

Western Australia

## **Fair Trading Act 1987**

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## Fair Trading Act 1987

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Western Australia

## **Fair Trading Act 1987**

**An Act to regulate the supply, advertising and description of goods and services and, in certain respects, the disposal of interests in land, and to make provision with respect to certain unfair or undesirable trade practices, as to the conditions and warranties to be applicable in consumer transactions, and as to the establishment of Codes of Practice as between certain classes of suppliers and consumers, and for related purposes.**

## Part I — Preliminary

**1. Short title**

This Act may be cited as the *Fair Trading Act 1987*<sup>1</sup>.

**2. Commencement**

The provisions of this Act shall come into operation on such day as is, or days as are respectively, fixed by proclamation<sup>1</sup>.

**3. Act binds Crown**

- (1) Except where otherwise expressly provided by this Act, this Act binds the Crown not only in right of Western Australia but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.
- (2) This Act applies to and in respect of the Crown in any of its capacities to the same extent as if the Crown were, in that capacity, a body corporate.

**4. Application of Act**

- (1) Except as otherwise expressly provided in or under this Act, this Act applies (notwithstanding anything to the contrary in any other Act or law) to and in respect of an acquisition or supply or the proposed acquisition or supply of goods or services, or the disposal or proposed disposal of an interest in land —
  - (a) if the person by or to whom the goods or services are or are proposed to be acquired or supplied signs in Western Australia a document relating to the acquisition or supply or the proposed acquisition or supply;
  - (b) if the person by or to whom the interest in land is or is proposed to be disposed of signs in Western Australia a document relating to the disposal or the proposed disposal of that interest; or

- (c) if that person does not so sign such a document, if the goods or services are or are proposed to be delivered or supplied, or that land is situated, in Western Australia.
- (2) This Act extends to the engaging in conduct outside Western Australia by bodies corporate incorporated, or taken to be registered, in Western Australia or carrying on business within Western Australia, or by persons ordinarily resident within Western Australia.
- (3) Where —
  - (a) the proper law of a contract for the supply of goods or services to a consumer would, but for a term that it should be the law of some other place or a term to the like effect, be the law of Western Australia; or
  - (b) a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, provisions of the law of some other country or of another State or of a Territory for all or any of the provisions of this Act,    this Act applies to the contract notwithstanding that term.
- (4) This Act is not intended to exclude or limit the concurrent operation of any law of the Commonwealth or of another State or a Territory.

*[Section 4 amended by No. 10 of 2001 s. 74.]*

## **5. Interpretation (TPA s. 4<sup>2</sup>)**

- (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires —
  - “acquire”** includes —
    - (a) in relation to goods — acquire by purchase or exchange or by taking on lease, on hire or on hire-purchase;
    - (b) in relation to services — accept; and

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- (c) in relation to an interest in land — acquire by purchase or exchange or by taking on lease, or in any other manner in which an interest in land may be acquired for valuable consideration;

**“authorised person”** means a person authorised by the Commissioner;

**“banning order”** means an order in force under section 23Q or 23R of the *Consumer Affairs Act 1971* prohibiting or restricting the supply of goods;

**“business”** includes —

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

**“Commissioner”** has the meaning given by section 4(1) of the *Consumer Affairs Act 1971*;

**“component part”** in relation to any goods includes an accessory to those goods;

**“consumer”** has the meaning given by section 6;

**“Consumer Products Safety Committee”** means the Consumer Products Safety Committee established under section 23E of the *Consumer Affairs Act 1971*;

**“dangerous”**, in relation to goods, means likely to cause death or to cause injury to the body or health of a person, whether the death or injury is likely to be caused directly or indirectly and whether or not because of —

- (a) a failure to include with or on the goods any instructions for their use;  
(b) the inclusion with or on the goods of instructions for the use of the goods that are inaccurate or inadequate;  
(c) a failure of the goods to function in the manner represented by the manufacturer or supplier;  
(d) the goods not being of the quality represented by the manufacturer or supplier; or

- (e) the necessity for, or possibility of, the use of the goods with other goods;

**“Department”** has the meaning given by section 4(1) of the *Consumer Affairs Act 1971*;

**“disposal”**, in relation to an interest in land, means disposal by sale, exchange or lease or by any other method by which an interest in land may be disposed of for valuable consideration;

**“document”** means —

- (a) a book, plan, paper, parchment or other material on which there is writing or printing, or on which there are marks, symbols or perforations having a meaning for persons qualified to interpret them; or
- (b) a disc, tape, paper or other device from which sounds or messages are capable of being reproduced,

and includes any source of information, whether or not the information is available only after the source is subjected to electronic or other process;

**“false representation”** has the meaning given by section 13;

**“give effect to”**, in relation to a provision of a contract, arrangement or understanding, includes do an act or thing in pursuance of or in accordance with or enforce or purport to enforce;

**“goods”** includes —

- (a) ships, aircraft and other vehicles;
- (b) animals, including fish;
- (c) minerals, trees and crops, whether on, under or attached to land or not;
- (d) gas and electricity; and
- (e) any component part of, or accessory to, goods;

**“information”** includes —

- (a) in relation to goods, information that would be taken by any reasonable person as referring directly or

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indirectly to any of the following matters with respect to the goods or any component part of the goods —

- (i) compliance with a standard under this Act or a standard specified or recognized by any person;
- (ii) quality, grade, composition, style, model, class, purity, nature, number, quantity, gauge, size, measure, mass, age, or any physical characteristic;
- (iii) history or previous ownership or use;
- (iv) fitness for purpose, strength, accuracy, safety, running costs, durability, benefits to be derived, or any characteristic of performance;
- (v) testing by any person or results of tests;
- (vi) sponsorship or approval by, of affiliation with, any person, or conformity with or similarity to, a type sponsored or approved by any person;
- (vii) price, change in price, comparative or relative price, recommended price or relation to recommended price;
- (viii) suitability of method of caring for, washing, cleaning or maintaining the goods;
- (ix) availability of maintenance or repair services or spare parts;
- (x) method or manner of manufacture, packaging, distribution, supply, selection, classification or grading;
- (xi) place or date of manufacture, packaging, distribution, supply or origin;
- (xii) person by whom manufactured, packaged, distributed, supplied, selected, classified or graded; or

- (xiii) in the case of goods that are printed, recorded or filmed matter, the contents or authorship;
- and
- (b) in relation to services, information that would be taken by any reasonable person as referring directly or indirectly to any of the following matters with respect to the services —
  - (i) compliance with a standard specified or recognized by any person;
  - (ii) quality or nature;
  - (iii) nature or amount of goods or materials used in the course of providing the services;
  - (iv) nature of equipment or machinery used in the course of providing the services;
  - (v) duration of or time at or within which the services are to be provided;
  - (vi) results or effect of services or benefits to be derived therefrom;
  - (vii) sponsorship or approval by, or affiliation with any person;
  - (viii) price, change in price, comparative or relative price, recommended price, or relation to recommended price;
  - (ix) standing, capabilities, competence, professional or technical qualifications of persons by whom provided;
  - (x) place at which services provided; or
  - (xi) amenities or facilities available;

(TPA s. 53A(3))

**“interest”**, in relation to land, means —

- (a) a legal or equitable estate or interest in the land;
- (b) a right of occupancy of the land, or of a building or part of a building erected on the land, conferred by

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shares, or by virtue of a contract to purchase shares, in a corporation that owns the land or the building; or

- (c) a right, power or privilege over, or in connection with, the land;

**“label”** means affix, append, or annex information to, mark information on, or incorporate information with, anything;

**“manufacture”** includes assemble, process or recondition;

**“materially inaccurate”** has the meaning given by section 13(2);

**“officer”** means —

- (a) the Commissioner; or
- (b) a person appointed and employed under Part 3 of the *Public Sector Management Act 1994*, or whose services are used, in accordance with the *Consumer Affairs Act 1971* to assist the Commissioner in carrying out his functions under any Act the administration of which is for the time being committed to the Minister by the Governor;

**“package”** in relation to any goods means —

- (a) wholly or partly enclose the goods in any form of covering or container for supply to any person; or
- (b) authorise, direct, cause, suffer or permit the Act referred to in paragraph (a);

**“packaging standard”** means a standard prescribed by regulations referred to in section 66;

**“price”** includes a charge of any description and the price of goods or services acquired by a person (whether or not by purchase) is the amount paid or payable for them or, if such an amount is not specified because acquisition of the goods or services is part only of a transaction for which a total amount is paid or payable, is —

- (a) the lowest amount for which the goods or services could reasonably have been acquired from the



supplier at the time of the transaction or, if not from the supplier, from another supplier; or

- (b) if they could not reasonably have been acquired separately from any supplier — their value at the time of the transaction;

**“product information standard”** means a standard prescribed by regulations referred to in section 58;

**“product quality standard”** means a standard prescribed by regulations referred to in section 64;

**“product safety standard”** means a standard prescribed by regulations referred to in section 50;

**“provide”** in relation to information in respect of goods or services or an interest in land includes authorise, direct, cause, suffer or permit information to be provided in respect of the goods, services or interest;

**“provision”**, in relation to an understanding, means any matter forming part of the understanding;

**“public authority”** means a public authority or local government constituted by an Act (whether or not a statutory body representing the Crown), a Government department or an administrative office;

**“published”**, in relation to a statement or information, includes —

- (a) inserted in a newspaper or other publication printed or published in the State;
- (b) publicly exhibited —
  - (i) in, on, over or under a building, vehicle, aircraft or ship, or in any other place (whether or not a public place and whether on land or water); or
  - (ii) in the air,  
in view of persons who are, or are passing, in or on a street or public place;

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- (c) contained in a document sent or given to a person or thrown or left upon, or at, premises occupied by a person;
- (d) broadcast by radio or television or otherwise publicly announced by means of transmission of light or sound; or
- (e) reproduced electronically;
- (f) made verbally; or
- (g) appended to or stamped upon an article in the form of a label or impressed stamp denoting that such article complies with the requirements of —
  - (i) Standards Australia; or
  - (ii) any other reference to quality or make indicated by a label or stamp;

**“regulations”** means the regulations made under section 84;

**“re-supply”** in relation to goods acquired from a person includes —

- (a) a supply of the goods to another person in an altered form or condition; and
- (b) a supply to another person of goods in which the first-mentioned goods have been incorporated;

**“send”** includes deliver;

**“services”** includes any rights (including rights in relation to, and interests in, real or personal 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 the rights, benefits, privileges and facilities that are, or are to be, provided, granted or conferred under —

- (a) a contract for or in relation to —
  - (i) the performance of work (including work of a professional nature), whether with or without the supply of goods;

- (ii) a contract for, or involving, the provision of gas or electricity or the provision of any other form of energy;
  - (iii) the provision, or making available for use, of facilities for amusement, entertainment, recreation or instruction; or
  - (iv) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;
- (b) a contract of insurance;
  - (c) 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; or
  - (d) a contract for or in relation to the lending of money, but does not include rights or benefits being the supply of goods or the performance of work under a contract of service;

**“shares”** includes stock;

**“statement”** includes a representation of any kind, whether made by means of —

- (a) a comment, word, map, plan or drawing; or
- (b) a pictorial representation or design, or by any combination of those means;

**“supplier”** means a person who, in the course of a business, supplies goods or services;

**“supply”** includes —

- (a) in relation to goods —
  - (i) supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and
  - (ii) exhibit, expose or have in possession for the purpose of sale, exchange, lease, hire or hire-purchase or for any purpose of advertisement, manufacture or trade;

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- (b) in relation to services — provide, grant or render for valuable consideration; and
- (c) in relation both to goods and to services — donate for promotional purposes;

**“this Act”** includes the regulations;

**“trade or commerce”** includes any business or professional activity;

**“unsolicited goods”** means goods sent to a person without any request for the goods being made by, or by the authority of, the person;

**“unsolicited services”** means services supplied to a person without any request for the services being made by, or by the authority of, the person.

(TPA s. 4C)

- (2) In this Act, unless the contrary intention appears —
  - (a) a reference to the supply or acquisition of goods includes a reference to agreeing to supply or acquire goods;
  - (b) a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods upon a supply of the goods;
  - (c) a reference to the supply or acquisition of services includes a reference to agreeing to supply or acquire services;
  - (d) a reference to the supply or acquisition of goods includes a reference to the supply or acquisition of goods together with other property or services, or both;
  - (e) a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with goods or other property or other services;

- (f) a reference to the disposal or acquisition of an interest in land includes a reference to the disposal or acquisition of such an interest together with goods or services;
- (g) a reference to goods or services includes a reference to goods and services; and
- (h) a reference to the disposal or acquisition of an interest in land includes a reference to agreeing to dispose of or acquire such an interest, whether or not the agreement is in writing or evidenced by writing.

(TPA s. 4B(2)(e))

- (3) For the purposes of this Act —
  - (a) the obtaining of credit by a person in connection with the acquisition of goods or services by the person is an acquisition by the person of services; and
  - (b) any amount by which the price of the goods or services is increased because credit was obtained is the price of the services represented by the obtaining of credit.

(TPA s. 4(2))

- (4) In this Act —
  - (a) a reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including —
    - (i) the making of, or the giving effect to a provision of, a contract or arrangement; or
    - (ii) the arriving at, or the giving effect to a provision of, an understanding;
  - (b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), shall be read as a reference to the doing of or the refusing to do any act, including —
    - (i) the making of, or the giving effect to a provision of, a contract or arrangement; or
    - (ii) the arriving at, or the giving effect to a provision of an understanding;

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- (c) a reference to refusing to do an act includes —
    - (i) a reference to refraining (otherwise than inadvertently) from doing the act; and
    - (ii) a reference to making it known that the act will not be done;and
  - (d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making known a willingness to accept applications, offers or proposals for the person to do the act or to do that act on the condition.
- (5) In this Act —
- (a) a reference to loss or damage, other than a reference to the amount of any loss or damage, includes a reference to injury; and
  - (b) a reference to the amount of any loss or damage includes a reference to damages in respect of an injury.
- (6) In this Act, a reference to the making of a representation includes a reference to the publishing of a statement.
- (7) Except as expressly provided by this Act, nothing in this Act shall be taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Act had not been enacted.
- (TPA s. 4L)
- (8) If the making of a contract contravenes this Act by reason of the inclusion of a particular provision in the contract, then, subject to subsection (9) and to any order made under section 77 or 78, nothing in this Act affects the validity or enforceability of the contract otherwise than in relation to that provision in so far as that provision is severable.
- (9) This Act has effect notwithstanding any stipulation in any contract or agreement to the contrary.

- (10) Where a provision of this Act is inconsistent with a provision of an Act specified in the Schedule to the *Consumer Affairs Act 1971* or prescribed for the purposes of this subsection, or a provision of an instrument made under an Act so specified or prescribed, the provision of the Act so specified or prescribed, or of the instrument, prevails.

