

Fair Trading Legislation Amendment (Consumer Guarantee Directions) Act 2018 No 43

[2018-43]



New South Wales

Status Information

Currency of version

Historical version for 21 August 2018 to 11 October 2018 (accessed 5 December 2024 at 6:28)

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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**

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File last modified 11 October 2018

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Fair Trading Legislation Amendment (Consumer Guarantee Directions) Act 2018 No 43



New South Wales

An Act to amend the *Fair Trading Act 1987* with respect to the resolution by way of direction of certain small consumer claims disputes; to amend certain legislation with respect to compliance and enforcement matters; and for other purposes.

1 Name of Act

This Act is the *Fair Trading Legislation Amendment (Consumer Guarantee Directions) Act 2018*.

2 Commencement

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

Schedule 1 Amendment of *Fair Trading Act 1987 No 68* relating to consumer guarantee directions

[1] Schedule 3

Insert after Schedule 2:

Schedule 3 Consumer guarantee directions

1 Interpretation and application of Schedule

(1) In this Schedule:

application for re-determination means an application under clause 10.

consumer guarantee direction means a direction made under clause 3.

dispute means a dispute between a consumer and supplier relating to a matter that is the subject of a complaint received under section 9 (1) (c) of this Act.

GST has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth.

- (2) This Schedule applies to a consumer good:
- (a) that is of a kind prescribed by the regulations, and
 - (b) that has been sold by a supplier to a consumer ordinarily resident in New South Wales, and
 - (c) to which a guarantee under sections 54–57 of the ACL applies, and
 - (d) that is the subject of an unresolved dispute concerning the application of such a guarantee to the sale of the good.
- (3) Until the regulations otherwise prescribe, a consumer good is taken to be of a kind prescribed for the purposes of subclause (2) (a) if the sale price of the good is \$25 or more but not more than \$3,000 (exclusive of GST), and the good is not:
- (a) a motor vehicle or a component part of a motor vehicle, or
 - (b) a second-hand good, or
 - (c) a solar battery, or
 - (d) material to which a statutory warranty under Part 2C of the *Home Building Act 1989* applies, or
 - (e) the subject of pending proceedings in the Tribunal or a court.

2 Applications for consumer guarantee directions

- (1) A consumer may, in the manner and form determined by the Secretary, apply to the Secretary for a consumer guarantee direction.
- (2) A consumer may not make an application under this clause if the consumer's complaint under section 9 (1) (c) of this Act regarding the relevant sale of the consumer good was made more than 6 months after the date of that sale (or such longer period as may be prescribed by the regulations). However, the Secretary may allow the application to be made if satisfied that it is justified because of special circumstances.
- (3) An application for a consumer guarantee direction may not be made in relation to the same subject-matter as has been determined in proceedings in the Tribunal under Part 6A of this Act.
- (4) A consumer may, in the manner and form determined by the Secretary, withdraw an application for a consumer guarantee direction made under this clause at any time before it is determined.

3 Making and content of consumer guarantee directions

- (1) The Secretary may resolve a dispute to which an application under clause 2 relates by making a consumer guarantee direction.
- (2) The Secretary may, by notice in writing given to a supplier, direct the supplier:
 - (a) to repair a good, or
 - (b) to replace a good, or
 - (c) to refund to the consumer concerned:
 - (i) any money paid by the consumer for a good, and
 - (ii) an amount that is equal to the value of any other consideration provided by the consumer for a good.
- (3) A consumer guarantee direction must specify the period within which the direction must be complied with. However, the consumer guarantee direction must not specify:
 - (a) a period of less than 28 days, and
 - (b) a period of more than 90 days without the agreement of the consumer and supplier concerned.
- (4) A consumer guarantee direction to repair or replace a consumer good must also direct that, if the good is not repaired or replaced within the specified time, the supplier is to immediately refund to the consumer:
 - (a) any money paid by the consumer for the good, and
 - (b) an amount that is equal to the value of any other consideration provided by the consumer for the good.
- (5) A consumer guarantee direction must specify the total amount that is to be refunded to the consumer under subclause (2) (c) or (4), as relevant.

