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**THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY**

FAIR TRADING LEGISLATION AMENDMENT BILL 2001

EXPLANATORY MEMORANDUM

**Circulated by authority of
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This Bill amends a number of laws dealing with fair trading to:

- keep ACT law consistent with similar consumer protection laws in the Commonwealth *Trade Practices Act 1974* (TPA) and similar legislation in other Australian jurisdictions; and
- provide the Territory with a level of flexibility in the enforcement of its fair trading laws which other jurisdictions have.

In particular, the Bill:

- provides a wider authority for the Commissioner for Fair Trading to accept and enforce undertakings from traders;
- allows the Commissioner for Fair Trading to require a trader to substantiate a claim made in the course of trading;
- makes it clear that for a defence to a fair trading prosecution to succeed, it must be due to a reasonable mistake of fact;
- permits regulations to provide for common provisions applicable to all Codes of Practice; and
- modernises and improves provisions relating to powers of entry and dealings with evidence.

The Bill also makes a number of minor technical amendments to the legislation. In particular, the Bill makes a number of amendments to fair trading legislation and related laws to ensure consistency between the ACT law and the TPA. The TPA overrides any inconsistent ACT law, and public confusion may result if such inconsistencies are not remedied.

Financial Impact

None.

Notes on provisions

Part 1 Preliminary

Clause 1 Name of Act
Formal.

Clause 2 Commencement
Amendments to the Act will commence on notification in the Gazette.

Part 2 Amendments to the *Fair Trading Act 1992*

Clause 3 Act Amended
The amendments in Part 2 are to the *Fair Trading Act 1992*.

Clause 4 Interpretation Section 5(1)
Formal, inserts definitions of "financial product" and "financial service" for the purposes of new section 10A.

Clause 5 New Section 10A
Consumer protection in relation to financial services is now dealt with by Division 2 of the *Australian Securities and Investments Commission Act 1989*. Accordingly, the amendments provide that the consumer protection provisions in Part 2 of the *Fair Trading Act 1992* do not apply to the supply or possible supply of financial services.

Clause 6 False or misleading representations Section 14
This provision is consequential to the amendment made by clause 7.

Clause 7 New section 14(2)
This new provision reconciles section 14 of the *Fair Trading Act 1992* to changes made to the TPA (see sections 65AA to 65AN, Division 1AA, Part V of the TPA which include a new test for country of origin representations).

Clause 8 New section 32A
This new provision will enable the making of common provisions (by regulation) that will apply to all ACT Codes of Practice.

The Territory's mandatory Codes of Practice prescribed under the FTA provide for tailored co-regulatory provisions relating to a particular industry. Presently, there are a number of mandatory Codes made under the FTA, namely:

- ACT Fitness Industry Code;
- Retirement Villages Industry Code;
- Motor Vehicle Service and Repair Industry Code;
- Access Control Industry Code;
- Bodyguard Industry Code;

- Cash Transit Industry Code;
- Crowd Marshals Industry Code; and
- Guard and Patrol Services Industry Code.

While the Codes contain a number of similar core provisions (eg, procedures for exemption, administration and dispute resolution provisions), these have been cast in different forms and some are quite ambiguous and/or are internally inconsistent with other provisions in the relevant Code. It is desirable that these core provisions now be recast as a series of consistent and comprehensible provisions. For this purpose, the new Act provides a power to make common provisions (by regulation) that will apply to all ACT Codes of Practice.

Clause 9 Codes of practice – amendment Section 35(3)(b)

This provision is consequential to the amendment made by clause 8.

Clause 10 New section 35(3)(c)

This provision is consequential to the amendment made by clause 8.

Clause 11 New section 35(5)

This provision is consequential to the amendment made by clause 8.

Clause 12 Undertakings following contravention of code New section 36(3)

This provision is consequential to the amendment made by clause 16.

Clause 13 Defences Section 49(1)(a) and (b)

This provision makes it clear that for a defence to a fair trading prosecution to succeed, it must be due to a reasonable mistake of fact, including a mistake of fact caused by reasonable reliance on information supplied by another person.

This amendment is intended to over-ride the effect of a recent decision of the South Australian Supreme Court (in *Gilmore v. Poole-Blunden* [1999] SASC 186) which held that a person could rely upon legal advice as a complete defence to a fair trading prosecution. This decision, if allowed to stand, would significantly erode the protections in the fair trading legislation (the defence was originally thought to extend only to mistakes of fact rather than mistakes of law). It would also mark a significant departure from the normal rule that ignorance of the law excuses no one.

The Standing Committee of Officials of Consumer Affairs (SCOCA) has recommended that the Commonwealth and all States and Territories make similar amendments to their legislation.

Clause 14 Section 49(1)(c)

Formal.

Clause 15 Section 49(2)

This provision simplifies an existing definition.

Clause 16 New sections 51A and 51B

This new provision provides for a wider authority for the Commissioner for Fair Trading to accept and enforce undertakings. This power is similar to sections 87B and 87C of the TPA.

Under existing ACT provisions, the authority to accept written undertakings can only be exercised when a person has carried on business in contravention of a prescribed Code of Practice. The new provision permits the Commissioner to accept a written undertaking from a person in connection with a matter in relation to which the Commissioner has a power or function under the law.