*[Section 5 amended by No. 32 of 1994 s. 3(2); No. 14 of 1996 s. 4; No. 57 of 1997 s. 39(10); No. 74 of 2003 s. 53(2); No. 55 of 2004 s. 336; No. 28 of 2006 s. 97.]*

**6. Consumers (TPA s. 4B)**

- (1) In this Act, a reference to a consumer is a reference to a person —
- (a) who for the purposes of the *Consumer Affairs Act 1971* would be a consumer within the meaning of that term as defined in section 4 of that Act; and
  - (b) who acquires, or proposes to acquire —
    - (i) goods or services; or
    - (ii) an interest in land, not being land used, or intended to be used, or apparently intended for use, for industrial or commercial purposes.
- (2) For the purposes of this Act, unless the contrary intention appears —
- (a) a person shall be taken to have acquired particular goods as a consumer if, and only if —
    - (i) the price of the goods did not exceed the prescribed amount; or
    - (ii) where that price exceeded the prescribed amount — the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial vehicle,

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and the person did not acquire the goods, or hold himself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; and

- (b) a person shall be taken to have acquired particular services as a consumer if, and only if —
  - (i) the price of the services did not exceed the prescribed amount; or
  - (ii) where that price exceeded the prescribed amount — the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.
- (3) For the purposes of subsection (2) —
  - (a) the prescribed amount is \$40 000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount;
  - (b) subject to paragraph (c), the price of goods or services purchased by a person shall be taken to have been the amount paid or payable by the person for the goods or services;
  - (c) where a person purchased goods or services together with other property or services, or with both other property and services, and a specified price was not allocated to the goods or services in the contract under which they were purchased, the price of the goods or services shall be taken to have been —
    - (i) the price at which, at the time of the acquisition, the person could have purchased from the supplier the goods or services without the other property or services;
    - (ii) if, at the time of the acquisition, the goods or services were not available for purchase from the



- supplier except together with the other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier without other property or services — the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or
- (iii) if, at the time of the acquisition, goods or services of the kind acquired were not available for purchase from any supplier except together with other property or services — the value of the goods or services at that time;
- (d) where a person acquired goods or services otherwise than by way of purchase, the price of the goods or services shall be taken to have been —
- (i) the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier;
- (ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier or were so available only together with other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier — the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or
- (iii) if goods or services of the kind acquired were not available, at the time of the acquisition, for purchase from any supplier or were not so available except together with other property or services — the value of the goods or services at that time.

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- (4) Where it is alleged in any proceeding under this Act or in any other proceeding in respect of a matter arising under this Act that a person was a consumer in relation to particular goods, services or land, it shall be presumed, unless the contrary is established, that the person was a consumer in relation to the goods, services or land.
- (5) In this section, “**commercial vehicle**” has the meaning given by section 5(1) of the *Credit Act 1984*.

**7. Application of Act in relation to leases and licences of land and buildings (TPA s. 4H)**

In this Act —

- (a) a reference to a contract shall be construed as including a reference to a lease of, or a licence in respect of, land or a building or part of a building and shall be so construed notwithstanding the express references in this Act to such leases or licences;
- (b) a reference to making or entering into a contract, in relation to such a lease or licence, shall be read as a reference to granting or taking the lease or licence; and
- (c) a reference to a party to a contract, in relation to such a lease or licence, shall be read as including a reference to any person bound by, or entitled to the benefit of, any provision contained in the lease or licence.

**8. References to purposes or reason (TPA s. 4F)**

For the purposes of this Act —

- (a) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if —
  - (i) the provision was included in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to

be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for purposes that included or include that purpose; and

(ii) that purpose was or is a substantial purpose;

and

(b) a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if —

(i) the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and

(ii) that purpose or reason was or is a substantial purpose or reason.

## **Part II — Unfair practices**

### **Division 1 — Misleading conduct and false representations**

#### **9. Interpretation (TPA s. 51A)**

- (1) For the purposes of this Part, where a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the person does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
- (2) The onus of establishing that a person had reasonable grounds for making a representation referred to in subsection (1) is on the person.
- (3) Subsection (1) shall not be taken to limit by implication the meaning of a reference in this Part to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

#### **10. Misleading or deceptive conduct (TPA s. 52)**

- (1) A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in this Part shall be taken as limiting by implication the generality of subsection (1).

#### **11. Unconscionable conduct (TPA s. 51AB)**

- (1) A supplier shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a consumer, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without limiting the matters to which a court may have regard for the purpose of determining whether a supplier has contravened subsection (1) in connection with the supply or

possible supply of goods or services, the court may have regard to —

- (a) the relative strengths of the bargaining positions of the supplier and the consumer;
  - (b) whether, as a result of conduct engaged in by the supplier, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier;
  - (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
  - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer (or a person acting on behalf of the consumer) by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
  - (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the supplier.
- (3) A supplier shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a consumer only because the supplier institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.
- (4) For the purpose of determining whether a supplier has contravened subsection (1) in connection with the supply or possible supply of goods or services to a consumer —
- (a) a court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) a court may have regard to conduct engaged in, or circumstances existing, before the commencement of this Act.

(5) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

(6) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.

**12. False representations and other misleading or offensive conduct (TPA s. 53 and s. 53A)**

(1) A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services —

- (a) falsely represent that goods are of a particular standard, quality, grade, composition, style or model or have had a particular history or particular previous use;
- (b) falsely represent that services are of a particular standard, quality or grade;
- (c) falsely represent that goods are new;
- (d) falsely represent that a particular person has agreed to acquire goods or services;
- (e) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
- (f) represent that the person has a sponsorship, approval or affiliation the person does not have;
- (g) make a false or misleading representation concerning the price of goods or services;

- (h) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods;
  - (j) make a false or misleading representation concerning the place of origin of goods or indicating that goods or services produced, manufactured, prepared or supplied by him are produced, manufactured, prepared or supplied by any other person;
  - (k) make a false or misleading representation concerning the need for any goods or services; or
  - (l) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.
- (2) A person shall not, in trade or commerce, in connection with the disposal, or the possible disposal, of an interest in land or in connection with the promotion by any means of the disposal of an interest in land —
- (a) represent that the person has a sponsorship, approval or affiliation the person does not have;
  - (b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land;
  - (c) offer gifts, prizes or other free items with the intention of not providing them or of not providing them as offered; or
  - (d) use physical force or undue harassment or coercion in connection with that disposal or possible disposal or the payment for that interest.
- (3) Any statement which is intended or apparently intended to —
- (a) promote the sale or supply of any goods, or the disposal of any interest in land; or

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- (b) induce any other person to make use on payment of a fee or other consideration of any services,  
and which is a false representation, contravenes this section.
- (4) A person shall not, in trade or commerce, publish or cause to be published any statement which to his knowledge contravenes this section.
- (5) Nothing in this section shall be taken as implying that other provisions of this Act do not apply in relation to the supply or acquisition, or the possible supply or acquisition, of interests in land.

**13. False representations categorised**

- (1) For the purposes of this Act, and without limiting the generality of section 12, a statement shall be taken to be a false representation if —
  - (a) it is false, or deceives, or if it or any information thereby provided is materially inaccurate and that statement is intended or is apparently intended —
    - (i) to promote the supply of any goods or services or the disposal of any interest in land;
    - (ii) to induce any other person to make use, on payment of a price, of any goods or services or interest in land; or
    - (iii) to relate to any business activity or employment referred to in an advertisement containing that statement;
  - or
  - (b) it specifies an amount payable as portion of the price for any goods or services offered for supply or an interest in land offered for disposal in the statement but does not specify —
    - (i) the total price for which the goods, services or interest in land may be obtained for cash; and



- (ii) where the price is payable by instalments —
  - (A) any deposit payable; and
  - (B) the amount of each instalment, when it is payable, and the total period over which the instalments will be payable.
- (2) For the purposes of this Act, “**materially inaccurate**”, in relation to any information, means —
  - (a) inaccurate; or
  - (b) misleading or likely to mislead,in a material respect and to a material degree by reason of anything contained or omitted from the statement.

**14. Misleading conduct in relation to employment (TPA s. 53B)**

- (1) A person shall not, in relation to employment that is to be, or may be, offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment.
- (2) For the purposes of subsection (1) the engagement, or possible engagement, of a person —
  - (a) on the basis of a commission or a selling contract;
  - (b) on a principal and agent relationship; or
  - (c) as an independent contractor, distributor or holder of a franchise,relating to the supply on behalf of another person of goods or services or an interest in land may be taken to constitute employment.

**15. Cash price to be stated in certain circumstances (TPA s. 53C)**

A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods

or services, make a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the goods or services unless the person also specifies the cash price for the goods or services.

**16. Offering gifts and prizes (TPA s. 54)**

A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, offer gifts, prizes or other free items with the intention of not providing them or of not providing them as offered.

**17. Certain misleading conduct in relation to goods (TPA s. 55)**

A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

**18. Certain misleading conduct in relation to services (TPA s. 55A)**

A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

**19. Bait advertising (TPA s. 56)**

- (1) A person shall not, in trade or commerce, advertise goods or services for supply or any interests in land for disposal at a specified price if there are reasonable grounds, of which the person is aware, or ought reasonably to be aware, for believing that the person will not be able to offer for supply those goods or services or those interests at that price for a period that is, and in quantities that are reasonable having regard to the nature of the market in which the person carries on business and the nature of the advertisement.

- (2) A person who has, in trade or commerce, advertised goods or services for supply or interests in land for disposal at a specified price shall not fail to make available the goods or services for supply or that interest for disposal at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the person carries on business and the nature of the advertisement.
- (3) In a prosecution of a person under this Act in relation to a failure to offer goods, services or interests in land to a person (in this subsection referred to as the “**customer**”) in accordance with subsection (2), it is a defence if it is established that —
- (a) the accused offered to supply, or to procure another person to supply, goods or services or interests in land of the kind advertised to the customer within a reasonable time, in a reasonable quantity and at the advertised price; or
  - (b) the accused offered to supply immediately, or to procure another person to supply within a reasonable time, equivalent goods or services or interests in land to the customer in a reasonable quantity and at the price at which the first-mentioned goods or services or interests were advertised,

and, in either case, where the offer was accepted by the customer, the accused has so supplied, or procured another person to supply, goods or services or interests in land of that kind or which are equivalent.

*[Section 19 amended by No. 84 of 2004 s. 82.]*

**20. Referral selling (TPA s. 57)**

A person shall not, in trade or commerce, induce a consumer to acquire goods or services by representing that the consumer will, after the contract for the acquisition of the goods or services is made, receive a rebate, commission or other benefit in return for giving the person the names of prospective customers or otherwise assisting the person to supply goods or

services to other consumers, if receipt of the rebate, commission or other benefit is contingent on an event occurring after that contract is made.

**21. Accepting payment without intending or being able to supply as ordered (TPA s. 58)**

A person shall not, in trade or commerce, accept payment or other consideration for goods or services where, at the time of the acceptance —

- (a) the person intends —
  - (i) not to supply the goods or services; or
  - (ii) to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is accepted;
- or
- (b) there are reasonable grounds, of which the person is aware, or ought reasonably to be aware, for believing that the person will not be able to supply the goods or services within the period specified by the person or, if no period is specified, within a reasonable time.

**22. Misleading statements about certain business activities (TPA s. 59)**

- (1) A person shall not, in trade or commerce, make a representation that is false or misleading in a material particular concerning the profitability or risk or any other material aspect of any business activity that the person has represented as one that can be, or can be to a considerable extent, carried on at or from any place of residence.
- (2) Where a person, in trade or commerce, invites, whether by advertisement or otherwise, other persons to engage or participate, or to offer or apply to engage or participate, in a business activity requiring the performance by the other persons of work, or the investment of money by the other persons and

the performance by them of work associated with the investment, the inviter shall not make, with respect to the profitability or risk or any other material aspect of the business activity, a representation that is false or misleading in a material particular.

**23. Harassment and coercion (TPA s. 60)**

A person shall not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

**Division 2 — Pyramid selling schemes**

**24. Pyramid selling etc. (TPA s. 65AAC)**

- (1) A person shall not obtain a benefit, or seek to obtain a benefit, from a trading scheme to which this section applies.
- (2) A person contravenes this section if —
  - (a) he is the promoter of, or (if there are more than one) one of the promoters of, or is a participant in, a trading scheme to which this section applies; and
  - (b) another person who is a participant in the trading scheme, or has applied or been invited to become a participant in the trading scheme, makes a payment to or for the benefit of the first-mentioned person, being a payment that he is induced to make because the prospect is held out to him of receiving payments or other benefits in respect of the introduction (whether by himself or by another person) of other persons who become participants in the trading scheme.
- (3) A person also contravenes this section if —
  - (a) he is the promoter of, or (if there are more than one) one of the promoters of, is a participant in, or is otherwise

- acting in accordance with, a trading scheme to which this section applies; and
- (b) he, by holding out to another person the prospect of receiving payments or other benefits in respect of the introduction (whether by himself or by another person) of other persons who become participants in the trading scheme, attempts to induce the person to whom the prospect is held out —
- (i) if he is already a participant in the trading scheme — to make any payment to or for the benefit of the promoter or any of the promoters or to or for the benefit of a participant in the trading scheme; or
  - (ii) if he is not already a participant in the trading scheme — to become such a participant and to make a payment of a kind referred to in subparagraph (i).
- (4) A person also contravenes this section if he promotes, or takes part in the promotion of, a scheme under which —
- (a) a payment is to be made by another person who participates, or has applied or been invited to participate, in the scheme to or for the benefit of the first-mentioned person or of another person who takes part in the promotion of the scheme or to or for the benefit of another person who participates in the scheme; and
  - (b) the inducement for making the payment is the holding out to the person who makes or is to make the payment the prospect of receiving payments from other persons who may participate in the scheme.
- (5) For the purposes of this Division —
- (a) a prospect shall be taken to be held out to a person —
    - (i) whether or not it is held out so as to confer on the person a legally enforceable right; and

- (ii) in so far as it relates to the introduction of new participants in a trading scheme, whether it is limited to the introduction of new participants by him or extends to the introduction of new participants by other persons;
  - (b) in determining whether an inducement or attempt to induce is made by holding out a prospect of a kind referred to in that subsection, it is sufficient if a prospect of that kind constitutes, or would constitute, a substantial part of the inducement;
  - (c) a reference to the making of a payment to or for the benefit of a person shall be construed as including the making of a payment partly to or for the benefit of the person and partly to or for the benefit of one or more other persons; and
  - (d) **“trading scheme”** includes any arrangements made in connection with the carrying on of a business, whether those arrangements are made or recorded wholly or partly in writing or not.
- (6) For the purposes of this Division, a scheme is a trading scheme to which this section applies if the elements of the scheme include —
- (a) the provision of goods or services by the person promoting the scheme (in this section referred to as the **“promoter”**) or, in the case of a scheme promoted by 2 or more persons acting in concert (in this section referred to as the **“promoters”**), by one or more of those persons;
  - (b) the supply of those goods or services to or for other persons under transactions arranged or effected by persons who participate in the scheme (each of whom is in this section referred to as a **“participant”**), being persons not all of whom are promoters; and

- (c) the prospect held out to participants of receiving payments or other benefits in respect of any one or more of the following matters —
  - (i) the introduction of other persons who become participants;
  - (ii) the promotion, transfer or other change of status of participants within the scheme;
  - (iii) the supply of goods to other participants;
  - (iv) the supply of training facilities or other services for other participants; or
  - (v) transactions effected by other participants under which goods or services are to be supplied to other persons.
- (7) For the purposes of subsection (6) —
  - (a) a scheme shall be taken to include the element referred to in subsection (6)(b) even if a participant who is not a promoter acts in relation to a transaction in the capacity of a servant or agent of the promoter or of one of the promoters or in any other capacity;
  - (b) a scheme includes any arrangements made in connection with the carrying on of a business, whether or not those arrangements are made or recorded wholly or partly in writing; and
  - (c) a reference to the provision of goods or services by a person includes a reference to the provision of goods or services under arrangements to which the person is a party.

