

1992

**AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY**

**FAIR TRADING BILL 1992**

**EXPLANATORY MEMORANDUM**

Circulated by authority of the  
Attorney-General  
Terry Connolly, MLA

EXPLANATORY MEMORANDUMFair Trading Bill 1992

## GENERAL OUTLINE

The purpose of this law is to promote fair trading by ensuring a level playing field for the making of bargains between consumers and traders. It has its origins in a 1983 agreement between the Commonwealth, States and Territories to mirror the consumer protection provisions of the *Trade Practices Act 1974* (TPA) in local Fair Trading legislation.

With a number of minor exceptions, the obligations contained in this law are imposed on persons who are engaged in trade or commerce. As the term 'person' is not defined, the *Interpretation Act 1967* applies so that the term includes corporations as well as individuals. In this Explanatory Memorandum the term 'trader' is used to describe corporations and individuals engaged in trade or commerce.

The Bill is in five Parts:

- . Part I contains preliminary matters including definitions.
- . Part II mirrors the unfair practices provisions of the TPA (Part V Division 1), taking into account the refinements to those provisions which have been included in the *NSW Fair Trading Act 1987* (NSW Act) and the *NT Consumer Affairs and Fair Trading Act 1990* (NT Act). The equivalent TPA or NSW Act sections are also included in the Notes on the Clauses in this document.
- . Part III makes provision for the development, prescription and enforcement of codes of practice for fair dealing, based on similar provisions in the NSW and NT Acts.
- . Part IV mirrors the enforcement provisions of the TPA (Part VI), with appropriate modifications to take account of the existing structure for the administration of justice in the ACT.
- . Part V contains miscellaneous provisions dealing with the power of the Executive to make regulations, the intervention of the Minister in proceedings and the concurrent operation of this and other fair trading legislation.

## FINANCIAL IMPACT

The enactment of this legislation will be of no cost to the Government over and above that already outlaid for the administration of the *Consumer Affairs Act 1973*. However, the development of codes of practice under Part III may require additional resources.

## NOTES ON CLAUSES

## PART I - PRELIMINARY

Clause 1: Short Title

This law can be referred to as the *Fair Trading Act 1992*.

Clause 2: Commencement

The standard commencement provisions apply.

Clause 3: Repeal

The *Pyramid Selling Act 1973* is repealed. It is replaced by clause 27 of this law which will continue the prohibition of pyramid selling schemes in the ACT.

Clause 4: Position of Crown

Because the Crown should be a model trader the business activities of the ACT Government and its instrumentalities are subject to all the provisions of this law.

Clause 5: Interpretation

Most of the definitions in this clause are modelled on those in the TPA. However, 'acquire', 'business', 'goods', 'interest', 'services' and 'supply' have been modified in line with NSW and NT fair trading laws.

Where this law uses the word 'Court', it means the Magistrates Court.

Clause 6: Consumers

For the purposes of this law, an individual or a corporation is a 'consumer' when he, she or it acquires any goods or services from a supplier. However, individuals and corporations are not consumers if the goods or services were acquired in the course of a business for the purpose of resupply, for use as a raw material or as an adjunct to a manufacturing process or for use in the repair or maintenance of other goods or property.

Clause 7: Acquisition, supply and re-supply

The terms 'acquisition', 'supply' and 're-supply' are defined widely to cover all kinds of selling or buying transactions.

Clause 8: Loss or damage to include injury

Wherever this law uses the phrase 'loss or damage', it also includes 'injury'. Likewise, the phrase 'amount of any loss or damage' also covers damages for an injury.

Clause 9: Severability

When a contract contains a provision that does not comply with this law, the contract is valid and enforceable if it can operate without that provision.

In cases where this clause cannot be used to save the contract, the Court may be able to do so by making a compensatory order under clause 50 or prohibiting the payment or transfer of moneys under clause 51.

Clause 10: Extended application of Part II

This law applies to unfair trading practices which occur outside the geographic limits of the ACT, where the person who engages in the prohibited conduct ordinarily resides in the ACT or is a company incorporated or carrying on business in the ACT.

