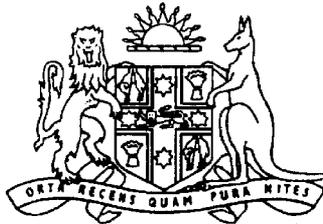


New South Wales

Fair Trading Amendment Act 2003 No 35

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New South Wales

Fair Trading Amendment Act 2003 No 35

Act No 35, 2003

An Act to amend the *Fair Trading Act 1987* to make provision with respect to direct commerce practices, product recall orders, express consumer trade warranties, enforcement provisions and other miscellaneous matters; to repeal the *Door-to-Door Sales Act 1967* and the *Mock Auctions Act 1973*; and for other purposes. [Assented to 22 July 2003]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Fair Trading Amendment Act 2003*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Fair Trading Act 1987 No 68

The *Fair Trading Act 1987* is amended as set out in Schedule 1.

4 Repeal of Door-to-Door Sales Act 1967 No 36

The *Door-to-Door Sales Act 1967* is repealed.

5 Repeal of Mock Auctions Act 1973 No 17

The *Mock Auctions Act 1973* is repealed.

Schedule 1 Amendments

(Section 3)

[1] Section 4 Definitions

Omit “Divisions 5–8” from the definition of *advisory council* in section 4 (1).

Insert instead “Divisions 5–9”.

[2] Section 4 (1), definitions of “Department” and “Director-General”

Omit the definitions. Insert instead:

Department means the Department of Commerce.

Director-General means:

- (a) the Commissioner for Fair Trading, Department of Commerce, or
- (b) if there is no such position in the Department—the Director-General of the Department.

[3] Section 4 (1), definition of “officer”

Omit the definition. Insert instead:

officer means:

- (a) the Director-General or any other member of staff (within the meaning of the *Public Sector Employment and Management Act 2002*) of the Department, or
- (b) a member of staff of a public sector agency (within the meaning of section 85 of the *Public Sector Employment and Management Act 2002*) who is transferred to, or who provides services for, the Department, or
- (c) any person engaged by the Director-General (with the approval of the Minister and on such terms as the Minister thinks fit) to assist in the exercise of the Director-General’s functions.

[4] Section 5 Meaning of “consumer”

Insert “(except for the purposes of section 43)” after “do not” in section 5 (2).

[5] Section 7 Staff of Department

Omit the section.

[6] Section 23A Power to require proof of claims and representations

Omit “substantiate a” from section 23A (1).

Insert instead “provide the Director-General with proof of any”.

[7] Section 23A (3) and (4)

Omit section 23A (3)–(5). Insert instead:

- (3) The notice must:
 - (a) specify the claim or representation to which the notice applies, and
 - (b) specify a time within which the person is required to provide the Director-General with proof of the claim or representation, and
 - (c) indicate that it is an offence to:
 - (i) fail to provide proof sufficient to support the claim or representation, or
 - (ii) fail to provide that proof within the time specified in the notice, or
 - (iii) provide the Director-General with information that is false or misleading in a material particular.
- (4) The Director-General may, by a further notice in writing served on the person, extend the time within which the person is required to provide the Director-General with proof of the claim or representation concerned.

[8] Section 23C Offences in relation to failing to provide proof of claim or representation

Omit section 23C (1) and (2). Insert instead:

- (1) A person on whom a notice under section 23A is served is guilty of an offence if the person:
 - (a) fails to provide proof sufficient to support the claim or representation, or
 - (b) fails to provide that proof within the time specified in the notice, or

- (c) provides any information to the Director-General that is false or misleading in a material particular.

[9] Section 23C (3)

Omit “subsection (2)”. Insert instead “subsection (1) (c)”.

[10] Section 23D Self incrimination

Omit “in compliance with” wherever occurring.

Insert instead “in response to”.

[11] Section 24 Products Safety Committee

Insert after section 24 (1):

- (1A) Without limiting subsection (1), the Products Safety Committee has the following functions:
 - (a) to provide advice to the Minister on such issues in relation to the operation of Divisions 2 and 3 of Part 3 as are referred to it by the Minister,
 - (b) to review recall orders made under Division 3 of Part 3.

[12] Section 28 Reference of certain questions to Products Safety Committee

Omit section 28 (1). Insert instead:

- (1) The Minister, or the Director-General with the approval of the Minister, may refer to the Products Safety Committee for consideration the question whether the supply of goods of a kind specified in the reference or any particular goods so specified should:
 - (a) because they are dangerous, or are a possible source of danger, be prohibited, or
 - (b) be allowed only subject to conditions or restrictions to be specified by the Committee.

[13] Section 28 (3)

Omit the subsection.

[14] Section 28 (5)

Omit “each”. Insert instead “any such”.

[15] Section 33 Remedy for supply of goods etc in contravention of Act or order

Omit the section.

[16] Sections 34–36F

Omit sections 34–36. Insert instead:

34 Definitions

In this Division:

defective goods means goods that:

- (a) do not comply with a product safety standard for the goods, or
- (b) are the subject of a banning order, or
- (c) are, in the opinion of the Director-General, of a kind that may cause death or injury to any person.

recall order means an order made by the Director-General under section 35.

35 Recall orders by Director-General

- (1) The Director-General may, by order published in the Gazette, require the supplier of defective goods to do any one or more of the following:
 - (a) recall the goods in the manner, and within the period, specified in the order,
 - (b) disclose to the public, or to a class of persons specified in the order, in the manner and within the period so specified, any one or more of the following:
 - (i) the nature of any defect in, or dangerous characteristic of, the goods identified in the order,
 - (ii) the circumstances in which the use of the goods is dangerous,
 - (iii) procedures for disposing of the goods,
 - (c) notify the public, or a class of persons specified in the order, in the manner and within the period so specified, that the supplier undertakes to do whichever of the following the supplier thinks is appropriate:

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- (i) except where the order identifies a dangerous characteristic of the goods—repair the goods,
 - (ii) replace the goods,
 - (iii) refund to a person to whom the goods were supplied (whether by the supplier or by another person) the price of the goods.
- (2) A recall order ceases to have effect at the end of the period of 28 days immediately following the date on which it was published in the Gazette unless the order is, before the end of that 28-day period, confirmed by the Minister by notice published in the Gazette.
- (3) Subsection (2) does not apply if a request is made under section 36 for a review of the recall order.
- (4) Sections 40 and 41 of the *Interpretation Act 1987* apply to a recall order as if it were a statutory rule to which those sections apply.