**25. Offences by promoters, lenders, etc.**

- (1) Where an offence against this Division in relation to a trading scheme is committed by a person who is a promoter of the scheme, any other person who is a promoter of that scheme is guilty of an offence against this Division punishable as the first-mentioned offence is punishable.



- (2) A person shall not lend money or agree to lend money to or on account of or on behalf of or at the request of another person if the first-mentioned person knows or ought on reasonable grounds to know that the money or part of the money is or is to be or may be used for or in connection with the participation or proposed participation by a person in a trading scheme to which section 24 applies.
- (3) In subsection (2) “**lend**” includes advance, discount and forbear to require payment.

**26. Defence to offences under this Division**

- (1) It is a defence to a prosecution of a person for an offence under this Division if the person proves that, in respect of the trading scheme to which the prosecution relates, all or a substantial number of transactions or negotiations for the provision of goods or services to other persons under the scheme were or were to be effected or took place or were to take place at the place of business of a promoter of the scheme or of the participant providing the goods or services.
- (2) For the purposes of this Division —
  - (a) a person is not and 2 or more persons together are not a participant in a trading scheme or pyramid selling scheme by reason only that that person has or those person have purchased goods or services from a promoter of or participant in the scheme; and
  - (b) the purchase or proposed purchase of goods or services from a promoter of or participant in a pyramid selling scheme does not constitute participation or proposed participation in the scheme.

**27. Power to declare that this Division does not apply to certain schemes, etc.**

- (1) The Governor may, by notice published in the *Gazette*, declare that the provisions of this Division, other than this section, do not apply or did not at a particular time apply to a specified

trading scheme or to specified transactions forming part of a trading scheme or to a specified trading scheme promoted by a specified person.

- (2) A declaration under subsection (1) may be made subject to specified terms and conditions.
- (3) The Governor may, by notice in writing published in the *Gazette*, revoke a declaration made under subsection (1).
- (4) The revocation of a declaration under subsection (3) does not affect the previous operation of the declaration or anything done or suffered in accordance with the declaration or a right, privilege or obligation acquired, accrued or incurred under the declaration.
- (5) In this section, “**specified**” means specified in the *Gazette* notice.

### **Division 3 — Unsolicited cards, goods and services**

#### **28. Unsolicited credit and debit cards (TPA s. 63A)**

- (1) A person shall not send a prescribed card to another person except —
  - (a) in pursuance of a request in writing by the person who will be under a liability to the person who issued the card in respect of the use of the card; or
  - (b) in renewal or replacement of, or in substitution for —
    - (i) a prescribed card of the same kind previously sent to that other person in pursuance of a request in writing by the person who was under a liability to the person who issued the card previously so sent in respect of the use of that card; or
    - (ii) a prescribed card of the same kind previously sent to that other person and used for a purpose for which it was intended to be used.

- (2) Subsection (1) applies only in relation to the sending of a prescribed card by or on behalf of the person who issued the card.
- (3) A person shall not take any action that enables another person who has a credit card or a debit card to use the card as a debit card or a credit card, as the case may be, except in accordance with a request in writing by the other person.
- (4) In this section —
- “**article**” includes a token, card and document;
- “**credit card**” means an article of a kind commonly known as a credit card or a similar article intended for use in obtaining cash, goods or services on credit, and includes an article of a kind commonly issued by persons carrying on business to customers or prospective customers of those persons for use in obtaining goods or services from those persons on credit;
- “**debit card**” means an article intended for use by a person in obtaining access to an account held by the person for the purpose of withdrawing or depositing cash or obtaining goods or services;
- “**prescribed card**” means a credit card, a debit card or an article that may be used as a credit card and a debit card.

**29. Assertion of right to payment for unsolicited goods or services, or for making entry in directory (TPA s. 64)**

- (1) A person shall not, in trade or commerce, assert a right to payment from another person for unsolicited goods unless the person asserting the right has reasonable cause to believe that there is a right to payment.
- (2) A person shall not, in trade or commerce, assert a right to payment from another person for unsolicited services unless the person asserting the right has reasonable cause to believe that there is a right to payment.

- (3) A person shall not assert a right to payment from another person of a charge for the making in a directory of an entry relating to the other person, or to the profession, business, trade or occupation of the other person, unless the person asserting the right knows, or has reasonable cause to believe, that the other person has authorised the making of the entry.
- (4) A person is not liable to make any payment to another person, and is entitled to recover by action in a court of competent jurisdiction against another person any payment made by the person to the other person, in full or part satisfaction of a charge for the making of an entry in a directory unless the first-mentioned person has authorised the making of the entry.
- (5) A person shall not make a request in the name of another person —
- (a) that goods or services be supplied to that other person where, if those goods or services were supplied to that person, they would be unsolicited goods or unsolicited services; or
  - (b) that an entry be made in a directory relating to the other person, or to the profession, business, trade or occupation of the other person,
- unless the person making the request has the authority of that other person to make that request.
- Penalty: \$2 000.

**30. Evidentiary provisions relating to section 29 (TPA s. 64)**

- (1) For the purposes of section 29, a person shall be taken to assert a right to payment from another person for unsolicited goods or unsolicited services, or of a charge for the making of an entry in a directory, if the first-mentioned person —
- (a) makes a demand for the payment or asserts a present or prospective right to the payment;
  - (b) threatens to bring any legal proceedings with a view to obtaining the payment;

- (c) places or causes to be placed the name of the other person on a list of defaulters or debtors, or threatens to do so, with a view to obtaining the payment;
  - (d) invokes or causes to be invoked any other collection procedure, or threatens to do so, with a view to obtaining the payment; or
  - (e) sends any invoice or other document stating the amount of the payment or setting out the price of the goods or services or the charge for the making of the entry and not stating as prominently (or more prominently) that no claim is made to the payment, or to payment of the price or charge, as the case may be.
- (2) A person shall not be taken for the purposes of section 29 to have authorised the making of an entry in a directory unless —
- (a) a document authorising the making of the entry has been signed by, or with the authority of, the person;
  - (b) the document specifies —
    - (i) the name of the directory;
    - (ii) the name and address of the person publishing the directory;
    - (iii) particulars of the entry; and
    - (iv) the amount of the charge for the making of the entry or the basis on which the charge is, or is to be calculated;
- and
- (c) a copy of the document has been given to the person before the right to payment of a charge for the making of the entry is asserted.
- (3) For the purposes of section 29, an invoice or other document purporting to have been sent by or on behalf of a person shall be deemed to have been sent by that person unless the contrary is established.

- (4) In a proceeding against a person in respect of a contravention of section 29 —
- (a) in the case of a contravention constituted by asserting a right to payment from another person for unsolicited goods or unsolicited services — the burden lies on the defendant of proving that the defendant has reasonable cause to believe that there was a right to payment; or
  - (b) in the case of a contravention constituted by asserting a right to payment from another person of a charge for the making of an entry in a directory — the burden lies on the defendant of proving that the defendant knew or had reasonable cause to believe that the other person had authorised the making of the entry.
- (5) For the purposes of section 29, where goods of a kind similar to the goods that a person has requested be sent to him are sent with a view to satisfying that request, those goods are not for that reason alone unsolicited gifts.
- (6) For the purposes of section 29 and of this section —
- “directory”** includes any publication of a similar nature to a directory but does not include a newspaper published in good faith as a newspaper at regular intervals or a publication published, or to be published, by or under the authority of the Australian Telecommunications Commission; and
- “making”**, in relation to an entry in a directory, means including, or arranging for the inclusion of, the entry.

**31. Liability of recipient of unsolicited goods (TPA s. 65)**

- (1) A person to whom unsolicited goods are supplied by another person, in trade or commerce, is not liable to make any payment for the goods and is not liable for the loss of or damage to the goods other than loss or damage resulting from the doing of a wilful and unlawful Act in relation to the goods during the period specified in subsection (4).

- (2) Subject to subsection (3), where a person sends, in trade or commerce, unsolicited goods to another person —
- (a) neither the person who sent the goods nor any person claiming under that person is entitled after the expiration of the period specified in subsection (4) to take action for the recovery of the goods from the person to whom the goods were sent; and
  - (b) upon the expiration of that period the goods become, by force of this section, the property of the person to whom the goods were sent freed and discharged from all liens and charges of any description.
- (3) Subsection (2) does not apply to or in relation to unsolicited goods sent to a person if —
- (a) the person has at any time during the period specified in subsection (4) unreasonably refused to permit the sender or the owner of the goods to take possession of the goods;
  - (b) the sender or the owner of the goods has within that period taken possession of the goods; or
  - (c) the goods were received by the person in circumstances in which the person knew, or might reasonably be expected to have known, that the goods were not intended for the person.
- (4) The period referred to in subsections (1), (2) and (3) is —
- (a) if the person who receives the unsolicited goods gives notice with respect to the goods to the sender in accordance with subsection (5) —
    - (i) the period of 1 month next following the day on which the notice is given; or
    - (ii) the period of 3 months next following the day on which the person received the goods,whichever first expires; and

- (b) in any other case — the period of 3 months next following the day on which the person received the goods.
- (5) A notice referred to in subsection (4) shall be in writing and shall —
  - (a) state the name and address of the person who received the goods;
  - (b) state the address at which possession may be taken of the goods if it is an address other than that of the person; and
  - (c) contain a statement to the effect that the goods are unsolicited goods.

**32. Power to declare that this Division does not apply to certain transactions or publications**

- (1) The Governor may, by notice published in the *Gazette*, declare that the provisions of this Division, other than this section, do not apply or did not at a particular time apply to —
  - (a) a specified transaction or class of transactions; or
  - (b) transactions effected by a specified person; or
  - (c) a specified directory or other publication.
- (2) A declaration under subsection (1) may be made subject to specified terms and conditions.
- (3) The Governor may, by notice in writing published in the *Gazette*, revoke a declaration made under subsection (1).
- (4) The revocation of a declaration under subsection (3) does not affect the previous operation of the declaration or anything done or suffered in accordance with the declaration or a right, privilege or obligation acquired, accrued or incurred under the declaration.
- (5) In this section, “**specified**” means specified in the *Gazette* notice.



### Part III — Conditions and warranties in consumer transactions

#### 33. Interpretation (TPA s. 66) and relationship to *Sale of Goods Act 1895*

- (1) In this Part —
  - (a) a reference to the quality of goods includes a reference to the state or condition of the goods;
  - (b) a reference to a contract does not include a reference to a contract made before the date on which this Part comes into operation<sup>1</sup>;
  - (c) a reference to antecedent negotiations in relation to a contract for the supply of goods to a consumer is a reference to any negotiations or arrangements conducted or made with the consumer by another person in the course of a business carried on by the other person whereby the consumer was induced to make the contract or which otherwise promoted the transaction to which the contract relates; and
  - (d) a reference to the person by whom any antecedent negotiations were conducted is a reference to the person by whom the negotiations or arrangements concerned were conducted or made.
- (2) Goods of any kind are of merchantable quality within the meaning of this Part if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.
- (3) Notwithstanding any rule of law or construction to the contrary or an agreement which otherwise provides, where a provision of this Part is, in its application to any circumstance, matter or thing inconsistent with a provision of the *Sale of Goods Act 1895*<sup>5</sup> in its application to the same circumstance, matter or

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thing the provision of this Part prevails and the provision of that Act to the extent of the inconsistency is inoperative.

**34. Application of provisions to contracts not to be excluded or modified (TPA s. 68)**

- (1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying —
  - (a) the application of all or any of the provisions of this Part;
  - (b) the exercise of a right conferred by such a provision; or
  - (c) any liability of the supplier for breach of a condition or warranty implied by such a provision,is void.
- (2) A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this Part unless the term does so expressly or is inconsistent with that provision.

**35. Limitation of liability for breach of certain conditions or warranties (TPA s. 68A)**

- (1) Subject to this section, a term of a contract for the supply of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 34 by reason only that the term limits the liability of the supplier for a breach of a condition or warranty (other than a condition or warranty implied by section 36) to —
  - (a) in the case of goods, any one or more of the following —
    - (i) the replacement of the goods or the supply of equivalent goods;
    - (ii) the repair of the goods;

- (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods;
    - (iv) the payment of the cost of having the goods repaired;
  - or
  - (b) in the case of services —
    - (i) the supplying of the services again; or
    - (ii) the payment of the cost of having the services supplied again.
- (2) Subsection (1) does not apply in relation to a term of a contract if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the supplier to rely on that term of the contract.
- (3) In determining for the purposes of subsection (2) whether or not reliance on a term of a contract is fair or reasonable, a court shall have regard to all the circumstances of the case and in particular to the following matters —
- (a) the strength of the bargaining positions of the supplier and the person to whom the goods or services were supplied (in this subsection referred to as “**the buyer**”) relative to each other, taking into account, among other things, the availability of equivalent goods or services and suitable alternative sources of supply;
  - (b) whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity of acquiring the goods or services or equivalent goods or services from any source of supply under a contract that did not include that term;
  - (c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); and

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- (d) in the case of the supply of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer.

**36. Implied undertakings as to title, encumbrances and quiet possession (TPA s. 69)**

- (1) In every contract for the supply of goods to a consumer, other than a contract to which subsection (3) applies, there is —
  - (a) an implied condition that, in the case of a supply by way of sale, the supplier has a right to sell the goods, and, in the case of an agreement to sell or a hire-purchase agreement, the supplier will have a right to sell the goods at the time when the property is to pass;
  - (b) an implied warranty that the consumer will enjoy quiet possession of the goods except so far as it may lawfully be disturbed by the supplier or by another person who is entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before the contract is made; and
  - (c) in the case of a contract for the supply of goods under which the property is to pass or may pass to the consumer — an implied warranty that the goods are free, and will remain free until the time when the property passes, from any charge or encumbrance not disclosed or known to the consumer before the contract is made.
- (2) A supplier is not, in relation to a contract for the supply of goods, in breach of the implied warranty referred to in subsection (1)(c) by reason only of the existence of a floating charge over assets of the supplier unless and until the charge becomes fixed and enforceable by the person to whom the charge is given.
- (3) In a contract for the supply of goods to a consumer in the case of which there appears from the contract or is to be inferred from the circumstances of the contract an intention that the

supplier should transfer only such title as he or a third person may have, there is —

- (a) an implied warranty that all charges or encumbrances known to the supplier and not known to the consumer have been disclosed to the consumer before the contract is made; and
- (b) an implied warranty that —
  - (i) the supplier;
  - (ii) in a case where the parties to the contract intend that the supplier should transfer only such title as a third person may have — that person; and
  - (iii) anyone claiming through or under the supplier or that third person otherwise than under a charge or encumbrance disclosed or known to the consumer before the contract is made,will not disturb the consumer's quiet possession of the goods.

**37. Supply by description (TPA s. 70)**

- (1) Where there is a contract for the supply (otherwise than by way of sale by auction) by a person in the course of a business of goods to a consumer by description, there is an implied condition that the goods will correspond with the description, and, if the supply is by reference to a sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
- (2) A supply of goods is not prevented from being a supply by description for the purposes of subsection (1) by reason only that, being exposed for sale or hire, they are selected by the consumer.

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**38. Implied undertakings as to quality or fitness (TPA s. 71)**

- (1) Where a person supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by virtue only of this section —
  - (a) as regards defects specifically drawn to the attention of the consumer before the contract is made; or
  - (b) if the consumer examines the goods before the contract is made, as regards defects which that examination ought to reveal.
- (2) Where a person supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the supplier or to the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the supplier or of that person.
- (3) Subsections (1) and (2) apply to a contract for the supply of goods made by a person who in the course of a business is acting as agent for a supplier as they apply to a contract for the supply of goods made by a supplier in the course of a business, except where that supplier is not supplying in the course of a business and either the consumer knows that fact or reasonable steps are taken to bring it to the notice of the consumer before the contract is made.

