



Australian Capital Territory

## **Fair Trading Act 1992    No 72**

**Republication No 8 (RI)**

**Effective: 31 March 2003 – 31 October 2003**

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Reissued: 11 August 2003 for textual correction in s 37 (1)

Last amendment made by A2003-2

Authorised by the ACT Parliamentary Counsel

## About this republication

### The republished law

This is a republication of the *Fair Trading Act 1992* (including any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes)) as in force on 31 March 2003. It also includes any amendment, repeal or expiry affecting the republished law to 31 March 2003.

The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

### Kinds of republications

The Parliamentary Counsel's Office prepares 2 kinds of republications of ACT laws (see the ACT legislation register at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)):

- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

### Editorial changes

The *Legislation Act 2001*, part 11.3 authorises the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation Act 2001*, s 115 and s 117). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication does not include amendments made under part 11.3 (see endnote 1).

### Uncommenced provisions and amendments

If a provision of the republished law has not commenced or is affected by an uncommenced amendment, the symbol **U** appears immediately before the provision heading. The text of the uncommenced provision or amendment appears only in the last endnote.

### Modifications

If a provision of the republished law is affected by a current modification, the symbol **M** appears immediately before the provision heading. The text of the modifying provision appears in the endnotes. For the legal status of modifications, see *Legislation Act 2001*, section 95.

### Penalties

The value of a penalty unit for an offence against this republished law at the republication date is—

- (a) if the person charged is an individual—\$100; or
- (b) if the person charged is a corporation—\$500.



Australian Capital Territory

# Fair Trading Act 1992

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Australian Capital Territory

# Fair Trading Act 1992

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An Act relating to trading practices

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## Part 1 Preliminary

### 1 Name of Act

This Act is the *Fair Trading Act 1992*.

### 5 Interpretation for Act

(1) In this Act:

*Note* A definition applies except so far as the contrary intention appears (see *Legislation Act 2001*, s 155).

**acquire** includes—

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

**arrive at**, in relation to an understanding, includes reach or enter into.

**business** includes—

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

**commissioner** means the commissioner for fair trading.

**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.



**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; and
- (b) animals, including fish; and
- (c) minerals, trees and crops, whether on, under or attached to land or not; and
- (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; and
- (b) a right, given by shares, or under a contract to purchase shares, in a corporation that 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; and

- (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; and
- (c) contained in a document sent or given to a person or thrown or left on, or at, premises occupied by a person; and
- (d) broadcast by radio or television; and
- (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 under 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 given 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 given 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; or
  - (ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or

- (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 supply of electricity, gas, or any other form of energy; or
- (v) the supply of water; or
- (vi) sewerage services; or
- (b) a contract of insurance; or
- (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 resupply) by way of sale, exchange, lease, hire or hire-purchase; and
  - (ii) exhibit, expose or have in possession for the purpose of sale, exchange, lease, hire or hire-purchase or for any purpose of manufacture or trade in relation to the supply of goods; and

- (iii) donate for promotional purposes; and
- (b) in relation to services—provide, grant, give or donate for promotional purposes; and

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 is a reference to doing or refusing to do any act, including—
  - (i) the making of, or the giving effect to a provision of, a contract or arrangement; or
  - (ii) the arriving at, or the giving effect to a provision of, an understanding; or
  - (iii) the requiring of the giving of, or the giving of, a covenant; and
- (b) a reference to *conduct*, when that expression is used as a noun otherwise than as mentioned in paragraph (a), is a reference to the doing of or the refusing to do any act, including—
  - (i) the making of, or the giving effect to a provision of, a contract or arrangement; or
  - (ii) the arriving at, or the giving effect to a provision of, an understanding; or
  - (iii) the requiring of the giving of, or the giving of, a covenant; and

- (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.

## 6 Consumers

- (1) For this Act, a *consumer* is a person who acquires goods or services from a supplier.
- (2) A person is not a *consumer* for 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) resupplying them; or
  - (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) If it is alleged in any proceedings under this Act or in any other proceedings in relation to 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.

## 7 Acquisition, supply and resupply

- (1) In this Act—

- (a) a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods under a supply of the goods; and
  - (b) a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services; and
  - (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; and
  - (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; and
  - (e) a reference to the resupply 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 firstmentioned goods have been incorporated; and
  - (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 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.

## **8 Loss or damage to include injury**

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.

## **9 Severability**

If the making of a contract after the commencement of this section contravenes this Act because 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 so far as that provision is severable.

## **10 Extended application of pt 2**

- (1) Part 2 extends to the engaging in conduct outside the ACT by bodies corporate incorporated or carrying on business within the ACT or by persons ordinarily resident in the ACT.
- (2) If a claim under section 46 is made in proceedings, a person is not entitled to rely at a hearing in relation to those proceedings on conduct to which a provision of this Act extends under subsection (1) except with the written consent of the Minister.
- (3) A person other than the Minister is not entitled to make an application to the Magistrates Court for an order under section 50 (1) or (2) in proceedings in relation to conduct to which a provision

of this Act extends under subsection (1) except with the written consent of the Minister.

