

Fair Trading Act 1985

No. 10201

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VICTORIA

No. 10201

Fair Trading Act 1985

An Act to make provision with respect to certain unfair or undesirable trade practices, to amend the *Consumer Affairs Act 1972* and the *Ministry of Consumer Affairs Act 1973* and for other purposes.

[Assented to 29 October 1985]

The Parliament of Victoria enacts as follows:

PART I.—PRELIMINARY

Short title.

1. This Act may be cited as the *Fair Trading Act 1985*.

Commencement.

2. The several provisions of this Act shall come into operation on a day or the respective days to be fixed by proclamation or successive proclamations of the Governor in Council published in the *Government Gazette*.

Act binds Crown.

3. (1) Except where otherwise expressly provided by this Act, this Act binds the Crown not only in right of Victoria but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

(2) This Act applies to and in respect of the Crown in any of its capacities to the same extent as if the Crown were, in that capacity, a body corporate.

Application of Act.

4. (1) Except as otherwise expressly provided in or under this Act, this Act applies (notwithstanding anything to the contrary in any other Act or law) to and in respect of an acquisition or supply of goods or services or a proposed acquisition or supply of goods or services—

- (a) if the person by or to whom the goods are or are proposed to be acquired or supplied signs in Victoria a document relating to the acquisition or supply or the proposed acquisition or supply; or
- (b) if that person does not so sign such a document, if the goods or services are or are proposed to be delivered or supplied in Victoria.

(2) This Act extends to the engaging in conduct outside Victoria by bodies corporate incorporated or carrying on business within Victoria or by persons ordinarily resident within Victoria.

Interpretation.

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

“Acquire” includes—

- (a) in relation to goods—acquire by way of purchase, exchange or taking on lease, or hire or on hire purchase; and
- (b) in relation to services—accept.

“Business” includes a business not carried on for profit.

“Director” means the Director of Consumer Affairs appointed for the purposes of the *Ministry of Consumer Affairs Act 1973*.

“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.

"Give effect to", in relation to a provision of a contract, arrangement or understanding, includes do an act or thing in pursuance of or in accordance with or enforce or purport to enforce.

"Goods" includes—

- (a) ships, aircraft and other vehicles;
- (b) animals, including fish;
- (c) minerals, trees and crops, whether on, under or attached to land or not; and
- (d) gas and electricity.

"Inspector" means a person appointed to be an inspector under the *Consumer Affairs Act 1972*.

"Price" includes a charge of any description.

"Provision", in relation to an understanding, means any matter forming part of the understanding.

"Send" includes deliver and **"sender"** has a corresponding meaning.

"Services" includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under a contract for or in relation to—

- (a) the performance of work (including work of a professional nature), whether with or without the supply of goods;
- (b) the provision of, or of the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
- (c) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction—

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

"Special price", in relation to an advertisement for the supply of goods or services, means—

- (a) a price that is represented in the advertisement to be a special or bargain price, by reference to an ordinary price or otherwise; or
- (b) a price that a person who reads, hears or sees the advertisement would reasonably understand to be a special or bargain price having regard to the prices at which the goods or services advertised or like goods or services are ordinarily supplied.

“Supply” includes—

(a) in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and

(b) in relation to services—provide, grant or confer—

and **“supplier”** has a corresponding meaning.

“Unsolicited goods” means goods sent to a person without any request made by or on behalf of the person.

“Unsolicited services” means services supplied to a person without any request made by or on behalf of the person.

(2) In this Act—

(a) a reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant;

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

(c) a reference to refusing to do an act includes a reference to—
(i) refraining (otherwise than inadvertently) from doing that act; or

(ii) making it known that that act will not be done; and

(d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.

(3) Where a provision of this Act is expressed to render a provision of a contract, or to render a covenant, unenforceable if the provision of a contract or the covenant has or is likely to have a particular effect, that provision of this Act applies in relation to the provision of the contract or the covenant at any time when the provision of the contract or the covenant has or is likely to have that effect notwithstanding that—

(a) at an earlier time the provision of the contract or the covenant did not have that effect or was not regarded as likely to have that effect; or

(b) the provision of the contract or the covenant will not or may not have that effect at a later time.

(4) For the purposes of this Act, a reference to trade or commerce includes a reference to a business not carried on for profit.

Consumers.

6. (1) For the purposes of this Act, unless the contrary intention appears—

Cf. Trade Practices Act 1974, s. 4B.