**39. Supply by sample (TPA s. 72)**

Where in a contract for the supply (otherwise than by way of sale by auction) by a person in the course of a business of goods to a consumer there is a term in the contract, expressed or implied, to the effect that the goods are supplied by reference to a sample —

- (a) there is an implied condition that the bulk will correspond with the sample in quality;
- (b) there is an implied condition that the consumer will have a reasonable opportunity of comparing the bulk with the sample; and
- (c) there is an implied condition that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample.

**40. Warranties in relation to the supply of services (TPA s. 74)**

- (1) In every contract for the supply by a person in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.
- (2) Where a person supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are required or the result that he desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connection with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely,

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or that it is unreasonable for him to rely on the supplier's skill or judgment.

- (3) A reference in this section to services does not include a reference to services that are, or are to be, provided, granted or conferred under —
- (a) a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored; or
  - (b) a contract of insurance.

**41. Rescission of contracts (TPA s. 75A)**

- (1) Where —
- (a) a supplier supplies goods to a consumer in the course of a business; and
  - (b) there is a breach of a condition that is, by virtue of a provision of this Part, implied in the contract for the supply of the goods,

the consumer is, subject to this section, entitled to rescind the contract by —

- (c) causing to be served on the supplier a notice in writing signed by him giving particulars of the breach; or
  - (d) causing the goods to be returned to the supplier and giving to the supplier, either orally or in writing, particulars of the breach.
- (2) Where a consumer purports to rescind under this section a contract for the supply of goods by a supplier, the purported rescission does not have any effect if —
- (a) the notice is not served or the goods are not returned within a reasonable time after the consumer has had a reasonable opportunity of inspecting the goods;



- (b) in the case of the rescission effected by service of a notice, after the delivery of the goods to the consumer but before the notice is served —
  - (i) the goods were disposed of by the consumer, were lost, or were destroyed otherwise than by reason of a defect in the goods;
  - (ii) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or
  - (iii) the goods were damaged by abnormal use;or
- (c) in the case of a rescission effected by return of the goods, while the goods were in the possession of the consumer —
  - (i) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or
  - (ii) the goods were damaged by abnormal use.
- (3) Where a contract for the supply of goods to a consumer has been rescinded in accordance with this section —
  - (a) if the property in the goods had passed to the consumer before the notice of rescission was served on, or the goods were returned to, the supplier — the property in the goods re-vests in the supplier upon the service of the notice or the return of the goods; and
  - (b) the consumer may recover from the supplier, as a debt, the amount or value of any consideration paid or provided by him for the goods.
- (4) The right of rescission conferred by this section is in addition to, and not in derogation of, any other right or remedy under this Act or any other written law or rule of law.

## Part IV — Codes of practice

### 42. Preparation of draft code of practice

- (1) The Commissioner may with the approval of the Minister, and shall if the Minister so directs, prepare for consideration by the Minister a draft code of practice for fair dealing —
  - (a) between a particular class of suppliers and consumers;  
or
  - (b) by a particular class of persons in relation to consumers,and for the purposes of this Part section 6(2) shall not have effect.
- (2) Subject to subsections (3) and (4) for the purpose of preparing a draft code of practice, the Commissioner shall arrange for consultation with, and invite submissions from, such persons and organisations who or which would have an interest in the terms of the proposed draft code of practice.
- (3) For the purposes of subsection (2) the Commissioner shall consult with and invite submissions from:
  - (a) such principal organisations that represent suppliers to consumers of goods, services or land in any affected business likely to be affected by the terms of the draft code of practice; and
  - (b) principal organisations representing consumers.
- (4) Before submitting a draft code pursuant to subsection (5) the Commissioner shall cause to be published throughout the State a notice that a draft code has been prepared for submission and inviting comment thereon from any person within a reasonable time. Copies of the draft code shall be made available on request and the notice shall state the place from which copies can be obtained.
- (5) If the Commissioner is satisfied that associated persons in a field of trade or commerce have, in consultation with

organisations representing consumers and other interested persons, agreed to abide by a particular code of practice in their dealings with or in relation to consumers, the Commissioner may submit the code to the Minister for consideration together with any recommendations by the Commissioner with respect to amendments to the code.

**43. Regulations — codes of practice**

- (1) Except as provided by subsection (2), the regulations may prescribe a code of practice that —
  - (a) has been submitted to the Minister in accordance with section 42; and
  - (b) has been approved by the Minister with or without amendments.
- (2) A code of practice may be prescribed as an interim code of practice to remain in force for a specified period not exceeding 6 months.
- (3) An interim code of practice has effect while it remains in force even if no action in relation to the code has been, or is, taken or concluded in accordance with section 42.
- (4) Nothing in this section shall authorise the continuation of a code of practice beyond 3 years from the date it first took effect, unless a review, in accordance with section 42, has been undertaken of that code of practice within that time.

**44. Undertakings following contravention of code**

Where it appears to the Commissioner that a person has carried on business in contravention of a prescribed code of practice applicable to the person, the Commissioner may —

- (a) request the person to execute within a specified time a deed in terms approved by the Commissioner under which the person gives undertakings as to —
  - (i) discontinuance of the conduct;
  - (ii) future compliance with the code of practice; and

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- (iii) the action the person will take to rectify the consequences of the contravention, or any of them; or
- (b) apply to the State Administrative Tribunal for an order under section 46(2).

*[Section 44 amended by No. 57 of 1997 s. 59; No. 55 of 2004 s. 339.]*

**45. Register of Undertakings**

- (1) Where a person executes a deed under section 44, the Commissioner shall —
  - [(a) deleted]*
  - (b) give a copy of the deed to the person who executed it.
- (2) The Commissioner shall retain all deeds and shall register the deeds in a Register of Undertakings kept by the Commissioner and containing the prescribed particulars.
- (3) The Register of Undertakings may, at any reasonable time, be inspected by any person free of charge.
- (4) A person shall observe undertakings given by him in a deed executed under section 44.  
Penalty: \$10 000.
- (5) A prosecution for an offence under subsection (4) shall not be instituted except by the Commissioner with leave of the State Administrative Tribunal given when making an order in accordance with section 46(3).

*[Section 45 amended by No. 55 of 2004 s. 337.]*

**46. Order by State Administrative Tribunal relating to code of practice**

*[(1) repealed]*

- (2) Where a person fails to comply with a request by the Commissioner for the giving by the person of an undertaking

under section 44, the State Administrative Tribunal may, on the application of the Commissioner and on being satisfied that there were grounds for requesting the undertaking, order the person —

- (a) to act in a manner that would have been required; or
- (b) to refrain from acting in a manner that would have been prohibited,

by the undertaking if it had been given, and the person shall comply with the order.

Penalty: \$10 000.

- (3) Where, on the application of the Commissioner, the State Administrative Tribunal is satisfied that a person has failed to observe an undertaking given by the person under section 44, the State Administrative Tribunal may make an order under subsection (4) against the person.
- (4) The State Administrative Tribunal may order the person —
  - (a) to observe the undertaking; and
  - (b) in the case of an undertaking to rectify the consequence of a contravention of a code of practice — to observe the undertaking within a time specified by the State Administrative Tribunal in the order.
- (5) If —
  - (a) the failure on which an application under subsection (2) or (3) is based is a failure by a body corporate; and
  - (b) the State Administrative Tribunal is satisfied that the failure occurred with the consent or connivance of a person who, at the time of the failure, was a director of the body corporate or a person concerned in its management,

the State Administrative Tribunal may, in addition to any other order, make an order under subsection (6).

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- (6) The State Administrative Tribunal may make an order prohibiting the person from —
- (a) continuing to consent to, or connive at, the failure; or
  - (b) consenting to, or conniving at, a like failure by any other body corporate of which the person is a director or in the management of which the person is concerned,

and the person to whom the order relates shall comply with the order.

Penalty: \$10 000.

- (7) An order under this section may be made subject to such conditions (whether as to the duration of the order or otherwise) as the State Administrative Tribunal thinks fit including —
- (a) conditions as to the future conduct of the person affected; and
  - (b) conditions specifying the action to be taken by the person to rectify the consequences of the failure the subject of the application under this section.

- (8) The State Administrative Tribunal may, on the application of the Commissioner, vary or discharge an order made under this section.

*[Section 46 amended by No. 55 of 2004 s. 338 and 339.]*

**47. Commissioner may proceed for another**

- (1) Where a person, not being a body corporate, has made a complaint to the Commissioner in respect of a matter arising under or in relation to a contravention or suspected contravention of a code of practice and the Commissioner, after investigating the complaint, is satisfied that —
- (a) the complainant may, with respect to that matter, have a right to take proceedings before a court or the State Administrative Tribunal or a defence to proceedings taken before a court or the State Administrative Tribunal

by another person against the complainant in respect of that matter; and

- (b) it is in the public interest that the Commissioner should take or, as the case may be, defend those proceedings on behalf of the complainant,

the Commissioner may, with the consent in writing of the Minister and the complainant, take or defend those proceedings on behalf of and in the name of the complainant.

- (2) Where a complainant has given a consent to the taking or defending by the Commissioner of proceedings before a court or the State Administrative Tribunal on behalf of the complainant, that consent is not, after the Commissioner has taken steps in those proceedings, revocable except with the concurrence of the Commissioner.
- (3) Where, under this section, the Commissioner takes or defends proceedings before a court or the State Administrative Tribunal on behalf of a complainant —
  - (a) the Commissioner shall have the conduct of those proceedings on behalf of the complainant, may (notwithstanding anything in any Act) appear personally or by counsel, solicitor or agent and may do all such things as are necessary or expedient to give effect to an order or decision of the court or the State Administrative Tribunal;
  - (b) the Commissioner is liable to pay the costs of the complainant; and
  - (c) the complainant is liable to pay any amount (other than costs for which the Commissioner is liable under paragraph (b)), that the court or the State Administrative Tribunal orders the complainant to pay.

*[Section 47 amended by No. 55 of 2004 s. 339.]*

## **Part V — Product safety**

### **Division 1 — Preliminary**

#### **48. Application of this Part**

- (1) The provisions of this Part do not apply to goods or component parts which are not intended to be supplied in Western Australia.
- (2) In this section reference to the provisions of an Act includes reference to the provisions of any subsidiary legislation made, given or promulgated under the provisions of that Act.
- (3) Subject to subsection (4), where any provision of this Part or a regulation made under this Part is inconsistent with any provision of an Act specified in the Schedule to the *Consumer Affairs Act 1971*, the provision of the Act specified in that Schedule shall prevail.
- (4) Where any provision of this Part or a regulation made under this Part is inconsistent with section 338B or 338C of the *Health Act 1911*, the provisions of this Part shall prevail.

### **Division 2 — Prohibition or restriction on supply of dangerous goods**

#### **49. Warning notice to public (TPA s. 65B, 65S)**

- (1) The Commissioner may take whatever action he considers necessary to warn the public of the danger associated with any dangerous goods or goods that do not comply with any applicable product safety standard, and, without limiting the generality of that power, he may publish in any newspaper or by radio or television any information as to the goods including the trade name and description of the goods, and, if he considers it desirable, the names of the manufacturers and suppliers of the goods that are known to him.



- (2) The Commissioner may publish a notice in writing in the *Gazette* containing one or both of the following —
- (a) a statement that goods of a kind specified in the notice are under investigation to determine whether the goods will or may cause injury to any person;
  - (b) a warning of possible risks involved in the use of goods of a kind specified in the notice.
- (3) The Commissioner shall, within 2 days after the publication of a warning under subsection (1) or of a notice in the *Gazette* under subsection (2), or, if it is not practicable to do so within that period, as soon as practicable after the end of that period, either —
- (a) cause particulars of that warning or a copy of the notice to be given to each person who, to the knowledge of the Commissioner, supplies goods of the kind to which the warning or notice relates; or
  - (b) cause particulars of that warning or a copy of the notice, as the case requires, to be published in a newspaper circulating in that part of the State where goods of the kind to which the notice relates are, to the knowledge of the Commissioner, supplied.
- (4) The Minister shall, as soon as practicable after an investigation referred to in a notice published under subsection (2) has been completed, by notice in writing published in the *Gazette*, announce the results of the investigation, and may announce in the notice whether, and if so, what action is proposed to be taken in relation to the goods under this Part or the *Consumer Affairs Act 1971*.

**50. Safety standards (TPA s. 65C, 65E)**

- (1) The regulations may prescribe a product safety standard for a specified kind of goods.

- (2) A product safety standard for goods shall consist of such requirements —
- (a) as to performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods;
  - (b) as to the testing of the goods during, or after the completion of, manufacture or processing;
  - (c) as to the form and content of markings, warnings or instructions to accompany the goods or be placed on a vending machine for the goods or a display stand or sign adjacent to the goods;
  - (d) as to equipment, component parts or other accessories to be supplied with the goods; or
  - (e) otherwise relating to goods of that class or description,
- as are reasonably necessary to prevent or reduce risk of injury to a person.
- (3) Regulations made under subsection (1) may —
- (a) adopt either wholly or in part and either specifically or by reference any Australian Standard or any of the standards, rules, codes or specifications —
    - (i) of Standards Australia; or
    - (ii) of a specified prescribed body,with or without specified additions or variations; and
  - (b) prescribe any specified class or description of goods, notwithstanding that the goods are for use only as component parts of other goods (whether or not those other goods are goods of a prescribed class or description).
- (4) In this section “**specified**” means specified in the regulations.
- [Section 50 amended by No. 74 of 2003 s. 53(3).]*

**51. Prohibition on supply of goods not complying with safety standards (TPA s. 65C)**

- (1) A person shall not, in trade or commerce, supply goods —
- (a) that are intended to be used, or are of a kind likely to be used, by a consumer; and
  - (b) in relation to which there is a product safety standard,
- unless the goods comply with the standard or subsection (4) applies.
- (2) Subject to subsection (4), a person shall not supply a component part in respect of which no requirements have been prescribed under section 50 but which is intended for, but not embodied in, any goods in respect of which any such requirements are in force, unless, if the component part were embodied in the goods, any requirement of the regulations, so far as the requirement relates to that part of the goods, applicable to the goods would be complied with.
- (3) Subject to subsection (4), where —
- (a) a person supplies goods in contravention of subsection (1) or subsection (2); and
  - (b) another person suffers loss or damage because of a defect in, or a dangerous characteristic of, the goods, or by not having particular information in relation to the goods, but would not have suffered it if the goods had complied with the product safety standard,
- the person who suffers the loss or damage shall be deemed, for the purposes of this Act, to have suffered it by the supplying of the goods.
- (4) The provisions of this section shall not apply to a person —
- (a) where he is supplying the goods or component parts as scrap, that is to say, for the value of the materials of which the goods or parts are composed and not for use as finished articles; or

- (b) in the case of goods or component parts which have been damaged by whatever cause, where he supplies the goods or component parts to a person who carries on a business of buying damaged goods and repairing or reconditioning them for resale, or to a person by whom the goods or parts were insured against damage.

**52. Offence to contravene banning order**

- (1) A person shall not supply goods in contravention of an order in force under section 23Q or section 23R of the *Consumer Affairs Act 1971*, in this Act referred to as a banning order.
- (2) If —
  - (a) a person supplies goods in contravention of subsection (1); and
  - (b) another person suffers loss or damage because of a defect in, or a dangerous characteristic of, the goods or by not having particular information as to a characteristic of the goods,

the person who suffers the loss or damage shall be deemed, for the purposes of this Act, to have suffered it by the supplying of the goods.