4 Secretary may decline to accept application or make direction

- (1) The Secretary may decline to accept an application for a consumer guarantee direction:
 - (a) if the Secretary is of the opinion that:
 - (i) the application is frivolous, vexatious, misconceived or without substance, or
 - (ii) the supplier concerned is bankrupt, in liquidation or under external

administration, or

(iii) because of the complexity of the subject-matter of the application, the matter should be dealt with by the Tribunal, or

(iv) it would not be in the public interest to deal with the application under this Schedule, or

(b) for any other reason prescribed by the regulations.

(2) The Secretary may refuse to make a consumer guarantee direction:

(a) if the Secretary is of the opinion that:

(i) because of the complexity of the subject-matter of the application, the matter should be dealt with by the Tribunal, or

(ii) it would not be in the public interest to make the direction under this Schedule, or

(iii) it is fair and reasonable in the circumstances to do so, or

(b) for any other reason prescribed by the regulations.

5 Notice of consumer guarantee direction to be given to consumer

The Secretary is to give a copy of a consumer guarantee direction to the consumer concerned at the same time as the direction is given to the supplier.

6 Procedure for making consumer guarantee direction

(1) The Secretary may determine to make a consumer guarantee direction if the Secretary is satisfied that:

(a) there has been a failure to comply with a guarantee under section 54, 55, 56 or 57 of the ACL, and

(b) it is fair and reasonable in all the circumstances to do so.

(2) The Secretary, in determining whether or not to make a consumer guarantee direction, is not bound by the rules of evidence, and may be informed in any manner that the Secretary thinks fit.

(3) Before making a consumer guarantee direction, the Secretary:

(a) must give the consumer and the supplier an opportunity to make a written submission or give written evidence concerning the application, and

(b) may give the consumer and the supplier the following:

(i) an opportunity to make an oral submission or give oral evidence

concerning the application,

(ii) a right of reply to the other party's submission and evidence (including the consumer's initial application),

(iii) an opportunity to comment on the content of a proposed direction.

(4) The rules of procedural fairness are not breached if the Secretary complies with subclause (3) and the procedures for making consumer guarantee directions set out in the regulations (if any).

7 Regulations relating to consumer guarantee directions

The regulations may make provision for or with respect to the following:

(a) the procedures to be used by the Secretary in making consumer guarantee directions,

(b) the written and oral submissions and evidence that the consumer and supplier may provide to the Secretary before the making of a consumer guarantee direction,

(c) the provision of reasons for making or refusing to make a decision in relation to a consumer guarantee direction,

(d) the making and withdrawal of applications for consumer guarantee directions.

8 Amendment of consumer guarantee directions

(1) The Secretary may, on the Secretary's own initiative, amend a consumer guarantee direction to correct a minor error in, or omission from, the direction.

(2) The procedure that applies under this Schedule to the making of a consumer guarantee direction does not apply to an amendment under this clause.

9 Recovery of refund

If a supplier fails to comply with a consumer guarantee direction, the amount directed to be refunded to the consumer may be registered as a judgment debt in a court of competent jurisdiction and is enforceable accordingly.

10 Application to Tribunal for re-determination of making of consumer guarantee directions

(1) The following persons may apply to the Tribunal for a re-determination of the making of a consumer guarantee direction:

(a) the consumer who applied for the consumer guarantee direction,

- (b) the supplier who is the subject of the consumer guarantee direction.
- (2) An application under this clause may not be made more than 28 days (or such other period as may be prescribed by the regulations) after the date on which notice of the direction was given to the supplier.
- (3) An application operates as a stay on the direction until the Tribunal determines the application or the application is withdrawn.

