

# **FAIR TRADING AMENDMENT BILL 1996**

## **EXPLANATORY NOTES**

### **GENERAL OUTLINE**

#### **Objective of the Legislation**

The objectives of the Bill are to increase consumer protection by enhancing the enforcement mechanisms and enforcement options available to the Office of Consumer Affairs, provide greater flexibility for door-to-door traders, streamline administrative procedures and repeal provisions rendered obsolete through the passage of time.

#### **Reasons for the Bill**

The *Fair Trading Act 1989* (“the Act”) was reviewed by the Office of Consumer Affairs in late 1994 as part of the former Government’s systematic review of business regulations.

The majority of the proposals for amendments to the Act contained in the Bill were identified during that review process, with most of them identified by the Office of Consumer Affairs as being necessary to facilitate more efficient and effective enforcement of the Act by that Office. Some provisions of the Act were also identified at that time as being obsolete. The amendments to the door-to-door trading provisions of the Act were developed after feedback was received during the 1994 review from a number of large door-to-door traders.

When developing the amendments contained in the Bill, consideration was also given to equivalent provisions in other jurisdictions’ fair trading legislation, including the *Trade Practices Act 1974*.

While the Office of Consumer Affairs and other Consumer Affairs agencies throughout Australia regularly receive complaints and queries about illegal pyramid selling schemes, the Office has been deluged in recent months with complaints and queries about a large number of pyramid selling schemes, including the Joker 88 and Edward L Green schemes, many of which seem to be active on the Gold and Sunshine Coasts.

As a result of this recent activity, the *Pyramid Selling Schemes (Elimination) Act 1973*, which prohibits such schemes, was reviewed and the decision made to repeal that Act and insert provisions equivalent to section 61 of the *Trade Practices Act 1974* in the Act. These amendments will bring Queensland into line with other jurisdictions, ensure that pure chain letters are prohibited by Queensland legislation for the first time and will give the Office of Consumer Affairs access to the more comprehensive enforcement mechanisms and options available under the *Fair Trading Act* when dealing with such schemes.

### **Ways in which the objectives are to be achieved**

The *Fair Trading Act 1989* is being amended—

- to insert provisions equivalent to those in section 61 (Pyramid Selling) of the *Trade Practices Act 1974*, while repealing the *Pyramid Selling Schemes (Elimination) Act 1973*;
- to give the Commissioner for Consumer Affairs the statutory power in certain circumstances to require the substantiation of representations;
- to provide that where a person is compelled to provide information to the Office of Consumer Affairs under the Act, the person cannot refuse to provide incriminating information, but any incriminating information provided will only be admissible in evidence in certain circumstances;
- to give the Commissioner the statutory power to accept enforceable undertakings;
- to give inspectors a limited power to seize goods without payment and to give owners of goods seized appeal rights;
- to make it clear it is an offence to attempt to commit certain offences against the Act;
- to increase the maximum penalties for breaches of those provisions which mirror Part V of the *Trade Practices Act 1974* so that they are equivalent to the maximum penalties imposed under that Act;
- to make it an offence to assert a right to payment for the making of an unsolicited entry in a directory, journal or magazine and to

make it clear a person asserts a right to payment if that person sends an “invoice” which does not contain a prescribed warning at the top of the first page in large type;

- to allow the chief executive to grant exemptions to traders from the door-to-door trading provisions and to exclude emergency repairs from the coverage of those provisions;
- to repeal obsolete provisions, including sections 80 and 88 of the Act; and
- to provide the Commissioner with the power to delegate his or her powers under the Act, and to provide for statutory office holders to be appointed under the *Public Service Act* when it commences.

### **Alternatives to the Bill**

The two alternatives are not to amend the *Fair Trading Act 1989* and not to repeal the *Pyramid Selling Schemes (Elimination) Act 1973*. They are not considered viable alternatives. The majority of the amendments contained in the Bill address enforcement problems encountered by the Office of Consumer Affairs on a daily basis. These amendments will allow the Office to enforce the Act in a more efficient and effective manner and will increase the enforcement options available to the Office.