A person can bring a claim for damages under clause 46 or ask the Court for a compensatory order under clause 50. However, before bringing a claim, that person must obtain the written consent of the Minister.

The Minister must give his or her consent unless he or she is of the opinion that the action is not in the public interest or that the conduct is legal where it took place.

**PART II - UNFAIR PRACTICES**Clause 11: Interpretation

(TPA s51A)

This clause facilitates proof in misrepresentation cases by stating when promises or predictions will be misleading or deceptive. If a trader makes a representation about future matters the representation is misleading unless he or she had reasonable grounds for believing otherwise.

The onus of proof is reversed on the assumption that the facts or beliefs on which the trader made the representation are more likely to be within his or her knowledge than the person to whom the trader made the representation.

Clause 12: Misleading or deceptive conduct

(TPA s52)

Traders must not engage in conduct that is misleading or deceptive or likely to mislead or deceive. The scope of this provision is not limited by the clauses that follow it.

Clause 31 grants prescribed information providers a limited exemption from this provision.

Clause 13: Unconscionable conduct

TPA s52A)

Traders must not engage in conduct that is unconscionable when they supply consumers with goods or services of a kind that are ordinarily acquired for personal, domestic or household use or consumption.

Unlike most of the other provisions of this Part, this clause applies to a limited number of consumer type transactions. To claim the benefit of this section, individuals or corporations must not only be consumers within the meaning of clause 6, but they must satisfy the requirement of subclause 13(5) that the conduct engaged in concerned the supply of goods and services of a kind that are usually acquired for personal, domestic or household use or consumption.

The term 'unconscionable' is not defined. However, the clause lists a number of factors which a Court can consider when determining whether, in all the circumstances, the trader's behaviour was fair.

The list, which is not exhaustive, focuses on situations where there may be an opportunity for traders to take advantage of the general disparity in bargaining power between themselves and consumers.

The Court can only take into account circumstances that were reasonably foreseeable at the time of the conduct.

Clause 14: False or misleading representations (TPA s53)

Traders must not make certain types of false or misleading claims about the nature of goods or services they offer or supply. Both the actual suppliers and the people who promote the supply of goods or services are covered by this provision.

In particular, traders must not make false or misleading claims about:

- . the standard, quality, value, grade, composition, style, model or history of goods;
- . the standard, quality, value or grade of services;
- . whether goods are new;
- . the agreement of a particular person to acquire the goods or services;
- . the sponsorship, approval, performance characteristics, accessories, use or benefits of goods or services;
- . the sponsorship, approval or affiliation of any person;
- . the price of goods or services;
- . the availability of repair facilities or spare parts;
- . the place of origin of goods;
- . a buyer's need for goods or services; or
- . the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Clause 31 grants prescribed information providers a limited exemption from this provision.

Clause 15: False representations and other misleading or offensive conduct in relation to land (TPAs53A)

Traders or promoters involved in the sale or grant of land must not make specific kinds of false or misleading representations or engage in misleading or offensive conduct about the sale or grant.

This provision does not restrict the application of any other part of this law to the promotion and sale of land.

Clause 31 grants prescribed information providers a limited exemption from this provision.

Clause 16: Misleading conduct in relation to employment (TPA s53B)

It is unlawful for anyone to engage in conduct that is liable to mislead another person about the availability, nature, terms or conditions of an offer of employment or any other matter relating to employment.

For example, employment agencies cannot attract clients by using advertisements for fictitious jobs.

Clause 17: Cash price to be stated in certain circumstances (TPA s53C)

Traders, or people involved in promoting the supply of goods or services, must not state part of the price for the supply of goods or services unless they also state the full cash price.

For example, advertisements that specify deposits or instalment payments must also state the full cash price.

Clause 18: Offering gifts and prizes (TPA s54)

Traders or promoters must not offer gifts, prizes or other free items associated with the supply of goods or services if they do not intend to provide them.

Clause 19: Misleading conduct in relation to goods (TPA s55)

Traders must not mislead the public about the nature, manufacturing process, characteristics, suitability or quantity of any goods.