- (4) The Minister shall give a consent under subsection (2) or (3) in relation to proceedings unless, in the opinion of the Minister—
- (a) the law of the place where 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 2                      Unfair practices**

### **Division 2.1              False and misleading conduct**

#### **11      Representations in relation to future matters**

- (1) For this part, if a person makes a representation in relation 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 application of subsection (1) in relation to proceedings about a representation made by a person in relation 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.

#### **12      Misleading or deceptive conduct**

- (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 sections 13 to 31 shall be taken as limiting by implication subsection (1).

#### **13      Unconscionable conduct**

- (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 Magistrates 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 (the *consumer*), the court may have regard to—
- (a) the relative strengths of the bargaining positions of the supplier and the consumer; and
  - (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; and
  - (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
  - (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 this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a consumer only because the 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 Magistrates 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 resupply or for the purpose of using them up or transforming them in trade or commerce.

#### **14 False or misleading representations**

- (1) A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services—
- (a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or
  - (b) falsely represent that services are of a particular standard, quality, value or grade; or
  - (c) falsely represent that goods are new; or
  - (d) falsely represent that a particular person has agreed to acquire goods or services; or
  - (e) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have; or

- (f) represent that the person has a sponsorship, approval or affiliation he or she does not have; or
  - (g) make a false or misleading representation in relation to the price of goods or services; or
  - (h) make a false or misleading representation about the availability of facilities for the repair of goods or of spare parts for goods; or
  - (i) make a false or misleading representation about the place of origin of goods; or
  - (j) make a false or misleading representation about the need for any goods or services; or
  - (k) make a false or misleading representation about the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.
- (2) A person does not contravene subsection (1) (i) if the person makes a representation about the country of origin of goods and the person complies with the *Trade Practices Act 1974* (Cwlth), part 5 (Consumer protection), division 1AA (Country of origin representations).

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

- (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; or
  - (b) make a false or misleading representation about—
    - (i) the nature of the interest in the land; or

- (ii) the price payable for the land; or
  - (iii) the location of the land; or
  - (iv) the characteristics of the land; or
  - (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.

## **16 Misleading conduct in relation to employment**

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 about the availability, nature, terms or conditions of, or any other matter relating to, the employment.

## **17 Cash price to be stated in certain circumstances**

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 in relation 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.

**18      Offering gifts and prizes**

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.

**19      Misleading conduct in relation to goods**

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

**20      Misleading conduct in relation to services**

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

**21      Bait advertising**

(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 the 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 4 in relation to a failure to offer goods or services to a person (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 firstmentioned goods or services were advertised;

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

## **22 Dual pricing**

- (1) A person shall not, in trade or commerce, sell goods to which more than 1 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; or
  - (b) that is used in connection with the goods or anything on which the goods are mounted for display or exposed for sale; or

- (c) that is determined on the basis of anything encoded on or in relation to the goods; or
  - (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 way from which it may reasonably be inferred that the price represented is a price applicable to the goods.
- (3) If 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 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 relation to 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.



## **23 Referral selling**

(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.

## **24 Accepting payment without intending or being able to supply as ordered**

A person shall not, in trade or commerce, accept payment or other consideration for goods or services if, 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 relation to 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.

## **25      Misleading representations about certain business activities**

- (1) A person shall not, in trade or commerce, make a representation that is false or misleading in a material particular about 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) If 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 money by the persons concerned and the performance by them of work associated with the investment, the person shall not make, in relation 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.

## **Division 2.2                      Pyramid selling**

### **25A    Definitions for div 2.2**

In this division:

*new participant*, in a pyramid selling scheme, includes a person who has applied, or been invited, to participate in the scheme.

*participant*, in a pyramid selling scheme, means a person who participates in the scheme.

*participate*, in a pyramid selling scheme, means—

- (a) establish or promote the scheme (whether alone or together with another person); or

- (b) take part in the scheme in any capacity (whether or not as an employee or agent of a person who establishes or promotes the scheme, or otherwise takes part in the scheme).

*participation payment*—see section 25C (1), definition of *pyramid selling scheme*, paragraph (a).

*payment*, to a person or received by a person, means—

- (a) the provision of a financial or non-financial benefit to or for the benefit of the person; or
- (b) the provision of a financial or non-financial benefit partly to or for the benefit of the person, and partly to or for the benefit of another person.

*pyramid selling scheme*—see section 25C.

*recruitment payment*—see section 25C (1), definition of *pyramid selling scheme*, paragraph (b).

## **25B Pyramid selling schemes—participation prohibited**

A person must not participate in a pyramid selling scheme.