Failure to repeal the *Pyramid Selling Schemes (Elimination) Act 1973* will mean that Queensland continues to be out of step with almost all other jurisdictions in its regulation of such schemes and that pure chain letters will continue to be excluded from the coverage of the current Act.

### **Administrative cost to Government**

The Bill requires the Commissioner for Consumer Affairs to keep a public register of enforceable undertakings he or she accepts under new sections 91H and 91I. While it is difficult to forecast how many enforceable undertakings may be accepted each year, it is anticipated the register could be established and maintained at a minimal cost. The Australian Competition and Consumer Commission, which has the power under section 87B of the *Trade Practices Act 1974* to accept enforceable undertakings, has advised that the cost of it maintaining a public register of those undertakings is negligible.

As applications for door-to-door trading exemptions will be vetted by departmental officers who will make recommendations to the chief executive on whether exemptions should be granted, traders requesting exemptions will be required to pay an application fee. This fee will be prescribed in the *Fair Trading Regulation 1989*. It is therefore anticipated that the processing of exemption requests will be revenue neutral for the Government.

The Bill requires the chief executive of the department to keep a public register of door-to-door trading exemptions he or she grants under new section 71A. While it is difficult to forecast how many door-to-door trading exemptions may be granted each year, only two exemption applications have ever been received under the existing exemption provisions in the *Fair Trading Act 1989*. As with the register of enforceable undertakings, it is anticipated the cost of establishing and maintaining this register would be minimal.

Members of the public wanting to search either register, or copy documents contained on them, will be required to pay a fee. These fees will be prescribed in the *Fair Trading Regulation 1989*. It is therefore anticipated that the searching of the two registers by members of the public will be revenue neutral for the Government.

The use of substantiation notices in appropriate cases should speed up investigations and may result in “savings” in inspectors’ time, leaving them free to investigate other complaints.

The ability to accept enforceable undertakings will provide the Commissioner for Consumer Affairs with greater flexibility when dealing with breaches of the Act. Further, the Commissioner and persons who give written undertakings will avoid the costs of litigation.

### **Consistency with fundamental legislative principles**

The Bill is consistent with fundamental legislative principles.

### **Consultation**

When the *Fair Trading Act 1989* was reviewed in late 1994 as part of the former Government’s review of business regulations, the Office of Consumer Affairs forwarded written requests for comments about the Act

to all those who had expressed an interest in being consulted about its review—i.e. the Queensland Consumers Association, the Bar Association and Queensland Law Society, 6 solicitors' firms, 50 industry members and associations, 3 banks, 1 building society and the Local Government Association.

Information on section 80 (shoes) was sought from the Federated Tanners' Association of Australia and Joshua Pitt Pty Ltd. Information on section 88 (refrigerators) was sought from the Child Accident Prevention Foundation of Australia, Queensland Chamber of Commerce and Industry, the Australian Gas Association, the Electrical Safety Coordination Branch of the Queensland Electricity Commission and the Petroleum and Gas Operations and Resources Branch of the then Department of Minerals and Energy.

Comments were sought from the Office of Consumer Affairs' State and Territory counterparts and the New Zealand Ministry of Consumer Affairs.

## **NOTES ON CLAUSES**

### **PART 1—PRELIMINARY**

*Clause 1* provides the short title of the Bill.

*Clause 2* provides that sections 6, 28, 29, 41 and 50 of the Bill will commence on a date to be fixed by proclamation.

### **PART 2—AMENDMENT OF FAIR TRADING ACT 1989**

*Clause 3* states that the purpose of the part is to amend the *Fair Trading Act 1989*.

*Clause 4, Subclause 1* replaces the heading of “Interpretation” with “Definitions” to more accurately reflect the contents of section 5.