Clause 31 grants prescribed information providers a limited exemption from this provision.

Clause 20: Misleading conduct in relation to services (TPA s55A)

Traders must not mislead the public about the nature, characteristics, suitability or quantity of any services.

Clause 31 grants prescribed information providers a limited exemption from this provision.

Clause 21: Bait advertising (TPA s56)

Traders must not use bait advertising. That is, they must not advertise goods or services at a particular price if they know, or should know, that they cannot supply reasonable quantities of the goods at that price, for a reasonable period of time. What is reasonable depends on the nature of the advertisement and the type of market in which the goods are sold.

Traders can avoid a charge of bait advertising by showing, either that they offered to get the customer the advertised goods or services within a reasonable time or, they offered to get the customer equivalent goods or services within a reasonable time for the same price.

Clause 22: Dual pricing (NSW FTA s40)

Traders must not sell goods at a price greater than the lower, or lowest, of the prices appended to the goods. For the purposes of this provision, 'appended prices' includes labels on goods, shelf or display labels, and prices determined by barcodes or advertising material associated with the goods.

Traders can avoid breaching this provision by withdrawing goods from sale if they discover that goods are dual priced. However, if traders sell goods in breach of this provision because the prices have been tampered with, they can claim a defence of due diligence. The trader must be able to show that the breach resulted from the act of someone or the occurrence of an event beyond the trader's control.

Clause 23: Referral selling (TPA s57)

Traders must not use referral selling techniques which induce consumers to buy goods or services in return for a future, uncertain benefit, such as a rebate or commission. For example, where the benefit depends on the trader making further sales of the goods or services to people that the consumer has referred.

Clause 24: Accepting payment without intending or being able to supply as ordered (TPA s58)

Traders must not accept payment for goods or services if they do not intend to supply them or intend to supply materially different goods or services.

To prove a breach, a consumer must show that there were reasonable grounds, which the trader knew or should have known, to suggest that the trader could not supply the goods or services when he or she accepted payment.

Clause 25: Misleading representations about certain business activities (TPA s59)

Traders must not make false or misleading representations about the profits, risks or feasibility of either:

- . a home-operated business or a business activity that requires performance of work at or from home; or
- . a scheme that requires people to work in a business, with or without the investment of money.

Clause 31 grants prescribed information providers a limited exemption from this provision.

Clause 26: Harassment and coercion (TPA s60)

Traders or their representatives must not use physical force, undue harassment or coercion when arranging the supply of goods or services to a consumer or when seeking payment from the consumer for goods or services.

The terms 'harassment' and 'coercion' are not defined. However, this clause lists a range of unduly harassing and coercive behaviour that is specifically prohibited.

Clause 27: Pyramid selling (TPA s61)

It is illegal for anyone to promote or participate in pyramid selling schemes in which people make a payment to a promoter or participant in a trading scheme with the prospect of receiving payments for the introduction of other participants to the scheme.

Pyramid selling schemes can be distinguished from other legal multi-level marketing schemes because with pyramid selling, the sale of the product, if any, is incidental to the recruitment of new participants.

Clause 28: Unsolicited credit and debit cards (TPA s63A)

It is unlawful for anyone to send unsolicited debit and/or credit cards to anyone.

Clause 29: Assertion of right to payment for unsolicited goods or services or for making entry in directory (TPA s64)

Traders must not demand payment for unsolicited goods or services unless they have a reasonable basis for believing they have the right to payment.

This prohibition also extends to demanding payment for unsolicited advertising or directory entries. A person is deemed not to have authorised a directory entry unless written authority has been obtained.

For example, traders must not demand payment if they have:

- . sent unsolicited books or magazine subscriptions;
- . made unauthorised repairs;
- . carried out unauthorised services; or
- . included unauthorised entries in a publication such as a telex or facsimile directory, whether or not the directory is published.