36 Review of recall orders

- (1) The Minister or the supplier of goods to which a recall order relates may, within 14 days of the date on which the order was published in the Gazette, request the Products Safety Committee to review the order.
- (2) If any such request is made, the Products Safety Committee is to conduct the review of the order and report to the Minister on the outcome of the review.
- (3) The provisions of sections 28 (7)–(11) and 29 apply to and in respect to the review of a recall order by the Products Safety Committee under this section in the same way as those provisions apply to the consideration of a question that is referred to the Committee under section 28 (1).
- (4) Accordingly:
- (a) a reference in those provisions to a question that is referred to the Committee includes a reference to a recall order that the Committee has been requested to review, and
 - (b) a reference in those provisions to the consideration by the Committee of such a question includes a reference to the conducting of a review of a recall order.

- (5) On receiving the Committee's report in relation to a recall order, the Minister may, by order published in the Gazette:
- (a) confirm the recall order, or
 - (b) amend the recall order in accordance with the terms of the Committee's report, or
 - (c) repeal the order.

36A Reduction of refund in certain circumstances

If:

- (a) in accordance with a recall order, a supplier undertakes to refund the price of goods, and
- (b) a period of more than 12 months has elapsed since a person (whether or not the person to whom the refund is to be made) acquired the goods from the supplier,

the amount of the refund may be reduced by an amount, calculated in accordance with the order, that is attributable to the use that a person has had of the goods.

36B Undertaking to repair or replace goods

- (1) If, in accordance with a recall order, a supplier undertakes to repair goods, the supplier must cause the goods to be repaired so that:
 - (a) any defect in the goods as identified in the order is rectified, and
 - (b) if there is a product safety standard for goods of that kind—the goods comply with the standard.
- (2) If, in accordance with a recall order, a supplier undertakes to replace goods, the supplier must replace the goods with like goods that:
 - (a) if a defect in, or a dangerous characteristic of, the goods to be replaced was identified in the order—do not contain that defect or have that characteristic, and
 - (b) if there is a product safety standard for goods of that kind—comply with the standard.
- (3) If, in accordance with a recall order, a supplier undertakes to repair or replace goods, the cost of the repair or replacement, including any necessary transportation costs, is to be borne by the supplier.

36C Compliance with recall order

A supplier of goods to which a recall order relates must not:

- (a) fail to comply with a requirement of the order, or
- (b) if the order identifies a defect in, or a dangerous characteristic of, the goods—supply goods of the kind to which the order relates and that contain that defect or have that characteristic, or
- (c) in any case other than a case referred to in paragraph (b)—supply goods of the kind to which the order relates, or
- (d) fail to carry out an undertaking given by the supplier under section 35 (1) (c), or
- (e) having given such an undertaking to repair or replace goods—fail to comply with section 36B.

36D Notification of voluntary recall

- (1) If a supplier takes action to recall goods otherwise than as required by a recall order, the supplier must, within 2 days after the action is taken, give the Director-General a notice in writing:
 - (a) stating that the goods are subject to recall, and
 - (b) if the goods contain a defect or have a dangerous characteristic—stating the nature of the defect or dangerous characteristic, and
 - (c) if the goods do not comply with a product safety standard for the goods—stating the nature of the non-compliance.

Maximum penalty: 100 penalty units in the case of a corporation or 20 penalty units in any other case.

- (2) If a person who would otherwise be required to give notice under subsection (1) has given notice of the matter under section 65R of the *Trade Practices Act 1974* of the Commonwealth, the person is not required to give notice under subsection (1).

36E Requirement to notify recall of goods to persons outside New South Wales

If any goods are recalled in accordance with a recall order or are voluntarily recalled under section 36D, a person who has supplied any of the goods to another person outside New South Wales must, as soon as practicable after the supply of those goods, give a notice in writing to that other person:

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

Maximum penalty: 100 penalty units in the case of a corporation or 20 penalty units in any other case.

36F Certain amounts recoverable as debt or damages

- (1) If a supplier fails to carry out an undertaking given under section 35 (1) (c) to refund the price of goods, the amount that should have been refunded is recoverable as a debt due by the supplier to the person to whom the undertaking was given.
- (2) If a supplier fails to carry out an undertaking given under section 35 (1) (c) to repair or replace goods, the supplier is taken to have given instead an undertaking, notified under section 35 (1) (c), to refund the price of the goods within the period specified for the repair or replacement of the goods.
- (3) If:
 - (a) a person:
 - (i) fails to comply with a requirement of a recall order, or
 - (ii) supplies goods in contravention of a recall order identifying a defect in, or dangerous characteristic of, the goods, and
 - (b) another person suffers loss or damage:
 - (i) because of a defect in, or dangerous characteristic of, the goods, or

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- (ii) by not having particular information as to a characteristic of the goods,

the person who suffered the loss or damage is, for the purposes of this Act, taken to have suffered the loss or damage because of the failure or contravention.

[17] Part 4, Divisions 3–5

Insert after Division 2:

Division 3 Direct commerce

40A Definitions

- (1) In this Division:

cooling-off period, in relation to a direct commerce contract, means the period within which the consumer is, under section 40E or under the contract, entitled to cancel the contract.

dealer means a person who, in the course of direct commerce:

- (a) enters into negotiations with another person with a view to the making of a contract for the supply of goods or services to that other person, or
- (b) calls on, or telephones, another person for the purpose of entering into such negotiations,

whether or not that person is or is to be the supplier of the goods or services.

direct commerce means the practice under which:

- (a) a person:
 - (i) goes from place to place, or
 - (ii) makes telephone calls,seeking out persons who may be prepared to enter, as consumers, into contracts for the supply of goods or services, and
- (b) that person (or some other person) enters into negotiations with those prospective consumers with a view to the making of such contracts.

direct commerce contract—see section 40B.

negotiation includes any discussion or dealing directed towards the making of a contract (whether or not the terms of the contract are open to negotiation).

related contract or instrument, in relation to a direct commerce contract, means:

- (a) a contract of guarantee or indemnity that is related to the contract, or
 - (b) an instrument related to the contract that creates a mortgage or charge in favour of the supplier or dealer (or a person nominated by the supplier or dealer), or
 - (c) another contract or instrument (not being an instrument of the kind referred to in paragraph (b)) that is collateral or related to the contract.
- (2) In this Division:
- (a) a reference to the consumer or supplier under a contract for the supply of goods or services extends to any person to whom the rights of the original consumer or supplier under the contract are assigned or transferred, or pass by operation of law, and
 - (b) a reference to negotiation of a direct commerce contract is a reference to negotiation of a contract that would, when made, be a direct commerce contract.
- (3) For the purposes of this Division, a contract is a contract for the supply of goods or services to a person who is a party to the contract if it provides for the supply of goods or services either to that person or to someone else but on the order of that person.