**53. Remedy for supply of goods etc., in contravention of Act or order**

- (1) If —
  - (a) goods are supplied to a person in contravention of section 51; or
  - (b) goods are supplied to a person and the supply of the goods is an offence under section 52 (whether or not there has been a conviction for the offence),

the person may recover from the supplier as a debt any money paid for the goods.

- (2) If judgment is given for the plaintiff in an action under subsection (1), the judgment debt may, if the court so directs, be satisfied by repair or modification of the goods in such a manner that —
- (a) the contravention relied on by the plaintiff would not have occurred if the goods had been supplied as required or modified; or
  - (b) the repaired or modified goods are accepted by the plaintiff on or before a day specified in the direction.

**Division 3 — Product recall etc.**

**54. Recall etc., of defective goods**

- (1) In this section —
- “**defect**”, in relation to goods, includes a dangerous characteristic of the goods;
- “**defective goods**” means goods that —
- (a) do not comply with a product safety standard for the goods;
  - (b) are the subject of a question referred to the Consumer Products Safety Committee or are proposed by the Minister or the Commissioner to be the subject of such a question;
  - (c) are the subject of a report of the Consumer Products Safety Committee on a question referred to it; or
  - (d) are the subject of a banning order.
- (2) Subject to section 55, the Commissioner may, by order published in the *Gazette*, require a supplier of defective goods to do any one or more of the following —
- (a) recall the goods in the manner, and within the period, specified in the order;

- (b) disclose to the public, or to a class of persons specified in the order, in the manner and within the period so specified, one or more of the following —
  - (i) the nature of any defect in the goods identified in the order;
  - (ii) the circumstances, being circumstances identified in the order, in which the use of the goods is dangerous; or
  - (iii) procedures for disposing of the goods;
- (c) notify the public, or a class of persons so specified, in the manner and within the period specified in the order, that the supplier undertakes to do whichever of the following the supplier thinks is appropriate —
  - (i) except where the order identifies a dangerous characteristic of the goods — repair the goods;
  - (ii) replace the goods;
  - (iii) refund to a person to whom the goods were supplied (whether by the supplier or by another person) the price of the goods,

within the period specified in the order.

- (3) If an order so provides, where —
  - (a) the supplier undertakes to refund the price of the goods; and
  - (b) a period of more than 12 months has elapsed since a person (whether or not the person to whom the refund is to be made) acquired the goods from the supplier,

the amount of the refund may be reduced by an amount that is attributable to the use which a person has had of the goods and is calculated as specified in the order.

- (4) An order made under this section may give directions as to the manner in which the supplier is to carry out a recall of goods required under subsection (2).

- (5) If a supplier undertakes to repair goods, the supplier shall cause the goods to be repaired so that —
- (a) any defect in the goods identified in the order is remedied; and
  - (b) if there is a product safety standard for goods of that kind — the goods comply with the standard.
- (6) If a supplier undertakes to replace goods, the supplier shall replace the goods with like goods which —
- (a) if a defect in the goods to be replaced was identified in the order — do not contain that defect; and
  - (b) if there is a product safety standard for goods of that kind — comply with that standard.
- (7) If a supplier undertakes to repair goods or replace goods, the cost of the repair or replacement, including any necessary transportation costs, shall be borne by the supplier.
- (8) While an order made under subsection (2) is in force, a supplier of goods to which the order relates shall not —
- (a) fail to comply with a requirement of, or a direction in, the order;
  - (b) where the order identifies a defect in the goods — supply goods of the kind to which the order relates and which contain that defect;
  - (c) in a case other than a case referred to in paragraph (b) — supply goods of the kind to which the order relates;
  - (d) fail to carry out an undertaking notified by the supplier under subsection (2); or
  - (e) having given such an undertaking to repair or replace goods — fail to comply with subsection (5), (6) or (7), where applicable.
- (9) Where goods are recalled, whether voluntarily or in accordance with an order of the Commissioner under subsection (2), a person who has supplied or supplies any of the recalled goods to

another person outside Western Australia shall, as soon as practicable after the supply of those goods, give a notice in writing to that other person —

- (a) stating that the goods are subject to recall;
- (b) if the goods have a defect — stating the nature of the defect; and
- (c) if the goods do not comply with a product safety standard for the goods — setting out the nature of the non-compliance.

Penalty: \$10 000 in the case of a corporation or \$5 000 in any other case.

- (10) A supplier who voluntarily takes action to recall goods shall, not later than 2 days after that action is taken, give to the Commissioner a notice in writing —

- (a) stating that the goods are subject to recall;
- (b) if the goods have a defect — stating the nature of the defect; and
- (c) if the goods do not comply with a product safety standard for the goods — stating the nature of the non-compliance.

Penalty: \$10 000 in the case of a corporation or \$5 000 in any other case.

- (11) It is a sufficient compliance with subsection (10) if a copy of a notice relating to the goods given under section 65R of the *Trade Practices Act 1974* of the Commonwealth is given to the Commissioner.

**55. Pre-requisites to the making of a product recall order (TPA s. 65J, 65L, 65P)**

- (1) Where the Commissioner is of the opinion that goods of a particular kind create an imminent risk of death, serious illness or serious injury, the Commissioner —
- (a) may make an order under section 54 forthwith; and



- (b) shall, by notice published in the *Gazette*, certify that by reason of that opinion the order was made without delay, and the provisions of this section shall not otherwise apply.
- (2) Subject to subsection (1), where the Commissioner considers making a recall order under section 54 in relation to goods of a particular kind he may, and in the case of goods the supply of which is not already banned or restricted under this Act or any other written law shall, refer to the Consumer Products Safety Committee the question as to whether the goods should be the subject of a recall order, and shall have regard to any report submitted by that Committee on a question referred to that Committee.
- (3) The Commissioner may, upon a question being referred under subsection (2), cause particulars of the question to be notified to the public in such manner as he thinks fit.
- (4) Where a question is referred under subsection (2), the Consumer Products Safety Committee shall have and may exercise in respect to that question all the powers which that Committee has under the *Consumer Affairs Act 1971* in relation to a question referred under section 23L of that Act.
- (5) The Commissioner shall, if requested to do so by the Consumer Products Safety Committee, give to that Committee to enable it to consider a question referred to it —
- (a) any information in the possession of the Commissioner which relates to the question; and
  - (b) any other assistance which the Committee may require, and which the Commissioner has power to give, in relation to the question.
- (6) Where the Commissioner does not refer the question pursuant to subsection (2), the Commissioner shall —
- (a) make such investigations as he considers necessary to enable him to make a determination with respect to the question;

- (b) take into account any representations made to him by any person who, in his opinion, has a substantial interest in the subject-matter of the question or by any body which, in his opinion, represents a substantial number of persons who have such an interest; and
- (c) unless the Commissioner does not consider that it is reasonably practicable to do so, permit any such person or body —
  - (i) to be heard, either by themselves or by their representatives, by a person authorised by him for the purpose; or
  - (ii) otherwise to participate in the consideration of the question,

before exercising the power conferred by section 54.

- (7) Where the Commissioner decides to act otherwise than in accordance with recommendations contained in a report of the Consumer Products Safety Committee furnished pursuant to this section, he shall by notice published in the *Gazette* set out the reasons for his decision.

**56. Certain amounts recoverable as debt or damages (TPA s. 65H)**

- (1) If a supplier fails to carry out an undertaking given under section 54 to refund the price of goods, the amount that should have been refunded is recoverable as a debt due by the supplier to the person to whom the undertaking was given.
- (2) If a supplier fails to carry out an undertaking under section 54 to repair or replace goods, the supplier shall be deemed to have given instead an undertaking, notified under section 54, to refund the price of the goods within the period specified for the repair or replacement of the goods.

- (3) If—
- (a) a person fails to comply with any requirement of an order made under section 54 or supplies goods in contravention of such an order disclosing a defect in, or dangerous characteristic of, the goods; and
  - (b) another person suffers loss or damage because of a defect in, or a dangerous characteristic of, the goods or by not having particular information as to a characteristic of the goods,

the person who suffered the loss or damage shall be deemed, for the purposes of this Act, to have suffered it because of the failure or contravention.

**57. Certain action not to affect insurance contracts (TPA s. 65T)**

The liability of an insurer under a contract of insurance with a person, being a contract relating to the recall of goods supplied or proposed to be supplied by the person or to the liability of the person with respect to possible defects in goods supplied or proposed to be supplied by the person, shall not be affected only because the person gives to the Minister, the Commissioner or the Consumer Products Safety Committee or to an officer information relating to any goods supplied or proposed to be supplied by the person.

## **Part VI — Product information**

### **Division 1 — Preliminary**

#### **58. The provision of information**

- (1) For the purposes of this Act —
- (a) goods that are attached to, or wholly or partly wrapped or wound around with, anything shall be deemed to be packaged and the thing to which they are attached, or with which they are wrapped or wound, shall be deemed to be the packaging, covering or container in which they are packaged;
  - (b) a person shall be deemed to provide information in relation to goods —
    - (i) if he labels the goods;
    - (ii) if he labels any covering or container in which the goods are packaged;
    - (iii) if he places the information in any covering or container in which the goods are packaged;
    - (iv) if he packages the goods in any covering or container that is labelled;
    - (v) in respect of the price of any goods, if that price is determined on the basis of anything encoded on or in relation to the goods;
    - (vi) if he publishes the information in connection with the goods or anything on which the goods are mounted for display or exposed for sale; or
    - (vii) if he provides the information in any other manner from which it may reasonably be inferred that the information is applicable in respect of the goods;
  - (c) a person shall be deemed to provide information in respect of goods if he supplies goods in respect of which

- information is provided (whether by himself or any other person) in the manner referred to in paragraph (b);
- (d) information shall be deemed to be provided in respect of goods or an interest in land if it would be taken by any reasonable person as referring directly or indirectly to the goods or interest, or a class of goods or interests that includes those goods or interests, whether or not those goods or interests are in existence at the time the information is provided;
- (e) a person provides information in respect of services if he provides the information in such a manner that it would be taken by any reasonable person as referring directly or indirectly to the services, or a class of services that includes the services, whether or not —
- (i) the services are being supplied; or
  - (ii) any physical thing that is or is to be supplied, or that is or is to be provided for use, in the course of supply of the services, is in existence, at the time the information is provided.

## **Division 2 — Product information standards**

### **59. Prescribing of product information standards (TPA s. 65D(2))**

- (1) The regulations may prescribe a product information standard to be used for a specified kind of goods.
- (2) A product information standard for goods shall consist of requirements for, and for the form and manner of, disclosure of such information —
- (a) as to the price, performance, composition, contents, methods of manufacture or processing, design, construction, finish, size or packaging of the goods;
  - (b) as to the place of manufacture or production of the goods;

- (c) as to the identity of the manufacturer, producer or supplier of the goods;
- (d) as to the date of the manufacture or production, and the durable life, of the goods;
- (e) as to the suitability of particular methods of cleaning, washing or otherwise caring for, or as to storage of, the goods;
- (f) as to the flammability of the goods, or for other safety or protective purposes; or
- (g) otherwise relating to goods of that class or description,

as is reasonably necessary to give persons using the goods information as to their origin, quantity, quality, nature, durability, value or safety.

- (3) Regulations made under subsection (1) may —
  - (a) adopt either wholly or in part and either specifically or by reference any Australian Standard or any of the standards, rules, codes or specifications —
    - (i) of Standards Australia; or
    - (ii) of a specified prescribed body,with or without specified additions or variations; and
  - (b) prescribe any specified class or description of goods, notwithstanding that the goods are for use only as component parts of other goods (whether or not those other goods are goods of a prescribed class or description).
- (4) Regulations made pursuant to this section may also require that the surface burning time of any article of clothing, textile, fabric or other goods to which a product information standard applies shall be not less than such minimum time as is thereby prescribed, may require that a person shall not, in trade or commerce, supply any goods to which the regulations relate unless the surface burning time of the goods exceeds the minimum time prescribed in respect of those goods and may

provide for and prescribe penalties for contravention of the regulations.

- (5) In this section, “**specified**” means specified in the regulations.  
*[Section 59 amended by No. 74 of 2003 s. 53(4).]*

**60. Compliance with product information standard  
(TPA s. 65D(1) and (7))**

- (1) A person shall not, in trade or commerce, supply goods —
- (a) that are intended to be used, or are of a kind likely to be used, by a consumer; and
  - (b) in relation to which there is a product information standard,

unless the person has complied with the standard in relation to the goods or subsection (4) applies.

- (2) Subject to subsection (4), a person shall not supply a component part in respect of which no requirements have been prescribed under section 58 but which is intended for, but not embodied in, any goods in respect of which any such requirements are in force, unless, if the component part were embodied in the goods, any requirement of the regulations, so far as the requirement relates to that part of the goods, applicable to the goods would be complied with.

- (3) If —
- (a) a person supplies goods in contravention of subsection (1) or subsection (2); and
  - (b) another person suffers loss or damage by not having particular information relating to the goods but would not have suffered it if the product information standard had been complied with in relation to the goods,
- the person who suffers the loss or damage shall be deemed, for the purposes of this Act, to have suffered it by the supplying of the goods.

- (4) The provisions of this section shall not apply to a person —
- (a) where he is supplying the goods or component parts as scrap, that is to say, for the value of the materials of which the goods or parts are composed and not for use as finished articles; or
  - (b) in the case of goods or component parts which have been damaged by whatever cause, where he supplies the goods or component parts to a person who carries on a business of buying damaged goods and repairing or reconditioning them for resale, or to a person by whom the goods or parts were insured against damage.

### **Division 3 — Information providers**

#### **61. Offence to provide materially inaccurate information in respect of goods, or services or interests in land**

- (1) A person shall not, in trade or commerce, provide any materially inaccurate information in respect of any goods, services, or interest in land.
- (2) Where a product information standard has been prescribed assigning a meaning to information of a specified kind in respect of any specified goods or services or class of goods or services, any such information shall, for the purposes of this section, be deemed to be materially inaccurate if it is in that respect inaccurate to any degree in terms of the meaning so assigned.
- (3) Alteration or variation by whatever means of any information already provided constitutes the provision of materially inaccurate information if the information as a result of the alteration or variation is materially inaccurate.
- (4) Where an act or omission by a person is an offence against this section and is also an offence against section 12 and a person is convicted of the offence, the person is not liable to be punished twice in respect of the same act or omission.



**62. Prescribed information other than product information standards**

- (1) Without prejudice to the application of section 59 in respect of any goods, regulations in respect of any goods, services or interests in land may —
- (a) prescribe or regulate the content of information to be provided or the manner or form in which the information is to be provided;
  - (b) provide that information of a specified kind is not to be provided or that information is not to be provided in a specified manner or form;
  - (c) require the provision of specified information and prescribe the manner and form in which it is to be provided;
  - (d) assign a meaning to information of a specified kind;
  - (e) prohibit the alteration or variation of, or any interference with, any information provided in compliance with any regulation; and
  - (f) provide for and prescribe penalties for contravention of any regulations made pursuant to this section.
- (2) In subsection (1), “**specified**” means specified in the regulations.