## **25C What is a *pyramid selling scheme***

- (1) In this Act:

*pyramid selling scheme* means a scheme with both the following characteristics:

- (a) to take part in the scheme, some or all new participants must make a payment (a *participation payment*) to another participant or participants in the scheme;
- (b) the participation payments are entirely or substantially induced by the prospect held out to new participants that they will be entitled to a payment (a *recruitment payment*) in relation to the introduction to the scheme of further participants.

- (2) A scheme may be a pyramid selling scheme—
- (a) no matter who holds out to new participants the prospect of entitlement to recruitment payments; and
  - (b) no matter who is to make recruitment payments to new participants; and
  - (c) no matter who is to make introductions to the scheme of further new participants.
- (3) A scheme may be a pyramid selling scheme even if it has any or all of the following characteristics:
- (a) the participation payments may (or must) be made after the new participants begin to take part in the scheme;
  - (b) making a participation payment is not the only requirement for taking part in the scheme;
  - (c) the holding out of the prospect of entitlement to recruitment payments does not give any new participant a legally enforceable right;
  - (d) arrangements for the scheme are not recorded in writing (whether entirely or partly);
  - (e) the scheme involves the marketing of goods or services (or both).

### **25D Marketing schemes—are they pyramid selling schemes?**

- (1) To decide whether a scheme that involves the marketing of goods or services (or both) is a pyramid selling scheme, a court may have regard to the following matters in working out whether participation payments under the scheme are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments:
- (a) the extent to which the participation payments bear a reasonable relationship to the value of the goods or services

that participants are entitled to be supplied under the scheme (as assessed, if appropriate, by reference to the price of comparable goods or services available elsewhere);

- (b) the emphasis given in the promotion of the scheme to the entitlement of participants to the supply of goods and services by comparison with the emphasis given to their entitlement to recruitment payments.
- (2) Subsection (1) does not limit the matters to which the court may have regard in working out whether participation payments are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments.

## **Division 2.3            Other conduct**

### **26    Harassment and coercion**

- (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 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 nonpayment;
  - (b) misrepresenting to a debtor the consequences of nonpayment 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 that 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 that is liable to mislead the recipient to believe that the sender of the letter is a legal practitioner or the employee of a legal practitioner;
- (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.

## **28      Unsolicited credit and debit cards**

- (1) A person shall not send a prescribed card to another person except—
  - (a) in pursuance of a written request by that other person who will be under a liability to the person who issued the card in relation to 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 written request by him or her and he or she was under a liability to the person who issued the card previously so sent in relation to 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 written request 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.

## **28A Credit card contracts and increases in credit card limits**

- (1) A credit provider must not enter into a continuing credit contract for a credit card with a debtor unless the credit provider has carried out a satisfactory assessment process.
- (2) A credit provider must not increase the amount of credit available under a continuing credit contract for a credit card unless—
  - (a) the debtor has requested the increase in writing, or the credit provider has offered the debtor the increase and the debtor has accepted the offer in writing; and
  - (b) the credit provider has carried out a satisfactory assessment process.
- (3) For this section, a *satisfactory assessment process*, in relation to a debtor, is an assessment of the debtor's financial situation sufficient to satisfy a diligent and prudent credit provider that the debtor has a

reasonable ability to repay the amount of credit provided or to be provided.

- (4) Without limiting subsection (3), an assessment process is a **satisfactory assessment process** only if the credit provider—
- (a) asks the debtor for a statement of the debtor's financial situation, including—
    - (i) income; and
    - (ii) all credit accounts and applicable limits and balances; and
    - (iii) repayment commitments; and
  - (b) takes the statement into account in making the assessment.
- (5) In this section:

**credit card**—see section 28 (4).

**continuing credit contract**—see the *Consumer Credit (Australian Capital Territory) Code*, schedule 1, section 1 (1), definition of **continuing credit contract**.

*Note 1*    The Code, sch 1, s 1 (1) defines a **continuing credit contract** as a credit contract under which—

- (a) multiple advances of credit are contemplated; and
- (b) the amount of available credit ordinarily increases as the amount of credit is reduced.

*Note 2*    The *Consumer Credit (Australian Capital Territory) Code* is defined in the *Legislation Act 2001*, dict, pt 1. For the latest republication of the code, see [www.legislation.act.gov.au](http://www.legislation.act.gov.au).

**credit provider**, in relation to a credit contract, means a person who provides credit under the credit contract in the course of a business of providing credit or as part of or incidentally to any other business of the credit provider, and includes a prospective credit provider.

**debtor** means a person (other than a guarantor) who is liable to pay for (or to repay) credit, and includes a prospective debtor.



## **28B Cash card use disclosure**

- (1) A cash card provider shall not disclose to any person particulars of the use of a cash card if those particulars identify or tend to identify the user.
- (2) Subsection (1) does not apply if—
  - (a) the user consents to the disclosure; or
  - (b) the disclosure is required by a court or is otherwise authorised or required by or under a law in force in the ACT.

