

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

[2018-43]



New South Wales

Status Information

Currency of version

Repealed version for 12 October 2018 to 28 December 2018 (accessed 13 December 2024 at 12:03)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force

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

Notes—

- **Repeal**

The Act was repealed by sec 30C of the [Interpretation Act 1987 No 15](#) with effect from 29.12.2018.

Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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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 (Repealed)