



AUSTRALIAN CAPITAL TERRITORY

Fair Trading Act 1992

No. 72 of 1992

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AUSTRALIAN CAPITAL TERRITORY

Fair Trading Act 1992

No. 72 of 1992

An Act relating to trading practices

[Notified in ACT Gazette S218: 8 December 1992]

The Legislative Assembly for the Australian Capital Territory enacts as follows:

PART I—PRELIMINARY

Short title

1. This Act may be cited as the *Fair Trading Act 1992*.

Commencement

2. (1) Section 1 and this section commence on the day on which this Act is notified in the *Gazette*.
(2) The remaining provisions commence on a day, or respective days, fixed by the Minister by notice in the *Gazette*.
(3) If a provision referred to in subsection (2) has not commenced before the end of the period of 6 months commencing on the day on which this Act is notified in the *Gazette*, that provision, by force of this subsection, commences on the first day after the end of that period.

Repeal

3. The *Pyramid Selling Act 1973* and the *Pyramid Selling Act 1974* are repealed.

Position of Crown

4. This Act binds the Crown.

Interpretation

5. (1) In this Act, unless the contrary intention appears—

“acquire” includes—

- (a) in relation to goods—acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase;
- (b) in relation to services—accept; and
- (c) in relation to land—acquire by way of purchase, exchange or taking on lease or in any other manner in which an interest in land is acquired for valuable consideration;

“arrive at”, in relation to an understanding, includes reach or enter into;

“authority of the Territory” means—

- (a) a body corporate established for a public purpose by or under a law of the Territory; or
- (b) an incorporated company in which the Territory, or a body corporate referred to in paragraph (a), has a controlling interest;

“business” includes—

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

“Court” means the Magistrates Court;

“covenant” means a covenant (including a promise not under seal) annexed to or running with an estate or interest in land (whether at law or in equity and whether or not for the benefit of other land), and “proposed covenant” has a corresponding meaning;

“Director” means the Director of Consumer Affairs for the Australian Capital Territory;

“document” includes—

- (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; and

- (b) a disc, tape, paper or other device from which sounds or messages are capable of being reproduced;

“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, water and electricity; and
- (e) any component part of, or accessory to, goods;

“interest”, in relation to land, includes—

- (a) any estate or profit, whether present or future, vested or contingent, arising out of or incident to that land;
- (b) a right, conferred by shares, or by virtue of a contract to purchase shares, in a corporation which owns that land or a building or part of a building erected on it, to occupy that land or building; and
- (c) a right, power or privilege over, or in connection with, that land;

“price” includes a charge of any description;

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

“published”, in relation to a statement, includes—

- (a) inserted in a newspaper or other publication;
- (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 in or on a street or public place;
- (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;
- (e) reproduced electronically; and
- (f) made verbally;

“require”, in relation to the giving of a covenant, means require or demand the giving of a covenant, whether by way of making a contract containing the covenant or otherwise, and whether or not a covenant is given in pursuance of the requirement or demand;

“send” includes deliver, and “sent” and “sender” have corresponding meanings;

“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 or 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) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction;
 - (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or
 - (iv) the provision of gas, electricity or any other form of energy;
- (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) any 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;

“share” includes stock;

“statement” includes representations of any kind, whether made by means of words, maps, plans or drawings, pictorial representations or designs or any combination of these;

“supply”, when used as a verb, includes—

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

- (iii) donate for promotional purposes; and
 - (b) in relation to services—provide, grant, confer or donate for promotional purposes;
- and, when used as a noun, has a corresponding meaning, and “supplied” and “supplier” have corresponding meanings;
- “trade or commerce” includes any business or professional activity;
- “unsolicited goods” means goods supplied to a person without any request made by him or her or on his or her behalf;
- “unsolicited services” means services supplied to a person without any request made by him or her or on his or her behalf.