- (3) In this section:

*cash card* means a card that—

- (a) is, or is intended to be, electronically encoded with a monetary value; and
- (b) once encoded, can be used to pay for goods or services up to the value encoded.

*provider*, in relation to a cash card, means a person who provides cash cards in the course of a business carried on by him or her.

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

- (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 firstmentioned 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 firstmentioned person has authorised the making of the entry.
- (5) For 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; or
  - (b) threatens to bring any legal proceedings with a view to obtaining the payment; or
  - (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; or
  - (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 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; and

- (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; and
  - (ii) the name and address of the person publishing the directory; and
  - (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 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 relation to a contravention of this section—
  - (a) for 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) for 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.

### **30 Liability of recipient of unsolicited goods**

- (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), if, on or after the commencing date, a person sends, in trade or commerce, unsolicited goods to another person—
  - (a) neither the firstmentioned person nor any person claiming on his or her behalf is entitled after the end 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) at the end 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; or
  - (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 subsections (1) to (3) is—
  - (a) if the person who receives the unsolicited goods gives notice in relation to the goods to the sender in accordance with subsection (5)—
    - (i) the period of 1 month next following the day when the notice is given; or
    - (ii) the period of 3 months next following the day when the person received the goods;whichever ends first; or
  - (b) in any other case—the period of 3 months next following the day when 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; and
  - (b) state the address where 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.

### **31 Application of provisions of pt 2 to prescribed information providers**

- (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; or

- (ii) the sale or grant, or possible sale or grant, of an interest in land; or
  - (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;
- if—
- (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 under 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 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) for a person who is a prescribed information provider under subsection (3), definition of *prescribed information provider*, paragraph (a), (b) or (c) (whether or not the person is also a prescribed information provider under 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* (Cwlth); and
- (b) a person who is the provider of a broadcasting service under a class licence under that Act; and
- (c) the holder of a licence continued in force by the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* (Cwlth), section 5 (1); and
- (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, if 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 if the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider.

## Part 3 Codes of practice

### 32 Definitions for pt 3

In this part:

*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.

### 32A Prescribed provisions

The regulations may prescribe provisions that are taken to be part of each code.

### 33 Preparation of draft codes of practice

- (1) The commissioner may, with the approval of the Minister, and shall, if the Minister so directs, prepare for consideration by the Minister a draft code of practice for fair dealing—
  - (a) between a particular class of suppliers and consumers; or
  - (b) by a particular class of persons in relation to consumers.
- (2) For the purpose of preparing a draft code of practice, the commissioner shall arrange for consultation with, and invite submissions from, the persons and organisations that, in the opinion of the commissioner, would have an interest in the terms of the proposed draft code of practice.
- (3) If the commissioner is satisfied that associated persons in a field of trade or commerce have, in consultation with organisations representing consumers and other interested persons, agreed to abide by a particular code of practice in their dealings with or in relation to consumers, the commissioner may submit the code to the



Minister for consideration together with any recommendations by the commissioner in relation to amendments to the code.

### **34 Regulations—codes of practice**

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.

### **35 Codes of practice—amendment**

- (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 commissioner has certified in writing that the amendment is of a minor or inconsequential nature and that compliance with section 33 is not required; or
  - (c) the commissioner has certified in writing that the amendment is consequential on a provision taken to be part of a code by regulations made for section 32A (Prescribed provisions).
- (4) An amendment may be approved by the Minister with or without alteration.
- (5) This section does not apply to a provision taken to be part of a code by regulations made for section 32A.

**35A Evidence of code**

In any proceeding before a court, evidence of a code as in force on a day or during a period may be given by the production of a document purporting to be a copy of the code if the copy contains a statement signed by the commissioner that the document is an accurate copy of the code as in force on that day or during that period.

**36 Undertakings following contravention of code**

- (1) If it appears to the commissioner that a person has carried on business in contravention of a prescribed code, the commissioner may request the person to execute within a specified time a deed in terms approved by the commissioner under which the person gives undertakings about 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 commissioner shall have regard to any dispute resolution process specified in the relevant code.
- (3) This section does not limit section 51A (Enforcement of undertakings).

**37 Powers of Magistrates Court**

- (1) If a person fails to comply with a request by the commissioner to give an undertaking under section 36, the Magistrates Court may, on the application of the commissioner and on being satisfied that there were grounds for requesting the undertaking—
  - (a) order the person to act in a way that would have been required by the undertaking; or

- (b) order the person to refrain from acting in a way that would have been prohibited by the undertaking; or
  - (c) make any other order it considers appropriate to give appropriate effect to the undertaking;
- had that undertaking been given.
- (2) If, on the application of the commissioner or a person authorised in writing by the commissioner so to apply, the Magistrates 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) for 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 Magistrates 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 the conditions (whether as to the duration of the order or otherwise) the Magistrates Court considers appropriate including—

- (a) conditions about 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.

Maximum penalty: 50 penalty units.