11 Tribunal to re-determine consumer guarantee matter as a consumer claim

- (1) The Tribunal is to deal with an application for re-determination as follows:
 - (a) the application for re-determination is to be dealt with by the Tribunal as if it were an application by the consumer concerned for the determination of a consumer claim under Part 6A of this Act relating to the sale of the consumer good concerned,
 - (b) the parties to the proceedings are the consumer and the supplier concerned and not the Secretary,
 - (c) subject to the regulations, the provisions of Part 6A of this Act apply, with any necessary modifications, to the determination of the application,
 - (d) the Tribunal may:
 - (i) make an order dismissing the application for re-determination, or
 - (ii) make such orders as it considers appropriate, including any order that the Tribunal may make under Division 3 of Part 6A of this Act.
- (2) If the Tribunal determines the application by making an order of the kind referred to in subclause (1) (d) (ii), the consumer guarantee direction concerned is terminated and ceases to have effect.
- (3) An application for re-determination is to be dealt with as a new hearing and evidence or information may be given in addition to, or in substitution for, the evidence or information given in relation to the making of the consumer guarantee direction concerned.
- (4) The Tribunal may have regard to the reasons given by the Secretary (if any) for making the consumer guarantee direction concerned.
- (5) The Tribunal may, in relation to an application for re-determination, require evidence or argument to be presented only in writing.

12 Tribunal to give notice and reasons for decisions to Secretary

- (1) The Tribunal is to ensure that the Secretary is given notice of any decision that it

makes in determining an application for re-determination.

- (2) If the Tribunal has provided a written statement of reasons for its decision in determining an application for re-determination to a party to the proceedings, the Tribunal is also to provide a copy of that written statement of reasons to the Secretary.
- (3) The Secretary may, within 28 days after being given notice of a decision of the Tribunal, request the Tribunal to provide a written statement of reasons for its decision if a written statement of reasons has not been provided to the Secretary. The statement must be provided within 28 days after the request is made.
- (4) A written statement of reasons for the purposes of this clause must set out the matters referred to in section 62 (3) of the *Civil and Administrative Tribunal Act 2013*.

13 Competing proceedings in Tribunal on same subject-matter prohibited

- (1) If an application for a consumer guarantee direction is pending, the consumer may not commence proceedings in the Tribunal under Part 6A of this Act in relation to the same subject-matter as the application.
- (2) If proceedings in the Tribunal under Part 6A are pending, the consumer may not make an application for a consumer guarantee direction under this Schedule in relation to the same subject-matter as those proceedings.
- (3) If an application for re-determination is pending, a consumer may not commence proceedings in the Tribunal under Part 6A in relation to the same subject-matter as the application.

14 Publication of information about consumer guarantee directions

- (1) The Secretary may publish information about consumer guarantee directions made by the Secretary.
- (2) The information that can be published under this clause includes information as to the identities of suppliers to whom a consumer guarantee direction has been given, but not the identity of any consumer who has applied for a consumer guarantee direction.
- (3) The information that can be published under this clause includes information as to the identities of suppliers who have failed to comply with a consumer guarantee direction.
- (4) The Secretary has qualified privilege in proceedings for defamation arising out of a publication made under this clause.

[2] Schedule 5 Savings and transitional provisions

Insert at the end of the Schedule, with appropriate Part and clause numbering:

**Part Provision consequent on enactment of Fair Trading
Legislation Amendment (Consumer Guarantee Directions)
Act 2018**

Consumer guarantee directions

Schedule 3 (Consumer guarantee directions) extends to the sale of a consumer good that occurred before the commencement of that Schedule, but only if the complaint under section 9 (1) (c) of this Act regarding that sale was first received by the Secretary after that commencement.

Schedule 2 Amendments relating to compliance and enforcement

2.1 Fair Trading Act 1987 No 68

[1] Section 4 Definitions

Insert in alphabetical order in section 4 (1):

small business contract has the same meaning as in section 23 (4) of the ACL.