(a) a person shall be taken to have acquired particular goods as a consumer if, and only if—

(i) the price of the goods did not exceed the prescribed amount; or

(ii) where that price exceeded the prescribed amount—the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption—

and the person did not acquire the goods, or hold out that the person was acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; and

(b) a person shall be taken to have acquired particular services as a consumer if, and only if—

(i) the price of the services did not exceed the prescribed amount; or

(ii) where that price exceeded the prescribed amount—the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

(2) For the purposes of sub-section (1)—

(a) the prescribed amount is \$20 000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount;

(b) subject to paragraph (c), the price of goods or services purchased by a person shall be taken to have been the amount paid or payable by the person for the goods or services;

(c) where a person purchased goods or services together with other property or services, or with both other property and services and a specified price was not allocated to the goods or services in the contract under which they were purchased, the price of the goods or services shall be taken to have been—

(i) the price at which, at the time of the acquisition, the person could have purchased from the supplier the goods or services without the other property or services;

(ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier except together with the other property or services but, at that

time, goods or services of the kind acquired were available for purchase from another supplier without other property or services—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

- (iii) if, at the time of the acquisition, goods or services of the kind acquired were not available for purchase from any supplier except together with other property or services—the value of the goods or services at that time;
- (d) where a person acquired goods or services otherwise than by way of purchase, the price of the goods or services shall be taken to have been—
- (i) the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier;
 - (ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier or were so available only together with other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or
 - (iii) if goods or services of the kind acquired were not available, at the time of the acquisition, for purchase from any supplier or were not so available except together with other property or services—the value of the goods or services at that time; and
- (e) without limiting by implication the meaning of the expression “services” in section 5 (1), the obtaining of credit by a person in connexion with the acquisition of goods or services shall be deemed to be the acquisition of a service and any amount by which the amount paid or payable for the goods or services is increased by reason of so obtaining credit shall be deemed to be paid or payable for that service.

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

Acquisition, supply and re-supply.

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

- (a) a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods in pursuance of a supply of the goods;
- (b) a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services;
- (c) a reference to the supply or acquisition of goods includes a reference to the supply or acquisition of goods together with other property or services, or both;
- (d) a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services, or both; and
- (e) a reference to the re-supply of goods acquired from a person includes a reference to—
 - (i) a supply of the goods to another person in an altered form or condition; and
 - (ii) a supply to another person of goods in which the first-mentioned goods have been incorporated.

Leases and licences of land &c.

8. In this Act—

*Cf. Trade
Practices Act
1974, s. 4H.*

- (a) a reference to a contract shall be construed as including a reference to a lease of, or a licence in respect of, land or a building or part of a building and shall be so construed notwithstanding the express references in this Act to such leases or licences;
- (b) a reference to making or entering into a contract, in relation to such a lease or licence, shall be read as a reference to granting or taking the lease or licence; and
- (c) a reference to a party to a contract, in relation to such a lease or licence, shall be read as including a reference to any person bound by, or entitled to the benefit of, any provision contained in the lease or licence.

Loss or damage to include injury.

9. In this Act—

*Cf. Trade
Practices Act
1974, s. 4K.*

- (a) a reference to loss or damage, other than a reference to the amount of any loss or damage, includes a reference to injury; and
- (b) a reference to the amount of any loss or damage includes a reference to damages in respect of an injury.

Severability.

*Cf. Trade
Practices Act
1974, s. 4L.*

10. If the making of a contract after the commencement of this section contravenes this Act by reason of the inclusion of a particular provision in the contract, then, subject to any order made under section 35, nothing in this Act affects the validity or enforceability of the contract otherwise than in relation to that provision in so far as that provision is severable.

PART II.—UNFAIR PRACTICES**Division 1—Misleading Conduct and False Representations****Misleading or deceptive conduct.**

*Cf. Trade
Practices Act
1974, s. 52.*

11. (1) A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in the succeeding provisions of this Part shall be taken as limiting by implication the generality of sub-section (1).

False representations.

*Cf. Trade
Practices Act
1974, s. 53.*

12. A person shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion 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, grade, composition, style or model or have had a particular history or particular previous use;
- (b) falsely represent that services are of a particular standard, quality or grade;
- (c) falsely represent that goods are new;
- (d) represent that goods or services have a sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
- (e) represent that the person has a sponsorship, approval or affiliation that the person does not have;
- (f) make a false or misleading statement with respect to the price of goods or services;
- (g) make a false or misleading statement concerning the need for any goods or services;
- (h) make a false or misleading statement concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy; or
- (i) make a statement that is false, misleading or deceptive in any material particular.

False representations etc. in relation to land.

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

*Ct. Trade
Practices Act
1974, s. 53A.*

- (a) represent that the person has a sponsorship, approval or affiliation that the person does not have;
- (b) make a false or misleading statement concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or 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 cause or permit a servant or agent to use, at a place of residence, physical force, undue harassment or coercion in connexion 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 Division do not apply in relation to the supply or acquisition, or the possible supply or acquisition, of interests in land.

(4) In this section, "interest", in relation to land, means—

- (a) a legal or equitable estate or interest in the land;
- (b) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in an incorporated company that owns the land or building; or
- (c) a right, power or privilege over, or in connexion with, the land.

