

Fair Trading Legislation (Repeal and Amendment) Act 2015 No 12

[2015-12]



New South Wales

Status Information

Currency of version

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Provisions in force

Some, but not all, of the provisions displayed in this version of the legislation have commenced.

Notes—

- **Note**

Amending Acts and amending provisions are subject to automatic repeal pursuant to sec 30C of the [Interpretation Act 1987 No 15](#) once the amendments have taken effect.

Authorisation

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Fair Trading Legislation (Repeal and Amendment) Act 2015 No 12



New South Wales

An Act to amend the *Fair Trading Act 1987* in relation to consumer claims; to provide for the repeal of the *Consumer Claims Act 1998*, the *Fitness Services (Pre-paid Fees) Act 2000*, the *HomeFund Commissioner Act 1993* and the *Landlord and Tenant Act 1899*; and for other purposes.

1 Name of Act

This Act is the *Fair Trading Legislation (Repeal and Amendment) Act 2015*.

2 Commencement

- (1) This Act commences on the date of assent to this Act, except as provided by this section.
- (2) Section 3 (a) and (b) and Schedules 1 [6]-[8], [10]-[12] and [18], 2, 3.2 and 3.5 commence on a day or days to be appointed by proclamation.
- (3) Schedule 1 [1], [3] and [4] commence on 1 July 2015 or assent, whichever is the later.

3 Repeals

The following Acts are repealed:

- (a) the *Consumer Claims Act 1998 No 162*,
- (b) the *Fitness Services (Pre-paid Fees) Act 2000 No 95*,
- (c) (Repealed)

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

[1] Whole Act (except Schedule 5)

Omit "Director-General" and "Director-General's" wherever occurring.

Insert instead "Secretary" and "Secretary's", respectively.

[2] (Repealed)

[3] Section 4 (1)

Omit the definitions of **Department**, **Director-General** and **officer**.

Insert in alphabetical order:

Department means the Department of Finance, Services and Innovation.

employee means:

- (a) the Secretary or any other Public Service employee employed in the Department, or
- (b) any person engaged by the Secretary (with the approval of the Minister and on such terms as the Minister thinks fit) to assist in the exercise of the Secretary's functions.

Secretary means:

- (a) the Commissioner for Fair Trading, Department of Finance, Services and Innovation, or
- (b) if there is no person employed as Commissioner for Fair Trading—the Secretary of the Department of Finance, Services and Innovation.

[4] Sections 4 (1) (definition of “investigator”), 10 (1) (a), 18 (1), 20 (6), 21 (2), 23, 24 (2) (a) and (b) and (3), 25 (2) (b) and (4) (b) and 47 and clause 1 (5) and (6) of Schedule 4

Omit “officer”, “officer’s” and “officers” wherever occurring.

Insert instead “employee”, “employee’s” and “employees”, respectively.

[5] (Repealed)

[6] Section 4 (1), definition of “services”

Omit “rights or benefits being the supply of goods or the performance of work under a contract of service”.

Insert instead “the supply of goods or the performance of work under a contract of employment”.

[7] Section 4 (1), definition of “supply”

Insert “(except in Part 6A)” after “includes”.

[8] Section 8 Delegation by Secretary

Omit section 8 (1) (b1).

[9] (Repealed)

[10] Section 79 Other injunctions

Omit section 79 (1) (a) (ii).

[11] Part 6A

Insert after Part 6:

Part 6A Jurisdiction of Tribunal in relation to consumer claims

Note—

For the purposes of comparison, provisions of this Part contain bracketed notes in headings drawing attention (“cf”) to equivalent or comparable (though not necessarily identical) provisions of the [Consumer Claims Act 1998](#) (the **CC Act 1998**) or the [Consumer Claims Regulation 2014](#) (the **CC Reg 2014**), as in force before the enactment of this Part.

Division 1 Preliminary

79B Objects of this Part (cf CC Act 1998, s 2A)

The objects of this Part are to provide for remedies for, and the straightforward resolution of, disputes concerning the supply of goods and services to consumers.