40B Meaning of “direct commerce contract”

- (1) For the purposes of this Division, a contract is a *direct commerce contract* if:
- (a) it is for the supply of goods or services to a consumer who is an individual, and
 - (b) negotiations leading to the making of the contract (whether or not they are the only negotiations that precede the making of the contract) take place between the dealer and the consumer:
 - (i) in each other’s presence at a place other than the business or trade premises of the supplier, or

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- (ii) over the telephone, and
 - (c) the dealer has called at that place or made that telephone call in the course of direct commerce, and
 - (d) the consumer did not invite the dealer to call at that place or make that telephone call for the purpose of entering into those negotiations, and
 - (e) the total consideration payable by the consumer under the contract:
 - (i) is not ascertainable at the time of the making of the contract, or
 - (ii) is ascertainable at the time of the making of the contract (but is more than \$100 or such other amount as may be prescribed by the regulations for the purposes of this section).
 - (2) Despite subsection (1), a direct commerce contract does not include any contract of a kind that is excluded from the operation of this Division by the regulations.
 - (3) If:
 - (a) 2 or more contracts relate substantially to the same transaction, and
 - (b) the transaction could have been effected by a single contract that would, in that case, have constituted a direct commerce contract,then each of the contracts that would not, if it stood alone, constitute a direct commerce contract becomes a direct commerce contract and, for the purpose of ascertaining the cooling-off period in relation to such a contract, the contract is taken to have been made when the last of the contracts was made.

40C Prohibition of certain contractual terms

- (1) A direct commerce contract must not contain any provision that purports:
 - (a) to exclude, restrict or modify any right conferred on a consumer under this Division, or
 - (b) to provide that the contract, or any proceedings arising from the contract, is governed by the law of a jurisdiction other than New South Wales.

- (2) If a direct commerce contract contains a provision contrary to subsection (1), the provision is void and the supplier and dealer are each guilty of an offence.

Maximum penalty: 100 penalty units.

- (3) For the purposes of this section, a reference to a direct commerce contract includes a related contract or instrument.

40D Consumer must be informed of right to cancel direct commerce contract

- (1) Before a direct commerce contract is made, the consumer must be given information as to the following:

- (a) that the consumer has a right to cancel the contract during the cooling-off period,
- (b) the manner in which that right may be exercised by the consumer,
- (c) such other matters as may be prescribed by the regulations for the purposes of this section.

- (2) In the case of a direct commerce contract that is made in the presence of both the dealer and the consumer, the information referred to in subsection (1) must be given to the consumer in writing.

- (3) In the case of a direct commerce contract that is made over the telephone, the information referred to in subsection (1) must:

- (a) be given to the consumer over the telephone, and
- (b) be subsequently given to the consumer in writing.

- (4) The regulations may make provision for or with respect to the form and manner in which the information referred to in subsection (1) must be given.

- (5) If this section and any regulation made under subsection (4) are not complied with in relation to a direct commerce contract, the supplier and the dealer are each guilty of an offence.

Maximum penalty: 100 penalty units.

- (6) The supplier under a direct commerce contract cannot enforce the contract against the consumer if this section and any regulation made under subsection (4) are not complied with.

40E Right of consumer to cancel direct commerce contract during cooling-off period

- (1) The consumer under a direct commerce contract may cancel the contract by giving written notice of cancellation to the supplier:
 - (a) in the case of a contract that is made in the presence of both the dealer and the consumer—within 5 clear business days from the day on which the contract was made, or
 - (b) in the case of a contract that is made over the telephone—within the period commencing on the day the contract was made and ending 5 clear business days from the day on which the information referred to in section 40D (1) is given to the consumer in writing, or
 - (c) in the case of either such contract—within such longer period as the contract may provide.
- (2) A notice of cancellation may be given:
 - (a) by delivering it personally to the supplier, or
 - (b) by delivering it, or sending it by post, in an envelope addressed to the supplier, to the supplier's address, or
 - (c) by faxing it to the supplier's address, or
 - (d) in such other manner as may be prescribed by the regulations.
- (3) A notice of cancellation sent by post to a supplier is taken to have been given to the supplier at the time of posting.
- (4) A right of cancellation conferred by this section may be exercised:
 - (a) despite affirmation of the contract by the consumer, and
 - (b) even though the contract has been fully executed.
- (5) If a direct commerce contract is cancelled by the consumer under this section, any related contract or instrument is void.

40F Consequences of cancellation of direct commerce contract

- (1) If a direct commerce contract is cancelled by the consumer during the cooling-off period under this Division:
 - (a) the consumer must immediately:
 - (i) return to the supplier any goods received from the supplier under the contract, or

- (ii) notify the supplier of the place where the supplier may collect the goods.
 - (b) the supplier must, after receiving the goods or any such notice, immediately return or refund to the consumer any consideration (or the value of any consideration) given by the consumer under the contract or a related contract or instrument.
- (2) If:
 - (a) the consumer gives notice to the supplier under subsection (1) (a) (ii), and
 - (b) the supplier does not collect the goods within 28 days after the cancellation of the contract,the goods become the property of the consumer free of any other right or interest.
- (3) If the consumer returns goods to the supplier under this section but has failed to take reasonable care of the goods, the consumer is liable to pay compensation to the supplier for the damage to or depreciation in the value of the goods. However, the consumer is not liable for any such damage or depreciation attributable to normal use of the goods or circumstances beyond the control of the consumer.
- (4) The obligations imposed by this section may be enforced by action in any court of competent jurisdiction.
- (5) A court that convicts a supplier of an offence against this Division may, on the application of the prosecutor, make orders for the enforcement of obligations imposed by this section.
- (6) A person who fails to comply with an order under subsection (5) is guilty of an offence.
Maximum penalty: 100 penalty units.

40G Waiver of rights

A consumer under a direct commerce contract is not competent to waive any right conferred by this Division.

40H Fees for services during cooling-off period prohibited

A supplier or dealer must not, in relation to a direct commerce contract or a related contract or instrument, collect any fees during the cooling-off period for services provided by the dealer or supplier during that period.

Maximum penalty: 100 penalty units.

40I Prohibited hours for direct commerce

A dealer must not call on, or telephone, any person:

- (a) after 8 pm on any day, or
- (b) before 9 am on any day,

for the purpose of negotiating a direct commerce contract (or for an incidental or related purpose) unless the dealer has made an appointment with the person.

Maximum penalty: 100 penalty units.

40J Other requirements in relation to dealers

- (1) A dealer who is carrying on negotiations on the telephone with a person (*the prospective consumer*) for the purpose of making a direct commerce contract (or for an incidental or related purpose) must cease those negotiations immediately on the request of the prospective consumer.
- (2) If any such request is made by the prospective consumer:
 - (a) the dealer, or
 - (b) if the dealer was acting on behalf of a supplier when carrying on negotiations with the prospective consumer—the supplier or any other person acting on behalf of the supplier,

must not contact the prospective consumer for the purpose of negotiating a direct commerce contract (or for an incidental or related purpose) for at least 30 days after the prospective consumer made the request.