False representations in relation to employment.

14. 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 likely to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment.

*Ct. Trade
Practices Act
1974, s. 53B.*

Offering gifts and prizes.

15. A person shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion 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.

*Ct. Trade
Practices Act
1974, s. 54.*

Misleading conduct in relation to goods.

*Cf. Trade
Practices Act
1974, s. 55.*

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

Misleading conduct in relation to services.

*Cf. Trade
Practices Act
1974, s. 55A.*

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

Bait advertising.

*Cf. Trade
Practices Act
1974, s. 56.*

18. (1) A person shall not, in trade or commerce, advertise for supply at a special price goods or services that the person does not intend to offer 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.

(2) Where a person has, in trade or commerce, advertised goods or services for supply at a special price that person shall offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the person carries on business and the nature of the advertisement.

(3) It is a defence to a prosecution under this section if it is established that the person—

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

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

Referral selling.

*Cf. Trade
Practices Act
1974, s. 57.*

19. 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 the services is made, receive a rebate, commission or other benefit in return for giving the person the names of prospective customers or otherwise assisting the person to supply goods or services to other consumers, if receipt of

the rebate, commission or other benefit is contingent on an event occurring after that contract is made.

Acceptance of payment.

20. A person shall not, in trade or commerce, accept payment or other consideration for goods or services where at the time of the acceptance the person intends—

Cf. Trade Practices Act 1974, s. 58.

- (a) not to supply the goods or services; or
- (b) to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is accepted.

Misleading statements.

21. (1) A person shall not, in trade or commerce, make a statement that is false or misleading in a material particular concerning the profitability or risk or any other material aspect of any business activity that the person has represented as one that can be, or can be to a considerable extent, carried on at a person's place of residence.

Cf. Trade Practices Act 1974, s. 59.

(2) Where a person, in trade or commerce, invites, whether by advertisement or otherwise, persons to engage or participate, or to offer or to apply to engage or participate, in a business activity requiring the investment of moneys by the persons concerned and the performance by those persons or work associated with the investment, the first-mentioned person shall not make, with respect to the profitability or risk or any other material aspect of the business activity, a statement that is false or misleading in a material particular.

Coercion.

22. A person shall not use or cause or permit a servant or agent to use, at a place of residence, physical force, undue harassment or coercion in connexion with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

Cf. Trade Practices Act 1974, s. 60.

Division 2—Pyramid Selling Schemes

Interpretation.

23. (1) In this Division, unless inconsistent with the context or subject-matter—

Cf. Consumer Affairs Act 1972, s. 32A.

“Participant” in relation to a trading scheme or a pyramid selling scheme means—

- (a) a person, not being a promoter, who participates in the scheme;
- (b) where two or more persons, not together being a promoter, together participate in the scheme, each of those persons; or

- (c) two or more persons, not together being a promoter, who together participate in the scheme.

“Promoter” in relation to a trading scheme or a pyramid selling scheme means—

- (a) a person who promotes the scheme;
- (b) where two or more persons together promote the scheme, each of those persons; or
- (c) two or more persons who together promote the scheme.

“Pyramid selling scheme” means a trading scheme under which—

- (a) goods or services are or are to be provided by a promoter of the trading scheme;
- (b) goods or services provided or to be provided by a promoter of the trading scheme are or are to be provided by a participant in the trading scheme (whether or not as servant or agent of a promoter) to or for other persons; and
- (c) the prospect is held out to a participant in the trading scheme (whether or not so as to confer a legally enforceable right) of receiving payments or other benefits in respect of—
 - (i) the introduction whether or not by the promoter of other persons who become participants in the trading scheme;
 - (ii) the promotion, transfer or other change of status of participants in the trading scheme;
 - (iii) the provision of training facilities or other services for other participants in the trading scheme; or
 - (iv) transactions effected by other participants in the trading scheme under which goods or services are or are to be provided to or for other persons.

“Trading scheme” includes arrangements whether or not recorded in writing made in connexion with the carrying on of a business.

(2) In this Division a reference to the provision of goods or services by a person includes a reference to the provision of goods or services under an arrangement to which that person is a party.

(3) For the purposes of this Division—

- (a) a person is not and two or more persons together are not a participant in a trading scheme or pyramid selling scheme by reason only that that person has or those persons have purchased goods or services from a promoter of or participant in the scheme; and
- (b) the purchase or proposed purchase of goods or services from a promoter of or participant in a pyramid selling

scheme does not constitute participation or proposed participation in the scheme.

Offences.

24. (1) A person shall not—

- (a) promote a pyramid selling scheme;
- (b) grant or purport to grant to another person a right (whether or not legally enforceable) to participate in a pyramid selling scheme;
- (c) offer another person a right (whether or not legally enforceable) to participate in a pyramid selling scheme; or
- (d) invite or induce another person to participate or to seek to participate in a pyramid selling scheme—

whether the promotion, grant, offer, invitation or inducement is made by the person, by an agent or as an agent of another person.

