

Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010

No. 44, 2010

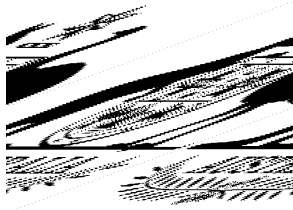
**An Act to amend the *Trade Practices Act 1974* and
the *Australian Securities and Investments
Commission Act 2001*, and for other purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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No. 44, 2010

**An Act to amend the *Trade Practices Act 1974* and
the *Australian Securities and Investments
Commission Act 2001*, and for other purposes**

[Assented to 14 April 2010]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Trade Practices Amendment
(Australian Consumer Law) Act (No. 1) 2010*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	14 April 2010
2. Schedule 1	If this Act receives the Royal Assent before 1 January 2010—1 July 2010. If this Act does not receive the Royal Assent before 1 January 2010—a single day to be fixed by Proclamation. A Proclamation must not specify a day that occurs before 1 July 2010. However, if this Act does not receive the Royal Assent before 1 January 2010 and any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	Proclamation
3. Schedule 2, Parts 1 to 6	The day after this Act receives the Royal Assent.	15 April 2010
4. Schedule 2, items 27 to 32	At the same time as the provision(s) covered by table item 2.	Proclamation
5. Schedule 2, item 40	At the same time as the provision(s) covered by table item 2. However, if Schedule 1 to the <i>Statute Stocktake (Regulatory and Other Laws) Act 2009</i> commences before that time, the provision(s) do not commence at all.	Does not commence at all

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
6. Schedule 2, item 41	The later of: (a) the same time as the provision(s) covered by table item 2; and (b) immediately after the commencement of Schedule 1 to the <i>Statute Stocktake (Regulatory and Other Laws) Act 2009</i> . However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	Proclamation
7. Schedule 2, items 42 to 74	At the same time as the provision(s) covered by table item 2.	Proclamation
8. Schedule 3, Part 1	At the same time as the provision(s) covered by table item 2.	Proclamation
9. Schedule 3, Parts 2 to 7	The day after this Act receives the Royal Assent.	15 April 2010
10. Schedule 3, Part 8	At the same time as the provision(s) covered by table item 2.	Proclamation
11. Schedule 3, Part 9	The day after this Act receives the Royal Assent.	15 April 2010
12. Schedule 4, items 1 and 2	At the same time as the provision(s) covered by table item 2.	Proclamation
13. Schedule 4, item 3	The day after this Act receives the Royal Assent.	15 April 2010
14. Schedule 4, items 4 and 5	At the same time as the provision(s) covered by table item 2.	Proclamation

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule

concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—The Australian Consumer Law

Part 1—Unfair contract terms

Trade Practices Act 1974

1 At the end of the Act

Add:

Schedule 2—The Australian Consumer Law

Note: See section 130.

Part 1—Preliminary

1 Definitions

In this Schedule:

constitution has the meaning given by the *Corporations Act 2001*.

consumer contract: see section 2(3).

interest, in relation to land, means:

- (a) a legal or equitable estate or interest in the land; or
- (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 connection with, the land.

rely on, in relation to a term of a consumer contract, includes the following:

- (a) attempt to enforce the term;
- (b) attempt to exercise a right conferred, or purportedly conferred, by the term;

- (c) assert the existence of a right conferred, or purportedly conferred, by the term.

ship has the meaning given by the *Admiralty Act 1988*.

transparent, in relation to a term of a consumer contract: see section 3(3).

unfair, in relation to a term of a consumer contract: see section 3(1).

upfront price: see section 5(2).

Part 2—Unfair contract terms

2 Unfair terms of consumer contracts

- (1) A term of a consumer contract is void if:
 - (a) the term is unfair; and
 - (b) the contract is a standard form contract.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- (3) A *consumer contract* is a contract for:
 - (a) a supply of goods or services; or
 - (b) a sale or grant of an interest in land;to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

3 Meaning of *unfair*

- (1) A term of a consumer contract is *unfair* if:
 - (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
 - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

- (2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
 - (b) the extent to which the term is transparent;
 - (c) the contract as a whole.
- (3) A term is **transparent** if the term is:
 - (a) expressed in reasonably plain language; and
 - (b) legible; and
 - (c) presented clearly; and
 - (d) readily available to any party affected by the term.
- (4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

4 Examples of unfair terms

- (1) Without limiting section 3, the following are examples of the kinds of terms of a consumer contract that may be unfair:
 - (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
 - (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
 - (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
 - (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
 - (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
 - (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
 - (g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;

- (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
 - (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
 - (j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
 - (k) a term that limits, or has the effect of limiting, one party's right to sue another party;
 - (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
 - (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
 - (n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.
- (2) Before the Governor-General makes a regulation for the purposes of subsection (1)(n) prescribing a kind of term, or a kind of effect that a term has, the Minister must take into consideration:
- (a) the detriment that a term of that kind would cause to consumers; and
 - (b) the impact on business generally of prescribing that kind of term or effect; and
 - (c) the public interest.

5 Terms that define main subject matter of consumer contracts etc. are unaffected

- (1) Section 2 does not apply to a term of a consumer contract to the extent that, but only to the extent that, the term:
- (a) defines the main subject matter of the contract; or
 - (b) sets the upfront price payable under the contract; or
 - (c) is a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory.
- (2) The *upfront price* payable under a consumer contract is the consideration that:

- (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and
- (b) is disclosed at or before the time the contract is entered into; but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

7 Standard form contracts

- (1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.
- (2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:
 - (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
 - (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
 - (c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 5(1)) in the form in which they were presented;
 - (d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 5(1);
 - (e) whether the terms of the contract (other than the terms referred to in section 5(1)) take into account the specific characteristics of another party or the particular transaction;
 - (f) any other matter prescribed by the regulations.

8 Contracts to which this Part does not apply

- (1) This Part does not apply to:
 - (a) a contract of marine salvage or towage; or
 - (b) a charterparty of a ship; or
 - (c) a contract for the carriage of goods by ship.
 - (2) Without limiting subsection (1)(c), the reference in that subsection to a contract for the carriage of goods by ship includes a reference
-

to any contract covered by a sea carriage document within the meaning of the amended Hague Rules referred to in section 7(1) of the *Carriage of Goods by Sea Act 1991*.

- (3) This Part does not apply to a contract that is the constitution of a company, managed investment scheme or other kind of body.

2 Application and transitional provisions

- (1) Part 2 of Schedule 2 to the *Trade Practices Act 1974* applies to a contract entered into on or after the commencement of this Schedule.
- (2) That Part does not apply to a contract entered into before the commencement of this Schedule. However:
- (a) if the contract is renewed on or after that commencement—that Part applies to the contract as renewed, on and from the day (the **renewal day**) on which the renewal takes effect, in relation to conduct that occurs on or after the renewal day; or
 - (b) if a term of the contract is varied on or after that commencement, and paragraph (a) has not already applied in relation to the contract—that Part applies to the term as varied, on and from the day (the **variation day**) on which the variation takes effect, in relation to conduct that occurs on or after the variation day.
- (2A) If paragraph (2)(b) applies to a term of a contract, subsection 2(2) and section 7 of Schedule 2 to the *Trade Practices Act 1974* applies to the contract.
- (3) Despite paragraphs (2)(a) and (b) and subitem (2A), that Part does not apply to a contract, or a term of a contract, to the extent that the operation of that Part would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph of the Constitution).

Part 2—Application of the Australian Consumer Law

Trade Practices Act 1974

3 Subsection 4(1)

Insert:

Australian Consumer Law means Schedule 2.

4 Subsection 4(1)

Insert:

provision, of the Australian Consumer Law, has the meaning given by section 4KB.

5 After section 4KA

Insert:

4KB References to the Australian Consumer Law etc.

- (1) A reference in this Act (other than the provisions referred to in subsection (2)) to the Australian Consumer Law is a reference to the Australian Consumer Law as applied under Division 1 of Part XI.
- (2) Subsection (1) does not apply in relation to the following provisions:
 - (a) the definitions of *Australian Consumer Law* and *provision* in subsection 4(1);
 - (b) this section;
 - (c) Part XI;
 - (d) Schedule 2.
- (3) A reference in this Act (other than in Part XI and Schedule 2) to one or more provisions of the Australian Consumer Law is a reference to that provision or those provisions as applied under Division 1 of Part XI.

4KC Contraventions of the Australian Consumer Law

Conduct is not taken, for the purposes of this Act, to contravene the Australian Consumer Law merely because of subsection 2(1) of the Australian Consumer Law.

6 After paragraph 5(1)(e)

Insert:

(ea) the Australian Consumer Law;

Note: The heading to section 5 is replaced by the heading “**Extended application of this Act to conduct outside Australia**”.

7 Paragraph 5(1)(f)

Omit “or (e)”, substitute “, (e) or (ea)”.

8 At the end of subparagraphs 6(2)(a)(i) and (ii), (2)(b)(i) and (ii) and (2)(c)(i)

Add “or”.

Note: The heading to section 6 is replaced by the heading “**Extended application of this Act to persons who are not corporations**”.

9 After paragraph 6(2)(c)

Insert:

- (ca) any reference in Part 2 of the Australian Consumer Law to a contract were, by express provision, confined to a contract made:
- (i) in the course of, or in relation to, trade or commerce between Australia and places outside Australia; or
 - (ii) in the course of, or in relation to, trade or commerce among the States; or
 - (iii) in the course of, or in relation to, trade or commerce within a Territory, between a State and a Territory or between two Territories; and

10 After subsection 6(3)

Insert:

- (3A) In addition to the effect that this Act, other than Parts IIIA, VIIA and X, has as provided by subsection (2), the provisions of Part 2

of the Australian Consumer Law have, by force of this subsection, the effect they would have if:

- (a) those provisions were, by express provision, confined in their operation to contracts for or relating to:
 - (i) the use of postal, telegraphic or telephonic services; or
 - (ii) radio or television broadcasts; and
- (b) a reference in the provisions of Part XI to a corporation included a reference to a person not being a corporation.