*Clause 4, Subclause 2* deletes the definitions of “shoes” and “sole” in section 5 as they are no longer necessary because of the repeal of section 80 by Clause 31 of the Bill.

*Clause 4, Subclauses 2-3* delete the definitions of “assistant commissioner” and the reference to “assistant commissioner” in the definition of “inspector” in section 5, as they are no longer necessary because of the removal of all references to “Assistant Commissioner”. Assistant Commissioners, who by virtue of section 19(5) of the Act may perform the duties of the Commissioner, are no longer required as Clause 7 of the Bill inserts a new section 19A which allows the Commissioner to delegate his or her powers under the Act.

*Clause 4, Subclause 4* replaces the existing definition of “supply” in section 5 with an extended definition which includes the definition of “supply” currently contained in sections 82(4), 84(4) and 84A.

*Clause 5* amends section 5F of the Act to make it clear that only sections 99, 100 and 112, all of which provide for civil remedies, make reference to a person involved in a contravention of a provision of the Act. Criminal liability for persons involved in contraventions of provisions of the Act is set out in section 92 of the Act.

*Clause 6* inserts a new section 19 in the Act which provides that the Commissioner for Consumer Affairs, inspectors and other officers considered necessary to assist the Commissioner are to be appointed under the *Public Service Act 1996* when it commences, rather than by Governor in Council, thereby streamlining the administrative procedures for the appointment of these offices. Under clause 50 of the Bill, current office holders will be deemed to have been appointed under the *Public Service Act 1996* for the remainder of their terms of appointment.

*Clause 7* inserts a new section 19A in the Act which allows the Commissioner for Consumer Affairs to delegate his or her powers under the Act.

*Clause 8* replaces the heading “Interpretation” for section 37 with “Interpretation for div 1”.

*Clause 9* increases the maximum penalty for a breach of section 40 (400 penalty units) to 540 penalty units. This has the effect of making the

maximum penalty consistent with that imposed for a breach of section 53 of the *Trade Practices Act 1974*, which section 40 mirrors.

*Clause 10* increases the maximum penalty for a breach of section 40A(1)-(2) (400 penalty units) to 540 penalty units. This has the effect of making the maximum penalty consistent with that imposed for a breach of section 53A of the *Trade Practices Act 1974*, which section 40A mirrors.

*Clause 11* increases the maximum penalty for a breach of section 41 (400 penalty units) to 540 penalty units. This has the effect of making the maximum penalty consistent with that imposed for a breach of section 53B of the *Trade Practices Act 1974*, which section 41 mirrors.

*Clause 12* increases the maximum penalty for a breach of section 42 (400 penalty units) to 540 penalty units. This has the effect of making the maximum penalty consistent with that imposed for a breach of section 53C of the *Trade Practices Act 1974*, which section 42 mirrors.

*Clause 13* increases the maximum penalty for a breach of section 43 (400 penalty units) to 540 penalty units. This has the effect of making the maximum penalty consistent with that imposed for a breach of section 54 of the *Trade Practices Act 1974*, which section 43 mirrors.

*Clause 14* increases the maximum penalty for a breach of section 44 (400 penalty units) to 540 penalty units. This has the effect of making the maximum penalty consistent with that imposed for a breach of section 55 of the *Trade Practices Act 1974*, which section 44 mirrors.

*Clause 15* increases the maximum penalty for a breach of section 45 (400 penalty units) to 540 penalty units. This has the effect of making the maximum penalty consistent with that imposed for a breach of section 55A of the *Trade Practices Act 1974*, which section 45 mirrors.

*Clause 16* increases the maximum penalty for a breach of section 46 (400 penalty units) to 540 penalty units. This has the effect of making the maximum penalty consistent with that imposed for a breach of section 56 of the *Trade Practices Act 1974*, which section 46 mirrors.