(2) 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;
 - (ii) the arriving at, or the giving effect to a provision of, an understanding; or
 - (iii) the requiring of the giving of, or the giving of, a covenant;
- (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;
 - (ii) the arriving at, or the giving effect to a provision of, an understanding; or
 - (iii) the requiring of the giving of, or the giving of, a covenant;
- (c) a reference to refusing to do an act includes a reference to—
 - (i) refraining (otherwise than inadvertently) from doing that act; or
 - (ii) making it known that that 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 it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.

Consumers

6. (1) For the purposes of this Act, unless the contrary intention appears, a consumer is a person who acquires goods or services from a supplier.

(2) A person is not a consumer for the purposes of this Act if, in the course of a business, he or she acquires, or holds himself or herself out as acquiring, goods or services from a supplier for the purpose of—

- (a) re-supplying them;
- (b) using them up or transforming them in or in connection with a process of manufacture or production; or
- (c) repairing or treating other goods or fixtures on land.

(3) Where it is alleged in any proceedings under this Act or in any other proceedings in respect of a matter arising under this Act that a person was a consumer in relation to particular goods or services, it shall be presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services.

Acquisition, supply and re-supply

7. (1) In this Act, unless the contrary intention appears—

- (a) a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods in pursuance of a supply of the goods;
- (b) a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services;
- (c) 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;
- (d) a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services, or both;
- (e) a reference to the re-supply of goods acquired from a person includes a reference to—
 - (i) a supply of the goods to another person in an altered form or condition; and
 - (ii) a supply to another person of goods in which the first-mentioned goods have been incorporated;
- (f) a reference to the disposal or acquisition of an interest in land includes a reference to an agreement, whether in writing or not, to dispose of or acquire such an interest; and

- (g) a reference to the disposal of or acquisition of an interest in land includes a reference to the disposal of or acquisition of such an interest together with goods.
- (2) 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.

Loss or damage to include injury

8. 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.

Severability

9. If the making of a contract after the commencement of this section contravenes this Act by reason of the inclusion of a particular provision in the contract, then, subject to any order made under section 50 or 51, 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.

Extended application of Part II

10. (1) Part II extends to the engaging in conduct outside the Territory by bodies corporate incorporated or carrying on business within the Territory or by persons ordinarily resident in the Territory.

(2) Where a claim under section 46 is made in proceedings, a person is not entitled to rely at a hearing in respect of those proceedings on conduct to which a provision of this Act extends by virtue of subsection (1) except with the consent in writing of the Minister.

(3) A person other than the Minister is not entitled to make an application to the Court for an order under subsection 50 (1) or 50 (2) in proceedings in respect of conduct to which a provision of this Act extends by virtue of subsection (1) except with the consent in writing of the Minister.

(4) The Minister shall give a consent under subsection (2) or (3) in respect of proceedings unless, in the opinion of the Minister—

- (a) the law of the place in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct; and
- (b) it is not in the public interest that the consent be given.

PART II—UNFAIR PRACTICES

Interpretation

11. (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) For the purposes of the application of subsection (1) in relation to proceedings concerning a representation made by a person with respect to any future matter, the person shall, unless he or she adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.

(3) Subsection (1) shall be deemed not 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.

Misleading or deceptive conduct

12. (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 the succeeding provisions of this Part shall be taken as limiting by implication the generality of subsection (1).

Unconscionable conduct

13. (1) A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

(2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the “consumer”), 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 person 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 by reason only that the consumer 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 person has contravened subsection (1) in connection with the supply or possible supply of goods or services to a consumer—

- (a) the Court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
- (b) the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(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.

False or misleading representations

14. 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, value, 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, value 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 he or she does not have;
- (g) make a false or misleading representation with respect to 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;
- (i) make a false or misleading representation concerning the place of origin of goods;
- (j) make a false or misleading representation concerning the need for any goods or services; or
- (k) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

False representations and other misleading or offensive conduct in relation to land

15. (1) A person shall not, in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land—

- (a) represent that the person has a sponsorship, approval or affiliation he or she does not have;
- (b) make a false or misleading representation concerning—
 - (i) the nature of the interest in the land;

- (ii) the price payable for the land;
 - (iii) the location of the land;
 - (iv) the characteristics of the land;
 - (v) the use to which the land is capable of being put or may lawfully be put; or
 - (vi) the existence or availability of facilities associated with the land; or
- (c) offer gifts, prizes or other free items with the intention of not providing them or of not providing them as offered.