Clause 30: Liability of recipient for unsolicited goods (TPA s65)

People who receive unsolicited goods have two options if they do not want them. They can:

- . notify the sender in writing that they do not want the goods and ask the sender to pick them up. The sender then has a month to collect the goods. After that, the goods become the property of the recipient; or
- . wait for the trader to collect the goods. If the trader does not collect the goods within three months, they become the property of the recipient.

If the goods are lost or damaged at any time before they are collected or become the property of the recipient, he or she is not liable for any loss or damage unless it was deliberate.

Clause 31: Application of provisions of this Part to prescribed information providers (TPA s65A)

In some cases prescribed information providers such as printers, publishers and broadcasters are exempt from the operation of clauses 12, 14, 15, 19, 20 and 25.

The exemption does not cover:

- . the publication of information about goods, services or land supplied or offered for sale by the information provider or a related corporation: that is, self-advertising;
- . promotional material published on behalf of, or by agreement with, a supplier of goods or services or someone selling land: that is, advertising in the guise of an article or editorial; or
- . advertisements.

## PART III - CODES OF PRACTICE

Clause 32: Interpretation

This clause restricts the scope of the terms 'code' and 'undertaking' used in this Part.

Clause 33: Preparation of draft codes of practice (NSW FTA s74)

This clause sets out the procedure for preparing a draft code of practice for consideration by the Minister:

- 33(1) Codes must relate either to fair dealing between consumers and a particular class of suppliers or fair dealing by a particular class of persons in relation to consumers.
- 33(2) The Director of Consumer Affairs is responsible for developing codes, either with the permission of the Minister, or at the direction of the Minister. The Director has a wide-ranging discretion to consult with, and invite submissions from, persons and organisations who have an interest in the terms of the code.
- 33(3) However, before submitting the draft code for approval by the Minister, the Director must be satisfied that consumer organisations have been consulted and that the appropriate industry organisations have agreed to abide by the code.

When submitting an industry agreed code to the Minister the Director can also recommend amendments to the code.

Clause 34: Regulations - codes of practice (NSW FTA s75)

The Executive can prescribe a code of practice developed by the Director following the procedure set out in clause 33.

Prior to prescribing a code, the Minister can make any amendments to the agreed draft code that he or she considers necessary.

Because a code is prescribed by regulation, it is subject to the disallowance procedure of the Legislative Assembly.

Clause 35: Amendment of codes of practice (NSW FTA s75A)

Proposed amendments to any existing code of practice must be submitted to the Minister using the same procedures that are required for developing and approving an original code of practice.

However, if the Director certifies that the proposed amendments are of a minor or inconsequential nature, the Minister can approve an amendment. Authorised by the ACT Parliamentary Counsel—also accessible at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)

Clause 36: Undertakings following  
contravention of code

(NSW FTA s76)

This clause sets out the first step in enforcing a code. If the Director believes that a trader has breached a code, he or she can request the trader to execute, within a specified time, a deed setting out undertakings relating to the breach.

However, before asking a trader to make an undertaking, the Director must have regard to any dispute resolution process specified in the code.

The Director can ask the trader to undertake to do any or all of the following:

- . to discontinue the conduct;
- . to comply with the code in the future; or
- . to take action to rectify the consequences of a breach of the code.

Clause 37: Powers of the Court

(NSW FTA s78)

This clause sets out the second step in the code enforcement procedure:

37(1) Where a trader refuses to comply with the Director's request to make an undertaking, the Director can apply to the Court for an order.

If the Court is satisfied that the Director had grounds for requesting the undertaking, it can:

- . order the trader to act in a manner that would have been required by the undertaking had it been given;
- . order the trader to refrain from acting in a manner that would have been prohibited by the undertaking had it been given; or
- . make any other order it thinks appropriate to give effect to the undertaking.

37(2) Where a trader breaches an undertaking, either the Director or a person authorised by the Director, can apply to the Court for an order.

If the Court is satisfied that the trader has breached an undertaking, it can order the trader:

- . to observe the undertaking; and
- . if the trader has made an undertaking to rectify the consequences of a breach of a code, to observe that undertaking within a period of time specified by the Court.

37(3) This subclause provides additional enforcement options against directors and managers where the trader is a corporation.