11 After Part X

Insert:

Part XI—The Australian Consumer Law

Division 1—Application of the Australian Consumer Law as a law of the Commonwealth

130 Application of the Australian Consumer Law in relation to corporations

The Australian Consumer Law applies as a law of the Commonwealth to the conduct of corporations.

131 Division does not apply to financial services etc.

- (1) Despite section 130, this Division does not apply to the supply, or possible supply, of services that are financial services.
- (2) Despite section 130, Part 2 of the Australian Consumer Law does not apply to, or in relation to:
 - (a) contracts that are financial products; or
 - (b) contracts for the supply, or possible supply, of services that are financial services.

132 Saving of other laws and remedies

This Division is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

Division 2—Application of the Australian Consumer Law as a law of a State or Territory

133 Definitions

In this Division:

application law means:

- (a) a law of a participating jurisdiction that applies the applied Australian Consumer Law, either with or without modifications, as a law of the participating jurisdiction; or
- (b) any regulations or other legislative instrument made under a law described in paragraph (a); or
- (c) the applied Australian Consumer Law, applying as a law of the participating jurisdiction, either with or without modifications.

applied Australian Consumer Law means (according to the context):

- (a) the text described in section 135; or
- (b) that text, applying as a law of a participating jurisdiction, either with or without modifications.

apply, in relation to the applied Australian Consumer Law, means apply the applied Australian Consumer Law by reference:

- (a) as in force from time to time; or
- (b) as in force at a particular time.

Commonwealth entity means:

- (a) an authority of the Commonwealth; or
- (b) an officer of the Commonwealth.

imposes a duty has the meaning given by section 140.

modifications includes additions, omissions and substitutions.

officer, in relation to the Commonwealth, includes the following:

- (a) a Minister;
- (b) a person who holds:
 - (i) an office established by or under an Act; or
 - (ii) an appointment made under an Act; or

- (iii) an appointment made by the Governor-General or a Minister but not under an Act;
- (c) a person who is a member or officer of an authority of the Commonwealth;
- (d) a person who is:
 - (i) in the service or employment of the Commonwealth, or of an authority of the Commonwealth; or
 - (ii) employed or engaged under an Act.

participating jurisdiction means a participating State or participating Territory.

participating State means a State that is a party to the Intergovernmental Agreement for the Australian Consumer Law and applies the applied Australian Consumer Law as a law of the State, either with or without modifications.

participating Territory means a Territory that is a party to the Intergovernmental Agreement for the Australian Consumer Law and applies the applied Australian Consumer Law as a law of the Territory, either with or without modifications.

Territory means the Australian Capital Territory or the Northern Territory.

134 Object of this Division

The object of this Division is to facilitate the application of the Australian Consumer Law by participating States and participating Territories.

135 The applied Australian Consumer Law

- (1) The applied Australian Consumer Law consists of:
 - (a) Schedule 2; and
 - (b) the remaining provisions of this Act (except sections 2A, 4KB, 5, 6 and 172), so far as they relate to Schedule 2; and
 - (c) the regulations under this Act, so far as they relate to any provision covered by paragraph (a) or (b).
- (2) For the purpose of forming part of the applied Australian Consumer Law, the provisions referred to in paragraphs (1)(b) and

(c) are to be modified as necessary to fit in with Schedule 2. In particular, references to corporations are to include references to persons who are not corporations.

136 Federal Court may exercise jurisdiction under application laws of Territories

The Federal Court may exercise jurisdiction (whether original or appellate) conferred on that Court by an application law of a Territory with respect to matters arising under the applied Australian Consumer Law.

137 Exercise of jurisdiction under cross-vesting provisions

This Division does not affect the operation of any other law of the Commonwealth, or any law of a State or Territory, relating to cross-vesting of jurisdiction.

138 Commonwealth consent to conferral of functions etc. on Commonwealth entities

- (1) An application law may confer functions or powers, or impose duties, on a Commonwealth entity for the purposes of the applied Australian Consumer Law.

Note: Section 140 sets out when such a law imposes a duty on a Commonwealth entity.

- (2) Subsection (1) does not authorise the conferral of a function or power, or the imposition of a duty, by an application law to the extent to which:
 - (a) the conferral or imposition, or the authorisation, would contravene any constitutional doctrines restricting the duties that may be imposed on the Commonwealth entity; or
 - (b) the authorisation would otherwise exceed the legislative power of the Commonwealth.
- (3) The Commonwealth entity cannot perform a duty or function, or exercise a power, under an application law unless the conferral of the function or power, or the imposition of the duty, is in accordance with an agreement between the Commonwealth and the State or Territory concerned.

139 How duty is imposed

Application

- (1) This section applies if an application law purports to impose a duty on a Commonwealth entity.

Note: Section 140 sets out when such a law imposes a duty on a Commonwealth entity.

State or Territory legislative power sufficient to support duty

- (2) The duty is taken not to be imposed by this Act (or any other law of the Commonwealth) to the extent to which:
- (a) imposing the duty is within the legislative powers of the State or Territory concerned; and
 - (b) imposing the duty by the law of the State or Territory is consistent with the constitutional doctrines restricting the duties that may be imposed on the entity.

Note: If this subsection applies, the duty will be taken to be imposed by force of the law of the State or Territory (the Commonwealth having consented under section 138 to the imposition of the duty by that law).

Commonwealth legislative power sufficient to support duty but State or Territory legislative powers are not

- (3) If, to ensure the validity of the purported imposition of the duty, it is necessary that the duty be imposed by a law of the Commonwealth (rather than by the law of the State or Territory), the duty is taken to be imposed by this Act to the extent necessary to ensure that validity.
- (4) If, because of subsection (3), this Act is taken to impose the duty, it is the intention of the Parliament to rely on all powers available to it under the Constitution to support the imposition of the duty by this Act.
- (5) The duty is taken to be imposed by this Act in accordance with subsection (3) only to the extent to which imposing the duty:
- (a) is within the legislative powers of the Commonwealth; and
 - (b) is consistent with the constitutional doctrines restricting the duties that may be imposed on the entity.
- (6) Subsections (1) to (5) do not limit section 138.

140 When an application law imposes a duty

For the purposes of this Division, an application law *imposes a duty* on a Commonwealth entity if:

- (a) the law confers a function or power on the entity; and
- (b) the circumstances in which the function or power is conferred give rise to an obligation on the entity to perform the function or to exercise the power.

141 Application laws may operate concurrently with this Act

This Act is not intended to exclude the operation of any application law, to the extent that the application law is capable of operating concurrently with this Act.

142 No doubling-up of liabilities

- (1) If:
 - (a) an act or omission is an offence against this Act and is also an offence against an application law; and
 - (b) the offender has been punished for the offence under the application law;the offender is not liable to be punished for the offence against this Act.
- (2) If a person has been ordered to pay a pecuniary penalty under an application law, the person is not liable to a pecuniary penalty under this Act in respect of the same conduct.

Division 3—Miscellaneous

143 References in instruments to the Australian Consumer Law

- (1) A reference in any instrument to the Australian Consumer Law is a reference to:
 - (a) the Australian Consumer Law as applied under Division 1; and
 - (b) the applied Australian Consumer Laws of any or all of the participating jurisdictions.

- (2) Subsection (1) has effect except so far as the contrary intention appears in the instrument or the context of the reference otherwise requires.

Schedule 2—Enforcement and remedies under the Trade Practices Act 1974

Part 1—Pecuniary penalties

Trade Practices Act 1974

1 Before section 77

Insert:

76E Pecuniary penalties—consumer protection etc.

- (1) If the Court is satisfied that a person:
- (a) has contravened any of the following provisions:
 - (i) a provision of Part IVA;
 - (ii) a provision of Division 1 or 1AAA of Part V (other than section 52);
 - (iii) subsection 65C(1) or (3), 65D(1) or 65F(8), section 65G or subsection 65Q(9), (9C) or (10) or 65R(1);
 - (iv) section 87ZN or 87ZO; or
 - (b) has attempted to contravene such a provision; or
 - (c) has aided, abetted, counselled or procured a person to contravene such a provision; or
 - (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or
 - (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
 - (f) has conspired with others to contravene such a provision;
- the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate.
- (2) In determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including:

- (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
- (b) the circumstances in which the act or omission took place; and
- (c) whether the person has previously been found by the Court in proceedings under Part VC or this Part to have engaged in any similar conduct.
- (3) The pecuniary penalty payable under subsection (1) is not to exceed the number of penalty units worked out using the following table:

Number of penalty units		
Item	For each act or omission to which this section applies that relates to ...	the number of penalty units is not to exceed ...
1	a provision of Part IVA	(a) if the person is a body corporate—10,000; or (b) if the person is not a body corporate—2,000.
2	a provision of Division 1 or 1AAA of Part V (other than section 52)	(a) if the person is a body corporate—10,000; or (b) if the person is not a body corporate—2,000.
3	subsection 65C(1) or (3) or 65D(1)	(a) if the person is a body corporate—10,000; or (b) if the person is not a body corporate—2,000.
4	subsection 65F(8)	(a) if the person is a body corporate—150; or (b) if the person is not a body corporate—30.
5	section 65G	(a) if the person is a body corporate—10,000; or (b) if the person is not a body corporate—2,000.
6	subsection 65Q(9)	(a) if the person is a body corporate—200; or (b) if the person is not a body corporate—40.

Number of penalty units		
Item	For each act or omission to which this section applies that relates to ...	the number of penalty units is not to exceed ...
7	subsection 65Q(9C)	(a) if the person is a body corporate—300; or (b) if the person is not a body corporate—60.
8	subsection 65Q(10)	(a) if the person is a body corporate—600; or (b) if the person is not a body corporate—120.
9	subsection 65R(1)	(a) if the person is a body corporate—150; or (b) if the person is not a body corporate—30.
10	section 87ZN	(a) if the person is a body corporate—150; or (b) if the person is not a body corporate—30.
11	section 87ZO	(a) if the person is a body corporate—250; or (b) if the person is not a body corporate—50.