### **38 Variation or discharge of restraining order**

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

### **39 Registers of undertakings**

- (1) The commissioner shall maintain in the form he or she considers appropriate registers of undertakings given under section 36.
- (2) If a person executes a deed under section 36, the commissioner shall—
  - (a) retain the deed and enter in a register of undertakings the prescribed particulars in relation 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 4 Enforcement and remedies

### 40 Meaning of person *involved* in contravention

A reference in this part to a person involved in a contravention of a provision of part 2 is a reference to a person who—

- (a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced, whether by threats, promises or otherwise, the contravention; or
- (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.

### 41 Offences against pt 2

- (1) A person who—
  - (a) contravenes; or
  - (b) aids, abets, counsels or procures a person to contravene; or
  - (c) induces, or attempts to induce, a person whether by threats or promises or otherwise, to contravene; or
  - (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 2 other than section 12 or 13 commits an offence.  
Maximum penalty: 200 penalty units.
- (2) If a person is convicted of 2 or more offences constituted by, or relating to, contraventions of the same provision of part 2, being contraventions that appear to the Magistrates 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 relation to the firstmentioned offences, impose on the person fines that, in the aggregate, exceed the maximum fine that would be applicable in relation to 1 offence by that person against that provision.

- (3) If—
- (a) a person is convicted of an offence constituted by, or relating to, a contravention of a provision of part 2; and
  - (b) a fine has, or fines have, previously been imposed on the person by the Magistrates 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 firstmentioned 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 relation to 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 relation to that offence against 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 2, the Magistrates 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) The *Crimes Act 1900*, sections 180, 182 and 183 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 against a law of the Commonwealth or a law in force elsewhere in Australia, a person convicted of an offence against that law is not liable to be convicted of the offence against this Act.

## **42 Enforcement and recovery of certain fines**

- (1) If a person on whom a fine has been imposed for an offence against section 41 or 51 (5) defaults in payment of the fine, a Magistrates Court may—
- (a) exercise any power that the court has apart from this section in relation to the enforcement and recovery of fines imposed by the court; or
  - (b) make an order, on the application of the Minister or the commissioner, 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) If a person in relation to whom an order is made under subsection (1) in relation to a fine gives security for the payment of the fine, the Magistrates Court shall cancel the order in relation to the fine.

### **43 Prosecutions**

Proceedings for an offence against part 2 may be taken and prosecuted only with the written consent of the commissioner.

### **44 Injunctions**

- (1) Subject to subsections (3) and (4), if, on the application of the Minister, the commissioner or any other person, the Magistrates 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 2; or
  - (b) attempting to contravene such a provision; or
  - (c) aiding, abetting, counselling or procuring a person to contravene such a provision; or
  - (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision; or
  - (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 the terms the court determines to be appropriate.

- (2) If an application for an injunction under subsection (1) has been made, whether before or after the commencement of this subsection, the Magistrates 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) If in the opinion of the Magistrates Court it is desirable to do so, the court may grant an interim injunction pending determination of an application under subsection (1).
- (4) The Magistrates Court may rescind or vary an injunction granted under subsection (1) or (3).
- (5) The power of the Magistrates 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; and
  - (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 firstmentioned person engages in conduct of that kind.
- (6) The power of the Magistrates 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 fail again, or to continue to fail, to do that act or thing; and
  - (b) whether or not the person has previously 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 firstmentioned person fails to do that act or thing.
- (7) If the Minister or the commissioner makes an application to the Magistrates 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 about damages.

- (8) If—
- (a) in a case to which subsection (7) does not apply the Magistrates Court would, apart from this subsection, require a person to give an undertaking about 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.

#### **45 Order to disclose information or publish advertisement**

Without limiting section 44, if, on the application of the Minister or the commissioner, the Magistrates Court is satisfied that a person has engaged in conduct constituting a contravention of a provision of part 2 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 the way specified in the order, the information, or information of a kind, so specified, being information that is in the possession of the person to whom the order is directed or to which that lastmentioned 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 way 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.

#### **46 Actions for damages**

- (1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of part 2 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.

#### **47 Finding in proceedings to be evidence**

In proceedings against a person under section 46 or in an application under section 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 2 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.

#### **48 Conduct by directors, servants or agents**

- (1) If, in proceedings under this part in relation to conduct engaged in by a body corporate, being conduct in relation to which part 2 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, if 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 this Act, to have been engaged in also by the body corporate.

- (3) If, in proceedings under this part in relation to conduct engaged in by a person other than a body corporate, being conduct in relation to which a provision of part 2 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 firstmentioned person, if 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 this Act, to have been engaged in also by the firstmentioned 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.