- (3) A dealer who calls at any premises for the purpose of negotiating a direct commerce contract (or for an incidental or related purpose) must leave the premises at the request of the occupier of the premises as soon as it is practicable to do so.

- (4) A dealer who calls on any person for the purpose of negotiating a direct commerce contract (or for an incidental or related purpose) must, as soon as it is practicable to do so:
- (a) advise the person of the purpose of the call, and
 - (b) produce to the person an identity card setting out:
 - (i) the dealer's full name and address, and
 - (ii) if the dealer is not the supplier—the supplier's full name and address.

Maximum penalty: 100 penalty units.

40K Prohibition of certain actions

- (1) If a direct commerce contract has been cancelled (or is capable of being cancelled) by the consumer under this Division, a person must not, for the purpose of recovering an amount alleged to be payable by the consumer under the contract or a related contract or instrument:
- (a) bring, or assert an intention to bring, legal proceedings against the consumer, or
 - (b) place the name of the consumer, or cause the name of the consumer to be placed, on any list of defaulters or debtors, or assert an intention of placing the name of the consumer, or causing the name of the consumer to be placed, on any such list, or
 - (c) take any other action against the consumer.

Maximum penalty: 100 penalty units.

- (2) Subsection (1) (a) does not prohibit:
- (a) the bringing of, or the asserting of an intention to bring, legal proceedings to determine whether or not a direct commerce contract has been, or is capable of being, cancelled under this Division, or
 - (b) the continuation of such proceedings (for the purpose of recovering an amount alleged to be payable by the consumer under the contract or a related contract or instrument) where it is determined that the contract has not been, or is not capable of being, so cancelled, or
 - (c) the bringing of, or the asserting of an intention to bring, legal proceedings as referred to in section 40F (4).

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- (3) If a person is convicted of an offence against subsection (1) (b), the court may order the person responsible for keeping any list on which the name of the consumer has been wrongfully placed to remove the name from that list.
 - (4) A person who fails to comply with an order under subsection (3) is guilty of an offence.
Maximum penalty: 100 penalty units.

Division 4 Conditions and warranties in consumer transactions

40L Interpretation and application (TPA s 66)

- (1) A reference in this Division to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.
- (2) In this Division:
 - (a) a reference to the quality of goods includes a reference to the state or condition of the goods, and
 - (b) a reference to negotiations in relation to a contract for the supply by a person of goods to a consumer is a reference to any negotiations or arrangements conducted or made with the consumer by another person in the course of a business carried on by the other person in respect of which the consumer was induced to make the contract or that otherwise promoted the transaction to which the contract relates.
- (3) For the purposes of this Division, goods of any kind are of *merchantable quality* if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect, having regard to any description applied to them, the price (if relevant) and all other relevant circumstances.
- (4) This Division does not apply to or in respect of a contract made before the commencement of this Division.

40M Application of provisions not to be excluded or modified (TPA s 68)

- (1) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying:

- (a) the application of all or any of the provisions of this Division, or
 - (b) the exercise of a right conferred by such a provision, or
 - (c) any liability of a person for breach of a condition or warranty implied by such a provision, or
 - (d) the application of section 40N,
- is void.
- (2) A term of a contract is not to be considered as excluding, restricting or modifying the application of a provision of this Division or the application of section 40N unless the term does so expressly or is inconsistent with that provision or section.
 - (3) This section is, with respect to a term of a contract for the supply of recreation services within the meaning of section 5N of the *Civil Liability Act 2002*, subject to that section.

40N Rescission of contracts (TPA s 75A)

- (1) If:
 - (a) a person (*the supplier*) supplies goods to a consumer in the course of a business, and
 - (b) there is a breach of a condition that is, by reason of a provision of this Division, implied in the contract for the supply of the goods,the consumer is, subject to this section, entitled to rescind the contract by:
 - (c) causing to be served on the supplier a notice in writing signed by the consumer giving particulars of the breach, or
 - (d) causing the goods to be returned to the supplier and giving to the supplier, either orally or in writing, particulars of the breach.
- (2) If a consumer purports to rescind under this section a contract for the supply of goods by a person, the purported rescission does not have any effect if:
 - (a) the notice is not served or the goods are not returned within a reasonable time after the consumer has had a reasonable opportunity of inspecting the goods, or

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

400 Implied undertakings as to title, encumbrances and quiet possession (TPA s 69)

- (1) In a contract for the supply of goods by a person (*the supplier*) to a consumer (other than a contract to which subsection (3) applies) there is:

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

- (iii) anyone claiming through or under the supplier or that third person otherwise than under a charge or encumbrance disclosed or known to the consumer before the contract is made,

will not disturb the consumer's quiet possession of the goods.

40P Supply by description (TPA s 70)

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

40Q Implied undertakings as to quality or fitness (TPA s 71)

- (1) If a person supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by reason only of this section:
 - (a) as regards defects specifically drawn to the consumer's attention before the contract is made, or
 - (b) if the consumer examines the goods before the contract is made—as regards any defect that the examination ought to have revealed.
- (2) If a person (*the supplier*) supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known:
 - (a) to the supplier, or

- (b) to the person by whom any negotiations are conducted, any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that purpose is one for which such goods are commonly supplied, except where the circumstances show that the consumer does not rely, or that it is unreasonable for the consumer to rely, on the skill or judgment of the supplier or the person conducting the negotiations.
- (3) Subsections (1) and (2) apply to a contract for the supply of goods made by a person who in the course of a business is acting as agent for the supplier in the same way as they apply to a contract for the supply of goods made by a person in the course of a business, except where that person is not supplying in the course of a business and either the consumer knows that fact or reasonable steps are taken to bring it to the notice of the consumer before the contract is made.

40R Supply by sample (TPA s 72)

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

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

40S Warranties in relation to supply of services (TPA s 74)

- (1) In every contract for the supply by a person in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and

skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.

- (2) If a person supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the person any particular purpose for which the services are required or the result that the consumer desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connection with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result.
- (3) Subsection (2) does not apply if the circumstances show:
 - (a) that the consumer does not rely, or
 - (b) that it is unreasonable for the consumer to rely, on the skill or judgment of the person.

Division 5 Actions against manufacturers and importers of goods

40T Interpretation (TPA s 74A)

- (1) In this Division:

express warranty, in relation to goods, means an undertaking, assertion or representation in relation to:

 - (a) the quality, performance or characteristics of the goods, or
 - (b) the provision of services that are or may at any time be required in respect of the goods, or
 - (c) the supply of parts that are or may at any time be required for the goods, or

- (d) the future availability of identical goods, or of goods constituting or forming part of a set of which the goods in relation to which the undertaking, assertion or representation is given or made form part,

given or made in connection with the supply of the goods or in connection with the promotion by any means of the supply or use of the goods, the natural tendency of which is to induce persons to acquire the goods.

manufactured includes grown, extracted, produced, processed and assembled.