**63. Application of certain provisions to information providers (TPA s. 65A)**

- (1) Nothing in section 10, 12, 13, 17, 18, 22, 61, or 62 applies to a prescribed publication of matter by a prescribed information provider, other than —
- (a) a publication of matter in connection with —
    - (i) the supply or possible supply of goods or services;
    - (ii) the sale or grant, or possible sale or grant, of interests in land;

- (iii) the promotion by any means of the supply or use of goods or services; or
- (iv) the promotion by any means of the sale or grant of interests in land,

where —

- (v) the goods or services were relevant goods or services, or the interests in land were relevant interests in land, as the case may be, in relation to the prescribed information provider; or
- (vi) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with —
  - (A) a person who supplies goods or services of that kind, or who sells or grants interests in land, being interests of that kind; or
  - (B) a body corporate that is related to a body corporate that supplies goods or services of that kind, or that sells or grants interests in land, being interests of that kind;

or

- (b) a publication of an advertisement.
- (2) For the purposes of this section, a publication by a prescribed information provider is a prescribed publication if —
- (a) in any case — the publication was made by the prescribed information provider in the course of carrying on a business of providing information; or
  - (b) in the case of a person who is a prescribed information provider by virtue of paragraph (a), (b) or (c) of the definition of “prescribed information provider” in subsection (3) (whether or not the person is also a prescribed information provider by virtue of another operation of that definition) — the publication was by

way of a radio or television broadcast by the prescribed information provider.

(3) In this section —

**“consortium”** has the same meaning as it has in Part IIIB of the *Broadcasting and Television Act 1942*<sup>6</sup> of the Commonwealth;

**“prescribed information provider”** means a person who carries on a business of providing information and, without limiting the generality of the foregoing, includes —

- (a) a person to whom, or each of the members of a consortium to which, a licence has been granted under Part IIIB of the *Broadcasting and Television Act 1942*<sup>6</sup> of the Commonwealth;
- (b) the Australian Broadcasting Corporation; and
- (c) the Special Broadcasting Service;

**“relevant goods or services”**, in relation to a prescribed information provider, means goods or services of a kind supplied by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider;

**“relevant interests in land”**, in relation to a prescribed information provider, means interests in land, being interests of a kind sold or granted by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider.

(4) Unless the Minister so authorises, no prosecution shall be instituted against the printer, publisher, or proprietor of any newspaper or the licensee of any commercial broadcasting station or commercial television station, or against any person acting under the authority of any such person, for the publication in any such newspaper or for the broadcasting by wireless transmission or by television from such station, as the

case may be, of any statement which contravenes this Act unless —

- (a) the printer, publisher, proprietor or licensee had been warned by the Commissioner, or a person authorised in writing by the Commissioner, of the nature of the false representation which would be conveyed by the statement, or any other statement substantially the same as that statement, and that its publication would contravene this Act; and
  - (b) the printer, publisher, proprietor or licensee has on any one day after the receipt of the warning published or broadcast by wireless transmission or by television or authorised or permitted the publication or broadcasting of the statement or any such other statement in any issue of any newspaper printed or published by him or from any commercial broadcasting station or commercial television station of which he is the licensee, as the case may be.
- (5) In subsection (4) —
- “**licensee**”, “**commercial broadcasting station**” and “**commercial television station**” have the meanings ascribed thereto in the *Broadcasting and Television Act 1942*<sup>6</sup> of the Commonwealth; and
  - “**newspaper**” includes any periodical publication.

#### **Division 4 — Product quality standards**

#### **64. Prescribing of product quality standards**

- (1) The regulations may prescribe a product quality standard to be used for textile products, footwear, or furniture.
- (2) For the purposes of this section —
  - “**fibre**” means wool, hair, silk, cotton, linen, and any other fibrous material, whether natural or artificial;

**“furniture”** means articles of which wood, reeds, rattan, cane, seagrass or metal comprise the whole or part and such as are usually made or assembled by cabinet makers, assemblers in the furnishing trades, chair and couch makers, upholsterers, wood carvers, or wood turners; and

**“textile products”**—

(a) means —

(i) woven, knitted or felted materials manufactured from fibre;

(ii) threads and lace,

whether in the piece or roll or in apparel, and

(iii) tops and yarns;

(iv) carpets; and

(v) any goods declared by the regulations to be textile products for the purposes of this Act,

but

(b) does not include anything which by the regulations is excluded from this definition.

(3) A product quality standard for goods shall consist of such requirements as to —

(a) performance, composition, contents, methods of manufacture or processing, design, construction, materials, finish or packaging of the goods;

(b) other characteristics of the goods;

(c) the testing of the goods; and

(d) the marking, stamping or labelling of the goods,

as are reasonably necessary to ensure that the goods are of such quality as to be reasonably fit for the purpose for which goods of the kind are ordinarily used.

(4) Regulations made for the purposes of this Division may prescribe offences and provide penalties in respect of the marking, stamping or labelling of goods to which the Division applies.

**65. Prohibition on supply of goods not complying with product quality standards**

- (1) A person shall not, in trade or commerce, supply goods —
- (a) that are intended to be used, or are of a kind likely to be used, by a consumer; and
  - (b) in relation to which there is a product quality standard, unless the goods comply with the standard.
- (2) If —
- (a) a person supplies goods in contravention of subsection (1); and
  - (b) another person suffers loss or damage because of a defect in, or a characteristic of, the goods but would not have suffered it if the goods had complied with the product quality standard,

the person who suffers the loss or damage shall be deemed, for the purposes of this Act, to have suffered it by the supplying of the goods.

**Division 5 — Packaging standards**

**66. Prescribing of packaging standards**

- (1) The regulations may prescribe a packaging standard to be used for a specified kind of goods.
- (2) A packaging standard for goods may consist of such requirements as are reasonably necessary to prevent deceptive packaging of goods and to ensure that goods are packaged for the reasonable convenience of persons to whom they may be supplied.
- (3) Without limiting the generality of subsection (2), the regulations may —
- (a) prescribe or regulate the composition, shape, size, dimensions or thickness of the covering or containers in which goods are packaged;

- (b) provide that the covering or containers in which goods are packaged shall not have any unoccupied space or more than a specified amount of unoccupied space;
- (c) provided that the covering or containers in which goods are packaged shall not have any cavities or recesses or cavities or recesses of a specified kind;
- (d) prescribe or regulate the mass or measure in which goods are to be packaged; and
- (e) prescribe or regulate any other matter relating to the packaging of goods whether or not similar to the matters referred to in paragraphs (a), (b), (c) or (d).

(4) In this section, “**specified**” means specified in the regulations.

**67. Prohibition on supply of goods not complying with packaging standards**

- (1) A person shall not, in trade or commerce, supply goods —
  - (a) that are intended to be used, or are of a kind likely to be used, by a consumer; and
  - (b) in relation to which there is a packaging standard,unless the goods comply with the standard.
- (2) If —
  - (a) a person supplies goods in contravention of subsection (1); and
  - (b) another person suffers loss or damage because of a defect in, or a characteristic of, the goods or packaging, but would not have suffered it if the goods had complied with the packaging standard,

the person who suffers the loss or damage shall be deemed, for the purposes of this Act, to have suffered it by the supplying of the goods.

## **Part VII — Enforcement and remedies**

### **68. Interpretation (TPA s. 75B)**

A reference in this Part to a person involved in a contravention of a provision of this Act shall be read as a reference to a person who —

- (a) has aided, abetted, counselled or procured the contravention;
- (b) has induced, whether by threats or promises or otherwise, the contravention;
- (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention;
- (d) has conspired with others to effect the contravention; or
- (e) has attempted to contravene the provision, or to do any Act of a kind referred to in paragraph (a), (b), (c) or (d).

### **69. Offences generally (TPA s. 79)**

(1) A person who —

- (a) contravenes; or
- (b) is involved in a contravention of,

a provision of this Act (other than section 10 or 11, or in circumstances to which section 70 applies) is guilty of a crime.

Summary conviction penalty: the lesser of a fine of \$6 000 or the maximum penalty provided by this Act for the offence.

(2) A person guilty of an offence against this Act (other than a breach of the regulations) for which a penalty is not otherwise provided is, subject to subsection (3), liable —

- (a) in the case of a person other than a body corporate — to a penalty not exceeding \$20 000; or
- (b) in the case of a body corporate — to a penalty not exceeding \$100 000.



- (3) Where —
- (a) a person is convicted, on the same or separate occasions, of 2 or more offences constituted by, or relating to, contraventions of the same provision of this Act; and
  - (b) the contraventions are of the same or a substantially similar nature and occurred at or about the same time (whether or not the person is also convicted of other contraventions of that provision that were of a different nature or occurred at a different time),
- a court shall not impose on the person for those offences fines that, in the aggregate, exceed the maximum fine that would be applicable for a single offence against that provision.
- (4) If an Act or omission is both an offence against this Act and an offence under a law of the Commonwealth or a law in force elsewhere in Australia, a person convicted of an offence under that law is not liable to be convicted of the offence against this Act.
- (5) Proceedings for an offence against this Act may be commenced within 3 years after the alleged commission of the offence.
- (6) Where proceedings in the Supreme Court or the District Court are taken against a person for contravening, or being involved in a contravention of, a provision of this Act, the Court, in addition to dealing with the offence charged, may —
- (a) grant an injunction under section 74 or 75 against the person in relation to —
    - (i) the conduct that constitutes, or is alleged to constitute, the contravention; or
    - (ii) other conduct of that kind;and
  - (b) make an order under section 77 in relation to the contravention.
- (7) If a person is convicted of an offence against this Act, the court by which the conviction was effected may order the offender to

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reimburse the Department for the cost of purchasing or testing any goods to which the conviction relates.

- (8) Where a person is, by any conviction or order of a court, adjudged to pay a fine, or costs or other sum of money in respect of an offence against this Act, the court by which the conviction or order was effected or made may —
- (a) exercise any power that the court has apart from this section; or
  - (b) on the application of the Minister or the Commissioner, order that the amount unpaid be recoverable as if it were a judgment debt payable by the defaulter to the Crown under a judgment entered up in the court.

*[Section 69 amended by No. 4 of 2004 s. 58.]*

**70. Offences against the regulations**

- (1) A person who contravenes or is involved in a contravention of the regulations, in circumstances which do not constitute an offence against Part II, Part V or Part VI, is guilty of an offence, punishable in accordance with the regulations.
- (2) A court of summary jurisdiction dealing with an offence under this Act is to be constituted by a magistrate.

*[Section 70 amended by No. 59 of 2004 s. 141.]*

*[71. Repealed by No. 4 of 2004 s. 58.]*

**72. Who may institute prosecutions (TPA s. 163)**

- (1) Prosecutions for offences against this Act may be instituted by the Commissioner or by a person authorised in writing by the Commissioner, but shall not be instituted otherwise except with the consent in writing of the Commissioner or of a person authorised by the Commissioner, by writing, to give such consents.

- (2) In proceedings for an offence against this Act, a document giving consent to the institution of a prosecution and purporting to have been signed by the Commissioner, or by an authorised person, is evidence of that consent without proof of the signature.

**73. Modified penalties by way of infringement notice for certain offences**

- (1) Payment of the amount of a penalty pursuant to this section shall not be regarded as an admission of liability for the purpose of, nor in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence.
- (2) The regulations may prescribe an offence for the purposes of this section by setting out the offence or by a reference to the provision of this Act or the regulations creating the offence.
- (3) A person authorised under subsection (10) who has reason to believe that a person who —
- (a) has committed an offence prescribed by the regulations for the purposes of this section; or
  - (b) is guilty of an offence by virtue of section 81 in relation to any offence of the kind referred to in paragraph (a),
- may give to that person an infringement notice in the prescribed form informing him that if he does not wish to be prosecuted for the alleged offence in a court he may, within a period of 21 days after the giving of the notice, pay to a person designated under subsection (10), the amount of money specified in the notice as being the modified penalty for that offence.
- (4) In an infringement notice the amount specified as being the modified penalty for the offence referred to in the notice shall not exceed 10% of the maximum penalty for that offence under this Act at the time the alleged offence is believed to have been committed.

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(5) An infringement notice may be given to an alleged offender within 21 days of the alleged offence —

- (a) personally; or
- (b) by posting it to him by certified post,

and where service is effected under paragraph (b), an official postal receipt held by the person who posted the notice is conclusive evidence of the giving of the notice.

(6) A person to whom an infringement notice is given may decline to be dealt with under this section and is deemed to have so declined if the modified penalty is not paid within 21 days or such further time as may, whether before or after the expiry of that period, be allowed by the Commissioner or a person authorised in writing by him for this purpose.

(7) The Commissioner may, whether or not the modified penalty has been paid, withdraw an infringement notice within 28 days after it was given by sending to the alleged offender a signed notice in the prescribed form, and where a notice is withdrawn after the modified penalty has been paid, the amount paid shall be refunded.

(8) Where the modified penalty payable under an infringement notice has been paid within 21 days or such further time as is allowed and it has not been withdrawn, no proceedings shall be brought or other penalty imposed on that person under this Act.

(9) The amount of any modified penalty paid pursuant to an infringement notice shall, subject to subsection (7), be dealt with as if it were a fine imposed by a court as a penalty for an offence.

(10) The Commissioner may —

- (a) in writing, authorise persons or classes of persons who are officers of the Department to give infringement notices; and

- (b) by notice published in the *Gazette*, designate the persons or classes of persons to whom payment of a modified penalty may be made,

and may in like manner revoke an authorisation or notice.

- (11) The Commissioner shall issue to each person authorised under subsection (10) a certificate in the prescribed form which that person shall produce whenever required to do so by a person to whom he has given or is about to give an infringement notice.

*[Section 73 amended by No. 78 of 1995 s. 38; No. 84 of 2004 s. 80; No. 28 of 2006 s. 98.]*

**74. Injunctions in restraint of conduct (TPA s. 80)**

- (1) The Supreme Court or the District Court, on the application of the Minister, the Commissioner or any other person, where the Court is satisfied that a person —

- (a) has engaged, or is proposing to engage, in conduct that constitutes or would constitute; or
- (b) is involved in,

a contravention of a provision of this Act, may grant an injunction in such terms as the Court determines to be appropriate.

- (2) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised —
  - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind;
  - (b) whether or not the person has previously engaged in conduct of that kind; and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

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**75. Other injunctions**

- (1) The Supreme Court or the District Court, on the application of the Commissioner, where the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes, or would constitute, or is involve in, a contravention of —
- (a) a provision of a banning order;
  - (b) a provision of any other legislation administered by the Minister or of an order made under any such legislation, being a provision relevant to the alleged contravention;
  - (c) a provision of a code of practice in force under Part IV in respect of which the Commissioner has requested the person to give an undertaking under section 44 or has applied to the State Administrative Tribunal under section 46; or
  - (d) a provision of an order of the State Administrative Tribunal under section 46,

may grant an injunction in such terms as the Court determines to be appropriate.

- (2) If the Court is satisfied, on the application of the Minister or the Commissioner, that a person has engaged in conduct constituting, or is involved in, a contravention of a provision of this Act, other than section 11, the Court may grant an injunction requiring that person to take specified action to remedy any adverse consequence of that conduct, including —
- (a) an order requiring that person or a person involved in the contravention to disclose to the public, to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information, or information of such a kind, as is so specified, being information that is in the possession of the person to whom the order is directed or to which that last-mentioned person has access; or
  - (b) an order requiring the person or a person involved in the contravention to publish, at the person's own expense, in

a manner and at times specified in the order,  
advertisements the terms of which are specified in, or  
are to be determined in accordance with, the order.