(2) Where a person participating or proposing to participate in a pyramid selling scheme—

- (a) makes a payment to or for the benefit of a promoter of or participant in the scheme; and
- (b) made or was induced to make that payment by reason of a prospect being held out to that person (whether or not as a legally enforceable right) of receiving payments or other benefits in respect of the introduction (whether or not by that person) of other persons who become participants in the scheme—

a person to whom or for whose benefits that payment or any part of that payment is made is guilty of an offence.

(3) A promoter of or a participant in a pyramid selling scheme who by holding out to another person a prospect (whether or not as a legally enforceable right) of receiving payments or other benefits in respect of the introduction (whether or not by that person) of other persons who become participants in the scheme, attempts to induce that person—

- (a) if the person is a participant in the scheme, to make a payment to or for the benefit of a promoter of or another participant in the scheme; or
- (b) if the person is not a participant in the scheme, to become a participant in the scheme and to make a payment to or for the benefit of a promoter of or another participant in the scheme—

is guilty of an offence.

(4) A person shall not lend money or agree to lend money to or on account of or on behalf of or at the request of another person if the first-mentioned person knows or ought on reasonable grounds to know that the money or part of the money is or is to be or may be used for or

*Cf. Consumer
Affairs Act 1972,
s. 32B.*

in connexion with the participation or proposed participation by a person in a pyramid selling scheme.

(5) For the purposes of sub-section (2) or (3), where a prospect referred to in sub-section (2) or (3) is held out, it is an inducement or an attempt to induce notwithstanding that the prospect did not or would not have constituted the whole of the inducement if the prospect constituted or would have constituted a substantial part of the inducement.

(6) In sub-section (4) "lend" includes advance, discount and forbear to require payment.

(7) It is a defence to a prosecution of a person for an offence under this section if the person proves that, in respect of the pyramid selling scheme to which the prosecution relates, all or a substantial number of transactions or negotiations for the provision of goods or services to other persons under the scheme were or were to be effected or took place or were to take place at the place of business of a promoter of the scheme or of the participant providing the goods or services.

Offences by promoters, directors, &c.

25. (1) Where an offence against this Division in relation to a pyramid selling scheme is committed by a person who is a promoter of the pyramid selling scheme, any other person who is a promoter of that scheme is guilty of an offence against this Division punishable as the first-mentioned offence is punishable.

(2) Where an offence against this Division is committed by a body corporate and the offence is committed with the consent or connivance of or facilitated by neglect on the part of a director or officer of the body corporate, the director or officer is guilty of an offence.

(3) In sub-section (2) "officer" in relation to a body corporate has the same meaning as it has in relation to a corporation in the *Companies (Victoria) Code*.

Rights of recovery.

26. (1) A person who is or has been a promoter of or participant in a pyramid selling scheme is liable to a person who, as a participant or prospective participant in that scheme, made a payment to the first-mentioned person for the amount of that payment.

(2) An action against a person for the recovery of an amount referred to in sub-section (1) may not be commenced after the expiration of the period of three years after the date on which the amount was paid to that person or, where that person is convicted of an offence against this Division, the date of the conviction of that person for the offence or, if there is more than one such conviction, the date of the last conviction, whichever is the later.

*Ct. Consumer
Affairs Act 1972,
s. 32C.*

*Ct. Consumer
Affairs Act 1972,
s. 32D.*

Power to declare certain schemes not to be pyramid selling schemes.

27. (1) The Governor in Council may, by notice in writing published in the *Government Gazette*, declare that the provisions of this Division, other than this section, do not apply or did not at a particular time apply to a specified trading scheme or to specified transactions forming part of a trading scheme or to a specified trading scheme promoted by a specified person.

*Cl. Consumer
Affairs Act 1972,
s. 32E.*

(2) A declaration under sub-section (1) may be made subject to such terms and conditions as the Governor in Council determines and specifies in the notice.

(3) The Governor in Council may, by notice in writing published in the *Government Gazette*, revoke a declaration made under sub-section (1).

(4) The revocation of a declaration under sub-section (3) does not affect the previous operation of the declaration or anything done or suffered in accordance with the declaration or a right, privilege or obligation acquired, accrued or incurred under the declaration.

Division 3—Unsolicited Credit Cards, Goods and Services

Unsolicited credit cards.

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

- (a) in pursuance of a request in writing by the person who will be under a liability to the person who issued the card in respect of the use of the card; or
- (b) in renewal or replacement of, or in substitution for—
 - (i) a credit card previously sent to the first-mentioned person in pursuance of a request in writing by the person who was under a liability to the person who issued the card previously so sent in respect of the use of that card; or
 - (ii) a credit card previously sent to the first-mentioned person and used for a purpose for which it was intended to be used.