- (2) In this Division:
- (a) a reference to goods is a reference to goods of a kind ordinarily acquired for personal, domestic or household use or consumption, and
 - (b) a reference to a person who acquires goods from a consumer does not include a reference to a person who acquires goods for the purpose of re-supply, and
 - (c) a reference to the quality of goods includes a reference to the state or condition of the goods, and
 - (d) a reference to negotiations in relation to the acquisition of goods by a consumer is a reference to any negotiations or arrangements conducted or made with the consumer by another person in the course of a business carried on by the other person in respect of which the consumer was induced to acquire the goods or which otherwise promoted the acquisition of the goods by the consumer.
- (3) If a person:
- (a) holds himself, herself or itself out to the public as the manufacturer of goods, or
 - (b) causes or permits:
 - (i) the name of the person, or
 - (ii) a name by which the person carries on business, or
 - (iii) a brand or mark of the person,to be applied to goods supplied by the person, or

- (c) causes or permits another person:
 - (i) in connection with the supply or possible supply of goods by that other person, or
 - (ii) in connection with the promotion by that other person by any means of the supply or use of goods,
to hold out the person to the public as the manufacturer of the goods,
the person is, for the purposes of this Division, taken to have manufactured the goods.
- (4) If:
 - (a) goods are imported into this State by a person who was not the manufacturer of the goods, and
 - (b) at the time of the importation the manufacturer of the goods does not have a place of business in this State,
the person is, for the purposes of this Division, taken to have manufactured the goods.
- (5) For the purposes of subsection (3) (b):
 - (a) a name, brand or mark is taken to be applied to goods if it:
 - (i) is woven in, impressed on, worked into or annexed or affixed to the goods, or
 - (ii) is applied to a covering, label, reel or thing in or with which the goods are supplied, and
 - (b) if the name of a person, a name in which a person carries on business or a brand or mark of a person is applied to goods, it is to be presumed, unless the contrary is established, that the person caused or permitted the name, brand or mark to be applied to the goods.
- (6) The reference in subsection (5) to a covering includes a reference to a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and the reference in that subsection to a label includes a reference to a band or ticket.
- (7) If goods are imported into this State on behalf of a person, the person is, for the purposes of this Division, taken to have imported the goods into this State.

- (8) For the purposes of this Division, goods are taken to be supplied to a consumer despite the fact that, at the time of the supply, they are affixed to land or premises.

40U Actions in respect of unsuitable goods (TPA s 74B)

- (1) If:
- (a) a person (*the supplier*), in trade or commerce, supplies goods manufactured by the supplier to another person who acquires the goods for re-supply, and
 - (b) a person (whether or not the person who acquired the goods from the supplier) supplies the goods (otherwise than by way of sale by auction) to a consumer, and
 - (c) the goods are acquired by the consumer for a particular purpose that was, expressly or by implication, made known to the supplier, either directly, or through the person from whom the consumer acquired the goods or a person by whom any negotiations in connection with the acquisition of the goods were conducted, and
 - (d) the goods are not reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, and
 - (e) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not reasonably fit for that purpose,

the supplier is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the supplier in a court of competent jurisdiction.

- (2) Subsection (1) does not apply:
- (a) if the goods are not reasonably fit for the purpose referred to in that subsection by reason of:
 - (i) an act or default of any person (not being the supplier or an employee or agent of the supplier), or
 - (ii) a cause independent of human control,occurring after the goods have left the control of the supplier, or

- (b) if the circumstances show that the consumer did not rely, or that it was unreasonable for the consumer to rely, on the skill or judgment of the supplier.

40V Actions in respect of false descriptions (TPA s 74C)

- (1) If:
 - (a) a person (*the supplier*), in trade or commerce, supplies goods manufactured by the supplier to another person who acquires the goods for re-supply, and
 - (b) a person (whether or not the person who acquired the goods from the supplier) supplies the goods (otherwise than by way of sale by auction) to a consumer by description, and
 - (c) the goods do not correspond with the description, and
 - (d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods do not correspond with the description,

the supplier is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the supplier in a court of competent jurisdiction.

- (2) Subsection (1) does not apply if the goods do not correspond with the description referred to in that subsection by reason of:
 - (a) an act or default of any person (not being the supplier or an employee or agent of the supplier), or
 - (b) a cause independent of human control,occurring after the goods have left the control of the supplier.
- (3) A supplier is not liable to compensate a person for loss or damage suffered by the person by reason that goods do not correspond with a description unless the description was applied to the goods:
 - (a) by or on behalf of the supplier, or
 - (b) with the consent of the supplier, whether express or implied.

- (4) If the goods referred to in subsection (1) are supplied to the consumer by reference to a sample as well as by description, it is not a defence to an action under this section that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
- (5) A supply of goods is not prevented from being a supply by description for the purposes of subsection (1) by reason only that, being exposed for sale or hire, they are selected by the consumer.

40W Actions in respect of goods of unmerchantable quality (TPA s 74D)

- (1) If:
 - (a) a person (*the supplier*), in trade or commerce, supplies goods manufactured by the supplier to another person who acquires the goods for re-supply, and
 - (b) a person (whether or not the person who acquired the goods from the supplier) supplies the goods (otherwise than by way of sale by auction) to a consumer, and
 - (c) the goods are not of merchantable quality, and
 - (d) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not of merchantable quality,

the supplier is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the supplier in a court of competent jurisdiction.

- (2) Subsection (1) does not apply:
 - (a) if the goods are not of merchantable quality by reason of:
 - (i) an act or default of any person (not being the supplier or an employee or agent of the supplier), or
 - (ii) a cause independent of human control, occurring after the goods have left the control of the supplier, or
 - (b) as regards defects specifically drawn to the consumer's attention before the making of the contract for the supply of the goods to the consumer, or

- (c) if the consumer examines the goods before that contract is made, as regards defects that the examination ought to reveal.
- (3) For the purposes of this section, goods of any kind are of *merchantable quality* if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to:
 - (a) any description applied to the goods by the supplier, and
 - (b) the price received by the supplier for the goods (if relevant), and
 - (c) all the other relevant circumstances.

40X Actions in respect of non-correspondence with samples etc

(TPA s 74E)

- (1) If:
 - (a) a person (*the supplier*), in trade or commerce, supplies goods manufactured by the supplier to another person who acquires the goods for re-supply, and
 - (b) a person (whether or not the person who acquired the goods from the supplier) supplies the goods (otherwise than by way of sale by auction) to a consumer, and
 - (c) the goods are supplied to the consumer by reference to a sample, and
 - (d) the bulk of the goods does not correspond with the sample in quality or the goods have a defect, rendering them unmerchantable, that is not, or would not be, apparent on reasonable examination of the sample, and
 - (e) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the bulk does not correspond with the sample in quality or by reason that the goods have that defect,

the supplier is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the loss or damage by action against the supplier in a court of competent jurisdiction.