*[Section 75 amended by No. 55 of 2004 s. 339; No. 28 of 2006  
s. 99.]*

**76. Injunctions generally (TPA s. 80)**

- (1) An injunction granted under this Part may be, or include, an injunction restraining a person from carrying on a business of supplying goods or services (whether or not as part of or incidental to, the carrying on of another business) —
  - (a) for a specified period; or
  - (b) except on specified terms and conditions.
- (2) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised —
  - (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;
  - (b) whether or not the person has previously refused or failed to do that act or thing; and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.
- (3) Where the Minister or the Commissioner makes an application to the Court for the grant of an injunction under this Part, the Court shall not require the applicant or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages or costs.
- (4) If —
  - (a) in a case to which subsection (3) does not apply, the Court would, but for this subsection, require a person to give an undertaking as to damages or costs; and
  - (b) the Minister gives the undertaking,

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the Court shall accept the undertaking by the Minister and shall not require a further undertaking from any other person.

- (5) An interim injunction may be granted under this Part pending final determination of the application.
- (6) A final injunction may, by consent of the parties, be granted under this Part without proof that proper grounds for the injunction exist.
- (7) An injunction under this Part may be rescinded or varied at any time.
- (8) If the Court grants an injunction in relation to goods the supply of which would offend against section 51, 52 or 54, the Court may make such order as it thinks fit with respect to disposal of the goods.

**77. Other orders (TPA s. 87)**

- (1) Without limiting the generality of section 74 or 75, if, in a proceeding instituted under this Part, or for an offence against this Act, the Supreme Court or the District Court is satisfied that a person has suffered, or is likely to suffer, loss or damage by reason of conduct of another person that contravened a provision of this Act, the Court, whether or not an injunction under this Part or any other relief is granted or any other order is made in those proceedings, may make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention for the purpose of compensating the first-mentioned person wholly or in part for the loss or damage or of preventing or reducing the extent of the loss or damage.
- (2) Whether or not other proceedings have been instituted under this Act in relation to a contravention, the Court may —
  - (a) on the application of a person who has suffered, or is likely to suffer, loss or damage by reason of the contravention; or



- (b) on the application of the Commissioner on behalf of one or more such persons made with the written consent of each such person,

make orders under this section.

- (3) The orders that may be made under this section include —
  - (a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void from its beginning or at all times on and after such date, before the date on which the order is made, as is specified in the order;
  - (b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date, before the date on which the order is made, as is so specified;
  - (c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;
  - (d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage;
  - (e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;
  - (f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at the person's

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own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage; and

- (g) an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to execute an instrument that —
  - (i) varies, or has the effect of varying, the first-mentioned instrument; or
  - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.
- (4) An application under subsection (2) in relation to a contravention of section 11 may be made at any time within 2 years after the cause of action accrued or, in any other case, at any time within 3 years after the cause of action accrued.
- (5) For the purpose of determining whether to make an order under this section in relation to a contravention of section 11, the Court may have regard to the conduct of the parties to the proceedings since the contravention occurred.
- (6) The Court shall not make an order under this section in relation to a contravention of section 11 in relation to a contract of insurance to which the *Insurance Contracts Act 1984* of the Commonwealth applies.
- (7) The powers conferred on the Supreme Court and the District Court under this section in relation to a contract or arrangement do not affect any powers that any other court may have in relation to the contract or arrangement in proceedings instituted in that other court in respect of the contract or arrangement.

**78. Power of Supreme Court and District Court to prohibit payment or transfer of money or other property (TPA s. 87A)**

- (1) Where —
- (a) proceedings have been commenced in the Supreme Court or the District Court against a person for an offence against this Act;
  - (b) an application has been made under section 74 or 75 for an injunction against a person in relation to a contravention of a provision of this Act;
  - (c) an action has been commenced under section 79(1) against a person in relation to a contravention of a provision of this Act; or
  - (d) an application for an order under section 77 has been or may be made against a person in relation to a contravention of a provision of this Act,

the Court may, on the application of the Minister or the Commissioner, make an order or orders of the kind specified in subsection (2) if the Court is satisfied that —

- (e) it is necessary or desirable to do so for the purpose of preserving money or other property held by or on behalf of a person referred to in paragraph (a), (b), (c) or (d), as the case may be (in this section referred to as the **“relevant person”**), where the relevant person is liable or may become liable under this Act to pay moneys by way of a fine, damages, compensation, refund or otherwise or to transfer, sell or return other property; and
  - (f) it will not unduly prejudice the rights and interests of any other person.
- (2) The orders referred to in subsection (1) are —
- (a) an order prohibiting, either absolutely or subject to conditions, a person who is indebted to the relevant person or to an associate of the relevant person from

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- making a payment in total or partial discharge of the debt to, or to another person at the direction or request of the person to whom the debt is owed;
- (b) an order prohibiting, either absolutely or subject to conditions, a person who is holding money or other property on behalf of the relevant person or on behalf of an associate of the relevant person from paying all or any of the money, or transferring, or otherwise parting with possession of the other property, to, or to another person at the direction or request of, the person on whose behalf the money or other property is held;
  - (c) an order prohibiting, either absolutely or subject to conditions, the taking or sending by any person of money of the relevant person or of an associate of the relevant person to a place outside the State;
  - (d) an order prohibiting, either absolutely or subject to conditions, the taking, sending or transfer by any person of other property of the relevant person or of an associate of the relevant person to a place outside the State; and
  - (e) an order appointing, where the relevant person is a natural person, a receiver or trustee of the property or of part of the property of the relevant person with such powers as are specified in the order.
- (3) Subject to subsection (4), an order under this section may be expressed to operate —
- (a) for a period specified in the order; or
  - (b) until proceedings under any other provision of this Part in relation to which the order was made have been concluded.
- (4) An order under this section made in the absence of the person against whom the order is sought shall not be expressed to operate for a period exceeding 30 days.

- (5) A person who contravenes or fails to comply with an order by the Supreme Court or the District Court under this section that is applicable to the person is guilty of an offence.
- (6) Nothing in this section affects the powers that the Supreme Court or the District Court has apart from this section.
- (7) The provisions of this section shall be given effect to subject to the *Bankruptcy Act 1966* of the Commonwealth.
- (8) A reference in this section to a person who is an associate of a relevant person is a reference to —
  - (a) a person holding money or other property on behalf of the relevant person; or
  - (b) if the relevant person is a body corporate — a wholly owned subsidiary of the relevant person.

**79. Actions for damages (TPA s. 82)**

- (1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part II (section 11 excepted), Part III, Part V or Part VI, may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.
- (2) An action under subsection (1) may be commenced at any time within 3 years after the date on which the cause of action accrued.

**80. Finding in proceedings under this Part to be evidence (TPA s. 83)**

In a proceeding against a person under section 79 or in an application under section 77(2) for an order against a person, a finding of any fact by a court made in proceedings under section 74 or 75, or for an offence against this Act, in which that person has been found to have contravened, or to have been involved in a contravention of, a provision of Part II, Part III, Part V or Part VI is evidence of that fact and the finding may be

proved by production of a document under the seal of the court from which the finding appears.

**81. Offences by directors, employers, and vicarious liability**

- (1) Where a corporation within the meaning of the *Corporations Act 2001* of the Commonwealth or any other body of persons, corporate or unincorporate, is convicted of an offence against this Act, each person who, at the time of the commission of that offence, was a director of the corporation or was the manager, secretary or other similar officer of that body, or who purported to act in any such capacity, is also guilty of an offence unless he proves —
- (a) that the offence was committed without his knowledge, or that he did not authorise or permit the commission of the offence; and
  - (b) that he was not in a position to influence the conduct of that corporation or body or, being in such a position, could not by the exercise of reasonable diligence have prevented the commission of the offence,

and is liable to a penalty not exceeding the penalty prescribed for the offence of which the corporation or body was convicted.

- (2) Where the affairs of a body of persons are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his function of management as if he were the manager of that body.
- (3) Where the employee or agent of a person is convicted of an offence against this Act, each person who, at the time of the commission of the offence, was his employer or principal is also guilty of an offence, unless he proves that he could not by the exercise of reasonable diligence have prevented the commission of the offence of which his employee or agent was convicted, and is liable to a penalty not exceeding the penalty prescribed for the offence of which the employee or agent was convicted.

- (4) Where a person has committed an offence against Division 1 of Part II, or would have committed an offence but for the fact that he could establish a defence under section 83(1), and the contravention, or what would have constituted the contravention, was due to the act or default of another person —
- (a) that other person —
    - (i) is also guilty of an offence and liable to the same penalty as is provided for the offence against Division 1 of Part II; and
    - (ii) may be charged and convicted of the offence, whether or not proceedings are taken against the first-mentioned person for the offence against Division 1 of Part II;
  - and
  - (b) the first-mentioned person shall be a competent and compellable witness in any proceedings taken against that other person in respect of the offence.

*[Section 81 amended by No. 10 of 2001 s. 75.]*

**82. Conduct and state of mind of directors, employees or agents (TPA s. 84)**

- (1) Where, in a proceeding under this Part in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, employee or agent of the body corporate, being a director, employee or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind.
- (2) Any conduct engaged in on behalf of a body corporate —
- (a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or
  - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director,

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employee or agent of the body corporate, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent,

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

- (3) Where, in a proceeding under this Part in respect of conduct engaged in by a person other than a body corporate, it is necessary to establish the state of mind of the person, it is sufficient to show that an employee or agent of the person, being an employee or agent by whom the conduct was engaged in within the scope of the employee's or agent's actual or apparent authority, had that state of mind.
- (4) Conduct engaged in on behalf of a person other than a body corporate —
- (a) by an employee or agent of the person, within the scope of the actual or apparent authority of the employee or agent; or
  - (b) by any other person, at the direction or with the consent or agreement (whether express or implied) of an employee or agent of the first-mentioned person, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent,

shall be deemed, for the purposes of this Act, to have been engaged in also by the first-mentioned person.

- (5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for that intention, opinion, belief or purpose.



**83. Defences (TPA s. 85)**

- (1) Subject to subsection (3), in a prosecution under this Part for an offence against this Act it is a defence if the accused establishes —
  - (a) that the contravention in respect of which the proceeding was instituted was due to reasonable mistake;
  - (b) that the contravention in respect of which the proceeding was instituted was due to reasonable reliance on information supplied by another person; or
  - (c) that —
    - (i) the contravention in respect of which the proceeding was instituted was due to the Act or default of another person, to an accident or to some other cause beyond the accused's control; and
    - (ii) the accused took reasonable precautions and could not by the exercise of due diligence have prevented the commission of the offence.
- (2) In subsection (1)(b) and (c), **“another person”** does not include a person who was —
  - (a) an employee or agent of the accused; or
  - (b) in the case of an accused being a body corporate, a director, employee or agent of the accused,at the time when the contravention occurred.
- (3) If a defence provided by subsection (1) involves an allegation that a contravention was due to reliance on information supplied by another person or to the Act or default of another person, the accused is not, without leave of the court, entitled to rely on that defence unless the accused has, not later than 7 days before the day on which the hearing of the proceeding commences, served on the person by whom the proceeding was instituted a notice in writing giving such information that would identify or assist in the identification of the other person as was then in the accused's possession.

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- (4) In a proceeding under this Part in relation to a contravention of this Act committed by the publication of an advertisement, it is a defence if it is established that the accused is a person whose business it is to publish or arrange for the publication of advertisements and that the accused received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to a contravention of this Act.
- (5) In a proceeding under this Part in relation to a contravention of this Act committed by the supplying of goods that did not comply with a product quality standard, a product safety standard or a packaging standard, or in relation to which the supplier did not comply with a product information standard, it is a defence if the accused establishes —
- (a) that the goods were acquired by him for the purpose of re-supply and were so acquired from a person who carried on in Australia a business of supplying such goods otherwise than as the agent of a person outside Australia; and
  - (b) that he did not know, and could not with reasonable diligence have ascertained, that the goods did not comply with that standard or that he had not complied with that standard in relation to the goods, as the case may be, or he relied in good faith on a representation by the person from whom he acquired the goods that a relevant standard of that kind had not been prescribed in respect of the goods.
- (6) A person is not, without leave of the court, entitled to rely on the defence provided by subsection (5) unless he has, not later than 7 days before the day on which the hearing of the proceeding commences, served on the person by whom the proceeding was instituted a notice in writing identifying the person from whom he acquired the goods.

*[Section 83 amended by No. 84 of 2004 s. 82.]*

**84. Regulations**

The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

### Notes

<sup>1</sup> This is a compilation of the *Fair Trading Act 1987* and includes the amendments made by the other written laws referred to in the following table <sup>1a</sup>. The table also contains information about any reprint.

#### Compilation table

Short title	Number and year	Assent	Commencement
<i>Fair Trading Act 1987</i>	108 of 1987	19 Dec 1987	Pt. I, III, IV and VII: 8 Apr 1988 (see s. 2 and <i>Gazette</i> 8 Apr 1988 p. 1107); balance: 9 Sep 1988 (see s. 2 and <i>Gazette</i> 9 Sep 1988 p. 3518)
<i>Acts Amendment (Public Sector Management) Act 1994 s. 3(2)</i>	32 of 1994	29 Jun 1994	1 Oct 1994 (see s. 2 and <i>Gazette</i> 30 Sep 1994 p. 4948)
<i>Sentencing (Consequential Provisions) Act 1995 Pt. 29</i>	78 of 1995	16 Jan 1996	4 Nov 1996 (see s. 2 and <i>Gazette</i> 25 Oct 1996 p. 5632)
<i>Local Government (Consequential Amendments) Act 1996 s. 4</i>	14 of 1996	28 Jun 1996	1 Jul 1996 (see s. 2)
<i>Statutes (Repeals and Minor Amendments) Act 1997 s. 39(10) and 59</i>	57 of 1997	15 Dec 1997	15 Dec 1997 (see s. 2(1))
<i>Corporations (Consequential Amendments) Act 2001 Pt. 24</i>	10 of 2001	28 Jun 2001	15 Jul 2001 (see s. 2 and <i>Gazette</i> 29 Jun 2001 p. 3257 and Cwlth <i>Gazette</i> 13 Jul 2001 No. S285)
<b>Reprint of the <i>Fair Trading Act 1987</i> as at 16 Nov 2001</b> (includes amendments listed above)			
<i>Statutes (Repeals and Minor Amendments) Act 2003 s. 53</i>	74 of 2003	15 Dec 2003	15 Dec 2003 (see s. 2)
<i>Criminal Code Amendment Act 2004 s. 58</i>	4 of 2004	23 Apr 2004	21 May 2004 (see s. 2)
<i>Courts Legislation Amendment and Repeal Act 2004 s. 141</i>	59 of 2004	23 Nov 2004	1 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7128)

Short title	Number and year	Assent	Commencement
<i>State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004 Pt. 2 Div. 45</i> <sup>7</sup>	55 of 2004	24 Nov 2004	1 Jan 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7130)
<i>Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004 s. 80 and 82</i>	84 of 2004	16 Dec 2004	2 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7129 (correction in <i>Gazette</i> 7 Jan 2005 p. 53))
<b>Reprint 2: The Fair Trading Act 1987 as at 24 Jun 2005</b> (includes amendments listed above)			
<i>Machinery of Government (Miscellaneous Amendments) Act 2006 Pt. 4 Div. 12</i> <sup>8</sup>	28 of 2006	26 Jun 2006	1 Jul 2006 (see s. 2 and <i>Gazette</i> 27 Jun 2006 p. 2347)

<sup>1a</sup> On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.