- (4) If conduct constitutes a contravention of 2 or more provisions referred to in paragraph (1)(a):
- (a) a proceeding may be instituted under this Act against a person in relation to the contravention of any one or more of the provisions; but
 - (b) a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

76F Pecuniary penalties under section 76E and offences

- (1) The Court must not make an order under section 76E against a person in relation to either of the following matters (a *consumer protection breach*):
- (a) a contravention of a provision referred to in paragraph 76E(1)(a);

(b) conduct referred to in paragraph 76E(1)(b), (c), (d), (e) or (f) that relates to a contravention of a provision referred to in paragraph 76E(1)(a);

if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the consumer protection breach.

- (2) Proceedings for an order under section 76E against a person in relation to a consumer protection breach are stayed if:
- (a) criminal proceedings are started or have already been started against the person for an offence; and
 - (b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the consumer protection breach.

The proceedings for the order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings are dismissed.

- (3) Criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a consumer protection breach regardless of whether an order under section 76E has been made against the person in respect of the breach.

- (4) Evidence of information given, or evidence of production of documents, by an individual is not admissible in criminal proceedings against the individual if:
- (a) the individual previously gave the evidence or produced the documents in proceedings for an order under section 76E against the individual in relation to a consumer protection breach (whether or not the order was made); and
 - (b) the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the consumer protection breach.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the order.

Note: The heading to section 76 is altered by adding at the end “—**restrictive trade practices etc.**”.

2 At the end of subsection 77(1)

Add “or 76E”.

3 Subsection 77A(3) (at the end of the definition of *civil liability*)

Add “, or a pecuniary penalty under section 76E”.

4 Subparagraph 79B(a)(i)

Omit “section 76”, substitute “section 76 or 76E”.

5 At the end of section 85

Add:

- (7) If, in proceedings under section 76E against a person other than a body corporate, it appears to the Court that the person has, or may have:
- (a) engaged in conduct in contravention of a provision referred to in paragraph (1)(a) of that section; or
 - (b) engaged in conduct referred to in paragraph (1)(b), (c), (d), (e) or (f) of that section that relates to a contravention of such a provision;
- but that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or partly from liability to a pecuniary penalty under that section.

6 Paragraph 86D(1)(a)

Omit “section 76”, substitute “section 76 or 76E”.

Part 2—Disqualification orders

Trade Practices Act 1974

7 Before subsection 86E(2)

Insert:

- (1B) On application by the Commission, the Court may make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if:
- (a) the Court is satisfied that the person has committed, has attempted to commit or has been involved in a contravention of:
 - (i) a provision of Part IVA; or
 - (ii) a provision of Division 1 or 1AAA of Part V (other than section 52); or
 - (iii) subsection 65C(1) or (3), 65D(1) or 65F(8), section 65G or subsection 65Q(9), (9C) or (10) or 65R(1); or
 - (iv) a provision of Part VC; and
 - (b) the Court is satisfied that the disqualification is justified.

Note: Section 206EA of the *Corporations Act 2001* provides that a person is disqualified from managing corporations if a court order is in force under this section. That Act contains various consequences for persons so disqualified.

8 Subsection 86E(2)

Omit “or (1A)”, substitute “, (1A) or (1B)”.

9 Subsection 86E(3)

After “subsection (1)”, insert “or (1B)”.

Part 3—Substantiation notices

Trade Practices Act 1974

10 Subsection 4(1)

Insert:

substantiation notice means a notice under section 87ZL.

11 Subsection 4(1)

Insert:

substantiation notice compliance period has the meaning given by subsection 87ZN(2).

12 Before Part VII

Insert:

Part VID—Substantiation notices

87ZL Commission may require claims to be substantiated etc.

- (1) This section applies if a person has made a claim or representation promoting, or apparently intended to promote:
 - (a) a supply, or possible supply, of goods or services by a corporation; or
 - (b) a sale or grant, or possible sale or grant, of an interest in land (within the meaning of section 53A) by a corporation; or
 - (c) employment that is to be, or may be, offered by a corporation;including any such claim or representation made by the corporation.
- (2) The Commission may give the person who has made the claim or representation a written notice that requires the person to do one or more of the following:

- (a) give information and/or produce documents to the Commission that could be capable of substantiating or supporting the claim or representation;
 - (b) if the claim or representation relates to a supply, or possible supply, of goods or services by a corporation—give information and/or produce documents to the Commission that could be capable of substantiating:
 - (i) the quantities in which; and
 - (ii) the period for which;the corporation is or will be able to make such a supply (whether or not the claim or representation relates to those quantities or that period);
 - (c) give information and/or produce documents to the Commission that are of a kind specified in the notice; within 21 days after the notice is given to the person.
- (3) Any kind of information or documents that the Commission specifies under paragraph (2)(c) must be a kind that the Commission is satisfied is relevant to:
- (a) substantiating or supporting the claim or representation; or
 - (b) if the claim or representation relates to a supply, or possible supply, of goods or services by a corporation—substantiating the quantities in which, or the period for which, the corporation is or will be able to make such a supply.
- (4) The notice must:
- (a) name the person to whom it is given; and
 - (b) specify the claim or representation to which it relates; and
 - (c) explain the effect of sections 87ZM, 87ZN and 87ZO.
- (5) The notice may relate to more than one claim or representation that the person has made.
- (6) This section does not apply to a person in relation to a claim or representation made by the person if the person:
- (a) is a prescribed information provider within the meaning of section 65A; and
 - (b) made the claim or representation by publishing it on behalf of another person in the course of carrying on a business of providing information; and

- (c) does not have a commercial relationship with the other person other than for the purpose of:
 - (i) publishing claims or representations promoting, or apparently intended to promote, the other person's business or other activities; or
 - (ii) the other person supplying goods or services, or selling or granting interests in land (within the meaning of section 53A), to the person.

87ZM Extending periods for complying with substantiation notices

- (1) A person who has been given a substantiation notice may, at any time within 21 days after the notice was given to the person, apply in writing to the Commission for an extension of the period for complying with the notice.
- (2) The Commission may, by written notice given to the person, extend the period within which the person must comply with the notice.

87ZN Compliance with substantiation notices

- (1) A person who is given a substantiation notice must comply with it within the substantiation notice compliance period for the notice.
- (2) The *substantiation notice compliance period* for a substantiation notice is:
 - (a) the period of 21 days specified in the notice; or
 - (b) if the period for complying with the notice has been extended under section 87ZM—the period as so extended.
- (3) Despite subsection (1), an individual may refuse or fail to give particular information or produce a particular document in compliance with a substantiation notice on the ground that the information or production of the document might tend to incriminate the individual or to expose the individual to a penalty.

87ZO False or misleading information etc.

- (1) A person must not, in compliance or purported compliance with a substantiation notice:
 - (a) give to the Commission false or misleading information; or
-

- (b) produce to the Commission documents that contain false or misleading information.
- (2) This section does not apply to:
- (a) information that the person could not have known was false or misleading; or
 - (b) the production to the Commission of a document containing false or misleading information if the document is accompanied by a statement of the person that the information is false or misleading.

Part 4—Orders to redress loss or damage suffered by non-party consumers etc.

Trade Practices Act 1974

13 Subsection 4(1)

Insert:

enforcement proceeding means:

- (a) a proceeding for an offence against Part VC; or
- (b) a proceeding instituted under Part VI (other than section 87AAA).

14 Subsection 4(1)

Insert:

non-party consumer, in relation to conduct, means a person who is not, or has not been, a party to an enforcement proceeding in relation to the conduct.

15 Section 4L

After “section 87”, insert “, 87AAA”.

16 Section 83

After “subsection 87(1A)”, insert “or 87AAA(1)”.

17 Subsection 87(1A)

After “section 80”, insert “or 87AAA”.

18 After section 87

Insert:

87AAA Orders to redress loss or damage suffered by non-party consumers etc.

Orders

- (1) Without limiting the generality of section 80, if:
-

- (a) a person engaged in conduct (the *contravening conduct*) in contravention of a provision of Part IVA, of Division 1 or 1AAA of Part V or of Part VC; and
- (b) the contravening conduct caused, or is likely to cause, a class of persons to suffer loss or damage; and
- (c) the class includes persons who are non-party consumers in relation to the contravening conduct;

the Court may, on the application of the Commission, make such order or orders (other than an award of damages) as the Court thinks appropriate against a person referred to in subsection (2) of this section.

Note: The orders that the Court may make include all or any of the orders set out in section 87AAB.

- (2) An order under subsection (1) may be made against the person who engaged in the contravening conduct or a person involved in that conduct.
- (3) The Court must not make an order under subsection (1) unless the Court considers that the order will:
 - (a) redress, in whole or in part, the loss or damage suffered by the non-party consumers in relation to the contravening conduct; or
 - (b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-party consumers in relation to the contravening conduct.

Application for orders

- (4) An application may be made under subsection (1) even if an enforcement proceeding in relation to the contravening conduct has not been instituted.
- (5) An application under subsection (1) may be made at any time within 6 years after the day on which the cause of action that relates to the contravening conduct accrues.

Determining whether to make an order

- (6) In determining whether to make an order under subsection (1) against a person referred to in subsection (2), the Court may have regard to the conduct of the person, and of the non-party

consumers in relation to the contravening conduct, since the contravention occurred.

- (8) In determining whether to make an order under subsection (1), the Court need not make a finding about either of the following matters:
- (a) which persons are non-party consumers in relation to the contravening conduct;
 - (b) the nature of the loss or damage suffered, or likely to be suffered, by such persons.

When a non-party consumer is bound by an order etc.

- (9) If:
- (a) an order is made under subsection (1) against a person; and
 - (b) the loss or damage suffered, or likely to be suffered, by a non-party consumer in relation to the contravening conduct to which the order relates has been redressed, prevented or reduced in accordance with the order; and
 - (c) the non-party consumer has accepted the redress, prevention or reduction;
- then:
- (d) the non-party consumer is bound by the order; and
 - (e) any other order made under subsection (1) that relates to that loss or damage has no effect in relation to the non-party consumer; and
 - (f) despite any other provision of this Act or any other law of the Commonwealth, or a State or Territory, no claim, action or demand may be made or taken against the person by the non-party consumer in relation to that loss or damage.