(2) A person shall not use physical force or undue harassment or coercion in connection with the sale or grant, or the possible sale or grant, of an interest in land or the payment for an interest in land.

(3) Nothing in this section shall be taken as implying that other provisions of this Part do not apply in relation to the supply or acquisition, or the possible supply or acquisition, of interests in land.

Misleading conduct in relation to employment

16. 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.

Cash price to be stated in certain circumstances

17. 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.

Offering gifts and prizes

18. 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.

Misleading conduct in relation to goods

19. 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.

Misleading conduct in relation to services

20. 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.

Bait advertising

21. (1) A person shall not, in trade or commerce, advertise for supply at a specified price, goods or services if there are reasonable grounds, of which the person is aware or ought reasonably to be aware, for believing that he or she will not be able to offer for supply those goods or services at that price—

- (a) for a period that is; and
- (b) 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 at a specified price shall offer such goods or services for supply 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 Part IV in relation to a failure to offer goods or services to a person (in this subsection referred to as the “customer”) in accordance with subsection (2), it is a defence if the person establishes that—

- (a) he or she offered to supply, or to procure another person to supply, goods or services of the kind advertised to the customer within a reasonable time, in a reasonable quantity and at the advertised price; or
- (b) he or she offered to supply immediately, or to procure another person to supply within a reasonable time, equivalent goods or services to the customer in a reasonable quantity and at the price at which the first-mentioned goods or services were advertised;

and, in either case, where the offer was accepted by the customer, the person has so supplied, or procured another person to supply, goods or services.

Dual pricing

22. (1) A person shall not, in trade or commerce, sell goods to which more than one price is appended at a price that is greater than the lower, or lowest, of the prices.

(2) In subsection (1), a reference to a price appended to goods includes a reference to a price—

- (a) that is annexed or affixed to, or is written, printed, stamped or located on, or otherwise applied to, the goods or any band, ticket, covering, label, reel or thing used in connection with the goods;
- (b) that is used in connection with the goods or anything on which the goods are mounted for display or exposed for sale;
- (c) that is determined on the basis of anything encoded on or in relation to the goods;
- (d) that is published in relation to the goods in a catalogue available to the public if—
 - (i) a time is specified in the catalogue as the time after which the goods will not be sold at that price and that time has not passed; or
 - (ii) in any other case—the catalogue may reasonably be regarded as not out-of-date; or
- (e) that is in any other way represented in a manner from which it may reasonably be inferred that the price represented is a price applicable to the goods.

(3) Where a price appended to goods is written, stamped or located wholly or partly over another price, or other prices, appended to the goods, all the prices are, for the purposes of subsection (1), prices appended to the goods.

(4) It is a defence to a prosecution of a person under this section that—

- (a) the contravention in respect of which the prosecution was instituted was due to the act or default of another person (other than a director, employee or agent of the defendant), to an accident or to some other cause beyond the defendant's control; and
- (b) the defendant had taken all reasonable precautions and exercised due diligence to avoid the contravention.

(5) In this section—

“price” includes any representation that may reasonably be inferred to be a representation of a price and does not include an amount expressed in a currency other than Australian currency.

Referral selling

23. (1) 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 referral selling benefit if receipt of that benefit is contingent on an event occurring after that contract is made.

(2) In this section—

“referral selling benefit” means a rebate, commission or other benefit given to a consumer in return for the consumer—

- (a) giving the person the names of prospective customers; or
- (b) otherwise assisting the person to supply goods or services to other consumers.

Accepting payment without intending or being able to supply as ordered

24. 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 he or she 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.

Misleading representations about certain business activities

25. (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 a person’s place of residence.

(2) Where a person, in trade or commerce, invites, whether by advertisement or otherwise, persons to engage or participate, or to offer or apply to engage or participate, in a business activity requiring the performance by the persons concerned of work, or the investment of moneys by the persons concerned and the performance by them of work associated with the investment, the person 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.