If the Court is satisfied that a breach of an undertaking occurred with the consent or connivance of a person who was at that time a director or manager of the corporation, the Court can order that the director or manager:

- . stop facilitating the breach; or
- . stop facilitating similar behaviour in any other corporation in which he or she is a director or manager.

37(4) The Court can make its orders subject to conditions. These include, but are not limited to:

- . the duration of the order;
- . the future conduct of the person affected; and
- . the action required to rectify the consequences of the breach in question.

37(5) Individuals can be fined up to \$5,000 for the breach of a Court order made under this clause and corporations can be fined up to \$25,000.

Clause 38: Variation or discharge of restraining order (NSW FTA s79)

The Director can apply to the Court to vary or discharge an order made under clause 37.

Clause 39: Registers of undertakings (NSW FTA s77)

The Director must keep registers of undertakings given under clause 36. The prescribed particulars of each undertaking must be entered into the appropriate register. The registers can be inspected by anyone free of charge.

The Director must give a copy of the undertaking to the person who made it.

#### **PART IV - ENFORCEMENT AND REMEDIES**

Clause 40: Interpretation (TPA s75B)

This clause defines those behaviours which can constitute being 'involved in a contravention' of Part II for the purposes of clauses 46 (damages), 47 (evidence in other proceedings) and 50 (other orders).

It sets out the circumstances in which a person can become a party to a breach of this law. These are:

- . aiding, abetting, counselling, procuring or inducing a breach;
- . being knowingly concerned in the breach, either directly or indirectly; or
- . conspiring with others to cause the breach.

Clause 41: Offences against Part II (TPA s79)

This clause sets out the penalties for breaches of Part II and the way in which the Court must impose them.

- 41(1) There are monetary penalties of up to \$100,000 for corporations and up to \$20,000 for individuals who breach any provision of Part II other than the clauses relating to misleading or deceptive conduct and unconscionable conduct.
- 41(2) Where a person is convicted of two or more breaches of the same or substantially the same nature which occurred at or about the same time, the Court cannot impose a total fine for those breaches which exceeds the maximum fine for a single breach.
- 41(3) Likewise, a person who has already been convicted and fined for a substantially similar breach, cannot be fined more than the maximum fine in total for all such related breaches.
- 41(4) In a prosecution for a breach of Part II the Court can:
- . grant an injunction under clause 44 to prevent further breaches of the Part; or
  - . make an order to disclose information or to publish an advertisement under clause 45.
- 41(5) The sections of the *Crimes Act 1900 (NSW)* that cover offences by aiders and abettors, accessories, attempts, incitements and conspiracies do not apply to this law. Instead, such conduct is specifically covered by clause 41.
- 41(6) Prosecutions for a breach of Part II cannot be commenced more than three years after they occurred.
- 41(7) A person cannot be prosecuted twice for the same offence. That is, a person convicted of an offence under the TPA or State fair trading legislation cannot be prosecuted for the same offence under clause 41.

Clause 42: Enforcement and recovery of certain fines (TPA s79A)

The Court can use any power that it has to enforce or recover fines imposed for breaches of this law. The Minister or the Director can apply to the Court for an order declaring that a fine is to have effect and be enforced in the same way that other judgment debts of the Court are enforced.

Clause 43: Prosecutions (TPA s163)

The Director must give his or her written consent before a person can be prosecuted for a breach of a provision of Part II.

Clause 44: Injunctions (TPA s80)

This clause allows the Court to grant injunctions to restrain breaches or attempted breaches of Part II.