Other

- (10) Subsection (1) has effect subject to section 87AB.

Note: Section 87AB may limit the liability, under an order made under subsection (1) of this section, of a person for his or her contravention of section 52 (which is about misleading or deceptive conduct) or involvement in such a contravention.

- (11) This section does not apply in relation to contravening conduct that occurred before the commencement of this section.

87AAB Kinds of orders that may be made to redress loss or damage suffered by non-party consumers etc.

Without limiting subsection 87AAA(1), the orders that the Court may make under that subsection against a person (the *respondent*) include all or any of the following:

- (a) an order declaring the whole or any part of a contract made between the respondent and a non-party consumer referred to in that subsection, or a collateral arrangement relating to such a contract:
 - (i) to be void; and
 - (ii) if the Court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (b) an order:
 - (i) varying such a contract or arrangement in such manner as is specified in the order; and
 - (ii) if the Court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;
- (d) an order directing the respondent to refund money or return property to a non-party consumer referred to in that subsection;
- (e) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that have been supplied under the contract or arrangement to a non-party consumer referred to in that subsection;
- (f) an order directing the respondent, at his or her own expense, to supply specified services to a non-party consumer referred to in that subsection;
- (g) an order, in relation to an instrument creating or transferring an interest in land (within the meaning of section 53A), directing the respondent 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.

19 Paragraph 87A(1)(d)

After “subsection 87(1A) or (1B)”, insert “or 87AAA(1)”.

20 Paragraph 157(1)(d)

After “subsection 87(1A)”, insert “, 87AAA(1)”.

Part 5—Infringement notices

Trade Practices Act 1974

21 Subsection 4(1)

Insert:

infringement notice means an infringement notice issued under section 87ZE.

22 Subsection 4(1)

Insert:

infringement notice compliance period has the meaning given by section 87ZJ.

23 Subsection 4(1)

Insert:

infringement notice provision means:

- (a) a provision of Part IVA; or
- (b) a provision of Division 1 or 1AAA of Part V (other than section 52, paragraph 53A(1)(c), section 54, subsection 56(1) or section 58 or 64); or
- (c) subsection 65C(1) or (3) or 65D(1) or section 65G; or
- (d) section 87ZN or 87ZO.

24 After Part VIB

Insert:

Part VIC—Infringement notices

87ZD Purpose and effect of this Part

- (1) The purpose of this Part is to provide for the issue of an infringement notice to a person for an alleged contravention of an

infringement notice provision as an alternative to proceedings for an order under section 76E.

- (2) This Part does not:
- (a) require an infringement notice to be issued to a person for an alleged contravention of an infringement notice provision; or
 - (b) affect the liability of a person to proceedings under Part VC or VI in relation to an alleged contravention of an infringement notice provision if:
 - (i) an infringement notice is not issued to the person for the alleged contravention; or
 - (ii) an infringement notice issued to a person for the alleged contravention is withdrawn under section 87ZK; or
 - (c) prevent a court from imposing a higher penalty than the penalty specified in the infringement notice if the person does not comply with the notice.

87ZE Issue of an infringement notice

- (1) If the Commission has reasonable grounds to believe that a person has contravened an infringement notice provision, the Commission may issue an infringement notice to the person.
- (2) The Commission must not issue more than one infringement notice to the person for the same alleged contravention of the infringement notice provision.
- (3) The infringement notice does not have any effect if the notice:
 - (a) is issued more than 12 months after the day on which the contravention of the infringement notice provision is alleged to have occurred; or
 - (b) relates to more than one alleged contravention of an infringement notice provision by the person.

87ZF Matters to be included in an infringement notice

An infringement notice must:

- (a) be identified by a unique number; and
- (b) state the day on which it is issued; and
- (c) state the name and address of the person to whom it is issued; and

- (d) state that it is being issued by the Commission; and
- (e) state how the Commission may be contacted; and
- (f) give details of the alleged contravention by the person, including:
 - (i) the date of the alleged contravention; and
 - (ii) the particular infringement notice provision that was allegedly contravened; and
- (g) state the maximum pecuniary penalty that the Court could order the person to pay under section 76E for the alleged contravention; and
- (h) specify the penalty that is payable in relation to the alleged contravention; and
- (i) state that the penalty is payable within the infringement notice compliance period for the notice; and
- (j) state that the penalty is payable to the Commission on behalf of the Commonwealth; and
- (k) explain how payment of the penalty is to be made; and
- (l) explain the effect of sections 87ZH, 87ZI, 87ZJ and 87ZK.

87ZG Amount of penalty

The penalty to be specified in an infringement notice that is to be issued to a person must be a pecuniary penalty equal to the number of penalty units worked out using the following table:

Number of penalty units		
Item	If the infringement notice is for an alleged contravention of ...	the number of penalty units is ...
1	a provision of Part IVA	(a) if the person is a body corporate—60; or (b) if the person is not a body corporate—12.
2	a provision of Division 1 or 1AAA of Part V (other than section 52, paragraph 53A(1)(c), section 54, subsection 56(1) or section 58 or 64)	(a) if the person is a body corporate—60; or (b) if the person is not a body corporate—12.

Number of penalty units		
Item	If the infringement notice is for an alleged contravention of ...	the number of penalty units is ...
3	subsection 65C(1) or (3) or 65D(1) or section 65G	(a) if the person is a body corporate—60; or (b) if the person is not a body corporate—12.
4	section 87ZN	(a) if the person is a body corporate—30; or (b) if the person is not a body corporate—6.
5	section 87ZO	(a) if the person is a body corporate—50; or (b) if the person is not a body corporate—10.

87ZH Effect of compliance with an infringement notice

- (1) This section applies if:
 - (a) an infringement notice for an alleged contravention of an infringement notice provision is issued to a person; and
 - (b) the person pays the penalty specified in the infringement notice within the infringement notice compliance period and in accordance with the notice; and
 - (c) the infringement notice is not withdrawn under section 87ZK.
- (2) The person is not, merely because of the payment, regarded as:
 - (a) having contravened the infringement notice provision; or
 - (b) having been convicted of an offence constituted by the same conduct that constituted the alleged contravention of the infringement notice provision.
- (3) No proceedings (whether criminal or civil) may be started or continued against the person by, or on behalf of, the Commonwealth or the Commission in relation to:
 - (a) the alleged contravention of the infringement notice provision; or
 - (b) an offence constituted by the same conduct that constituted the alleged contravention.

87ZI Effect of failure to comply with an infringement notice

If:

- (a) an infringement notice for an alleged contravention of an infringement notice provision is issued to a person; and
- (b) the person fails to pay the penalty specified in the infringement notice within the infringement notice compliance period and in accordance with the notice; and
- (c) the infringement notice is not withdrawn under section 87ZK;

the person is liable to proceedings under Part VC or VI in relation to the alleged contravention of the infringement notice provision.

87ZJ Infringement notice compliance period for infringement notice

- (1) Subject to this section, the ***infringement notice compliance period*** for an infringement notice is a period of 28 days beginning on the day after the day on which the infringement notice is issued.
- (2) The Commission may extend, by notice in writing, the infringement notice compliance period for the notice if the Commission is satisfied that it is appropriate to do so.
- (3) Only one extension may be given and the extension must not be for longer than 28 days.
- (4) Notice of the extension must be given to the person who was issued the infringement notice.
- (5) A failure to comply with subsection (4) does not affect the validity of the extension.
- (6) If the Commission extends the infringement notice compliance period for an infringement notice, a reference in this Act to the infringement notice compliance period for an infringement notice is taken to be a reference to the infringement notice compliance period as so extended.

87ZK Withdrawal of an infringement notice

Representations to the Commission

- (1) The person to whom an infringement notice has been issued for an alleged contravention of an infringement notice provision may make written representations to the Commission seeking the withdrawal of the infringement notice.
- (2) Evidence or information that the person, or a representative of the person, gives to the Commission in the course of making representations under subsection (1) is not admissible in evidence against the person or representative in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).

Withdrawal by the Commission

- (3) The Commission may, by written notice (the ***withdrawal notice***) given to a person who has been issued an infringement notice for an alleged contravention of an infringement notice provision, withdraw the infringement notice if the Commission is satisfied that it is appropriate to do so.
- (4) Subsection (3) applies whether or not the person has made representations seeking the withdrawal.

Content of withdrawal notices

- (5) The withdrawal notice must state:
 - (a) the name and address of the person; and
 - (b) the day on which the infringement notice was issued to the person; and
 - (c) that the infringement notice is withdrawn; and
 - (d) that proceedings under Part VC or VI may be started or continued against the person in relation to:
 - (i) the alleged contravention of the infringement notice provision; or
 - (ii) an offence constituted by the same conduct that constituted the alleged contravention.

Time limit for giving withdrawal notices

- (6) To be effective, the withdrawal notice must be given to the person within the infringement notice compliance period for the infringement notice.

Refunds

- (7) If the infringement notice is withdrawn after the person has paid the penalty specified in the infringement notice, the Commission must refund to the person an amount equal to the amount paid.

25 Section 87ZD

Renumber as section 87ZP.

Part 6—Public warning notices

Trade Practices Act 1974

26 After section 86D

Insert:

86DA Commission may issue a public warning notice

Contraventions

- (1) The Commission may issue to the public a written notice containing a warning about the conduct of a corporation if:
 - (a) the Commission has reasonable grounds to suspect that the conduct may constitute a contravention of a provision of Part IVA, V or VC; and
 - (b) the Commission is satisfied that one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct; and
 - (c) the Commission is satisfied that it is in the public interest to issue the notice.
- (2) Subsection (1) does not apply to the supply or possible supply, or the promotion by any means of the supply or use, of services that are financial services.