Harassment and coercion

26. (1) 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.

(2) Without limiting the generality of subsection (1), the following conduct constitutes undue harassment or coercion—

- (a) using documents resembling court documents or official documents to mislead a debtor in connection with a debt or the consequences of non-payment;
- (b) misrepresenting to a debtor the consequences of non-payment of the debt or of debt recovery procedures;
- (c) serving unissued summonses;
- (d) impersonation of bailiffs or police;
- (e) carrying dangerous weapons within the meaning of the *Weapons Act 1991*;
- (f) use by creditors of letterhead which is liable to mislead the recipient to believe that the creditor is an independent debt collector;
- (g) use by creditors or debt collectors of letterhead which is liable to mislead the recipient to believe that the sender of the letter is a solicitor or the employee of a solicitor;
- (h) unwarranted disclosure, or threat of disclosure, of debt information to third parties who do not have a clear and legitimate interest in the information;
- (i) unreasonable communication with a debtor.

Pyramid selling

27. (1) A person contravenes this section if—

- (a) the person 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) a person who is a participant in that trading scheme, or has applied or been invited to become a participant in that trading scheme, makes any payment to or for the benefit of the first-mentioned person, being a payment that he or she is induced to make by reason that the prospect is held out to him or her of receiving payments or other benefits in respect of the introduction (whether by himself or herself or by another person) of other persons who become participants in that trading scheme.
- (2) A person also contravenes this section if—
- (a) he or she 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 or she, by holding out to another person (“the second person”) the prospect of receiving payments or other benefits in respect of the introduction (whether by himself or herself or by a third person) of other persons who become participants in that trading scheme, attempts to induce the second person—
 - (i) if he or she is already a participant in that 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 that trading scheme; or
 - (ii) if he or she is not already a participant in that trading scheme, to become such a participant and to make a payment of a kind mentioned in subparagraph (i).
- (3) A person also contravenes this section if he or she promotes, or takes part in the promotion of, a scheme under which—
- (a) a payment is to be made by a person who participates, or who has applied or been invited to participate, in the scheme to or for the benefit of the person or 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.
- (4) For the purposes of subsection (1), (2) or (3)—
- (a) a prospect of a kind mentioned in that subsection shall be taken to be held out to a person whether it is held out so as to confer on him or her a legally enforceable right or not;

- (b) in determining whether an inducement or attempt to induce is made by holding out a prospect of a kind mentioned in that subsection, it is sufficient if a prospect of that kind constitutes or would constitute a substantial part of the inducement; and
- (c) any 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 that person and partly to or for the benefit of one or more other persons.

(5) For the purposes of this section, a scheme is a trading scheme to which this section applies if the scheme includes the following elements:

- (a) goods or services, or both, are to be provided by the person promoting the scheme (in this section referred to as the “promoter”) or, in the case of a scheme promoted by two or more persons acting in concert (in this section referred to as the “promoters”), are to be provided by one or more of those persons;
- (b) the goods or services so provided are to be supplied 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.

(6) For the purposes of subsection (5)—

- (a) a scheme shall be taken to include the element referred to in paragraph (5) (b) whether a participant who is not a promoter acts in relation to a transaction referred to in that paragraph 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 those arrangements are made or recorded wholly or partly in writing or not; and
- (c) any reference to the provision of goods or services by a person shall be construed as including a reference to the provision of goods or services under arrangements to which that person is a party.

Unsolicited credit and debit cards

28. (1) A person shall not send a prescribed card to another person except—

- (a) in pursuance of a request in writing by that other 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 him or her and he or she 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 person.

(4) In this section—

“article” includes a token, card or document;

“credit card” means any article of a kind commonly known as a credit card or any similar article intended for use in obtaining cash, goods or services on credit, and includes any 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.