- 44(1) The Court can grant any kind of injunction if it is satisfied that a person:
- . has engaged in conduct;
  - . is a party to conduct;
  - . intends to be engaged in conduct; or
  - . intends to be party to conduct,
- which is or would be a breach of Part II.
- 44(2) The Court does not need to be satisfied that a person has engaged or intends to engage in prohibited conduct to grant a consent injunction.
- 44(3) The Court can grant interim injunctions.
- 44(4) The Court can cancel or vary an injunction.
- 44(5) The Court can grant an injunction prohibiting conduct whether or not the conduct:
- . has happened before;
  - . is likely to happen again or continue, or
  - . will cause harm to anyone.
- 44(6) The Court can grant an injunction requiring a person to do something whether or not:
- . the person has refused or failed to do it;
  - . the person is likely to refuse or fail to do it; or
  - . the failure to do it will cause harm.
- 44(7)&  
44(8) The Court's power to require undertakings as to damages or costs when granting an interim injunction is limited:
- . if the Minister or the Director applies, the Court cannot require any person to make undertakings as to damages.

if any other person applies and the Court requires that person to make an undertaking as to damages or costs, the Minister can choose to make the undertaking for that person.

Clause 45: Order to disclose information or publish advertisement (TPA s80A)

These orders are particularly useful in cases where the misleading or deceptive conduct complained of was contained in an advertisement. However, they are not limited to correcting misleading or deceptive advertising.

If the Court is satisfied that a person has breached a provision in Part II, other than the unconscionable conduct provision, it can make either or both of the following orders:

- that a person involved in the breach give, in the form and manner determined by the Court, information to the public, a person or a group of people;

- that a person involved in the breach publish advertisements at his or her own expense, in a form and manner determined by the Court.

Only the Minister or the Director can make an application under this clause. Individuals who want orders for disclosure or corrective advertising must rely on the Court's power to include such an order in the grant of a mandatory injunction under clause 44.

Clause 46: Actions for damages (TPA s82)

This clause allows a person to bring an action in the Magistrates Court to recover any loss or damages he or she has suffered as a result of a breach of any provision in Part II, other than clause 13 concerning unconscionable conduct.

An action can be brought against any individual or corporation whose conduct gave rise to the loss or damage. This includes any person who is party to the breach in the manner described in clause 40.

No time limit is set out for bringing an action under this clause because it is intended that the *Limitation Act 1985* apply.

The remedy for a breach of clause 13 is an injunction under clause 44 or an order under clause 50.

Clause 47: Findings in proceedings to be evidence (TPA s83)

If someone brings an action for damages under clause 46, or seeks an order for compensation under subclause 50(2), he or she can rely on the facts previously determined by a court during proceedings for:

- an injunction under clause 44;

- . an order for disclosure or corrective advertising under clause 45; or
- . a proven unfair trading offence under clause 41.

**Clause 48: Conduct by directors, servants or agents (TPA s84)**

This clause deals with the responsibility of a corporation or an individual for conduct engaged in on their behalf. It sets out the circumstances in which a corporation or an individual can be sued or prosecuted for a breach of this law by their representatives.

- 48(1) & 48(3) To attribute the conduct of a representative to a corporation or an individual, it is necessary to show that:
- . the person was the corporation's or individual's representative;
  - . the representative's conduct was within the scope of his or her actual or apparent authority; and
  - . where this law requires it, that the representative had the required state of mind.
- 48(2)(a) In the case of a corporation, a representative can be a director, an employee or an agent. However, the corporation will only be responsible for the conduct of such a representative, if he or she acted within the scope of his or her authority. The authority can be either that which the corporation gives to the representative or that which one can reasonably assume this kind of representative to have.
- 48(2)(b) A corporation will also be responsible for the conduct of a person acting at the direction or with the consent of one of its representatives if the representative had the authority to give the direction or consent.
- 48(4)(a) In the case of an individual, a representative can be an employee or an agent. However, an individual will only be responsible for the conduct of such a representative, if the employee or agent acted within the scope of his or her authority. The authority can be either that which the individual gives to the representative or that which one can reasonably assume this kind of representative to have.
- 48(4)(b) An individual will also be responsible for the conduct of a person acting at the direction or with the consent of one of its representatives, if the representative had the authority to give the direction or consent.

- 48(5) The words 'state of mind of a person' are intended to have a wide meaning. It can include, but is not limited to, a person's knowledge, intention, opinion, belief and purpose. It can also include a person's reasons for his or her intention, opinion, belief or purpose.