Substantiation notices

- (3) Without limiting subsection (1), if:
 - (a) a person refuses to respond to a substantiation notice given to the person, or fails to respond to the notice before the end of the substantiation notice compliance period for the notice; and
 - (b) the Commission is satisfied that it is in the public interest to issue a notice under this subsection;the Commission may issue to the public a written notice containing a warning that the person has refused or failed to respond to the substantiation notice within that period, and specifying the matter to which the substantiation notice related.

Notice is not a legislative instrument

- (4) A notice issued under subsection (1) or (3) is not a legislative instrument.

Part 7—Enforcement and remedies relating to the Australian Consumer Law

Trade Practices Act 1974

27 Subsection 4(1)

Insert:

consumer contract has the meaning given by the Australian Consumer Law.

29 Subsection 4(1) (definition of *non-party consumer*)

Repeal the definition, substitute:

non-party consumer means:

- (a) in relation to conduct referred to in subparagraph 87AAA(1)(a)(i)—a person who is not, or has not been, a party to an enforcement proceeding in relation to the conduct; and
- (b) in relation to a term of a consumer contract referred to in subparagraph 87AAA(1)(a)(ii)—a person who is not, or has not been, a party to an enforcement proceeding in relation to the term.

31 Subsection 4(1)

Insert:

rely on, in relation to a term of a consumer contract, includes the meaning given by the Australian Consumer Law.

32 Subsection 4(1)

Insert:

unfair, in relation to a term of a consumer contract, has the meaning given by the Australian Consumer Law.

40 At the end of paragraph 80(1)(a)

Add:

(iii) a provision of the Australian Consumer Law; or

Note: This item does not commence at all if Schedule 1 to the *Statute Stocktake (Regulatory and Other Laws) Act 2009* commences before items 27 to 32 of this Schedule. (See table item 5 in subsection 2(1) of this Act.)

41 Paragraph 80(1)(a)

Repeal the paragraph, substitute:

(a) a contravention of any of the following provisions:

(i) a provision of Part IV, IVA, IVB, V or VC;

(ii) a provision of the Australian Consumer Law; or

Note: This item does not commence at all if Schedule 1 to the *Statute Stocktake (Regulatory and Other Laws) Act 2009* does not commence. (See table item 6 in subsection 2(1) of this Act.)

42 At the end of paragraphs 80(1)(b) to (d)

Add “or”.

43 After subsection 80(1B)

Insert:

(1C) A reference in paragraph (1)(a) to a contravention of a provision of the Australian Consumer Law includes a reference to applying or relying on, or purporting to apply or rely on, a term of a consumer contract that the Court has declared under section 87AC to be an unfair term.

46 Paragraphs 84(1)(b) and (3)(b)

After “or VC”, insert “, or a provision of the Australian Consumer Law,”.

47 At the end of subsection 86(1)

Add “or has been instituted in relation to subsection 2(1) of the Australian Consumer Law (as applied under Division 1 of Part XI)”.

48 Subsection 86(1A)

After “or Part VA”, insert “, or a provision of the Australian Consumer Law,”.

49 Subsection 86(2)

After “of Part V”, insert “, or a provision of the Australian Consumer Law,”.

50 Paragraphs 86A(1)(b), (4)(b) and (5)(b) and 86B(1)(b)

After “of Part V”, insert “, or a provision of the Australian Consumer Law”.

56 Subsection 87(1)

After “or VC,”, insert “or of the Australian Consumer Law,”.

57 Paragraphs 87(1A)(a) and (b) and (1B)(a)

After “or VC”, insert “, or a provision of the Australian Consumer Law”.

58 Subsection 87(1C)

After “or VC”, insert “, or of a provision of the Australian Consumer Law,”.

59 After subsection 87(5)

Insert:

- (5A) A reference in this section to a contravention of a provision of the Australian Consumer Law includes a reference to applying or relying on, or purporting to apply or rely on, a term of a consumer contract that the Court has declared under section 87AC to be an unfair term.

60 Paragraph 87AAA(1)(a)

Repeal the paragraph, substitute:

- (a) a person:
- (i) engaged in conduct (the *contravening conduct*) in contravention of a provision of Part IVA, of Division 1 or 1AAA of Part V, or of Part VC; or
 - (ii) is a party to a consumer contract who is advantaged by a term (the *declared term*) of the contract in relation to which the Court has made a declaration under section 87AC; and

61 Paragraphs 87AAA(1)(b) and (c)

After “contravening conduct”, insert “or declared term”.

62 Subsection 87AAA(2)

Repeal the subsection, substitute:

- (2) An order under subsection (1) may be made against:
- (a) if subparagraph (1)(a)(i) applies—the person who engaged in the contravening conduct, or a person involved in that conduct; or
 - (b) if subparagraph (1)(a)(ii) applies—a party to the contract who is advantaged by the declared term.

63 Paragraphs 87AAA(3)(a) and (b)

After “contravening conduct”, insert “or declared term”.

64 Subsection 87AAA(4)

After “contravening conduct”, insert “or declared term”.

65 Subsection 87AAA(5)

Repeal the subsection, substitute:

- (5) An application under subsection (1) may be made at any time within 6 years after the day on which:
- (a) if subparagraph (1)(a)(i) applies—the cause of action that relates to the contravening conduct accrues; or
 - (b) if subparagraph (1)(a)(ii) applies—the declaration is made.

66 Subsection 87AAA(6)

Omit “subsection (2)”, substitute “paragraph (2)(a)”.

67 After subsection 87AAA(6)

Insert:

- (7) In determining whether to make an order under subsection (1) against a person referred to in paragraph (2)(b), the Court may have regard to the conduct of the person, and of the non-party consumers in relation to the declared term, since the declaration was made.

68 Paragraph 87AAA(8)(a)

After “contravening conduct”, insert “or declared term”.

69 Paragraph 87AAA(9)(b)

After “contravening conduct”, insert “, or declared term,”.

70 Paragraph 87A(1)(b)

After “or VC”, insert “, or of the Australian Consumer Law”.

72 Paragraph 87A(1)(d)

After “or VC”, insert “, or of the Australian Consumer Law”.

73 At the end of section 87A

Add:

- (9) A reference in paragraph (1)(b) or (d) to a contravention of a provision of the Australian Consumer Law includes a reference to applying or relying on, or purporting to apply or rely on, a term of a consumer contract that the Court has declared under section 87AC to be an unfair term.

74 After section 87AB

Insert:

87AC Declarations

- (1) The Court may, on the application of a party to a consumer contract or on the application of the Commission, declare that a term of such a contract is an unfair term.
- (1A) Subsection (1) does not apply unless the consumer contract is a standard form contract.
- (2) Subsection (1) does not limit any other power of the Court to make declarations.

Schedule 3—Amendment of corporations legislation

Part 1—Unfair contract terms

Australian Securities and Investments Commission Act 2001

1A Subsections 12AE(1) and (3)

Before “Subdivision C”, insert “Subdivision BA (sections 12BF to 12BM),”.

1 Subsection 12BA(1)

Insert:

consumer contract has the meaning given by subsection 12BF(3).

3 Subsection 12BA(1)

Insert:

rely on, in relation to a term of a consumer contract, includes the following:

- (a) attempt to enforce the term;
- (b) attempt to exercise a right conferred, or purportedly conferred, by the term;
- (c) assert the existence of a right conferred, or purportedly conferred, by the term.

4 Subsection 12BA(1)

Insert:

transparent, in relation to a term of a consumer contract, has the meaning given by subsection 12BG(3).

5 Subsection 12BA(1)

Insert:

unfair, in relation to a term of a consumer contract, has the meaning given by subsection 12BG(1).

6 Subsection 12BA(1)

Insert:

upfront price has the meaning given by subsection 12BI(2).

7 After Subdivision B of Division 2 of Part 2

Insert:

Subdivision BA—Unfair contract terms

12BF Unfair terms of consumer contracts

- (1) A term of a consumer contract is void if:
 - (a) the term is unfair; and
 - (b) the contract is a standard form contract; and
 - (c) the contract is:
 - (i) a financial product; or
 - (ii) a contract for the supply, or possible supply, of services that are financial services.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- (3) A *consumer contract* is a contract at least one of the parties to which is an individual whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for personal, domestic or household use or consumption.

12BG Meaning of *unfair*

- (1) A term of a consumer contract referred to in subsection 12BF(1) is *unfair* if:
 - (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
 - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

- (2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
 - (b) the extent to which the term is transparent;
 - (c) the contract as a whole.
- (3) A term is *transparent* if the term is:
 - (a) expressed in reasonably plain language; and
 - (b) legible; and
 - (c) presented clearly; and
 - (d) readily available to any party affected by the term.
- (4) For the purposes of paragraph (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

12BH Examples of unfair terms

- (1) Without limiting section 12BG, the following are examples of the kinds of terms of a consumer contract referred to in subsection 12BF(1) that may be unfair:
 - (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
 - (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
 - (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
 - (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
 - (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
 - (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
 - (g) a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied under the contract;

- (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
 - (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
 - (j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
 - (k) a term that limits, or has the effect of limiting, one party's right to sue another party;
 - (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
 - (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
 - (n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.
- (2) Before the Governor-General makes a regulation for the purposes of paragraph (1)(n) prescribing a kind of term, or a kind of effect that a term has, the Minister must take into consideration:
- (a) the detriment that a term of that kind would cause to consumers; and
 - (b) the impact on business generally of prescribing that kind of term or effect; and
 - (c) the public interest.

12BI Terms that define main subject matter of consumer contracts etc. are unaffected

- (1) Section 12BF does not apply to a term of a consumer contract referred to in subsection (1) of that section to the extent that, but only to the extent that, the term:
- (a) defines the main subject matter of the contract; or
 - (b) sets the upfront price payable under the contract; or
 - (c) is a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory.
- (2) The *upfront price* payable under a consumer contract referred to in subsection 12BF(1) is the consideration that:

- (a) is provided, or is to be provided, for the supply under the contract; and
 - (b) is disclosed at or before the time the contract is entered into; but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.
- (3) To avoid doubt, if a consumer contract referred to in subsection 12BF(1) is a contract under which credit is provided or is to be provided, the consideration referred to in subsection (2) of this section includes the total amount of principal that is owed under the contract.