### Provisions that have not come into operation

Short title	Number and Year	Assent	Commencement
<i>Retail Shops and Fair Trading Legislation Amendment Act 2006 Pt. 4</i> <sup>10</sup>	47 of 2006	4 Oct 2006	To be proclaimed (see s. 2)
<i>Consumer Protection Legislation Amendment and Repeal Act 2006 Pt. 5</i> <sup>11</sup>	69 of 2006	13 Dec 2006	To be proclaimed (see s. 2)

<sup>2</sup> This reference, and all following references, to “TPA”, refers to the *Trade Practices Act 1974* of the Commonwealth.

<sup>3</sup> Footnote no longer applicable.

<sup>4</sup> Footnote no longer applicable.

<sup>5</sup> Formerly referred to *The Sale of Goods Act 1895*, the short title of which was changed to the *Sale of Goods Act 1895* by the *Statutes (Repeals and Minor*

*Amendments) Act 2003* s. 150(1). The reference was changed under the *Reprints Act 1984* s. 7(3)(gb).

<sup>6</sup> Now see the *Broadcasting Services Act 1992* of the Commonwealth.

<sup>7</sup> The *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* Pt. 5, the *State Administrative Tribunal Act 2004* s. 167, and the *State Administrative Tribunal Regulations 2004* r. 28 and 42 deal with certain transitional issues, some of which may be relevant to this Act.

<sup>8</sup> The *Machinery of Government (Miscellaneous Amendments) Act 2006* Pt. 4 Div. 23 reads as follows:

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### **Division 23 — Transitional provisions**

#### **151. Commissioner for Fair Trading**

- (1) On commencement, the person holding the office of Commissioner for Fair Trading immediately before commencement is to be taken to have been designated as the Commissioner or Registrar (as the case requires) for the purposes of each of the following enactments —
  - (a) the *Associations Incorporation Act 1987*;
  - (b) the *Business Names Act 1962*;
  - (c) the *Chattel Securities Act 1987*;
  - (d) the *Companies (Co-operative) Act 1943*;
  - (e) Part 8 of the *Competition Policy Reform (Western Australia) Act 1996*;
  - (f) the *Consumer Affairs Act 1971*;
  - (g) the *Co-operative and Provident Societies Act 1903*;
  - (h) the *Credit Act 1984*;
  - (i) the *Credit (Administration) Act 1984*;
  - (j) the *Employment Agents Act 1976*;
  - (k) the *Hire-Purchase Act 1959*;
  - (l) the *Limited Partnerships Act 1909*;
  - (m) the *Motor Vehicle Dealers Act 1973*;
  - (n) the *Petroleum Products Pricing Act 1983*;
  - (o) the *Petroleum Retailers Rights and Liabilities Act 1982*;
  - (p) the *Residential Tenancies Act 1987*;
  - (q) the *Retirement Villages Act 1992*;
  - (r) the *Travel Agents Act 1985*.
- (2) A thing done or omitted to be done by, to or in relation to, the Commissioner for Fair Trading (including in his or her capacity as

the Prices Commissioner) before commencement under a provision of the *Consumer Affairs Act 1971* for the purposes of another enactment listed in subsection (1) has the same effect after commencement, to the extent that it has any force or significance after commencement, as if it had been done or omitted —

- (a) by, to or in relation to, the Commissioner or Registrar (as the case requires) as defined in that other enactment as in force after commencement; and
  - (b) where relevant, under the corresponding provision of that other enactment as in force after commencement.
- (3) To the extent that a thing done or omitted to be done by, to or in relation to, the Commissioner for Fair Trading (including in his or her capacity as the Prices Commissioner) before commencement under, or for the purposes of, an enactment listed in subsection (1) is not covered by subsection (2), it has the same effect after commencement, to the extent that it has any force or significance after commencement, as if it had been done or omitted by, to or in relation to, the Commissioner or Registrar (as the case requires) as defined in that enactment as in force after commencement.
- (4) A thing done or omitted to be done by, to or in relation to, the Commissioner for Fair Trading before commencement under, or for the purposes of, an enactment not listed in subsection (1) has the same effect after commencement, to the extent that it has any force or significance after commencement, as if it had been done or omitted by, to or in relation to, the Commissioner as defined in the *Consumer Affairs Act 1971* as in force after commencement.
- (5) A reference in an enactment to the Commissioner for Fair Trading is to have effect after commencement as if it had been amended to be a reference to —
- (a) in the case of an enactment listed in subsection (1) or subsidiary legislation made under such an enactment — the Commissioner or Registrar (as the case requires) as defined in the enactment as in force after commencement; or
  - (b) in the case of any other enactment or subsidiary legislation — the Commissioner as defined in the *Consumer Affairs Act 1971* as in force after commencement.

**152. Commissioner for Corporate Affairs and Registrar of Co-operative and Financial Institutions**

- (1) A thing done or omitted to be done by, to or in relation to, the Commissioner for Corporate Affairs before commencement under,

or for the purposes of, the *Companies (Co-operative) Act 1943* has the same effect after commencement as if it had been done or omitted by, to or in relation to, the Registrar as defined in that Act as in force after commencement.

- (2) A thing done or omitted to be done by, to or in relation to, the Registrar of Co-operative and Financial Institutions before commencement under, or for the purposes of, the *Co-operative and Provident Societies Act 1903* has the same effect after commencement as if it had been done or omitted by, to or in relation to, the Registrar as defined in that Act as in force after commencement.

**153. *Consumer Affairs Act 1971***

Each office in existence immediately before commencement because of section 15(1) of the *Consumer Affairs Act 1971* does not cease merely because that subsection is repealed by this Act.

**154. *Petroleum Products Pricing Act 1983***

Each office in existence immediately before commencement because of section 5(2)(b) of the *Petroleum Products Pricing Act 1983* does not cease merely because that paragraph is deleted by this Act.

**155. Interpretation**

In this Division —

“**commencement**” means the time at which this Division comes into operation;

“**Commissioner for Fair Trading**” means the Commissioner for Fair Trading referred to in section 15 of the *Consumer Affairs Act 1971* as in force before commencement;

“**Prices Commissioner**” means the Prices Commissioner referred to in section 5(1) of the *Petroleum Products Pricing Act 1983* as in force before commencement.

”.

<sup>9</sup> Footnote no longer applicable.

<sup>10</sup> On the date as at which this compilation was prepared, the *Retail Shops and Fair Trading Legislation Amendment Act 2006* Pt. 4 had not come into operation. It reads as follows:



“

**Part 4 — Fair Trading Act 1987**

**26. The Act amended**

The amendments in this Part are to the *Fair Trading Act 1987*.

**27. Section 11A inserted**

After section 11 the following section is inserted —

“

**11A. Unconscionable conduct in business transactions (TPA s. 51AC)**

(1) In this section —

“**applicable industry code**”, in relation to a person who is a participant in an industry, means a code of practice relating to the industry that has been prescribed under section 43 and that is in force;

“**commencement**” means the commencement of section 27 of the *Retail Shops and Fair Trading Legislation Amendment Act 2006*;

“**industry code**” means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry;

“**listed public company**” has the same meaning as it has in the *Income Tax Assessment Act 1997* of the Commonwealth.

(2) A person shall not, in trade or commerce, in connection with —

- (a) the supply or possible supply of goods or services to another person (other than a listed public company); or
- (b) the acquisition or possible acquisition of goods or services from another person (other than a listed public company),

engage in conduct that is, in all the circumstances, unconscionable.

(3) Without in any way limiting the matters to which a court may have regard for the purpose of determining whether a person (the “**supplier**”) has contravened subsection (2) in connection with the supply or possible supply of goods or services to a person (the “**business consumer**”), the court may have regard to —

- (a) the relative strengths of the bargaining positions of the supplier and the business consumer;

- (b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier;
  - (c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
  - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer (or a person acting on behalf of the business consumer) by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services;
  - (e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier;
  - (f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other similar business consumers;
  - (g) the requirements of any applicable industry code;
  - (h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code;
  - (i) the extent to which the supplier unreasonably failed to disclose to the business consumer —
    - (i) any intended conduct of the supplier that might affect the interests of the business consumer; and
    - (ii) any risks to the business consumer arising from the supplier's intended conduct that are risks that the supplier should have foreseen would not be apparent to the business consumer;
  - (j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for the supply of the goods or services with the business consumer; and
  - (k) the extent to which the supplier and the business consumer acted in good faith.
- (4) Without in any way limiting the matters to which a court may have regard for the purpose of determining whether a person (the “**acquirer**”) has contravened subsection (2) in connection with the

acquisition or possible acquisition of goods or services from a person (the “**small business supplier**”), the court may have regard to —

- (a) the relative strengths of the bargaining positions of the acquirer and the small business supplier;
- (b) whether, as a result of conduct engaged in by the acquirer, the small business supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer;
- (c) whether the small business supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services;
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the small business supplier (or a person acting on behalf of the small business supplier) by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services;
- (e) the amount for which, and the circumstances in which, the small business supplier could have supplied identical or equivalent goods or services to a person other than the acquirer;
- (f) the extent to which the acquirer’s conduct towards the small business supplier was consistent with the acquirer’s conduct in similar transactions between the acquirer and other similar small business suppliers;
- (g) the requirements of any applicable industry code;
- (h) the requirements of any other industry code, if the small business supplier acted on the reasonable belief that the acquirer would comply with that code;
- (i) the extent to which the acquirer unreasonably failed to disclose to the small business supplier —
  - (i) any intended conduct of the acquirer that might affect the interests of the small business supplier; and
  - (ii) any risks to the small business supplier arising from the acquirer’s intended conduct that are risks that the acquirer should have foreseen would not be apparent to the small business supplier;
- (j) the extent to which the acquirer was willing to negotiate the terms and conditions of any contract for the

- acquisition of the goods or services with the small business supplier; and
- (k) the extent to which the acquirer and the small business supplier acted in good faith.
- (5) A person is not to be taken for the purposes of this section to engage in unconscionable conduct in connection with —
- (a) the supply or possible supply of goods or services to another person; or
- (b) the acquisition or possible acquisition of goods or services from another person,
- only because the first-mentioned person institutes legal proceedings in relation to that supply, possible supply, acquisition or possible acquisition or refers a dispute or claim in relation to that supply, possible supply, acquisition or possible acquisition to arbitration.
- (6) For the purpose of determining whether a person has contravened subsection (2) —
- (a) a court is not to have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
- (b) a court may have regard to circumstances existing before the commencement but not to conduct engaged in before the commencement.
- (7) A reference in this section to the supply or possible supply of goods or services is a reference to the supply or possible supply of goods or services to a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.
- (8) A reference in this section to the acquisition or possible acquisition of goods or services is a reference to the acquisition or possible acquisition of goods or services by a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.
- (9) A reference in this section to the supply or possible supply of goods or services does not include a reference to the supply or possible supply of goods or services at a price in excess of \$3 000 000, or such higher amount as is prescribed.
- (10) A reference in this section to the acquisition or possible acquisition of goods or services does not include a reference to the acquisition or possible acquisition of goods or services at a price in excess of \$3 000 000, or such higher amount as is prescribed.

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- (11) For the purposes of subsections (9) and (10) —
- (a) subject to paragraphs (b), (c), (d) and (e), the price for —
    - (i) the supply or possible supply of goods or services to a person; or
    - (ii) the acquisition or possible acquisition of goods or services by a person,is taken to be the amount paid or payable by the person for the goods or services;
  - (b) section 6(3)(c) applies as if references in that provision to the purchase of goods or services by a person were references to —
    - (i) the supply of goods or services to a person pursuant to a purchase; or
    - (ii) the acquisition of goods or services by a person by way of purchase,as the case requires;
  - (c) section 6(3)(d) applies as if —
    - (i) the reference in that provision to a person acquiring goods or services otherwise than by way of purchase included a reference to a person being supplied with goods or services otherwise than pursuant to a purchase; and
    - (ii) a reference in that provision to acquisition included a reference to supply;
  - (d) section 5(3) applies as if the reference in that provision to the acquisition of goods or services by a person, or to the acquisition of services by a person, included a reference to the supply of goods or services to a person, or to the supply of services to a person, as the case requires; and
  - (e) the price for the supply or possible supply, or the acquisition or possible acquisition, of services comprising or including a loan or loan facility is taken to include the capital value of the loan or loan facility.

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**28. Section 69 amended**

Section 69(1) is amended by deleting “section 10 or 11,” and inserting instead —

“ section 10, 11 or 11A, ”.

**29. Section 75 amended**

Section 75(2) is amended after “section 11” by inserting —

“ or 11A ”.

**30. Section 77 amended**

Section 77(4), (5) and (6) are each amended after “section 11” by inserting —

“ or 11A ”.

**31. Section 79 amended**

Section 79(1) is amended by deleting “(section 11 excepted)” and inserting instead —

“ (sections 11 and 11A excepted) ”.

<sup>11</sup> On the date as at which this compilation was prepared, the *Consumer Protection Legislation Amendment and Repeal Act 2006* Pt. 5 had not come into operation. It reads as follows:

“

**Part 5 — Fair Trading Act 1987 amended**

**12. The Act amended**

The amendment in this Part is to the *Fair Trading Act 1987*.

**13. Part II Division 4 inserted**

After section 32 the following Division is inserted in Part II —

“

**Division 4 — Third party trading schemes**

**32A. Interpretation**

In this Division —

“**approved third party trading scheme**” means a third party trading scheme in relation to which a notice has been given under section 32B;

“**prohibited third party trading scheme**” means a third party trading scheme that is the subject of a declaration under section 32C;

“**third party trading scheme**” means a scheme or arrangement under which the acquisition of goods or services by a consumer from a supplier is a condition, or one of a number of conditions, compliance with which gives rise, or apparently gives rise, to an entitlement to a benefit from a third party in the form of goods or services or some discount,

concession, or advantage in connection with the acquisition of goods or services.

**32B. Minister may approve third party trading scheme**

- (1) The Minister may, on application, give notice in writing that a specified third party trading scheme is an approved third party trading scheme.
- (2) The Minister is not to approve a third party trading scheme under this section unless satisfied that the scheme is genuine, reasonable, and not contrary to the interests of consumers.
- (3) An approval under this section may be given subject to such conditions as the Minister thinks fit and specifies in the notice to the applicant.
- (4) An application under this section is to be supported by such information as the Minister may require.

**32C. Prohibition of third party trading scheme**

- (1) The Commissioner may recommend to the Minister that a third party trading scheme be declared to be a prohibited third party trading scheme if —
  - (a) the scheme is not an approved third party trading scheme and the Commissioner is of the opinion that the scheme is not genuine and reasonable or is contrary to the interests of consumers;
  - (b) in the case of an approved third party trading scheme, a condition of the approval has been contravened or not complied with; or
  - (c) in the case of an approved third party trading scheme, the scheme is conducted in a manner that is not genuine, reasonable or in the interests of consumers.
- (2) The Minister may, on the recommendation of the Commissioner, by notice published in the *Gazette*, declare a third party trading scheme to be a prohibited third party trading scheme.
- (3) The Minister may by notice published in the *Gazette* revoke a declaration under this section.

**32D. Offence**

A person who —

- (a) acts as a promoter of a prohibited third party trading scheme;
- (b) as a party to a prohibited third party trading scheme, supplies goods or services; or

- (c) publishes an advertisement relating to a prohibited third party trading scheme or causes such an advertisement to be published,

commits an offence.

Penalty: \$5 000.

**32E. Codes of practice**

The Governor may make regulations prescribing codes of practice to be complied with by persons who act as promoters of third party trading schemes or supply goods or services as parties to such schemes.

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