Enforceable undertakings are an administrative remedy to a contravention of any provision of Fair Trading laws. Enforceable undertakings are a less costly alternative to a formal court action in order to require a business entity/person to comply with provisions of the law.

Under the enforceable undertakings procedure, the regulator accepts a formal, written undertaking from a person or organisation that has breached the Act whereby the offender makes a solemn promise to the regulator. The promise might include:

- compensating consumers who suffered from the wrongful conduct;
- corrective advertising; or
- implementing a compliance program.

If an enforceable undertaking is breached, a court may:

- direct the person to comply with the terms of the undertaking;
- direct the person to pay to the government an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
- make any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach; and
- make any other appropriate order.

Under section 51B, the Commissioner for Fair Trading may require a provider of goods or services to substantiate a claim made in the course of trading. Failure to respond to a substantiation notice by the stated time or day is an offence.

Part 3 Amendments to the *Fair Trading (Consumer Affairs) Act 1973*

Clause 17 Act Amended in pt 3

The amendments in Part 3 are to the *Fair Trading (Consumer Affairs) Act 1973*.

Clause 18 New section 8A

Formal, inserts new definitions.

Clause 19 Power of investigator to enter etc Section 12

These new provisions deal with an investigator's power to enter premises, warrants (including telephone warrants), general powers on entry, and the power to seize evidence.

In particular, the provisions allow fair trading inspectors entry to business premises either:

- with consent or when the premises are open to the public or during normal business hours; or
- with judicial authority (with a warrant or, where, it is not practicable for the court to fax the warrant to an investigator, by way of the investigator completing a warrant form).

In accordance with ordinary investigation practice where evidence may be retained by an inspector for the purposes of prosecution (for example, the *Trade Measurement Act 1991* provides a consumer protection power to seize and retain certain goods), the new provisions allow an inspector to seize and retain goods in circumstances where (for example):

- the supply of goods is prohibited by an order and a person contravenes such order;
- the supply of goods is prohibited by an order and a fair trading inspector suspects on reasonable grounds that the goods are intended for supply in contravention of the order; and
- where a report or complaint is received by the Office of Fair Trading relating to goods, the fair trading inspector may seize enough of the goods to decide whether contravention has occurred or to be used as evidence in a proceeding under the Act about the contravention.

Clause 20 Section 13(3) and (4)

This provision is consequential to the amendment made by clause 19.

Clause 21 Section 13

Formal.

Part 4 Amendments to the *Magistrates Court Act 1930*

Clause 22 Act amended in pt 4

The amendments in Part 4 are to the *Magistrates Court Act 1930*.

Clause 23 New part 8

These amendments provide for "framework provisions" for the issuing of infringement notices in relation to offences specified by regulation. They are based on the standard form of provision found in recent legislation, including the *Road Transport (General) Act 1999*, the *Domestic Animals Act 2000*, the *Fisheries Act 2000* and the *Occupational Health and Safety Amendment Act 2001*.

The framework provisions provide for how regulations may apply the standard provisions to specified offences, for the service, content, payment and withdrawal of infringement notices and the issuance of reminder notices. The provisions also deal with disputing liability and miscellaneous issues.

The scheme incorporates amendments made by the Assembly to section 75K of the *Occupational Health and Safety Amendment Act 2001* following comments made in the Scrutiny of Bills and Subordinate Legislation Report 15 of 2000 about that law.

The use of infringement notices within an appropriate compliance framework can be an effective measure, providing a fast and immediate response to certain offences. Only a number of offence provisions are suitable for infringement notices; offence provisions that might be appropriate for infringement notices would be those where evidence would indicate a clear contravention of a provision.

The framework provisions provide a comprehensive set of standard provisions concerning infringement notices that might be called up in respect of other laws, including fair trading laws. Note that the ACT has previously adopted infringement notices in dealing with other consumer legislation (section 70, *Sale of Motor Vehicles Act 1977* and section 13, Part 4, *Trade Measurement Administration Act 1991*). As these Acts are reviewed, it is intended to collapse existing (less comprehensive) statutory provisions into the operation of this Part through Regulations under the Act.

Part 5 Amendments to the *Sale of Goods Act 1954*

Clause 24 Act amended in pt 5

The amendments in Part 5 are to the *Sale of Goods Act 1954*.

Clause 25 When condition to be treated as warranty Section 16(4)

Repeals section 16(4) of the *Sale of Goods Act 1954*, which is inconsistent with section 75A of the TPA.

Clause 26 Section 16

Formal.

Clause 27 Implied conditions as to quality and fitness Section 19(1)

This provision repeals section 19(1) of the *Sale of Goods Act 1954*, which is inconsistent with section 71 of the TPA.

Clause 28 Section 19

Formal.

Clause 29 Exclusion of implied terms and conditions Section 58

This provision repeals section 58 of the *Sale of Goods Act 1954*, which is inconsistent with section 58 of the TPA.

Part 6 Repeal

Clause 30 Repeal - *Law Reform (Manufacturers Warranties) Act 1977*

This provision repeals the *Law Reform (Manufacturers Warranties) Act 1977*, which has been overtaken by Division 2A of Part V of the TPA.