#### 49 Defences

- (1) Subject to subsection (2), in a prosecution under this part in relation to a contravention of a provision of part 2, it is a defence if the defendant establishes—
- (a) that the contravention was caused by a reasonable mistake of fact, including a mistake of fact caused by reasonable reliance on information supplied by another person; or
  - (b) that—

- (i) the contravention in relation to 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 subsection (1):
- another person* does not include a person who was, at the time of the contravention—
- (a) an employee or agent of the defendant; or
  - (b) if the defendant is a corporation—an officer, employee or agent of the defendant.
- officer*, of a corporation—see the Corporations Act, section 9 (Dictionary).
- (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 Magistrates Court, entitled to rely on that defence unless he or she has, not later than 7 days before the day when the hearing of the proceedings begins, served on the person by whom the proceedings were instituted, a written notice giving the information that would identify or assist in the identification of the other person that was then in his or her possession.
- (4) In proceedings under this part in relation to a contravention of a provision of part 2 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.

## **50 Other orders**

- (1) Without limiting section 44, if, in proceedings instituted under, or for an offence against, this part, the Magistrates 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 2, the court may, whether or not it grants an injunction under section 44 or makes an order under section 45 or 46, make the orders it considers 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 section 44, the Magistrates 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 contravention of a provision of part 2 or on the application of the commissioner in accordance with subsection (3) on behalf of such a person or 2 or more such persons, make the order or orders the court considers 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) If, in proceedings instituted for an offence against section 41 or instituted by the commissioner or the Minister under section 44, a person is found to have engaged in conduct in contravention of

part 2, the commissioner 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 commissioner shall not make such an application except with the written consent 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 2 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 Magistrates Court may have regard to the conduct of parties to the proceedings since the contravention occurred.
- (6) The Magistrates 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* (Cwlth) 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 Magistrates Court considers appropriate, to have been void ab initio or at all times on and after the date before the date when the order is made that is specified in the order; and
  - (b) an order varying such a contract or arrangement in the way specified in the order and, if the court considers appropriate, declaring the contract or arrangement to have had effect as so

varied on and after such date before the date when the order is made as is so specified; and

- (c) an order refusing to enforce any or all of the provisions of such a contract; and
- (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; and
- (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; and
- (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; and
- (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 firstmentioned instrument; or



- (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the firstmentioned instrument.
- (8) The powers conferred on the Magistrates 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 relation to the contract or covenant.

## **51 Power of Magistrates Court to prohibit payment or transfer of money or other property**

- (1) If—
- (a) proceedings have been begun against a person for an offence against section 41; or
  - (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 2; or
  - (c) an action has been begun under section 46 (1) against a person in relation to a contravention of a provision of part 2; or
  - (d) an application for an order under section 50 (2) or (3) has been or may be made against a person in relation to a contravention of a provision of part 2;

the Magistrates Court may, on the application of the Minister or the commissioner, 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 (the *relevant person*), if the relevant person is liable or may become liable under this Act to pay money 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; and
- (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; and
- (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 where the money is held; and
- (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 where the other property is located; and
- (e) an order appointing, if the relevant person is an individual, a receiver or trustee of the property or of part of the property of the relevant person with the powers 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 an order by the Magistrates Court under this section that is applicable to the person commits an offence.
- Maximum penalty: 200 penalty units.
- (6) Nothing in this section affects the powers that the Magistrates Court has apart from this section.
- (7) This section has effect subject to the *Bankruptcy Act 1966* (Cwlth).
- (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.

### **51A Enforcement of undertakings**

- (1) The commissioner may accept a written undertaking given by a person for this section in relation to a matter.
- (2) The person may withdraw or amend the undertaking at any time, but only with the commissioner's consent.
- (3) The commissioner's consent is required even if the undertaking purports to authorise a withdrawal or amendment of the undertaking without that consent.

- (4) If the commissioner considers that the person who gave the undertaking has breached any of its terms, the commissioner may apply to the Magistrates Court for an order under subsection (5).
- (5) If the Magistrates Court is satisfied that the person has breached a term of the undertaking, the court may make all or any of the following orders:
  - (a) an order directing the person to comply with that term of the undertaking;
  - (b) an order directing the person to pay to the Territory an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
  - (c) any order that the court considers appropriate directing the person to compensate anyone else who has suffered loss or damage because of the breach;
  - (d) any other order that the court considers appropriate.

**51B Substantiation of claims**

- (1) This section applies to a person who publishes a statement promoting, or apparently intended to promote, the supply of goods or services or the sale or letting of premises by the person.
- (2) The commissioner may, by written notice, ask the person to give the commissioner, within the period stated in the notice, proof of any claim or representation made in the statement.
- (3) A person on whom a notice under this section is served commits an offence if the person—
  - (a) fails to provide proof sufficient to support the claim or representation; or
  - (b) fails to provide that proof by the time stated in the notice.

Maximum penalty: 50 penalty units.

## Part 5                      Miscellaneous

### 52      Intervention by Minister

- (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) If 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.

### 53      Saving of rights and remedies

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.

### 54      Regulation-making power

The Executive may make regulations for this Act.

*Note*      Regulations must be notified, and presented to the Legislative Assembly, under the *Legislation Act 2001*.