79C Conferral of jurisdiction under this or any other Act not affected

This Part does not affect any provision of this or any other Act that confers jurisdiction on the Tribunal.

79D Definitions (cf CC Act 1998, s 3 (1) and s 3 (3) (transferred to definition of “consumer”))

In this Part:

consumer means any of the following persons or bodies to whom or to which a supplier has supplied, or agreed to supply, goods or services (whether or not under a contract), or with whom or with which a supplier has entered into a contract that is collateral to a contract for the supply of goods or services:

- (a) a natural person,
- (b) a firm (within the meaning of the [Partnership Act 1892](#)),
- (c) a small proprietary company (within the meaning of the [Corporations Act 2001](#) of the Commonwealth),

- (d) an owners corporation constituted under the *Strata Schemes Management Act 1996*,
- (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,
- (f) an incorporated association,
- (g) an unincorporated body whose members are associated for a common purpose,
- (h) a company limited by guarantee (other than a company limited both by shares and by guarantee).

consumer claim—see section 79E.

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—see section 79F.

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

supply—see section 79G.

79E Meaning of “consumer claim” (cf CC Act 1998, s 3A)

- (1) For the purposes of this Part, a **consumer claim** means a claim by a consumer, for one or more of the following remedies, that arises from a supply of goods or services by a supplier to the consumer (whether or not under a contract) or that arises under a contract that is collateral to a contract for the supply of goods or services:
 - (a) the payment of a specified sum of money,
 - (b) the supply of specified services,
 - (c) relief from payment of a specified sum of money,
 - (d) the delivery, return or replacement of specified goods or goods of a specified description.
- (2) For the avoidance of doubt, a reference in this Part to a consumer claim includes a reference to a claim by a consumer against a supplier (for example, a manufacturer or wholesaler) who is not the direct supplier of goods or services to the consumer if the claim arises from or in connection with the supply of those goods or services by the direct supplier to the consumer.

79F Meaning of “services” (cf CC Act 1998, s 3 (1), definition of “services”)

- (1) For the purposes of this Part, a reference to services is a reference to any of the following:
 - (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,
 - (g) the rights or benefits provided, granted or conferred under 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,
 - (i) any other 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.
- (2) However, a reference in this Part to services does not include a reference to any of the following:
 - (a) the supply of goods or the performance of work under a contract of employment,
 - (b) rights or benefits provided, granted or conferred under a service contract (within the meaning of the [Retirement Villages Act 1999](#)),
 - (c) the provision of assurance cover in respect of a person’s life.

79G Meaning of “supply” (cf CC Act 1998, s 3 (1) (definition of “supply”) and s 3 (2))

- (1) For the purposes of this Part, a reference to the supply of goods includes a reference to any of the following:
 - (a) supplying goods by way of sale, exchange, lease, hire or hire-purchase,

- (b) resupplying goods,
- (c) agreeing to supply goods,
- (d) supplying goods together with services.

(2) For the purposes of this Part, a reference to the supply of services includes a reference to any of the following:

- (a) providing, granting or rendering services for valuable consideration,
- (b) agreeing to supply services,
- (c) supplying services together with goods.

79H Persons presumed to be consumers (cf CC Act 1998, s 4)

For the purposes of this Part:

- (a) a person or body claiming to be a consumer is to be presumed to be a consumer until the contrary is proved, and
- (b) in any legal proceedings (including proceedings before the Tribunal), the onus of proving that a person or body claiming to be a consumer is not a consumer is on the party who seeks to establish that fact.

Division 2 Application to and jurisdiction of Tribunal

79I Consumer may apply to Tribunal (cf CC Act 1998, s 6)

Any consumer may apply to the Tribunal for determination of a consumer claim.

79J General statement of jurisdiction (cf CC Act 1998, s 7 (1))

The Tribunal has jurisdiction, except as otherwise provided by this Division, to hear and determine a consumer claim the subject of an application under this Division.