12BK Standard form contracts

- (1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.
- (2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:
 - (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
 - (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
 - (c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in subsection 12BI(1)) in the form in which they were presented;
 - (d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in subsection 12BI(1);
 - (e) whether the terms of the contract (other than the terms referred to in subsection 12BI(1)) take into account the specific characteristics of another party or the particular transaction;
 - (f) any other matter prescribed by the regulations.

12BL Contracts to which this Part does not apply

This Part does not apply to a consumer contract that is the constitution of a company, managed investment scheme or other kind of body.

12BM Contraventions of this Subdivision etc.

Conduct is not taken, for the purposes of this Act, to contravene this Subdivision (or this Division) merely because of subsection 12BF(1).

8 Application and transitional provisions

- (1) Subdivision BA of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* applies to a contract entered into on or after the commencement of this Part of this Schedule.
 - (2) That Subdivision does not apply to a contract entered into before the commencement of this Part of this Schedule. However:
 - (a) if the contract is renewed on or after that commencement—that Subdivision applies to the contract as renewed, on and from the day (the *renewal day*) on which the renewal takes effect, in relation to conduct that occurs on or after the renewal day; or
 - (b) if a term of the contract is varied on or after that commencement, and paragraph (a) has not already applied in relation to the contract—that Subdivision applies to the term as varied, on and from the day (the *variation day*) on which the variation takes effect, in relation to conduct that occurs on or after the variation day.
 - (2A) If paragraph (2)(b) applies to a term of a contract, subsection 12BF(2) or section 12BK of the *Australian Securities and Investments Commission Act 2001* applies to the contract.
 - (3) Despite paragraphs (2)(a) and (b) and subitem (2A), that Subdivision does not apply to a contract, or a term of a contract, to the extent that the operation of that Subdivision would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph of the Constitution).
-

Part 2—Pecuniary penalties

Australian Securities and Investments Commission Act 2001

9 After section 12GB

Insert:

12GBA Pecuniary penalties

- (1) If the Court is satisfied that a person:
 - (a) has contravened a provision of Subdivision C, D or GC (other than section 12DA); or
 - (b) has attempted to contravene such a provision; or
 - (c) has aided, abetted, counselled or procured a person to contravene such a provision; or
 - (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or
 - (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
 - (f) has conspired with others to contravene such a provision;the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate.
- (2) In determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including:
 - (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
 - (b) the circumstances in which the act or omission took place; and
 - (c) whether the person has previously been found by the Court in proceedings under this Subdivision to have engaged in any similar conduct.

- (3) The pecuniary penalty payable under subsection (1) is not to exceed the number of penalty units worked out using the following table:

Number of penalty units		
Item	For each act or omission to which this section applies that relates to ...	the number of penalty units is not to exceed ...
2	a provision of Subdivision C or D (other than section 12DA)	(a) if the person is a body corporate—10,000; or (b) if the person is not a body corporate—2,000.
3	section 12GYB	(a) if the person is a body corporate—150; or (b) if the person is not a body corporate—30.
4	section 12GYC	(a) if the person is a body corporate—250; or (b) if the person is not a body corporate—50.

- (4) If conduct constitutes a contravention of 2 or more provisions referred to in paragraph (1)(a):
- (a) a proceeding may be instituted under this Act against a person in relation to the contravention of any one or more of the provisions; but
 - (b) a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

12GBB Pecuniary penalties and offences

- (1) The Court must not make an order under section 12GBA against a person in relation to either of the following matters (a **consumer protection breach**):
- (a) a contravention of a provision referred to in paragraph 12GBA(1)(a);
 - (b) conduct referred to in paragraph 12GBA(1)(b), (c), (d), (e) or (f) that relates to a contravention of a provision referred to in paragraph 12GBA(1)(a);

if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the consumer protection breach.

- (2) Proceedings for an order under section 12GBA against a person in relation to a consumer protection breach are stayed if:
- (a) criminal proceedings are started or have already been started against the person for an offence; and
 - (b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the consumer protection breach.

The proceedings for the order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings are dismissed.

- (3) Criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a consumer protection breach regardless of whether an order under section 12GBA has been made against the person in respect of the breach.
- (4) Evidence of information given, or evidence of production of documents, by an individual is not admissible in criminal proceedings against the individual if:
- (a) the individual previously gave the evidence or produced the documents in proceedings for an order under section 12GBA against the individual in relation to a consumer protection breach (whether or not the order was made); and
 - (b) the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the consumer protection breach.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the order.

12GBC Civil action for recovery of pecuniary penalties

- (1) ASIC may institute a proceeding in the Court for the recovery on behalf of the Commonwealth of a pecuniary penalty referred to in section 12GBA.
- (2) A proceeding under subsection (1) may be commenced within 6 years after the contravention.

12GBD Indemnification of officers

Officers not to be indemnified

- (1) A body corporate (the *first body*), or a body corporate related to the first body, must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against any of the following liabilities incurred as an officer of the first body:
 - (a) a liability to pay a pecuniary penalty under section 12GBA;
 - (b) legal costs incurred in defending or resisting proceedings in which the person is found to have such a liability.

Penalty: 25 penalty units.

- (2) For the purposes of subsection (1), the outcome of proceedings is the outcome of the proceedings and any appeal in relation to the proceedings.
- (3) Subsection (1) does not authorise anything that would otherwise be unlawful.

Indemnities are void

- (4) Anything that purports to indemnify a person against a liability is void to the extent that it contravenes subsection (1).

Application of this section to a person other than a body corporate

- (5) If, as a result of the operation of Part 2.4 of the *Criminal Code*, a person other than a body corporate is:
 - (a) convicted of an offence (the *relevant offence*) against subsection (1) of this section; or
 - (b) convicted of an offence (the *relevant offence*) against section 11.4 of the *Criminal Code* in relation to an offence referred to in subsection (1) of this section;the relevant offence is taken to be punishable on conviction by a fine not exceeding 5 penalty units.

10 Paragraph 12GCA(a)

Repeal the paragraph, substitute:

- (a) the Court considers that it is appropriate:

- (i) to impose a fine under section 12GB on a person (the *defendant*); or
- (ii) to order a person (the *defendant*) to pay a pecuniary penalty under section 12GBA; in respect of a contravention, or an involvement in a contravention, of this Division; and

11 Section 12GG

Omit “section 12GD”, substitute “section 12GBC, 12GD”.

12 At the end of section 12GI (after the note)

Add:

- (5) If, in proceedings under section 12GBA against a person other than a body corporate, it appears to the Court that the person has, or may have:
 - (a) engaged in conduct in contravention of a provision referred to in paragraph (1)(a) of that section; or
 - (b) engaged in conduct referred to in paragraph (1)(b), (c), (d), (e) or (f) of that section that relates to a contravention of such a provision;but that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or partly from liability to pay a pecuniary penalty under that section.

13 Subsection 12GLB(1)

Repeal the subsection, substitute:

- (1) The Court may, on application by ASIC, make an adverse publicity order in relation to a person who:
 - (a) has been ordered to pay a pecuniary penalty under section 12GBA; or
 - (b) is guilty of an offence under section 12GB.

Part 3—Disqualification orders

Australian Securities and Investments Commission Act 2001

14 Before section 12GM

Insert:

12GLD Order disqualifying a person from managing corporations

- (1) On application by ASIC, the Court may make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if:
 - (a) the Court is satisfied that the person has committed, has attempted to commit or has been involved in a contravention of a provision of Subdivision C or D (other than section 12DA); and
 - (b) the Court is satisfied that the disqualification is justified.

Note 1: Section 206EB of the *Corporations Act 2001* provides that a person is disqualified from managing corporations if a court order is in force under this section. That Act contains various consequences for persons so disqualified.

Note 2: ASIC must keep a register of persons who have been disqualified from managing corporations (see section 1274AA of the *Corporations Act 2001*).

- (2) In determining under subsection (1) whether the disqualification is justified, the Court may have regard to:
 - (a) the person's conduct in relation to the management, business or property of any corporation; and
 - (b) any other matters that the Court considers appropriate.

Corporations Act 2001

15 After section 206EA

Insert:

206EB Disqualification under the ASIC Act

A person is disqualified from managing corporations if a court order disqualifying the person from managing corporations is in force under section 12GLD of the ASIC Act.

16 Paragraph 1274AA(1)(a)

Omit “206EA, 206EAA”, substitute “206EAA, 206EA, 206EB”.

17 After paragraph 1274AA(2)(ab)

Insert:

(ac) every court order referred to in section 206EB; and

Part 4—Substantiation notices

Australian Securities and Investments Commission Act 2001

18 Subsection 12BA(1)

Insert:

substantiation notice means a notice under section 12GY.

19 Subsection 12BA(1)

Insert:

substantiation notice compliance period for a substantiation notice has the meaning given by subsection 12GYB(2).

20 Before Subdivision H of Division 2 of Part 2

Insert:

Subdivision GC—Substantiation notices

12GY ASIC may require claims to be substantiated etc.