Assertion of right to payment for unsolicited goods or services or for making entry in directory

29. (1) A person shall not, in trade or commerce, assert a right to payment from another person for unsolicited goods unless he or she 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 he or she 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 his or her profession, business, trade or occupation unless the first-mentioned person 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 him or her to that 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) For the purposes of this section, a person shall be taken to assert a right to a payment from a person for unsolicited goods or services, or of a charge for the making of an entry in a directory, if the 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 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.

(6) A person shall not be taken for the purposes of this section 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 the person or by another person authorised by him or her;
- (b) 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; and
- (c) 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.

(7) For the purposes of this section, 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.

(8) In proceedings against a person in respect of a contravention of this section—

- (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 person against whom the proceedings have been brought of proving that he or she had 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 a person of a charge for the making of an entry in a directory—the burden lies on the person against whom the proceedings have been brought of proving that he or she knew or had reasonable cause to believe that the person had authorised the making of the entry.

(9) In 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;

“making”, in relation to an entry in a directory, means including, or arranging for the inclusion of, the entry.

Liability of recipient of unsolicited goods

30. (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 by him or her of a wilful and unlawful act in relation to the goods during the period specified in subsection (4).

(2) Subject to subsection (3), where, on or after the commencing date, a person sends, in trade or commerce, unsolicited goods to another person—

- (a) neither the first-mentioned person nor any person claiming on his or her behalf 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 him or her.
- (4) The period referred to in the foregoing subsections 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 expires first; or
 - (b) in any other case—the period of 3 months next following the day on which the person received the goods.
- (5) A notice under 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.

Application of provisions of Part to prescribed information providers

31. (1) Nothing in section 12, 14, 15, 19, 20 or 25 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 an interest 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—

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

- (a) the holder of a licence granted under the *Broadcasting Services Act 1992* of the Commonwealth;
- (b) a person who is the provider of a broadcasting service under a class licence under that Act;

- (c) the holder of a licence continued in force by subsection 5 (1) of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* of the Commonwealth;
- (d) the Australian Broadcasting Corporation; and
- (e) 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.

PART III—CODES OF PRACTICE

Interpretation

32. In this Part, unless the contrary intention appears—

“code” means a code prescribed under section 34;

“undertaking” means an undertaking given in response to a request for an undertaking made under section 36.

Preparation of draft codes of practice

33. (1) The Director 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.

(2) For the purpose of preparing a draft code of practice, the Director shall arrange for consultation with, and invite submissions from, such persons and organisations as, in the opinion of the Director, would have an interest in the terms of the proposed draft code of practice.

(3) If the Director 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 Director may submit the code to the Minister for consideration together with any recommendations by the Director with respect to amendments to the code.

Regulations—codes of practice

- 34.** The regulations may prescribe a code of practice that—
- (a) has been submitted to the Minister in accordance with section 33; and
 - (b) has been approved by the Minister with or without amendments.

Codes of practice—amendment

35. (1) A code of practice prescribed under section 34 may be amended by the regulations, in accordance with this section.

(2) An amendment to a code of practice may be made only with the approval of the Minister.

- (3)** A code of practice is not to be amended unless—
- (a) the amendment has been submitted to the Minister in accordance with section 33 as if it were a draft code of practice; or
 - (b) the Director has certified in writing that the amendment is of a minor or inconsequential nature and that compliance with section 33 is not required.

(4) An amendment may be approved by the Minister with or without alteration.

Undertakings following contravention of code

36. (1) If it appears to the Director that a person has carried on business in contravention of a prescribed code, the Director may request the person to execute within a specified time a deed in terms approved by the Director under which the person gives undertakings as to all or any of the following:

- (a) discontinuance of the conduct;
- (b) future compliance with the code of practice;
- (c) the action the person will take to rectify any consequence of the contravention.

(2) In considering whether to require a person to give an undertaking under subsection (1) the Director shall have regard to any dispute resolution process specified in the relevant code.

Powers of the Court

37. (1) If a person fails to comply with a request by the Director to give an undertaking under section 36, the Court may, on the application of the Director and on being satisfied that there were grounds for requesting the undertaking—

- (a) order the person to act in a manner that would have been required by the undertaking;

- (b) order the person to refrain from acting in a manner that would have been prohibited by the undertaking; or
- (c) make such other order as it thinks fit to give appropriate effect to the undertaking;

had that undertaking been given.