*Clause 17* increases the maximum penalty for a breach of section 47 (400 penalty units) to 540 penalty units. This has the effect of making the maximum penalty consistent with that imposed for a breach of section 57 of the *Trade Practices Act 1974*, which section 47 mirrors.

*Clause 18* increases the maximum penalty for a breach of section 48 (400 penalty units) to 540 penalty units. This has the effect of making the

maximum penalty consistent with that imposed for a breach of section 58 of the *Trade Practices Act 1974*, which section 48 mirrors.

*Clause 19, Subclause 1* prescribes the maximum penalty for a breach of section 49(1) as 540 penalty units, making the maximum penalty consistent with that imposed for a breach of section 59 of the *Trade Practices Act 1974*, which section 49 mirrors. The *Fair Trading Amendment Act 1994* repealed section 92(2) of the Act, the general offence provision, and inserted specific penalties for particular offences. By mistake, no specific penalty was inserted for section 49(1) of the Act. This amendment corrects that mistake.

*Clause 19, Subclause 2* increases the maximum penalty for a breach of section 49(2) (400 penalty units) to 540 penalty units. This has the effect of making the maximum penalty consistent with that imposed for a breach of section 59 of the *Trade Practices Act 1974*.

*Clause 20* increases the maximum penalty for a breach of section 50 (400 penalty units) to 540 penalty units. This has the effect of making the maximum penalty consistent with that imposed for a breach of section 60 of the *Trade Practices Act 1974*, which section 50 mirrors.

*Clause 21, Subclause 1* increases the maximum penalty for a breach of section 52(1)-(3) (400 penalty units) to 540 penalty units. This has the effect of making the maximum penalty consistent with that imposed for a breach of section 64 of the *Trade Practices Act 1974*, which section 52 mirrors.

*Clause 21, Subclause 2* inserts a new section 52(5)(e) to make it clear that a person asserts a right to payment for unsolicited goods or services, or for making an entry in a directory, if that person sends an invoice or other document stating the amount of the payment, the price of the goods or services or the charge for making the entry and that document does not contain a warning statement which complies with the new section 52(5A) of the Act.

*Clause 21, Subclause 3* inserts a new section 52(5A) in the Act which requires “THIS IS A SOLICITATION, NOT AN INVOICE FOR A DEBT INCURRED BY YOU” to be printed at the top of the first page of the invoice or other document in uppercase and in a type not smaller than 18-point. This amendment is designed to prevent traders from using small print on their “invoices”, or from positioning warnings where they don’t catch readers’ eyes.



*Clause 21, Subclause 4* inserts a new definition of “directory” which provides that “directory” includes a journal, magazine or similar publication.

*Clause 21, Subclause 5* inserts a definition of “entry” in a directory, to make it clear that an entry includes an advertisement promoting a business.

*Clause 22* inserts a new Division 2A, which contains provisions equivalent to those in section 61 (Pyramid selling) of the *Trade Practices Act 1974*, in the *Fair Trading Act 1989*. Clause 51 of the Bill repeals the *Pyramid Selling Schemes (Elimination) Act 1973*. These amendments are designed to bring Queensland into line with other jurisdictions, ensure that pure chain letters are caught by the Act and to give the Office of Consumer Affairs access to the comprehensive enforcement mechanisms and options in the Act when dealing with these schemes.

The new section 55A of the Act inserts a number of definitions for the division. The definition of “benefits” picks up section 61(3)(a) of the *Trade Practices Act 1974*. For the meaning of “payments” to or for the benefit of a person, see section 55C of the Act. The definition of “promoter” of a trading scheme picks up section 61(4)(a) of the *Trade Practices Act 1974*. For the definition of “trading scheme”, see section 55B of the Act.

The new section 55B(1), which defines a “trading scheme”, is equivalent to section 61(4) of the *Trade Practices Act 1974*.

