other document to a consumer claims tribunal is to be read as a reference to the Fair Trading Tribunal.

### **8 Unsatisfactory suppliers list**

- (1) A list compiled under section 42 of the former Act is taken (as it stood immediately before the repeal of that section) to form part of any list compiled for the purposes of section 16 of this Act.
- (2) A reference in section 16 (2) (a) to a report made under section 15 includes a reference to a report made under section 41 of the former Act.
- (3) A reference in section 16 (2) (b) or (c) to orders made under this Act includes a reference to orders made by a consumer claims tribunal under the former Act.

### **Schedule 2 (Repealed)**