*Cl. Trade
Practices Act
1974, s. 63A.*

(2) Sub-section (1) applies only in relation to the sending of a credit card by or on behalf of the person who issued the card.

(3) 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.

Right to payment for unsolicited goods, &c.

*Cl. Trade
Practices Act
1974, s. 64.*

29. (1) A person shall not, in trade or commerce, assert a right to payment from another person for unsolicited goods unless the first-mentioned person has reasonable cause to believe that there is a right to payment.

(2) Sub-section (1) does not apply in relation to the assertion of a right to payment from a person for unsolicited goods if that person ordinarily uses like goods in the course of the profession, business, trade or occupation of that person.

(3) A person shall not, in trade or commerce, assert a right to payment from another person for unsolicited services unless the first-mentioned person has reasonable cause to believe that there is a right to payment.

(4) Sub-section (3) does not apply in relation to the assertion of a right to payment from a person for unsolicited services if that person ordinarily uses like services in the course of the profession, business, trade or occupation of that person.

(5) A person shall not assert a right to payment from any other person of a charge for the making in a directory of an entry relating to the other person or to the profession, business, trade or occupation of the other person unless the first-mentioned person knows or has reasonable cause to believe that the other person has authorized the making of the entry.

(6) A person is not liable to make any payment to another person, and is entitled to recover against another person any payment made by the first-mentioned person to the other person in full or part satisfaction of a charge for the making of an entry in a directory unless the first-mentioned person has authorized the making of the entry.

(7) For the purposes of this section, a person shall be taken to assert a right to a payment from another person for unsolicited goods or services, or of a charge for the making of an entry in a directory, if the first-mentioned person—

- (a) makes a demand for the payment or asserts a present or prospective right to the payment;
- (b) threatens to bring any legal proceedings with a view to obtaining the payment;
- (c) places or causes to be placed the name of the other person on a list of defaulters or debtors, or threatens to do so, with a view to obtaining the payment;
- (d) invokes or causes to be invoked any other collection procedure, or threatens to do so, with a view to obtaining the payment; or

- (e) sends any invoice or other document stating the amount of the payment or setting out the price of the goods or services or the charge for the making of the entry and not stating as prominently (or more prominently) that no claim is made to the payment, or to payment of the price or charge, as the case may be.

(8) A person shall not be taken for the purposes of this section to have authorized the making of an entry in a directory unless—

- (a) a document authorizing the making of the entry has been signed by the person or by another person authorized by that person;
- (b) a copy of the document has been given to the person before the right to payment of a charge for the making of the entry is asserted; and
- (c) the document specifies—
 - (i) the name of the directory;
 - (ii) the name and address of the person publishing the directory;
 - (iii) particulars of the entry; and
 - (iv) the amount of the charge for the making of the entry or the basis on which the charge is, or is to be, calculated.

(9) For the purposes of this section, an invoice or other document purporting to have been sent by or on behalf of a person shall be deemed to have been sent by the person unless the contrary is established.

(10) In a proceeding against a person in respect of a contravention of this section—

- (a) in the case of a contravention constituted by asserting a right to payment for unsolicited goods or unsolicited services—the burden lies on the person of proving that the person had reasonable cause to believe that there was a right to payment; or
- (b) in the case of a contravention constituted by asserting a right to payment of a charge for the making of an entry in a directory—the burden lies on the person of proving that the person knew or had reasonable cause to believe that the person had authorized the making of the entry.

(11) In this section—

“**Directory**” includes any publication of a similar nature to a directory but does not include a newspaper published in good faith as a newspaper at regular intervals or a publication published, or to be published, by or under the authority of the Australian Telecommunications Commission.

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

Liability of recipient of unsolicited goods.

*Cf. Trade
Practices Act
1974, s. 65.*

30. (1) A person to whom unsolicited goods are supplied by another person, in trade or commerce, is not liable to make any payment for the goods and is not liable for the loss of or damage to the goods other than loss or damage resulting from the doing by the first-mentioned person of a wilful and unlawful act in relation to the goods during the period specified in sub-section (4).

(2) Subject to sub-section (3), where a person sends, in trade or commerce, unsolicited goods to a person—

- (a) neither the person nor any person claiming on behalf of the person is entitled after the expiration of the period specified in sub-section (4) to take action for the recovery of the goods from the person to whom the goods were sent; and
- (b) upon the expiration of that period the goods become, by force of this section, the property of the person to whom the goods were sent freed and discharged from all liens and charges of any description.

(3) Sub-section (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 sub-section (4) unreasonably refused to permit the sender or the owner of the goods to take possession of the goods;
- (b) the sender or the owner of the goods has within the 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 that person.