(2) If, on the application of the Director or a person authorised in writing by the Director so to apply, the Court is satisfied that a person has failed to observe an undertaking he or she gave under section 36, the Court may order the latter person—

- (a) to observe the undertaking; and
- (b) in the case of an undertaking to rectify the consequences of a contravention of a code—to observe the undertaking within a time specified by the Court.

(3) If—

- (a) the failure on which an application under subsection (1) or (2) is based is a failure by a body corporate; and
- (b) the Court 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 Court may, in addition to any other order, order—

- (c) that the person desist from consenting to or conniving in the failure; or
- (d) that the person desist from consenting to or conniving in a like failure by any other body corporate of which he or she is a director or in the management of which he or she is concerned.

(4) An order under this section may be made subject to such conditions (whether as to the duration of the order or otherwise) as the Court 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.

(5) A person shall not contravene or fail to comply with an order made under this section.

Penalty:

- (a) if the offender is a natural person—\$5,000;
- (b) if the offender is a body corporate—\$25,000.

Variation or discharge of restraining order

38. The Court may, on the application of the Director, vary or discharge an order made under section 37.

Registers of undertakings

39. (1) The Director shall maintain in such form as he or she thinks fit registers of undertakings given under section 36.

(2) Where a person executes a deed under section 36, the Director shall—

- (a) retain the deed and enter in a register of undertakings the prescribed particulars with respect to the deed; and
- (b) give a copy of the deed to the person who executed it.

(3) A register of undertakings may, at any reasonable time, be inspected by any person free of charge.

PART IV—ENFORCEMENT AND REMEDIES**Interpretation**

40. A reference in this Part to a person involved in a contravention of a provision of Part II 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, promises or otherwise, the contravention;
- (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.

Offences against Part II

41. (1) A person who—

- (a) contravenes;
- (b) aids, abets, counsels or procures a person to contravene;
- (c) induces, or attempts to induce, a person whether by threats or promises or otherwise, to contravene;
- (d) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of; or
- (e) conspires with others to contravene;

a provision of Part II other than section 12 or 13 is guilty of an offence punishable on conviction by a fine of—

- (f) if the offender is a natural person—\$20,000; or
- (g) if the offender is a body corporate—\$100,000.

(2) Where a person is convicted of 2 or more offences constituted by, or relating to, contraventions of the same provision of Part II, being contraventions that appear to the Court to have been of the same nature or substantially similar nature and to have occurred at or about the same time (whether or not the person is also convicted of an offence or offences constituted by, or relating to, another contravention or other contraventions of that provision that were of a different nature or occurred at a different time), the Court shall not, in respect of the first-mentioned offences, impose on the person fines that, in the aggregate, exceed the maximum fine that would be applicable in respect of one offence by that person against that provision.

(3) Where—

- (a) a person is convicted of an offence constituted by, or relating to, a contravention of a provision of Part II; and
- (b) a fine has, or fines have, previously been imposed on the person by the Court for an offence or offences constituted by, or relating to, another contravention or other contraventions of the same provision, being a contravention that, or contraventions each of which, appears to the Court to have been of the same nature as, or of a substantially similar nature to, and to have occurred at or about the same time as, the first-mentioned contravention (whether or not a fine has, or fines have, also previously been imposed on the person for an offence or offences constituted by, or relating to, a contravention or contraventions of that provision that were of a different nature or occurred at a different time);

the Court shall not, in respect of the offence mentioned in paragraph (a), impose on the person a fine that exceeds the amount (if any) by which the maximum fine applicable in respect of that offence under subsection (1) is greater than the amount of the fine, or the sum of the amounts of the fines, first referred to in paragraph (b).

(4) In proceedings under this section against a person for contravening a provision of Part II, the Court may—

- (a) grant an injunction under section 44 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; or
- (b) make an order under section 45 in relation to the contravention.