- (1) This section applies if a person has made a claim or representation promoting, or apparently intended to promote, a supply, or possible supply, of financial services by that or any other person.
- (2) ASIC may give the person who has made the claim or representation a written notice that requires the person to do one or more of the following:
 - (a) give information and/or produce documents to ASIC that could be capable of substantiating or supporting the claim or representation;
 - (b) give information and/or produce documents to ASIC that could be capable of substantiating:
 - (i) the quantities in which; and
 - (ii) the period for which;

- the person is or will be able to make a supply to which the claim or representation relates (whether or not the claim or representation relates to those quantities or that period);
- (c) give information and/or produce documents to ASIC that are of a kind specified in the notice;
- within 21 days after the notice is given to the person.
- (3) Any kind of information or documents that ASIC specifies under paragraph (2)(c) must be a kind that ASIC is satisfied is relevant to:
- (a) substantiating or supporting the claim or representation; or
- (b) substantiating the quantities in which, or the period for which, the person is or will be able to make such a supply.
- (4) The notice must:
- (a) name the person to whom it is given; and
- (b) specify the claim or representation to which it relates; and
- (c) explain the effect of sections 12GYA, 12GYB and 12GYC.
- (5) The notice may relate to more than one claim or representation that the person has made.
- (6) This section does not apply to a person in relation to a claim or representation made by the person if the person:
- (a) is a prescribed information provider within the meaning of section 12DN; and
- (b) made the claim or representation by publishing it on behalf of another person in the course of carrying on a business of providing information; and
- (c) does not have a commercial relationship with the other person other than for the purpose of:
- (i) publishing claims or representations promoting, or apparently intended to promote, the other person's business or other activities; or
- (ii) the other person supplying financial services to the person.

12GYA Extending periods for complying with substantiation notices

- (1) A person who has been given a substantiation notice may, at any time within 21 days after the notice was given to the person, apply
-

in writing to ASIC for an extension of the period for complying with the notice.

- (2) ASIC may, by written notice given to the person, extend the period within which the person must comply with the notice.

12GYB Compliance with substantiation notices

- (1) A person who is given a substantiation notice must comply with it within the substantiation notice compliance period for the notice.
- (2) The *substantiation notice compliance period* for a substantiation notice is:
 - (a) the period of 21 days specified in the notice; or
 - (b) if the period for complying with the notice has been extended under section 12GYA—the period as so extended.
- (3) Despite subsection (1), an individual may refuse or fail to give particular information or produce a particular document in compliance with a substantiation notice on the ground that the information or production of the document might tend to incriminate the individual or to expose the individual to a penalty.

12GYC False or misleading information etc.

- (1) A person must not, in compliance or purported compliance with a substantiation notice:
 - (a) give to ASIC false or misleading information; or
 - (b) produce to ASIC documents that contain false or misleading information.
- (2) This section does not apply to:
 - (a) information that the person could not have known was false or misleading; or
 - (b) the production to ASIC of a document containing false or misleading information if the document is accompanied by a statement of the person that the information is false or misleading.

Part 5—Orders to redress loss or damage suffered by non-party consumers etc.

Australian Securities and Investments Commission Act 2001

21 Subsection 12BA(1)

Insert:

enforcement proceeding means a proceeding instituted under
Subdivision G of Division 2 of Part 2 (other than section 12GNB).

22 Subsection 12BA(1)

Insert:

non-party consumer, in relation to conduct, means a person who is
not, or has not been, a party to an enforcement proceeding in
relation to the conduct.

23 Section 12GG

After “subsection 12GM(2)”, insert “or 12GNB(1)”.

24 Subsection 12GM(2)

After “section 12GD”, insert “or 12GNB”.

25 Paragraph 12GN(1)(d)

After “subsection 12GM(2) or (3)”, insert “or 12GNB(1)”.

26 After section 12GNA

Insert:

12GNB Orders to redress loss or damage suffered by non-party consumers etc.

Orders

- (1) Without limiting the generality of section 12GD, if:
 - (a) a person engaged in conduct (the *contravening conduct*) in
contravention of a provision of Subdivision C or D; and

(b) the contravening conduct caused, or is likely to cause, a class of persons to suffer loss or damage; and

(c) the class includes persons who are non-party consumers in relation to the contravening conduct;

the Court may, on the application of ASIC, make such order or orders (other than an award of damages) as the Court thinks appropriate against a person referred to in subsection (2) of this section.

Note: The orders that the Court may make include all or any of the orders set out in section 12GNC.

- (2) An order under subsection (1) may be made against the person who engaged in the contravening conduct or a person involved in that conduct.
- (3) The Court must not make an order under subsection (1) unless the Court considers that the order will:
- (a) redress, in whole or in part, the loss or damage suffered by the non-party consumers in relation to the contravening conduct; or
 - (b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-party consumers in relation to the contravening conduct.

Application for orders

- (4) An application may be made under subsection (1) even if an enforcement proceeding in relation to the contravening conduct has not been instituted.
- (5) An application under subsection (1) may be made at any time within 6 years after the day on which the cause of action that relates to the contravening conduct accrues.

Determining whether to make an order

- (6) In determining whether to make an order under subsection (1) against a person referred to in subsection (2), the Court may have regard to the conduct of the person, and of the non-party consumers in relation to the contravening conduct, since the contravention occurred.

- (8) In determining whether to make an order under subsection (1), the Court need not make a finding about either of the following matters:
- (a) which persons are non-party consumers in relation to the contravening conduct;
 - (b) the nature of the loss or damage suffered, or likely to be suffered, by such persons.

When a non-party consumer is bound by an order etc.

- (9) If:
- (a) an order is made under subsection (1) against a person; and
 - (b) the loss or damage suffered, or likely to be suffered, by a non-party consumer in relation to the contravening conduct to which the order relates has been redressed, prevented or reduced in accordance with the order; and
 - (c) the non-party consumer has accepted the redress, prevention or reduction;
- then:
- (d) the non-party consumer is bound by the order; and
 - (e) any other order made under subsection (1) that relates to that loss or damage has no effect in relation to the non-party consumer; and
 - (f) despite any other provision of this Act or any other law of the Commonwealth, or a State or Territory, no claim, action or demand may be made or taken against the person by the non-party consumer in relation to that loss or damage.

Other

- (10) Subsection (1) has effect subject to section 12GNA.

Note: Section 12GNA may limit the liability, under an order made under subsection (1) of this section, of a person for his or her contravention of section 12DA (which is about misleading or deceptive conduct) or involvement in such a contravention.

- (11) This section does not apply in relation to contravening conduct that occurred before the commencement of this section.

12GNC Kinds of orders that may be made to redress loss or damage suffered by non-party consumers etc.

Without limiting subsection 12GNB(1), the orders that the Court may make under that subsection against a person (the *respondent*) include all or any of the following:

- (a) an order declaring the whole or any part of a contract made between the respondent and a non-party consumer referred to in that subsection, or a collateral arrangement relating to such a contract:
 - (i) to be void; and
 - (ii) if the Court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (b) an order:
 - (i) varying such a contract or arrangement in such manner as is specified in the order; and
 - (ii) if the Court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;
- (d) an order directing the respondent to refund money or return property to a non-party consumer referred to in that subsection;
- (e) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that have been supplied under the contract or arrangement to a non-party consumer referred to in that subsection;
- (f) an order directing the respondent, at his or her own expense, to supply specified services to a non-party consumer referred to in that subsection;
- (g) an order, in relation to an instrument creating or transferring an interest in land (within the meaning of section 12DC), directing the respondent 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.

27 Paragraph 12HB(1)(b)

Omit “or 12GN(1)”, insert “, 12GN(1) or 12GNB(1)”.

Part 6—Infringement notices

Australian Securities and Investments Commission Act 2001

28 Subsection 12BA(1)

Insert:

infringement notice means an infringement notice issued under section 12GXA.

29 Subsection 12BA(1)

Insert:

infringement notice compliance period for an infringement notice has the meaning given by section 12GXF.

30 Subsection 12BA(1)

Insert:

infringement notice provision means a provision of Subdivision C, D or GC (other than section 12DA, subsection 12DC(2), section 12DE, subsection 12DG(1) or section 12DI or 12DM).

31 After Subdivision GA of Division 2 of Part 2

Insert:

Subdivision GB—Infringement notices

12GX Purpose and effect of this Subdivision

- (1) The purpose of this Subdivision is to provide for the issue of an infringement notice to a person for an alleged contravention of an infringement notice provision as an alternative to proceedings for an order under section 12GBA.
- (2) This Subdivision does not:
 - (a) require an infringement notice to be issued to a person for an alleged contravention of an infringement notice provision; or

- (b) affect the liability of a person to proceedings under Subdivision G (sections 12GA to 12GO) in relation to an alleged contravention of an infringement notice provision if:
 - (i) an infringement notice is not issued to the person for the alleged contravention; or
 - (ii) an infringement notice issued to a person for the alleged contravention is withdrawn under section 12GXG; or
- (c) prevent a Court from imposing a higher penalty than the penalty specified in the infringement notice if the person does not comply with the notice.

12GXA Issue of an infringement notice

- (1) If ASIC has reasonable grounds to believe that a person has contravened an infringement notice provision, ASIC may issue an infringement notice to the person.
- (2) ASIC must not issue more than one infringement notice to the person for the same alleged contravention of the infringement notice provision.
- (3) The infringement notice does not have any effect if the notice:
 - (a) is issued more than 12 months after the day on which the contravention of the infringement notice provision is alleged to have occurred; or
 - (b) relates to more than one alleged contravention of an infringement notice provision by the person.

12GXB Matters to be included in an infringement notice

An infringement notice must:

- (a) be identified by a unique number; and
- (b) state the day on which it is issued; and
- (c) state the name and address of the person to whom it is issued; and
- (d) state that it is being issued by ASIC; and
- (e) state how ASIC may be contacted; and
- (f) give details of the alleged contravention by the person, including:
 - (i) the date of the alleged contravention; and

- (ii) the particular infringement notice provision that was allegedly contravened; and
- (g) state the maximum pecuniary penalty that the Court could order the person to pay under section 12GBA for the alleged contravention; and
- (h) specify the penalty that is payable in relation to the alleged contravention; and
- (i) state that the penalty is payable within the infringement notice compliance period for the notice; and
- (j) state that the penalty is payable to ASIC on behalf of the Commonwealth; and
- (k) explain how payment of the penalty is to be made; and
- (l) explain the effect of sections 12GXD, 12GXE, 12GXF and 12GXG.