(4) The period referred to in the foregoing sub-sections is—

- (a) if the person who receives the unsolicited goods gives notice with respect to the goods to the sender in accordance with sub-section (5)—
 - (i) the period of one month next following the day on which the notice is given; or
 - (ii) the period of three months next following the day on which the person received the goods—
 whichever first expires; and
- (b) in any other case—the period of three months next following the day on which the person received the goods.

(5) A notice under sub-section (4) shall be in writing and shall—

- (a) state the name and address of the person who received the goods;
- (b) state the address at which possession may be taken of the goods if it is an address other than that of the person; and

(c) contain a statement to the effect that the goods are unsolicited goods.

(6) This section does not apply in relation to a person who receives unsolicited goods if the person ordinarily uses like goods in the course of the profession, business, trade or occupation of that person.

PART III.—ENFORCEMENT AND REMEDIES

Division 1—General

Interpretation.

31. A reference in this Part to a person involved in a contravention of a provision of Part II, shall be read as a reference to a person who—

Cl. Trade Practices Act 1974, s. 75B.

- (a) has aided, abetted, counselled or procured the contravention;
- (b) has induced, whether by threats or promises or otherwise, the contravention;
- (c) has been in any way, directly or indirectly, knowingly concerned in or party to, the contravention; or
- (d) has conspired with others to effect the contravention.

Offences.

32. (1) A person who contravenes a provision of this Act other than section 11 is guilty of an offence punishable on conviction—

Cl. Trade Practices Act 1974, s. 79.

- (a) in the case of a person not being a body corporate—by a fine not exceeding 100 penalty units; or
- (b) in the case of a person being a body corporate—by a fine not exceeding 500 penalty units.

(2) Where a person is convicted of two or more offences constituted by, or relating to, contraventions of the same provision of this Act, being contraventions that appear to a court to have been of the same nature or a 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), a court shall not, in respect of the first-mentioned offences, impose on the person fines that, in the aggregate, exceed the maximum fine that would be applicable in respect of one offence by that person against that provision.

(3) Where—

- (a) a person is convicted of an offence constituted by, or relating to, a contravention of a provision of this Act; and
- (b) a fine has, or fines have, previously been imposed on the person by a 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 a court to have been of the same nature to, and to have occurred at or about the same time as the first-mentioned contravention (whether or not a fine has, or fines have, also previously been imposed on the person for an offence or offences constituted by, or relating to, a contravention or contraventions of that provision that were of a different nature or occurred at a different time)—

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

Division 2—Powers of County Court

Interpretation.

33. In this Division, “Court” means the County Court.

Powers of Court.

34. (1) The Court may, on the application of—

- (a) the Minister;
- (b) the Director; or
- (c) any other person—

grant an injunction restraining a person from engaging in conduct that constitutes or would constitute—

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

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

(3) The Court may rescind or vary an injunction granted under sub-section (1) or (2).

(4) Where an application is made to the Court for the grant of an injunction restraining a person from engaging in conduct of a particular kind, being conduct referred to in sub-section (1), the Court may—

- (a) if it is satisfied that the person has engaged in conduct of that kind—grant an injunction under sub-section (1) restraining the person from engaging in conduct of that kind; or
- (b) if in the opinion of the Court it is desirable to do so—grant an interim injunction under sub-section (2) restraining the person from engaging in conduct of that kind—

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.

(5) Where an application is made to the Court for the grant of an injunction restraining a person from engaging in conduct of a particular kind, being conduct referred to in sub-section (1), the Court may—

- (a) if it appears to the Court that, in the event that an injunction is not granted, it is likely that the person will engage in conduct of that kind—grant an injunction under sub-section (1) restraining the person from engaging in conduct of that kind; or
- (b) if in the opinion of the Court it is desirable to do so—grant an interim injunction under sub-section (2) restraining the person from engaging in conduct of that kind—

whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

(6) Where the Minister or the Director makes an application to the Court for the grant of an injunction under this section, the Court shall not require the applicant or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

(7) Where—

- (a) in a case to which sub-section (6) does not apply, the Court would, but for this sub-section, require a person to give an undertaking as to damages or costs; and
- (b) the Minister or the Director gives the undertaking—

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

Special powers of Court.

35. (1) Where, on the application of the Minister or the Director, the Court is satisfied that a person has engaged in conduct constituting a contravention of a provision of Part II., the Court may make either or both of the following orders:

*Cl. Trade
Practices Act
1974, s. 80A.*

- (a) An order requiring that person or a person involved in the contravention to disclose to the public, to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information or information of such a kind as is so specified, being information that is in the possession of the person to whom the order is directed or to which that last-mentioned person has access;
- (b) An order requiring that person or a person involved in the contravention to publish, at the expense of the person, in a manner and at times specified in the order, advertisements the terms of which are specified in, or are to be determined in accordance with, the order.

(2) Where, on an application made under sub-section (1), the Court is satisfied that a contravention of a provision of Part II. has been committed, the Court shall not, in respect of that contravention, make an order or orders under sub-section (1) that the Court considers would, or would be likely to, require the expenditure by the person or persons to whom the order or orders is or are directed of an amount that exceeds, or of amounts that, in the aggregate, exceed, \$50 000.