## Endnotes

1 About the endnotes

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## Endnotes

### 1 About the endnotes

Amending and modifying laws are annotated in the legislation history and the amendment history. Current modifications are not included in the republished law but are set out in the endnotes.

Not all editorial amendments made under the *Legislation Act 2001*, part 11.3 are annotated in the amendment history. Full details of any amendments can be obtained from the Parliamentary Counsel's Office.

Uncommenced amending laws and expiries are listed in the legislation history and the amendment history. These details are underlined. Uncommenced provisions and amendments are not included in the republished law but are set out in the last endnote.

If all the provisions of the law have been renumbered, a table of renumbered provisions gives details of previous and current numbering.

The endnotes also include a table of earlier republications.

If the republished law includes penalties, current information about penalty unit values appears on the republication inside front cover.

### 2 Abbreviation key

am = amended	ord = ordinance
amdt = amendment	orig = original
ch = chapter	p = page
cl = clause	par = paragraph
def = definition	pres = present
dict = dictionary	prev = previous
disallowed = disallowed by the Legislative Assembly	(prev...) = previously
div = division	prov = provision
exp = expires/expired	pt = part
Gaz = Gazette	r = rule/subrule
hdg = heading	reg = regulation/subregulation
IA = Interpretation Act 1967	renum = renumbered
ins = inserted/added	reloc = relocated
LA = Legislation Act 2001	R[X] = Republication No
LR = legislation register	RI = reissue
LRA = Legislation (Republication) Act 1996	s = section/subsection
mod = modified / modification	sch = schedule
No = number	sdiv = subdivision
num = numbered	sub = substituted
o = order	SL = Subordinate Law
om = omitted/repealed	<u>underlining</u> = whole or part not commenced or to be expired

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### 3 Legislation history

**Fair Trading Act 1992 No 72**

notified 8 December 1992 (Gaz 1992 No S218)  
s 1, s 2 commenced 8 December 1992 (s 2 (1))  
remainder commenced 1 January 1993 (s 2 (2) and Gaz 1992  
No S245)

as amended by

**Acts Revision (Position of Crown) Act 1993 No 44 sch 2**

notified 27 August 1993 (Gaz 1993 No S165)  
commenced 27 August 1993 (s 2)

**Statute Law Revision Act 1994 No 26 sch**

notified 31 May 1994 (Gaz 1994 No S93)  
commenced 31 May 1994 (s 2)

**Fair Trading (Amendment) Act 1996 No 9**

notified 10 April 1996 (Gaz 1996 No S59)  
ss 1-3 commenced 10 April 1996 (s 2 (1))  
remainder commenced 10 May 1996 (s 2 (2) and Gaz 1996 No S85)

**Legal Practitioners (Consequential Amendments) Act 1997 No 96  
sch 1**

notified 1 December 1997 (Gaz 1997 No S380)  
s 1, s 2 commenced 1 December 1997 (s 2 (1))  
sch 1 commenced 1 June 1998 (s 2 (2))

**Statute Law Revision (Penalties) Act 1998 No 54 sch**

notified 27 November 1998 (Gaz 1998 No S207)  
s 1, s 2 commenced 27 November 1998 (s 2 (1))  
sch commenced 9 December 1998 (s 2 (2) and Gaz 1998 No 49)

**Law Reform (Miscellaneous Provisions) Act 1999 No 66 sch 3**

notified 10 November 1999 (Gaz 1999 No 45)  
commenced 10 November 1999 (s 2)

**Justice and Community Safety Legislation Amendment Act 2000  
(No 3) No 17 sch 1**

notified 1 June 2000 (Gaz 2000 No 22)  
commenced 1 June 2000 (s 2)

## Endnotes

### 4 Amendment history

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#### **Utilities (Consequential Provisions) Act 2000 No 66 sch 1 pt 6**

notified 20 December 2000 (Gaz 2000 No S68)  
s 1, s 2 commenced 20 December 2000 (IA s 10B)  
sch 1 pt 6 commenced 1 January 2001 (Gaz 2000 No S69)

#### **Legislation (Consequential Amendments) Act 2001 No 44 pt 137**

notified 26 July 2001 (Gaz 2001 No 30)  
s 1, s 2 commenced 26 July 2001 (IA s 10B)  
pt 137 commenced 12 September 2001 (s 2 and see Gaz 2001 No S65)

#### **Fair Trading Legislation Amendment Act 2001 No 77 pt 2**

notified LR 14 September 2001  
s 1, s 2 commenced 14 September 2001 (LA s 75)  
pt 2 commenced 14 March 2002 (LA s 79)

#### **Fair Trading Amendment Act 2002 No 31**

notified LR 9 September 2002  
s 1, s 2 commenced 9 September 2002 (LA s 75)  
remainder commenced 25 November 2002 (s 2)