12GXC Amount of penalty

The penalty to be specified in an infringement notice that is to be issued to a person must be a pecuniary penalty equal to the number of penalty units worked out using the following table:

Number of penalty units		
Item	If the infringement notice is for an alleged contravention of ...	the number of penalty units is ...
2	a provision of Subdivision C or D (other than section 12DA, subsection 12DC(2), section 12DE, subsection 12DG(1) or section 12DI or 12DM)	(a) if the person is a body corporate—60; or (b) if the person is not a body corporate—12.
3	section 12GYB	(a) if the person is a body corporate—30; or (b) if the person is not a body corporate—6.
4	section 12GYC	(a) if the person is a body corporate—50; or (b) if the person is not a body corporate—10.

12GXD Effect of compliance with an infringement notice

- (1) This section applies if:
 - (a) an infringement notice for an alleged contravention of an infringement notice provision is issued to a person; and
 - (b) the person pays the penalty specified in the infringement notice within the infringement notice compliance period and in accordance with the notice; and
 - (c) the infringement notice is not withdrawn under section 12GXG.
- (2) The person is not, merely because of the payment, regarded as:
 - (a) having contravened the infringement notice provision; or
 - (b) having been convicted of an offence constituted by the same conduct that constituted the alleged contravention of the infringement notice provision.
- (3) No proceedings (whether criminal or civil) may be started or continued against the person by, or on behalf of, the Commonwealth or ASIC in relation to:
 - (a) the alleged contravention of the infringement notice provision; or
 - (b) an offence constituted by the same conduct that constituted the alleged contravention.

12GXE Effect of failure to comply with an infringement notice

If:

- (a) an infringement notice for an alleged contravention of an infringement notice provision is issued to a person; and
 - (b) the person fails to pay the penalty specified in the infringement notice within the infringement notice compliance period and in accordance with the notice; and
 - (c) the infringement notice is not withdrawn under section 12GXG;
- the person is liable to proceedings under Subdivision G (sections 12GA to 12GO) in relation to the alleged contravention of the infringement notice provision.

12GXF Infringement notice compliance period for infringement notice

- (1) Subject to this section, the *infringement notice compliance period* for an infringement notice is a period of 28 days beginning on the day after the day on which the infringement notice is issued.
- (2) ASIC may extend, by notice in writing, the infringement notice compliance period for the infringement notice if ASIC is satisfied that it is appropriate to do so.
- (3) Only one extension may be given and the extension must not be for longer than 28 days.
- (4) Notice of the extension must be given to the person who was issued the infringement notice.
- (5) A failure to comply with subsection (4) does not affect the validity of the extension.
- (6) If ASIC extends the infringement notice compliance period for an infringement notice, a reference in this Act to the infringement notice compliance period for an infringement notice is taken to be a reference to the infringement notice compliance period as so extended.

12GXG Withdrawal of an infringement notice

Representations to ASIC

- (1) The person to whom an infringement notice has been issued for an alleged contravention of an infringement notice provision may make written representations to ASIC seeking the withdrawal of the infringement notice.
- (2) Evidence or information that the person, or a representative of the person, gives to ASIC in the course of making representations under subsection (1) is not admissible in evidence against the person or representative in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).

Withdrawal by ASIC

- (3) ASIC may, by written notice (the *withdrawal notice*) given to a person who has been issued an infringement notice for an alleged contravention of an infringement notice provision, withdraw the infringement notice if ASIC is satisfied that it is appropriate to do so.
- (4) Subsection (3) applies whether or not the person has made representations seeking the withdrawal.

Content of withdrawal notices

- (5) The withdrawal notice must state:
 - (a) the name and address of the person; and
 - (b) the day on which the infringement notice was issued to the person; and
 - (c) that the infringement notice is withdrawn; and
 - (d) that proceedings under Subdivision G (sections 12GA to 12GO) may be started or continued against the person in relation to:
 - (i) the alleged contravention of the infringement notice provision; or
 - (ii) an offence constituted by the same conduct that constituted the alleged contravention.

Time limit for giving withdrawal notices

- (6) To be effective, the withdrawal notice must be given to the person within the infringement notice compliance period for the infringement notice.

Refunds

- (7) If the infringement notice is withdrawn after the person has paid the penalty specified in the infringement notice, ASIC must refund to the person an amount equal to the amount paid.

Part 7—Public warning notices

Australian Securities and Investments Commission Act 2001

32 After section 12GLB

Insert:

12GLC ASIC may issue a public warning notice

Contraventions

- (1) ASIC may issue to the public a written notice containing a warning about the conduct of a person if:
 - (a) ASIC has reasonable grounds to suspect that the conduct may constitute a contravention of a provision of Subdivision C or D; and
 - (b) ASIC is satisfied that one or more other persons has suffered, or is likely to suffer, detriment as a result of the conduct; and
 - (c) ASIC is satisfied that it is in the public interest to issue the notice.

Substantiation notices

- (2) Without limiting subsection (1), if:
 - (a) a person refuses to respond to a substantiation notice given to the person, or fails to respond to the notice before the end of the substantiation notice compliance period for the notice; and
 - (b) ASIC is satisfied that it is in the public interest to issue a notice under this subsection;

ASIC may issue to the public a written notice containing a warning that the person has refused or failed to respond to the substantiation notice within that period, and specifying the matter to which the substantiation notice related.

Notice is not a legislative instrument

- (3) A notice issued under subsection (1) or (2) is not a legislative instrument.

Part 8—Enforcement and remedies relating to unfair contract terms

Australian Securities and Investments Commission Act 2001

34 Subsection 12BA(1) (definition of *non-party consumer*)

Repeal the definition, substitute:

non-party consumer means:

- (a) in relation to conduct referred to in subparagraph 12GNB(1)(a)(i)—a person who is not, or has not been, a party to an enforcement proceeding in relation to the conduct; and
- (b) in relation to a term of a consumer contract referred to in subparagraph 12GNB(1)(a)(ii)—a person who is not, or has not been, a party to an enforcement proceeding in relation to the term.

37 At the end of section 12GD

Add:

- (9) A reference in this section to a contravention of a provision of this Division includes a reference to applying or relying on, or purporting to apply or rely on, a term of a consumer contract that the Court has declared under section 12GND to be an unfair term.

42 At the end of section 12GM

Add:

- (10) A reference in this section to a contravention of a provision of this Division includes a reference to applying or relying on, or purporting to apply or rely on, a term of a consumer contract that the Court has declared under section 12GND to be an unfair term.

44 At the end of section 12GN

Add:

- (9) A reference in paragraph (1)(b) or (d) to a contravention of a provision of this Division includes a reference to applying or

relying on, or purporting to apply or rely on, a term of a consumer contract that the Court has declared under section 12GND to be an unfair term.

45 Paragraph 12GNB(1)(a)

Repeal the paragraph, substitute:

- (a) a person:
 - (i) engaged in conduct (the *contravening conduct*) in contravention of a provision of Subdivision C or D; or
 - (ii) is a party to a consumer contract who is advantaged by a term (the *declared term*) of the contract in relation to which the Court has made a declaration under section 12GND; and

46 Paragraphs 12GNB(1)(b) and (c)

After “contravening conduct”, insert “or declared term”.

47 Subsection 12GNB(2)

Repeal the subsection, substitute:

- (2) An order under subsection (1) may be made against:
 - (a) if subparagraph (1)(a)(i) applies—the person who engaged in the contravening conduct, or a person involved in that conduct; or
 - (b) if subparagraph (1)(a)(ii) applies—a party to the contract who is advantaged by the declared term.

48 Paragraphs 12GNB(3)(a) and (b)

After “contravening conduct”, insert “or declared term”.

49 Subsection 12GNB(4)

After “contravening conduct”, insert “or declared term”.

50 Subsection 12GNB(5)

Repeal the subsection, substitute:

- (5) An application under subsection (1) may be made at any time within 6 years after the day on which:
 - (a) if subparagraph (1)(a)(i) applies—the cause of action that relates to the contravening conduct accrues; or

(b) if subparagraph (1)(a)(ii) applies—the declaration is made.

51 Subsection 12GNB(6)

Omit “subsection (2)”, substitute “paragraph (2)(a)”.

52 After subsection 12GNB(6)

Insert:

- (7) In determining whether to make an order under subsection (1) against a person referred to in paragraph (2)(b), the Court may have regard to the conduct of the person, and of the non-party consumers in relation to the declared term, since the declaration was made.

53 Paragraph 12GNB(8)(a)

After “contravening conduct”, insert “or declared term”.

54 Paragraph 12GNB(9)(b)

After “contravening conduct”, insert “, or declared term,”.

55 Before section 12GO

Insert:

12GND Declarations

- (1) The Court may, on the application of a party to a consumer contract or on the application of ASIC, declare that a term of such a contract is an unfair term.
- (1A) Subsection (1) does not apply unless the consumer contract is a standard form contract that is:
- (a) a financial product; or
 - (b) a contract for the supply, or possible supply, of services that are financial services.
- (2) Subsection (1) does not limit any other power of the Court to make declarations.

Part 9—Miscellaneous

Australian Securities and Investments Commission Act 2001

57 After subsection 102(2B)

Insert:

- (2C) ASIC must not delegate a function or power under section 12GLC, or under Subdivision GB or GC of Division 2 of Part 2, to a person other than:
- (a) a member of ASIC; or
 - (b) a member of staff who is an SES employee or an acting SES employee.

Schedule 4—Miscellaneous

Administrative Decisions (Judicial Review) Act 1977

1 Paragraphs 2(e) and (f) of Schedule 3

Omit “the Schedule”, substitute “Schedule 1”.

Telecommunications (Interception and Access) Act 1979

2 Paragraph 5D(5B)(c)

Omit “the Schedule”, substitute “Schedule 1”.

Trade Practices Act 1974

3 Subsection 6(3)

Omit “1A and 1AA”, substitute “1AAA, 1AA and 1A”.

4 Section 150A (definition of *Schedule version of Part IV*)

Omit “the Schedule”, substitute “Schedule 1”.

5 Schedule (heading)

Omit “Schedule” (first occurring), substitute “Schedule 1”.

[*Minister’s second reading speech made in—
House of Representatives on 24 June 2009
Senate on 26 October 2009*]

(139/09)