79K Supply or agreement made, or supply intended to be made, in New South Wales (cf CC Act 1998, s 7 (2) and (3))

- (1) The Tribunal has jurisdiction to hear and determine a consumer claim only if:
- (a) the goods or services to which the claim relates were supplied in New South Wales, or
 - (b) a contract or other agreement to which the claim relates contemplated that the goods or services would be supplied in New South Wales (whether or not they were so supplied), or
 - (c) a contract or other agreement to which the claim relates was made in New

South Wales (whether or not the goods or services were supplied in New South Wales).

- (2) The Tribunal has such jurisdiction whether or not:
- (a) a contract or other agreement to which the claim relates confers jurisdiction on any other court or tribunal (whether in New South Wales or elsewhere), or
 - (b) the rules of private international law require a law other than the law of New South Wales to be applied to the hearing or determination of the claim.

79L Limitation periods (cf CC Act 1998, s 7 (4) and (4A))

- (1) The Tribunal does not have jurisdiction to hear and determine a consumer claim if any of the following apply:
- (a) the cause of action giving rise to the claim first accrued more than 3 years before the date on which the claim is lodged,
 - (b) the goods or services to which the claim relates were supplied (or, if made in instalments, were last supplied) to the claimant more than 10 years before the date on which the claim is lodged.
- (2) Nothing in this section affects any period of limitation under the [Limitation Act 1969](#).

79M Claim relating to solicitor's or barrister's costs (cf CC Act 1998, s 7 (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 if the costs can be the subject of a costs assessment under Part 3.2 of the [Legal Profession Act 2004](#).

Division 3 Orders of Tribunal

79N Orders in favour of claimant (cf CC Act 1998, s 8 (1))

In determining a consumer claim wholly or partly in favour of a claimant, the Tribunal may, subject to this Division, make any one or more of the following orders that 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,
- (h) an order that requires a respondent to refund all or part of the purchase price of specified goods that are in the possession (or under the control) of the claimant and the claimant to return all or part of those goods to the respondent (whether the property in the goods has passed or not).

790 Orders in favour of respondent (cf CC Act 1998, s 8 (2))

In determining a consumer claim wholly or partly in favour of a respondent to the claim, the Tribunal may make any one or more of the following orders that 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.

79P Orders where more than one respondent (cf CC Act 1998, s 8 (2A))

Without limiting section 79N or 79O, in determining a consumer claim in which there is more than one respondent, the Tribunal may make any one or more of the following orders that it considers appropriate:

- (a) an order that requires a respondent to pay to another respondent a specified amount of money,
- (b) an order that requires a respondent to supply to another respondent specified services other than work,
- (c) an order that requires a respondent to deliver to another respondent goods of a specified description,

- (d) an order that requires a respondent (***the first respondent***) to return to another respondent specified goods that are in the possession or under the control of the first respondent, whether the property in the goods has passed or not.

79Q Other matters relating to orders under section 79N, 79O or 79P (cf CC Act 1998, s 8 (3)–(5))

- (1) In making an order under section 79N, 79O or 79P 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.
- (2) The Tribunal may not make any of the orders referred to in this section unless the claimant's case has been presented to the Tribunal (whether or not in person) following the making of the relevant application under section 79I.
- (3) Nothing in subsection (2) prevents the Tribunal from dismissing or adjourning proceedings under section 55 of the *Civil and Administrative Tribunal Act 2013*.

79R Interim and ancillary orders (cf CC Act 1998, s 10)

- (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.

79S Monetary limit on Tribunal's jurisdiction to make orders (cf CC Act 1998, s 14 and CC Reg 2014, cl 4)