[2] Section 17A

Insert before section 18:

17A Definition

In this Part, ***place*** includes a vehicle, vessel or aircraft.

[3] Section 19 Powers of entry

Insert “, stored” after “prepared” in section 19 (3).

[4] Section 19 (3) (c1)

Insert after section 19 (3) (c):

(c1) seize, detain or remove any consumer goods in that place that:

- (i) do not comply with a safety standard (within the meaning of section 2 (1) of the ACL), or

- (ii) are the subject of an interim or permanent ban, or
- (iii) are the subject of a recall notice, or
- (iv) the investigator believes, on reasonable grounds, are or are likely to become unsafe,

[5] Section 19 (4)

Omit the subsection. Insert instead:

- (4) If an investigator believes on reasonable grounds that there are on any premises documents evidencing:
 - (a) conduct in contravention of this Act or any other legislation administered by the Minister, or
 - (b) the inclusion of an unfair term in a consumer contract or small business contract that is a standard form contract (as referred to in Part 2-3 of the ACL),the investigator may enter the premises and do any of the following:
 - (c) inspect any document,
 - (d) make a copy of, or take an extract from, any document,
 - (e) seize any document, if the investigator believes on reasonable grounds that it is necessary to prevent it being interfered with or to prevent its concealment, loss, deterioration or destruction.

[6] Section 19 (6)

Insert after section 19 (5):

- (6) An investigator who seizes, detains or removes any goods, or partly manufactured goods, under this section must provide a receipt for the goods.

[7] Section 19A Powers of search and seizure under search warrant

Omit the definition of **place** from section 19A (1).

[8] Section 19A (2) (a1)

Insert after section 19A (2) (a):

- (a1) there is evidence relating to the inclusion of an unfair term in a consumer contract or small business contract that is a standard form contract (as referred to in Part 2-3 of the ACL), or

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

Insert after section 20 (1) (a):

- (a1) the possible inclusion of an unfair term in a consumer contract or small business contract that is a standard form contract (as referred to in Part 2-3 of the ACL), or

[10] Section 23A Dealing with property

Omit section 23A (1) and (2). Insert instead:

- (1) This section applies to:
 - (a) anything seized under the authority of a search warrant issued for the purposes of section 19A, and
 - (b) anything that has been obtained by the Secretary or an investigator in the course of an investigation under this Act.
- (2) Anything to which this section applies must be returned to the person who had lawful possession of the thing before it was seized or obtained by the Secretary or an investigator if its retention as evidence in proceedings for an offence against this or any other Act is not required.

[11] Section 23A (3)

Insert “, or obtained in the course of an investigation under this Act,” after “anything seized”.

[12] Section 23A (3) (b)

Insert “or obtained” after “seized”.

[13] Section 23B Court orders relating to disposal of certain consumer goods

Insert “or obtained in the course of an investigation under this Act” after “section 19A” in section 23B (4).

[14] Section 23C Disposal of property

Omit the section.

[15] Section 23D Embargo notices

Omit section 23D (1). Insert instead:

- (1) An investigator may give an embargo notice in relation to consumer goods to an occupier of premises if the investigator has reasonable grounds to believe that:

- (a) the consumer goods are being manufactured, prepared, stored on or supplied from the premises in trade or commerce and the consumer goods:
 - (i) do not comply with a safety standard (within the meaning of section 2 (1) of the ACL), or
 - (ii) are the subject of an interim or permanent ban, or
 - (iii) are the subject of a recall notice, or
 - (iv) are or are likely to become unsafe, and
 - (b) it is not practicable to seize and remove the consumer goods or equipment used in the manufacturing, processing, storage or supply of the consumer goods.
- (1A) An investigator may give an embargo notice in relation to product related services to an occupier of premises if the investigator reasonably believes that:
- (a) product related services are being supplied from the premises in trade or commerce, and
 - (b) the product related services are unsafe, and
 - (c) it is not practicable to seize and remove equipment used in connection with the supply of those unsafe product related services.