(5) Sections 345, 347 and 348 of the *Crimes Act 1900* do not apply in relation to an offence against subsection (1).

(6) A prosecution for an offence against subsection (1) may be commenced within 3 years after the commission of the offence.

(7) 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.

Enforcement and recovery of certain fines

42. (1) Where a person on whom a fine has been imposed for an offence against section 41 or subsection 51 (5) defaults in payment of the fine, a Court may—

- (a) exercise any power that the Court has apart from this section with respect to the enforcement and recovery of fines imposed by the Court; or
- (b) make an order, on the application of the Minister or the Director, declaring that the fine is to have effect, and may be enforced, as if it were a judgment debt under a judgment of the Court.

(2) Where a person in relation to whom an order is made under subsection (1) in respect of a fine gives security for the payment of the fine, the Court shall cancel the order in respect of the fine.

Prosecutions

43. Proceedings for an offence against Part II of this Act may be taken and prosecuted only with the written consent of the Director.

Injunctions

44. (1) Subject to subsections (3) and (4), where, on the application of the Minister, the Director or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute—

- (a) a contravention of a provision of Part II;
- (b) attempting to contravene such a provision;
- (c) aiding, abetting, counselling or procuring a person to contravene such a provision;
- (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision;
- (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
- (f) conspiring with others to contravene such a provision;

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

(2) Where an application for an injunction under subsection (1) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that a person has engaged, or is proposing to engage, in conduct of a kind mentioned in subsection (1).

(3) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).

(4) The Court may rescind or vary an injunction granted under subsection (1) or (3).

(5) 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.

(6) 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.

(7) Where the Minister or the Director makes an application to the Court for the grant of an injunction under this section, 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.

(8) Where—

- (a) in a case to which subsection (7) 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;

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

Order to disclose information or publish advertisement

45. Without limiting the generality of section 44, where, on the application of the Minister or the Director, the Court is satisfied that a person has engaged in conduct constituting a contravention of a provision of Part II other than section 13, the Court may make either or both of the following orders:

- (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;
- (b) an order requiring that person or a person involved in the contravention to publish, at his or her 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.

Actions for damages

46. (1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part II may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

(2) Subsection (1) does not apply in relation to conduct done in contravention of section 13.

Finding in proceedings to be evidence

47. In proceedings against a person under section 46 or in an application under subsection 50 (2) for an order against a person, a finding of any fact by a court made in proceedings under section 44 or 45 or for an offence against section 41, in which that person has been found to have contravened, or to have been involved in a contravention of, a provision of Part II 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.

Conduct by directors, servants or agents

48. (1) Where, in proceedings under this Part in respect of conduct engaged in by a body corporate, being conduct in relation to which Part II applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, being a director, servant 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, servant 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, servant or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;

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

(3) Where, in proceedings under this Part in respect of conduct engaged in by a person other than a body corporate, being conduct in relation to which a provision of Part II applies, it is necessary to establish the state of mind of the person, it is sufficient to show that a servant or agent of the person, being a servant or agent by whom the conduct was engaged in within the scope of the servant'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 a servant or agent of the person within the scope of the actual or apparent authority of the servant or agent; or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the servant 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 the person's intention, opinion, belief or purpose.

Defences

49. (1) Subject to subsection (2), in a prosecution under this Part in relation to a contravention of a provision of Part II, it is a defence if the defendant establishes—

- (a) that the contravention in respect of which the proceedings were instituted was due to reasonable mistake;
- (b) that the contravention in respect of which the proceedings were instituted was due to reasonable reliance on information supplied by another person; or
- (c) that—
 - (i) the contravention in respect of which the proceedings were instituted was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control; and
 - (ii) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

(2) In paragraphs (1) (b) and (c), “another person” does not include a person who was—

- (a) a servant or agent of the defendant; or
- (b) in the case of a defendant being a body corporate, a director, servant or agent of the defendant;

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 defendant is not, without the leave of the Court, entitled to rely on that defence unless he or she has, not later than 7 days before the day on which the hearing of the proceedings commences, served on the person by whom the proceedings were instituted, a notice in writing giving such information that would identify or assist in the identification of the other person as was then in his or her possession.