(3) Where, on an application made under sub-section (1), the Court is satisfied that a person has committed, or been involved in, two or more contraventions of the same provision of Part II., being contraventions that appear to the Court to have been of the same nature or a substantially similar nature and to have occurred at or about the same time (whether or not the person has also committed, or been involved in, another contravention or other contraventions of that provision that was or were of a different nature or occurred at a different time), the Court shall not, in respect of the first-mentioned contraventions, make an order or orders under sub-section (1) that the Court considers would, or would be likely to, require the expenditure by the person or persons to whom the order or orders is or are directed of an amount that exceeds, or of amounts that, in the aggregate, exceed, \$50 000.

(4) Where—

- (a) on an application made under sub-section (1), the Court is satisfied that a person has committed, or been involved in, a contravention or contraventions of a provision of Part II.; and
- (b) an order has, or orders have, previously been made under sub-section (1) against the person who committed, or against a person who was involved in, that contravention or those contraventions in respect of another contravention or other contraventions of the same provision, being a contravention which, or contraventions each of which, appears to the Court to have been of the same nature as, or of a substantially similar nature to, and to have occurred at or about the same

time as, the first-mentioned contravention or contraventions (whether or not an order has, or orders have, also previously been made under sub-section (1) against any of those persons in respect of another contravention or other contraventions of that provision that was or were of a different nature or occurred at a different time)—

the Court shall not, in respect of the contravention or contraventions mentioned in paragraph (a), make an order or orders under sub-section (1) that the Court considers would be likely to require the expenditure by the person or persons to whom the order or orders is or are directed of an amount that exceeds, or of amounts that, in the aggregate, exceed, the amount (if any) by which \$50 000 is greater than the amount, or the sum of the amounts that has or have been or that the Court considers would be or be likely to be, expended in accordance with the previous order or previous orders first mentioned in paragraph (b).

Division 3—General Power of Courts

Other orders.

36. (1) Without limiting the generality of section 35, a court may, on the application of—

- (a) a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of this Act; or
- (b) the Minister or the Director in accordance with sub-section (2) on behalf of such a person or two or more such persons—

make such order or orders as the court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention 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 the person or persons.

(2) Where, in a proceeding instituted for an offence against section 32 or instituted by the Minister or the Director under section 34, a person is found to have engaged in conduct in contravention of a provision of this Act, the Minister or the Director may make application under sub-section (1) on behalf of one or more persons identified in the application who have suffered or are likely to suffer, loss or damage by such conduct, but the Minister or the Director shall not make such an application except with the consent in writing given before the application is made by the person or by each of the persons, on whose behalf the application is made.

Actions for damages.

Cf. Trade
Practices Act
1974, s. 82.

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

(2) An action under sub-section (1) may be commenced at any time within three years after the date on which the cause of action accrued.

Findings in proceedings to be evidence.

Cf. Trade
Practices Act
1974, s. 83.

38. In a proceeding against a person under section 37 or in an application under sub-section 41 (2) for an order against a person, a finding of any fact by a court made in proceedings under section 34 or 35, or for an offence against section 32, in which that person has been found to have contravened, or to have been involved in a contravention of, a provision of Part II. is *prima facie* evidence of that fact and the finding may be proved by production of a document under the seal of the court from which the finding appears.

Conduct by servants or agents of body corporate.

Cf. Trade
Practices Act
1974, s. 84.

39. (1) Where, in a proceeding under this Part in respect of any conduct engaged in by a body corporate, being conduct in relation to which a provision of Part II. applies, it is necessary to establish the intention of the body corporate, it is sufficient to show that a servant or agent of the body corporate by whom the conduct was engaged in had that intention.

(2) Any conduct engaged in on behalf of a body corporate by a director, agent or servant of the body corporate or by any other person at the direction or with the consent or agreement (whether express or implied) of a director, agent or servant of the body corporate shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

Defences.

Cf. Trade
Practices Act
1974, s. 85 (1) (c).

40. In any proceedings under this Act it is a defence if the defendant establishes that—

- (a) the contravention in respect of which the proceeding was 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
- (b) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

Other orders.

41. (1) Where, in a proceeding instituted under, or for an offence against, this Act, a court finds that a person who is a party to the proceeding 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 II., the court may, whether or not it grants an injunction under section 34 or makes an order under section 35 or 36, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in sub-section (2) of this section) if the court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

*Ci. Trade
Practices Act
1974, s. 87.*

(2) Without limiting the generality of section 34, a court may, on the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of a provision of Part II. make such order or orders as the court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in sub-section (3)) 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 the person.