- (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 relevant total under or because of the order or orders would exceed the prescribed amount.
- (2) For the purposes of subsection (1), the ***relevant total*** is 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.
- (3) The Tribunal has no jurisdiction to make in respect of a particular consumer claim an order or orders referred to in section 79O if the amount or the total of the amounts (if any) to be paid under or because of the order or orders would exceed the prescribed amount.
- (4) The Tribunal has no jurisdiction to make in respect of a particular consumer claim an order or orders under section 79P if the relevant total under or because of the order or orders would exceed the prescribed amount.
- (5) For the purposes of subsection (4), the **relevant total** is 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 services to be supplied, and
 - (c) the value or values of goods (if any) to be delivered.
- (6) Subsections (1), (3) and (4) do not apply in relation to a consumer claim:
- (a) 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](#), or
 - (b) relating to commission fees charged by agents licensed under the [Property, Stock and Business Agents Act 2002](#).
- (7) In this section:
- new motor vehicle** means a motor vehicle that is not a second-hand motor vehicle within the meaning of the [Motor Dealers and Repairers Act 2013](#).
- prescribed amount** means \$40,000 or such other amount as is prescribed for the purposes of this section.

79T Suspension of orders (cf CC Act 1998, s 11)

- (1) If the Tribunal has made an order under this Division that 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) suspend the operation of the order by making a suspension order.
- (2) The Tribunal may make a suspension order for such reasons and for such period, or until the happening of such event or the fulfilment of such conditions, as the Tribunal specifies in the suspension order.
- (3) Nothing in this section limits the operation of section 43 (2) of the [Interpretation Act 1987](#).

79U Matters to be considered by Tribunal when making orders (cf CC Act 1998, s 13)

- (1) When making any orders under this Division, the Tribunal must be satisfied that the orders will be fair and equitable to all the parties to the claim.
- (2) Without limiting subsection (1), when determining whether or not to make an order under this Division, the Tribunal is to take the following factors into consideration if 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 any party to the claim was not reasonably able to protect the party's interest because of the age or physical or mental capacity of that party,
 - (c) whether or not any person who represented any of the parties to the claim was not reasonably able to protect the interests of the party represented because of the age or physical or mental capacity of that person,
 - (d) the relative economic circumstances, educational background and literacy of the parties to the claim and of any person who represented any of those parties,
 - (e) whether or not and when independent legal or other expert advice was obtained by the claimant,
 - (f) whether any undue influence, unfair pressure or unfair tactic was 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 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 on behalf of any other party to the claim,
 - (g) the conduct of the parties to the claim in relation to similar transactions to which any of them has been a party,
 - (h) 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 the contract or to reject any of its provisions, and
 - (iii) whether or not any provisions of the contract impose conditions that 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 determining whether or not to make an order or orders under section 79N, 79O or 79P, it is appropriate for the Tribunal to consider (if relevant to the particular circumstances of the case):
- (a) any code of practice prescribed under this Act, and
 - (b) if the Secretary 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.

79V Joint liability (cf CC Act 1998, s 12)

Section 95 of the *Civil Procedure Act 2005* applies to and in respect of an order of the Tribunal under this Division as if such an order were a judgment of the Supreme Court.

Division 4 Miscellaneous

79W Certain matters to be reported to President of Tribunal or to Minister (cf CC Act 1998, s 15)

- (1) Members of the Tribunal may give a written report to the President 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 Part

and should be brought to the attention of the President of the Tribunal.

- (2) The President of the Tribunal may give 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 President) that the President considers to be of importance as regards the relationship of consumer and supplier, or
 - (b) any matter that, in the opinion of the President, is relevant to the administration of this Part and should be brought to the attention of the Minister, or
 - (c) any matter reported to the President by any member of the Tribunal in accordance with subsection (1) and that the President 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 Secretary, the Tribunal may give a written report to the Secretary concerning that conduct.
- (4) The Secretary may give a copy of any report relating to a supplier that is given to the Secretary under this section (or any information contained in the report) to:
 - (a) any authority responsible for the administration of a law that appears to the Secretary to require the supplier (as a supplier of goods or services) to be the holder of a licence, certificate of registration, practising certificate, permit or other authority, or
 - (b) any trade organisation comprising persons (or mostly persons) who supply goods or services of the kind supplied by the supplier, but only if it appears to the Secretary that the supplier is a member of that organisation.
- (5) The Secretary has qualified privilege in proceedings for defamation arising out of a communication made under this section.