[16] Section 66 Other orders that may be made by court on conviction

Omit section 66 (3). Insert instead:

- (3) If a person is convicted of an offence against this Act or any other legislation administered by the Minister, the convicting court may order the offender to reimburse the Department for the costs and expenses reasonably incurred during the investigation of the offence in such amount as is fixed by the order.
- (4) In this section:
 - costs and expenses**, in relation to the investigation of an offence, means the following costs and expenses incurred during the investigation of the offence:
 - (a) the costs and expenses of purchasing or testing any goods to which the conviction relates,
 - (b) the costs and expenses in conducting any inspection, test, measurement or analysis,
 - (c) the costs and expenses of transporting, storing or disposing of evidence,

- (d) the costs and expenses of any auditor or accountant conducting an examination of financial records in connection with the investigation of the offence, and includes any other costs and expenses prescribed by the regulations.

2.2 Plumbing and Drainage Act 2011 No 59

[1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

performance solution has the same meaning as in the *Plumbing Code of Australia*.

[2] Section 3 (3)

Insert after section 3 (2):

- (3) For the purposes of this Act, plumbing and drainage work does not involve a proposed performance solution if it is carried out in relation to an existing performance solution and it does not change the design of the existing performance solution.

[3] Section 9 Plumbing and drainage work must be pre-notified to plumbing regulator

Omit section 9 (3). Insert instead:

- (3) The notice of work must be given to the plumbing regulator:
- (a) in relation to plumbing and drainage work that involves a proposed performance solution—no later than 20 business days before the work is carried out, and
 - (b) in any other case—before:
 - (i) the work is carried out, and
 - (ii) any notice under section 13 is given in relation to the work.

[4] Section 12 Inspection of plumbing and drainage work by plumbing regulator

Omit section 12 (1) and (2). Insert instead:

- (1) The plumbing regulator may, for the purpose of monitoring compliance with this Act, do either or both of the following:
- (a) inspect any plumbing and drainage work,

(b) inspect any documents in the possession of the plumbing regulator in connection with the plumbing and drainage work.

(2) To avoid any doubt, the plumbing regulator may carry out more than one inspection under this section if the regulator considers it necessary in the circumstances.

[5] Section 14 Defective or uninspected plumbing and drainage work

Insert “the plumbing regulator considers, on reasonable grounds, that” before “there is a risk to public health” wherever occurring in section 14 (1) (e) and (f).

[6] Section 14 (1) (g)-(j)

Insert at the end of section 14 (1) (f):

, or

(g) to uncover all or part of the work to allow the plumbing regulator to inspect the work if:

(i) the responsible person failed to notify the plumbing regulator when the work was ready for inspection in accordance with section 13, or

(ii) the work was not accessible and ready to be inspected during the inspection period referred to in that section, or

(h) if the responsible person has failed to comply with section 9, 15 or 16, to give to the plumbing regulator any notice or other document required to be given under the section concerned, or

(i) to disconnect any plumbing or drainage installed by the responsible person that is connected to other plumbing and drainage work that has been previously installed in contravention of this Act, or

(j) if the responsible person has failed to comply with section 13 (5) (b), to re-notify the plumbing regulator when the work will be ready for inspection.

[7] Section 14 (2)

Omit the subsection. Insert instead:

(2) A responsible person to whom a direction is given must comply with the direction within the period specified in the written notice, unless the responsible person has a reasonable excuse.

Maximum penalty: 100 penalty units and, in the case of a continuing offence, a further penalty of 50 penalty units for each day the offence continues.