#### **Justice and Community Safety Legislation Amendment Act 2003 A2003-2 pt 4**

notified LR 3 March 2003  
s 1, s 2 commenced 3 March 2003 (LA s 75 (1))  
pt 4 commenced 31 March 2003 (s 2 (2))

## 4 Amendment history

### **Commencement**

s 2 om R4 LRA

### **Repeal**

s 3 om R4 LRA

### **Position of Crown**

s 4 om 1993 No 44 sch 2

### **Interpretation for Act**

s 5 def **authority of the Territory** om 1994 No 26 sch  
def **commissioner** ins 2000 No 17 sch 1  
def **director** sub 1999 No 66 sch 3  
om 2000 No 17 sch 1  
def **services** am 2000 No 66 sch 1 pt 6



**False and misleading conduct**

div 2.1 hdg ins A2003-2 s 33

**False or misleading representations**

s 14 am 2001 No 77 s 4, s 5

**Pyramid selling**

div 2.2 hdg ins A2003-2 s 34

**Definitions for div 2.2**

s 25A ins A2003-2 s 34  
def *new participant* ins A2003-2 s 34  
def *participant* ins A2003-2 s 34  
def *participate* ins A2003-2 s 34  
def *participation payment* ins A2003-2 s 34  
def *payment* ins A2003-2 s 34  
def *pyramid selling scheme* ins A2003-2 s 34  
def *recruitment payment* ins A2003-2 s 34

**Pyramid selling schemes—participation prohibited**

s 25B ins A2003-2 s 34

**What is a pyramid selling scheme**

s 25C ins A2003-2 s 34

**Marketing schemes—are they pyramid selling schemes?**

s 25D ins A2003-2 s 34

**Other conduct**

div 2.3 hdg ins A2003-2 s 34

**Harassment and coercion**

s 26 am 1997 No 96 sch 1

**Pyramid selling**

s 27 om A2003-2 s 35

**Credit card contracts and increases in credit card limits**

s 28A ins 2002 No 31 s 5

**Cash card use disclosure**s 28B (prev s 28A) ins 1996 No 9 s 4  
renum 2002 No 31 s 4**Prescribed provisions**

s 32A ins 2001 No 77 s 6

**Preparation of draft codes of practice**

s 33 am 2000 No 17 sch 1

**Codes of practice—amendment**

s 35 am 2000 No 17 s 3 sch 1; 2001 No 77 ss 7-9

## Endnotes

### 4 Amendment history

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#### **Evidence of code**

s 35A ins 1999 No 66 sch 3  
am 2000 No 17 sch 1

#### **Undertakings following contravention of code**

s 36 am 2000 No 17 sch 1; 2001 No 77 s 10

#### **Powers of Magistrates Court**

s 37 am 1998 No 54 sch; 2000 No 17 sch 1

#### **Variation or discharge of restraining order**

s 38 am 2000 No 17 sch 1

#### **Registers of undertakings**

s 39 am 2000 No 17 sch 1

#### **Offences against pt 2**

s 41 am 1998 No 54 sch

#### **Enforcement and recovery of certain fines**

s 42 am 2000 No 17 sch 1

#### **Prosecutions**

s 43 am 2000 No 17 sch 1

#### **Injunctions**

s 44 am 2000 No 17 sch 1

#### **Order to disclose information or publish advertisement**

s 45 am 2000 No 17 sch 1

#### **Defences**

s 49 am 2001 No 77 ss 11-13

#### **Other orders**

s 50 am 1994 No 26 sch; 2000 No 17 sch 1

#### **Power of Magistrates Court to prohibit payment or transfer of money or other property**

s 51 am 1998 No 54 sch; 2000 No 17 sch 1

#### **Enforcement of undertakings**

s 51A ins 2001 No 77 s 14

#### **Substantiation of claims**

s 51B ins 2001 No 77 s 14

#### **Regulation-making power**

s 54 sub 2001 No 44 amdt 1.1582

## 5 Earlier republications

Some earlier republications were not numbered. The number in column 1 refers to the publication order.

Since 12 September 2001 every authorised republication has been published in electronic pdf format on the ACT legislation register. A selection of authorised republications have also been published in printed format. These republications are marked with an asterisk (\*) in column 1. Except for the footer, electronic and printed versions of an authorised republication are identical.

Republication No	Amendments to	Republication date
1	Act 1993 No 44	31 January 1994
2	Act 1997 No 96	1 June 1998
3	Act 1998 No 54	31 March 1999
4	Act 2000 No 17	31 July 2000
5	<u>Act 2001 No 77</u>	14 September 2001
5 (RI)	<u>Act 2001 No 77 ‡</u>	11 August 2003
6	Act 2001 No 77	14 March 2002
6 (RI)	Act 2001 No 77 ‡	11 August 2003
7	Act 2002 No 31	25 November 2002
7 (RI)	Act 2002 No 31 ‡	11 August 2003
8	A2003-2	31 March 2003

‡ includes textual correction in s 37 (1)

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