- (2) Subsection (1) does not apply if:
- (a) the sample is not supplied by the supplier, or
 - (b) the supply by sample is made without the express or implied concurrence of the supplier, or
 - (c) the failure of the bulk of the goods to correspond with the sample in quality or the existence of the defect is due to:
 - (i) an act or default of any person (not being the supplier or an employee or agent of the supplier), or a cause independent of human control, occurring after the goods have left the control of the supplier, or
 - (ii) other circumstances that were beyond the control of the supplier and that it could not reasonably be expected to have foreseen.

40Y Actions in respect of failure to provide facilities for repairs or parts (TPA s 74F)

- (1) If:
- (a) a person (*the supplier*), in trade or commerce, supplies goods (otherwise than by way of sale by auction) manufactured by the supplier to a consumer, or
 - (b) a person (*the supplier*), in trade or commerce, supplies goods manufactured by the supplier to another person who acquires the goods for re-supply and a person (whether or not the person who acquired the goods from the supplier) supplies the goods (otherwise than by way of sale by auction) to a consumer,
- and:
- (c) at a time (in this section referred to as the *relevant time*) after the acquisition of the goods by the consumer:
 - (i) the goods need to be repaired but facilities for their repair are not reasonably available to the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer, or

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- (ii) a part is required for the goods but the part is not reasonably available to the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer, and
 - (d) the supplier acted unreasonably in failing to ensure that facilities for the repair of the goods were, or that the part was, reasonably available to the consumer or that other person at the relevant time, and
 - (e) the consumer or that other person suffers loss or damage by reason of the failure of the supplier to ensure that facilities for the repair of the goods were, or that the part was, reasonably available to the consumer or that other person at the relevant time,
- the supplier is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the supplier in a court of competent jurisdiction.
- (2) Subsection (1) does not apply if the supplier took reasonable action to ensure that the consumer acquiring the goods would be given notice at or before the time when the consumer acquired the goods that:
 - (a) the supplier did not promise that facilities for the repair of the goods, or that parts for the goods, would be available, or
 - (b) the supplier did not promise that facilities for the repair of the goods, or that parts for the goods, would be available after a specified period, being a period that expired before the relevant time.
 - (3) If the supplier took reasonable action to ensure that the consumer acquiring the goods would be given notice at or before the time when the consumer acquired the goods that the supplier did not promise that:
 - (a) facilities for the repair of the goods, being facilities of a kind specified in the notice, would be available, or
 - (b) parts for the goods, being parts of a kind specified in the notice, would be available, or

- (c) facilities for the repair of the goods would be available at, or parts for the goods would be available from, a place or places specified in the notice,

the supplier is not liable to compensate the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer for loss or damage suffered by the consumer or that other person by reason of the failure of the supplier to ensure that facilities of the kind specified in the notice, or parts of the kind specified in the notice, were available, or that facilities for the repair of the goods were available at, or parts for the goods were available from, a place or places specified in the notice, as the case may be.

- (4) In determining whether a supplier acted unreasonably in failing to ensure that facilities for the repair of goods were, or that a part was, reasonably available to a person at the relevant time, a court is to have regard to all the circumstances of the case, and in particular to the existence, at the relevant time, of circumstances that prevented those facilities or that part being so available, being circumstances beyond the control of the supplier.

40Z Actions in respect of non-compliance with express warranty

(TPA s 74G)

- (1) If:
- (a) a person (*the supplier*), in trade or commerce:
 - (i) supplies goods (otherwise than by way of sale by auction) manufactured by the supplier to a consumer, or
 - (ii) supplies goods manufactured by the supplier to another person who acquires the goods for re-supply and a person (whether or not the person who acquired the goods from the supplier) supplies the goods (otherwise than by way of sale by auction) to a consumer, and
 - (b) the supplier fails to comply with an express warranty given or made by the supplier in relation to the goods, and

- (c) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason of the failure,

the supplier is liable to compensate the consumer or that other person for the loss or damage and the consumer or that other person may recover the amount of the compensation by action against the supplier in a court of competent jurisdiction.

- (2) For the purposes of any action instituted by a person against a supplier under this section, if:
 - (a) an undertaking, assertion or representation was given or made in connection with the supply of goods or in connection with the promotion by any means of the supply or use of goods, and
 - (b) the undertaking, assertion or representation would, if it had been given or made by the supplier or a person acting on the supplier's behalf, have constituted an express warranty in relation to the goods,

it is to be presumed that the undertaking, assertion or representation was given or made by the supplier or a person acting on the supplier's behalf unless the supplier proves that the supplier did not give or make, and did not cause or permit the giving or making of, the undertaking, assertion or representation.

40ZA Right to recover against manufacturer or importer (TPA s 74H)

If:

- (a) a person (*the seller*) is under a liability to another person (*the consumer*) in respect of loss or damage suffered by the consumer as a result of a breach of a condition or warranty implied by a provision of Division 4 in a contract for the supply of goods by the seller to the consumer, and
- (b) a third person (*the manufacturer*) is liable to compensate the consumer in respect of the same loss or damage by reason of a provision of this Division,

the manufacturer is liable to indemnify the seller in respect of the liability of the seller to the consumer and the seller may, in respect of the manufacturer's liability to indemnify the seller, institute an action against the manufacturer in a court

of competent jurisdiction for such legal or equitable relief as the seller could have obtained if the liability of the manufacturer to indemnify the seller had arisen under a contract of indemnity made between the manufacturer and the seller.

40ZB Time for commencing actions (TPA s 74J)

- (1) This section does not apply to a cause of action to which Division 6 of Part 2 of the *Limitation Act 1969* applies.
- (2) An action under a provision of this Division may be commenced at any time within 3 years after the day on which the cause of action accrued.
- (3) For the purposes of this section, a cause of action is taken to have accrued:
 - (a) in the case of an action other than an action under section 40ZA, on the day on which the consumer or a person who acquired the goods from, or derived title to the goods through or under, the consumer first became aware, or ought reasonably to have become aware:
 - (i) in the case of an action under section 40U—that the goods were not reasonably fit for the purpose referred to in that section, or
 - (ii) in the case of an action under section 40V—that the goods did not correspond with the description referred to in that section, or
 - (iii) in the case of an action under section 40W—that the goods were not of merchantable quality, or
 - (iv) in the case of an action under section 40X—that the bulk of the goods did not correspond with the sample in quality or the goods had the defect referred to in that section, or
 - (v) in the case of an action under section 40Y—that the goods needed to be repaired or that the part was required for the goods, as the case may be, or
 - (vi) in the case of an action under section 40Z—of the failure of the supplier to comply with the express warranty referred to in that section, or

- (b) in the case of an action under section 40ZA, on:
 - (i) the day, or the first day, as the case may be, on which the seller referred to in that section made a payment in respect of, or otherwise discharged in whole or in part, the liability of that seller to the consumer referred to in that section, or
 - (ii) the day on which a proceeding was instituted by that consumer against that seller in respect of that liability or, if more than one such proceeding was instituted, the day on which the first such proceeding was instituted,

whichever was the earlier.