[8] Section 14 (7)-(10)

Insert after section 14 (6):

- (7) For the avoidance of doubt, a single written notice may contain more than one direction under this section.
- (8) For the purposes of subsection (5), plumbing and drainage work is completed by a responsible person when the responsible person completes, in accordance with this Act, the whole of the plumbing and drainage work that the person was engaged to carry out, has given notice under section 13 (1) and the period during which the plumbing and drainage work must be available for inspection by the plumbing regulator has ended.
- (9) Section 13 (2)-(6) apply to a re-notification in accordance with a direction under subsection (1) (j) in the same way as those provisions apply to a notification under section 13 (1).
- (10) It is a defence to a prosecution under subsection (2) in relation to a direction under subsection (1) (g) if the responsible person concerned establishes that they took all reasonable steps to ensure the plumbing and drainage work or the part of the plumbing and drainage work concerned was uncovered in accordance with the direction.

[9] Section 15 Person to give certificate of compliance after work completed

Omit section 15 (1). Insert instead:

- (1) The responsible person for plumbing and drainage work must:
 - (a) give the plumbing regulator a certificate of compliance:
 - (i) if a physical inspection of the plumbing and drainage work has been conducted—on the completion of the work, or
 - (ii) in any other case—within the period prescribed by the regulations after completing the work, and
 - (b) give a copy of that certificate of compliance to the person for whom the work is carried out, whether as contractor or employee, within the period prescribed by the regulations after completing the work.

Maximum penalty: 100 penalty units.

[10] Section 16 Supply of plans

Insert “any part of” before “plumbing and drainage work” in section 16 (1).

[11] Section 16 (4) and (4A)

Omit section 16 (4). Insert instead:

- (4) A plan or a copy of a plan required to be supplied to the owner of the land or the owner's agent under this section is required to be supplied no later than as prescribed by the regulations.
- (4A) A plan or a copy of a plan required to be supplied to the plumbing regulator under this section is required to be supplied:
 - (a) if a physical inspection of the plumbing and drainage work has been conducted—on the completion of the work, or
 - (b) in any other case—no later than as prescribed by the regulations after completing the work.

[12] Section 42A

Insert after section 42:

42A Continuing offences

- (1) A person who is guilty of an offence because the person contravenes a requirement made by or under this Act or the regulations (whether the requirement is imposed by a notice or otherwise) to do or cease to do something (whether or not within a specified period or before a particular time):
 - (a) continues, until the requirement is complied with and despite the fact that any specified period has expired or time has passed, to be liable to comply with the requirement, and
 - (b) is guilty of a continuing offence for each day the contravention continues.
- (2) This section does not apply to an offence if the relevant provision of this Act or the regulations does not provide for a penalty for a continuing offence.
- (3) This section does not apply to the extent that a requirement of a notice is revoked.

2.3 Plumbing and Drainage Regulation 2017

[1] Clause 3 Definitions

Omit the definition of **performance solution** from clause 3 (1).

[2] Clause 3 (2)

Omit the subclause.

[3] Clause 4 Notices of work

Omit the clause.

[4] Clause 8 Certificates of compliance

Omit “section 15 (1) (a) and (b)” from clause 8 (1).

Insert instead “section 15 (1) (a) (ii) and (b)”.

[5] Clause 9 Plans of work involving sanitary drainage systems

Omit “section 16 (4)”. Insert instead “section 16 (4) and (4A) (b)”.

[6] Schedule 1 Fees

Insert “(or documents in the possession of the plumbing regulator in connection with the plumbing and drainage work)” after “plumbing and drainage work” wherever occurring in Part 1 of the Schedule.

[7] Schedule 2 Penalty notice offences

Omit the matter relating to section 14 from the Schedule. Insert instead:

Section 14 (2), in relation to an initial contravention	\$1,100
Section 14 (2), in relation to a continuing offence, for each day the contravention continues	\$550
Section 14 (3)	\$1,100

2.4 Property, Stock and Business Agents Act 2002 No 66

Section 205 Powers of entry, inspection etc

Insert “or which is open for inspection in advance of, or in preparation for, such an auction” after “conducted” in section 205 (4) (b).