Clause 49: Defences

(TPA s 85)

If a person is being prosecuted for a breach of Part II, he or she can rely on one of the defences provided in this clause.

49(1) & A defendant can claim that the breach was:

49(2)

- . a reasonable mistake;
- . caused by reasonable reliance on information supplied by someone other than an employee or agent of the defendant;
- . caused by the act or failure to act of someone other than the defendant's employee or agent and the defendant took care and reasonable precautions to avoid the breach; or
- . caused by an accident or something else beyond the defendant's control and the defendant took care and reasonable precautions to avoid the breach.

49(3) Sets out the procedure to be followed when the defendant wants to rely on a defence under subclause 49(1).

49(4) Provides for a special 'publisher's defence'. Publishers of advertisements who receive information in the ordinary course of business and have no reason to suspect that the publication would breach Part II can use this defence.

These defences cannot be used in civil actions or proceedings for an injunction.

Clause 50: Other orders

(TPA s87)

The Court has an extensive power to make orders for compensation for loss or damage, or to prevent or reduce loss or damage, arising from a breach of Part II. The power to make these orders is additional to the Court's power to grant injunctions under clause 44.

The Court can make any appropriate order in the following situations:

50(1) In civil or criminal proceedings for a breach of Part II, if a person who is party to the proceedings has suffered or is likely to suffer loss or damage as a result of a breach of Part II.

The order can be made whether or not the Court also grants an injunction or makes an order for damages.

- 50(2) If a person who has suffered, or is likely to suffer, loss or damage as a result of a breach of Part II applies to the Court for an order under this section.
- 50(3) With the written consent of the person concerned, the Director in a prosecution under clause 41 or the Minister or the Director in an application for an injunction under clause 44, may apply for an order on behalf of one or more persons who have suffered, or are likely to suffer, loss or damage as a result of a breach of Part II.

The Court can only grant an order which it considers will partly or totally compensate the applicant for the loss or damage or will prevent or reduce that loss or damage.

Special provisions apply when the Court is determining whether to make an order for a breach of clause 13 concerning unconscionable conduct. The Court can take into account the behaviour of the parties since the breach occurred. It cannot make any order if the breach concerns an insurance contract to which the *Insurance Contracts Act 1984* (Cth) applies.

The provision lists examples of the types of orders that the Court can make. The list is not exhaustive. It includes:

- . orders which avoid, vary or refuse to enforce a contract or part of a contract;
- . orders for the refund of money or the return of property;
- . orders for the payment of compensatory damages;
- . orders for the repair of goods or the provision of parts for goods supplied;
- . orders for the supply of specified services; and
- . orders concerning the execution of instruments affecting interests in land.

No time limit is set out for the bringing of an action under this provision. Consequently, the *Limitation Act 1985* applies.

Clause 51: Power of the Court to prohibit payment (TPA s87A) or transfer of moneys or other property

This clause supplements the power of the Court to grant interim injunctions. It gives the Court broad powers to make orders to preserve assets of a person (the defendant) pending the outcome of a prosecution or a civil action brought against him or her under Part II.

Only the Minister or the Director can apply to the Court for such an order. If an order is made in the absence of the defendant it is operative for 30 days only.

Before making any such order, the Court must be satisfied that the order will not unduly prejudice the rights or interests of any other person.

The Court can make an order to:

- . prevent a defendant's debtor from repaying the debt;
- . prevent a person holding the defendant's money or property from disposing of it;
- . prevent anyone from taking or sending the defendant's money or property outside the ACT;
- . prevent the movement of a defendant's property or property which benefits him or her, from one State or Territory to another; or
- . appoint a receiver or trustee for the defendant's property.

#### PART V - MISCELLANEOUS

##### Clause 52: Intervention by Minister

The Minister can intervene in any legal proceedings brought under this law.

##### Clause 53: Savings of rights and remedies (TPA s75)

This law is intended to operate concurrently with the Commonwealth Trade Practices Act and other Fair Trading laws.

##### Clause 54: Regulations

The Executive can make regulations that are required or permitted by this law or are necessary or convenient for the proper operation of this law.