79X Power of Secretary to establish and maintain list of unsatisfactory suppliers (cf CC Act 1998, s 16)

- (1) The Secretary may establish and maintain for the purposes of this Part a list to be known as the ***unsatisfactory suppliers list***.
- (2) The Secretary may enter in the unsatisfactory suppliers list the name and any

other prescribed particulars of:

- (a) any supplier who has been the subject of an adverse report made under this Division, or
 - (b) any supplier who has failed to comply with the requirements of an order made under this Part 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 Part during the period prescribed for the purposes of this paragraph.
- (3) The Secretary 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 (not less than 7 days after the opportunity was given) as the Secretary may allow.
- (4) The Secretary must remove the name and other prescribed particulars of a supplier from the unsatisfactory suppliers list at the end of the period prescribed for the purposes of this subsection, on the happening of a prescribed event or on fulfilment of prescribed conditions.
- (5) The Secretary may publish in such manner as the Secretary thinks fit a copy of the unsatisfactory suppliers list or of any particulars currently entered in the list.
- (6) The Secretary has qualified privilege in proceedings for defamation arising out of a publication made in accordance with subsection (5).

[12] Section 79B NSW Consumer Law Fund

Renumber the section as section 79Y.

[13]-[17] (Repealed)

[18] Schedule 5 Savings and transitional provisions

Insert at the end of clause 1A (1):

Fair Trading Legislation (Repeal and Amendment) Act 2015

any other Act that amends this Act

[19] (Repealed)

Schedule 2 Amendment of Acts consequent on repeal of [Consumer](#)

Claims Act 1998

2.1 Civil and Administrative Tribunal Act 2013 No 2

Schedule 4 Consumer and Commercial Division

Omit “*Consumer Claims Act 1998*” from clause 3 (1).

2.2 Conveyancers Licensing Act 2003 No 3

Section 51 Powers of Tribunal

Omit “The provisions of sections 9–13 of the *Consumer Claims Act 1998*” from section 51 (2).

Insert instead “Sections 79R and 79T–79V of the *Fair Trading Act 1987*”.

2.3 Home Building Act 1989 No 147

[1] Section 48A Definitions

Insert in alphabetical order in section 48A (1):

goods, services and **supply** have the same meanings as in Part 6A of the *Fair Trading Act 1987*.

[2] Section 48A (3) and (4)

Omit the subsections.

[3] Section 480 Powers of Tribunal

Omit “The provisions of sections 9–13 of the *Consumer Claims Act 1998*” from section 480 (3).

Insert instead “Sections 79R and 79T–79V of the *Fair Trading Act 1987*”.

2.4 Property, Stock and Business Agents Act 2002 No 66

[1] Section 36 Review of commission and fees

Omit “*Consumer Claims Act 1998*” from section 36 (4).

Insert instead “Part 6A of the *Fair Trading Act 1987*”.

[2] Section 36 (5)

Omit “the *Consumer Claims Act 1998* to that person, a reference in that Act”.

Insert instead “Part 6A of the *Fair Trading Act 1987* to that person, a reference in that

Part”.

[3] Section 36 (7)

Omit “the *Consumer Claims Act 1998*”.

Insert instead “Part 6A of the *Fair Trading Act 1987*”.

2.5 Sydney Water Act 1994 No 88

[1] Section 58 Consumer claims

Omit “the *Consumer Claims Act 1998*”.

Insert instead “Part 6A of the *Fair Trading Act 1987*”.

[2] Section 58

Omit “that Act”. Insert instead “that Part”.

Schedule 3 Amendment of other Acts

3.1

(Repealed)

3.2 Fines Act 1996 No 99

Schedule 1 Statutory provisions under which penalty notices issued

Omit the matter relating to the *Fitness Services (Pre-paid Fees) Act 2000*.

3.3, 3.4

(Repealed)

3.5 Law Enforcement (Powers and Responsibilities) Act 2002 No 103

Schedule 2 Search warrants under other Acts

Omit the matter relating to the *Fitness Services (Pre-paid Fees) Act 2000*.

3.6

(Repealed)