(3) Where, in a proceeding instituted for an offence against section 32 or instituted by the Minister or the Director under section 34 a person is found to have engaged in conduct in contravention of a provision of Part II., the Minister or the Director may make an application under sub-section (2) on behalf of one or more persons identified in the application who have suffered, or are likely to suffer, loss or damage by such conduct, but the Minister or the Director shall not make such an application except with the consent in writing given before the application is made by the person, or by each of the persons, on whose behalf the application is made.

(4) The orders referred to in sub-sections (1) and (2) are—

- (a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;
- (b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the court thinks

fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;

- (c) an order refusing to enforce any or all of the provisions of such a contract;
- (d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage;
- (e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;
- (f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at the expense of the person, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage;
- (g) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at the expense of the person, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage; and
- (h) an order in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to execute an instrument that—
 - (i) varies, or has the effect of varying, the first-mentioned instrument; or
 - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.

(5) In sub-section (4) (h), "interest", in relation to land, has the same meaning as in section 13.

Division 4—Powers of Inspectors

Powers of inspectors.

42. (1) An inspector at any reasonable time by day or night may—
- (a) with such assistance as the inspector requires enter any premises or place which the inspector considers it necessary to enter in the administration of this Act;
 - (b) examine any part of such premises and any goods therein;

- (c) on payment or tender of a reasonable price, demand select and obtain any goods or any sample of any goods which are in or on such premises;
- (d) examine with respect to any matters under this Act any person found in such premises;
- (e) examine with respect to any matters under this Act any documents found in such premises and take copies or extracts therefrom;
- (f) with respect to any matter under this Act, require a person—
 - (i) to give whether orally or in writing such information as may be required;
 - (ii) to answer whether orally or in writing any question; and
 - (iii) to produce a document specified in the request; and
- (g) exercise such other powers as are necessary for carrying this Act into effect.

(2) Where under sub-section (1), an inspector requires information, an answer to a question or the production of a document from or by a person and that person, without reasonable excuse—

- (a) refuses or fails to reply to the request; or
- (b) furnishes information that is false or misleading in a material particular—

that person is guilty of an offence.

(3) It is a defence to proceedings for an offence under this section if the defendant proves that no information was provided of the requirement to reply to the request.

(4) In proceedings for an offence under this section, a request to a person for information, an answer to a question or production of a document sent in writing by prepaid certified mail to the address of the place of residence or business of that person last known to the person sending the request or, if the first-mentioned person is a body corporate, to the address of the registered office of the body corporate, shall in the absence of evidence to the contrary be deemed to have been duly made to the first-mentioned person and to have been received by that person at the time at which it would have been delivered in the ordinary course through the certified mail service.

Facilitation of inspection.

43. (1) The occupier of any premises or place and the agents and employees of the occupier shall provide an inspector with any facilities that are necessary or desirable to enable an entry or inspection to be made to the premises or place or to exercise or perform any other power function or duty under this Act.

*Cf. Consumer
Affairs Act 1972,
s. 65.*

(2) A person who—

- (a) wilfully delays an inspector in the exercise of any power under this Act;
- (b) who assaults or directly or indirectly intimidates or threatens or attempts to intimidate or threaten an inspector;
- (c) fails to comply with a requisition of an inspector made under any such power; or
- (d) conceals or prevents any person from appearing before or being examined by an inspector or attempts so to conceal or prevent a person—

shall be guilty of an offence.

(3) Every person who—

- (a) obstructs hinders impedes resists or opposes; or
- (b) refuses admission to any premises to—

any inspector or person assisting an inspector or other persons in the performance of anything which such inspector or other person is lawfully doing under this Act and the occupier of any premises where any such obstructing hindering impeding resisting opposing or refusing occurs shall be guilty of an offence.

Division 5—Miscellaneous

Double jeopardy.

44. Where an act or omission by a person is an offence against this Act and is also an offence against a corresponding Act of the Commonwealth or of another State or of a Territory, the person may be prosecuted and convicted under this Act in respect of that act or omission notwithstanding that the person has been convicted, in respect of that act or omission under a corresponding Act of the Commonwealth or of another State or of a Territory, but nothing in this Act renders a person liable to be punished twice in respect of the same act or omission.

Regulations.

45. The Governor in Council may make regulations for or with respect to prescribing any matter or thing authorized or required to be prescribed for the purposes of this Act.

Division 6—Repeals and Amendments

Repeal of parts of *Consumer Affairs Act 1972*.

46. Section 13 other than sub-sections (2B) and (2C) and sections 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32A, 32B, 32C, 32D, 32E and 32F of the *Consumer Affairs Act 1972* are hereby repealed.

Consequential amendment.

47. At the end of the Schedule to the *Ministry of Consumer Affairs Act 1973* there shall be inserted the following:

“*Fair Trading Act 1985*”.

NOTE

Minister's Second Reading Speech—

Legislative Assembly: 28 May 1985

Legislative Council: 16 October 1985