- (4) In an action under a provision of this Division, it is a defence if the defendant proves that the action was not commenced within 10 years after the time of the first supply to a consumer of the goods to which the action relates.

40ZC Application of Division not to be excluded or modified (TPA s 74k)

- (1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that:
 - (a) purports to exclude, restrict or modify, or
 - (b) has the effect of excluding, restricting or modifying,any liability of a person to compensate or indemnify another person that may arise under this Division, is void.
- (2) A term of a contract is not to be taken to exclude, restrict or modify the application of a provision of this Division unless the term does so expressly or is inconsistent with that provision.

[18] Section 43 Unconscionable conduct

Omit “customer” wherever occurring. Insert instead “consumer”.

[19] Section 43 (5)

Omit the subsection.

[20] Section 43 (6)

Omit “does not include”. Insert instead “includes”.

[21] Section 44A

Insert after section 44:

44A Country of origin representations

- (1) If:
- (a) a person makes a representation as to the country of origin of goods, and
 - (b) the goods have been substantially transformed in that country, and
 - (c) 50% or more of the cost of producing or manufacturing the goods is attributable to production or manufacturing processes that occurred in that country, and
 - (d) the representation is not a representation referred to in subsection (2) or (3),

the person does not contravene section 42 or 44 (i) by reason only of making the representation.

- (2) If:
- (a) a person makes a representation that goods are the produce of a particular country (whether the representation uses the words “product of”, “produce of” or any other grammatical variation of the word “produce”), and
 - (b) the country was the country of origin of each significant ingredient or significant component of the goods, and
 - (c) all, or virtually all, processes involved in the production or manufacture occurred in that country,

the person does not contravene section 42 or 44 (i) by reason only of making the representation.

- (3) If:
- (a) a person makes a representation as to the country of origin of goods by means of a logo specified in the regulations made under subsection (4), and
 - (b) the goods have been substantially transformed in the country represented by the logo as the country of origin of the goods, and

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- (c) the prescribed percentage of the cost of producing or manufacturing the goods is attributable to production or manufacturing processes that occurred in that country, the person does not contravene section 42 or 44 (i) by reason only of making the representation.
- (4) The regulations may, in relation to a specified logo, prescribe a percentage in the range of 51% to 100% as the percentage applicable to the goods for the purposes of subsection (3) (c).
- (5) For the purposes of this section, goods are *substantially transformed* in a country if they undergo a fundamental change in that country in form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change.
- (6) Without limiting subsection (5), the regulations may prescribe:
- (a) changes (whether in relation to particular classes of goods or otherwise) that are not fundamental changes for the purposes of that subsection, and
- (b) examples (in relation to particular classes of goods or otherwise) of changes that are fundamental changes for the purposes of that subsection.
- (7) For the purposes of this section, the cost of producing or manufacturing goods is to be determined in accordance with the regulations.
- (8) If in any proceedings against a person for an offence under section 42 or 44 (i) the person seeks to rely on a provision of this section or the regulations made under this section, the onus is on the person to establish the matters set out in the provision on which the person seeks to rely.

[22] Section 51A

Insert after section 51:

51A Prohibition on mock auctions

- (1) A person must not promote or conduct or assist in the promotion or conduct of an auction:
- (a) at which:
- (i) goods are sold to a person at a price lower than the highest bid for the goods, or

- (ii) part of the price for the sale of goods to a person is repaid or credited to the person or is stated to be so repaid or credited, or
 - (b) at which the right to bid for goods is restricted or is stated to be restricted to persons who have bought or agreed to buy other goods, or
 - (c) at which any goods or services are given away or offered as gifts.
- (2) Subsection (1) (a) does not apply if the lower price, repayment or credit is because of:
 - (a) a defect that the person conducting the auction became aware of after the highest bid was made, or
 - (b) damage sustained after the bid was made.
- (3) For the purposes of this section:
 - (a) any bid stated to have been made at an auction is, in the absence of evidence to the contrary, taken to have been made and to have been a bid of the amount stated, and
 - (b) a reference to the sale of goods to a person who has made a bid for them includes a reference to a purported sale of those goods to a person stated to have made a bid for them (whether or not that person exists), and
 - (c) anything done in or about the place where an auction is held, if done in connection with the auction, is taken to be done at the auction whether or not it is done at the time of the auction or before or after the auction.
- (4) In this section:

auction means any sale of goods at which some or all of the persons present compete for the purchase of goods, whether by way of increasing bids or by the offer of goods to be bid for at successively decreasing prices or otherwise.

stated in relation to an auction means stated by or on behalf of the person conducting the auction by way of an announcement made to the persons for the time being present at the auction.

[23] Section 62 Offences against this Act

Insert after section 62 (2):

- (2A) A person who is convicted of a second or subsequent offence against Part 5 is, in addition to, or as an alternative to, any monetary penalty that may be imposed in relation to the offence, liable to imprisonment for a term not exceeding 3 years. However, the maximum term of imprisonment that a Local Court may impose for any such second or subsequent offence is 2 years.

[24] Sections 62 (6), 65 (1) (a), 66 (1) (a) (i), 67, 71 (1) and 72 (1)–(4)

Insert “, 5C” after “5B” wherever occurring.

[25] Section 63 Disposal of proceedings for offences

Omit “50 penalty units” from section 63 (5).

Insert instead “100 penalty units”.

[26] Section 63A

Insert after section 63:

63A Compensation orders by Local Court on conviction of person

- (1) If:
- (a) a person is convicted by a Local Court of an offence against this Act or the regulations, and
 - (b) the Court is satisfied that another person has sustained loss or damage as a result of the conduct of the convicted person,
- the Court may, in addition to any penalty it may impose in respect of the offence, order the convicted person to compensate the other person for the loss or damage.
- (2) The amount of compensation a Local Court may order to be paid under this section is not to exceed \$40,000 or such other amount as is specified for the time being in section 12 (1) of the *Local Courts (Civil Claims) Act 1970*.