(4) In proceedings under this Part in relation to a contravention of a provision of Part II committed by the publication of an advertisement, it is a defence if the defendant establishes that he or she is a person whose business it is to publish or arrange for the publication of advertisements and that he or she 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 a provision of that Part.

Other orders

50. (1) Without limiting the generality of section 44, where, in proceedings instituted under, or for an offence against, this Part, the Court finds that a person who is a party to the proceedings has suffered, or is likely to suffer loss or damage by conduct of another person that was engaged in in contravention of a provision of Part II, the Court may, whether or not it grants an injunction under section 44 or makes an order under section 45 or 46, make such orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (7)) if the Court considers that the order or orders concerned will compensate the aggrieved person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

(2) Without limiting the generality of section 44, the Court may, on the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of a provision of Part II or on the application of the Director in accordance with subsection (3) on behalf of such a person or 2 or more such persons, 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 (including all or any of the orders mentioned in subsection (7)) if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage, or will prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.

(3) Where, in proceedings instituted for an offence against section 41 or instituted by the Director or the Minister under section 44, a person is found to have engaged in conduct in contravention of Part II, the Director may make an application under subsection (2) on behalf of 1 or more persons identified in the application who have suffered, or are likely to suffer, loss or damage by the conduct but the Director shall not make such an application except with the consent in writing given before the application is made by the person, or by each of the persons, on whose behalf the application is made.

(4) An application may be made under subsection (2) in relation to a contravention of Part II notwithstanding that proceedings have not been instituted under another provision of this Part in relation to that contravention.

(5) For the purpose of determining whether to make an order under this section in relation to a contravention of section 13, the Court may have regard to the conduct of 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 13 in relation to a contract of insurance to which the *Insurance Contracts Act 1984* of the Commonwealth applies.

(7) The orders referred to in subsections (1) and (2) are—

- (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 *ab initio* 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;
- (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 his or her own expense, to repair, or provide parts for, goods that have been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage;
- (g) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage; and

- (h) 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.

(10) The powers conferred on the Court under this section in relation to a contract or covenant do not affect any powers that any other court may have in relation to the contract or covenant in proceedings instituted in that other court in respect of the contract or covenant.

Power of Court to prohibit payment or transfer of moneys or other property

51. (1) Where—

- (a) proceedings have been commenced against a person for an offence against section 41;
- (b) an application has been made under section 44 for an injunction against a person in relation to a contravention of a provision of Part II;
- (c) an action has been commenced under subsection 46 (1) against a person in relation to a contravention of a provision of Part II; or
- (d) an application for an order under subsection 50 (2) or (3) has been or may be made against a person in relation to a contravention of a provision of Part II;

the Court may, on the application of the Minister or the Director, make an order or orders mentioned 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 refund 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 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 or Territory in which the money is held;
 - (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 or Territory in which the other property is located; 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 on an application *ex parte* 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 Court under this section that is applicable to the person is guilty of an offence punishable on conviction by a fine of—
- (a) if the offender is a natural person—\$20,000; or
 - (b) if the offender is a body corporate—\$100,000.
- (6) Nothing in this section affects the powers that the Court has apart from this section.

(7) This section has effect 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.

PART V—MISCELLANEOUS

Intervention by Minister

52. (1) The Minister may, at any stage of proceedings brought before a court under—

- (a) this Act; or
- (b) any other legislation administered by the Minister;

intervene in the proceedings.

(2) Where the Minister intervenes in proceedings, the Minister—

- (a) becomes a party to the proceedings; and
- (b) has all the rights of appeal, of a party to the proceedings.

Saving of rights and remedies

53. Except to the extent that this Act otherwise expressly provides, this Act does not limit, restrict or otherwise affect any right or remedy a person would have had if this Act had not been enacted.

Regulations

54. The Executive may make regulations not inconsistent with this Act, prescribing matters—

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

[Presentation speech made in Assembly on 9 September 1992]