- (3) In this section:
- (a) a reference to the conviction of a person includes a reference to the making of an order in respect of a person under section 10 of the *Crimes (Sentencing Procedure) Act 1999*, and
 - (b) a reference to loss or damage does not, if the loss or damage arises from a contravention of Part 5 (section 43 excepted), include a reference to:
 - (i) the death of a person, or
 - (ii) personal injury to a person (including any pre-natal injury, any impairment of the person's physical or mental condition and any disease).

[27] Section 64A Suspension of licences

Omit "of Fair Trading" wherever occurring from section 64A (4).

[28] Section 65 Injunctions

Omit "offend against section 27, 32 or 34" from section 65 (10).

Insert instead "constitute an offence under Part 3".

[29] Section 66 Other injunctions

Insert "or" at the end of section 66 (1) (a) (i) and (ia).

[30] Section 66 (1) (a) (iii) and (iv)

Omit the subparagraphs.

[31] Sections 66A and 66B

Insert after section 66:

66A Show cause action may be taken by Director-General

- (1) In this section:
- unlawful conduct* means any conduct that constitutes a contravention of a provision of this Act (or would constitute such a contravention if the conduct occurred in New South Wales), whether or not any proceedings have been brought in respect of the contravention.

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- (2) If the Director-General is satisfied that a person has, in trade or commerce, engaged in any unlawful conduct on more than one occasion (whether in New South Wales or in any other place), the Director-General may, by notice in writing served on the person, call on the person to show cause why the person should not, for the reason specified in the notice, be prevented from carrying on a business of supplying goods or services.
 - (3) The notice must specify the period (being at least 14 days after the notice is served) in which the person may show cause.
 - (4) The person on whom a notice to show cause has been served under this section may, within the period specified in the notice, make a written submission in relation to the matters to which the notice relates.
 - (5) The Director-General:
 - (a) is to consider any such submission, and
 - (b) may conduct such inquiries, or make such investigations, in relation to the matters to which the notice relates as the Director-General thinks appropriate.
 - (6) This section does not limit the operation of section 65 or 66.

66B Trading prohibition orders

- (1) The Director-General may, after issuing a notice under section 66A to a person and taking into consideration any submissions made in relation to the matter, apply to the Supreme Court for an order under this section in respect of the person if the Director-General is of the opinion that the person is likely to engage again, or to continue to engage, in any unlawful conduct within the meaning of section 66A.
- (2) The Supreme Court may, on application by the Director-General under subsection (1), make an order prohibiting the person who is the subject of the application (*the relevant person*) from carrying on a business of supplying goods or services (whether or not as part of, or incidental to, the carrying on of another business) for an indefinite period or for a period specified in the order.

- (3) In making any such order, the Supreme Court may, if the Court is satisfied that a person has sustained loss or damage as a result of the unlawful conduct of the relevant person, order the relevant person to compensate the other person for the loss or damage.
- (4) A reference in subsection (3) to loss or damage does not, if the loss or damage arises from a contravention of Part 5 (section 43 excepted), include a reference to:
 - (a) the death of a person, or
 - (b) personal injury to a person (including any pre-natal injury, any impairment of the person's physical or mental condition and any disease).
- (5) This section does not limit the operation of section 65 or 66.

[32] Sections 68 (1) and 69

Omit "or 5B" wherever occurring. Insert instead ", 5B or 5C".

[33] Section 68 Actions for damages

Omit section 68 (2). Insert instead:

- (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.
- (2A) Subsection (2) does not apply to a cause of action to which Division 6 of Part 2 of the *Limitation Act 1969* applies.

[34] Section 68A

Insert after section 68:

68A Remedy for supply of goods in contravention of certain provisions

- (1) If:
 - (a) goods are supplied to a person in contravention of section 27, or
 - (b) goods are supplied to a person and the supply of the goods is an offence under section 32 (whether or not there has been a conviction for the offence),

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

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

[35] Section 69 Finding in proceedings to be evidence

Omit “In a proceeding against a person under section 68 or in an application under section”.

Insert instead “In any proceedings under section 68 or 68A or in an application under section 66B or”.

[36] Section 72 Other orders

Omit section 72 (6). Insert instead:

- (6) An application under subsection (2) may be made at any time within 6 years after the date on which the cause of action that relates to the conduct accrued.
- (6A) Subsection (6) does not apply to a cause of action to which Division 6 of Part 2 of the *Limitation Act 1969* applies.

[37] Section 73 Power of Supreme Court to prohibit payment or transfer of money or other property

Insert “or” at the end of section 73 (1) (a).

[38] Section 73 (1) (b1)

Insert at the end of section 73 (1) (b):

or

- (b1) an application for an order under section 66B has been made in relation to a person, or

[39] Section 73 (1) (e)

Insert “(b1),” after “(b),”.

[40] Section 73A Enforcement of undertakings

Omit “(other than a function in connection with Part 7)” from section 73A (1).

[41] Part 7 Codes of practice

Omit the Part.

[42] Schedule 4 Provisions applicable to Products Safety Committee

Insert “or in relation to the subject-matter of a review by the Committee under section 36” after “section 28” in clause 3 (1).

[43] Schedule 5 Savings and transitional provisions

Insert after clause 11C:

11D Fair Trading Amendment Act 2003

- (1) In this clause, *amending Act* means the *Fair Trading Amendment Act 2003*.
- (2) The amendments made to sections 23A and 23C by the amending Act do not apply to or in respect of a notice served on a person under section 23A before the commencement of those amendments, and sections 23A and 23C (as in force immediately before that commencement) apply in relation to a person on whom such a notice has been served as if those amendments had not been made.
- (3) Division 3 of Part 3, as amended by the amending Act, does not apply to or in respect of an order made under section 34 (as in force immediately before the commencement of the amendments to that Division), and the provisions of that Division (as in force immediately before that commencement) apply to any such order as if those amendments had not been made.
- (4) Division 3 of Part 4, as inserted by the amending Act, does not apply to or in respect of a credit purchase agreement (within the meaning of the *Door-to-Door Sales Act 1967*) made before the repeal of that Act by the amending Act, and the repealed Act continues to apply to any such agreement as if the repealed Act had not been repealed.

- (5) Section 66A, as inserted by the amending Act, extends to unlawful conduct occurring before the commencement of that section.
- (6) Section 68 (2), as amended by the amending Act, does not apply to a cause of action accruing before the commencement of the amendment to that subsection.
- (7) Section 68 (2), as in force immediately before the commencement of the amendment to that section by the amending Act, continues to apply to or in respect of a cause of action accruing before that commencement as if the amendment had not been made.

[44] Schedule 5, clause 12 (1)

Insert at the end of the subclause:

Fair Trading Amendment Act 2003

[Second reading speech made in—
Legislative Assembly on 21 May 2003
Legislative Council on 3 July 2003]

BY AUTHORITY