The new section 55B(2) is equivalent to section 61(5) of the *Trade Practices Act 1974*. The new section 55C of the Act is equivalent to section 61(3)(c) of the *Trade Practices Act 1974*.

The new section 55D contains the offence provisions with respect to pyramid selling schemes. Section 55D(1) of the Act is equivalent to section 61(1) of the *Trade Practices Act 1974*. The maximum penalty for a breach of section 55D(1) is 540 penalty units, which is equivalent to the penalty imposed for a breach of section 61(1) of the *Trade Practices Act 1974*.

The new section 55D(2) of the Act is equivalent to section 61(2) of the *Trade Practices Act 1974*. The maximum penalty for a breach of section 55D(2) is 540 penalty units, which is equivalent to the penalty imposed for a breach of section 61(2) of the *Trade Practices Act 1974*.

The new section 55D(3) of the Act is equivalent to section 61(2A) of the *Trade Practices Act 1974*. The maximum penalty for a breach of section

55D(3) is 540 penalty units, which is equivalent to the penalty imposed for a breach of section 61(2A) of the *Trade Practices Act 1974*.

The new section 55D(4) of the Act is equivalent to section 61(3)(b) of the *Trade Practices Act 1974*.

*Clause 23, Subclause 1* replaces the heading of “Interpretation” with “Definitions for div 4” to more accurately reflect the contents of section 57.

*Clause 23, Subclauses 2-3* correct an error in the definition of “consumer”.

*Clause 23, Subclause 4* and *Clause 24*, for ease of reference, omit the three interpretation provisions in section 57(2) and (3) and insert them as separate sections in the Act. Their meaning remains unchanged. The new section 57A is virtually identical to section 57(2)(a) of the Act. The new section 57B is virtually identical to section 57(3) of the Act. The new section 57C is virtually identical to section 57(2)(b) of the Act.

*Clause 25* omits section 58(3) of the Act, thereby removing the ability for contracts of a certain kind to be exempted by regulation from the application of Division 4 (door-to-door sales) of the Act.

*Clause 26* inserts a new section 58A which provides that Division 4 (door-to-door sales) of the Act does not apply to contracts to supply goods or services for emergency repairs to property damaged by a major incident. “Major incident” is defined to mean an accident, earthquake, fire, flood, storm or similar event. In these sorts of circumstances, because of the urgency involved, it would not be practical to require traders to apply for exemptions from the relevant provisions of the Act.

*Clause 27, Subclause 1* replaces the heading of “Definition of prescribed contract” to the meaning of “prescribed contract” to more accurately reflect the contents of section 60.

*Clause 27, Subclause 2* deletes section 60(3)(c) of the Act, thereby removing the ability for contracts of a certain kind to be declared by regulation not to be “prescribed contracts”.

*Clause 28* deletes section 62(3) of the Act and makes a consequential amendment to section 62(2), thereby ensuring that the supply of goods or services of a certain kind may not be exempted by regulation from the application of section 62(2) of the Act.

*Clause 29* inserts new sections 71A and 71B in the Act. The new section 71A allows the chief executive to grant exemptions to dealers or suppliers of goods or services from all or any of the provisions of Division 4 (door-to-door sales) for a particular contract or a particular type of contract to be entered into by those dealers or suppliers. Any such exemptions may be conditional or unconditional, and for a limited or unlimited period. Dealers or suppliers will be required to pay an application fee.

Under new section 71B, any exemptions granted by the chief executive will be required to be kept on a public register which may be searched by members of the public upon payment of the prescribed fee.

*Clause 30* replaces the heading of “Interpretation” to “Definitions for div 5” to more accurately reflect the contents of section 73.

*Clause 31* repeals Division 6, Part 3 (i.e. section 80) of the Act.

*Clause 32* deletes the definition of “supply” in section 82(4) of the Act. This definition is no longer necessary as Clause 4 of the Bill extends the definition of “supply” in section 5 of the Act to cover this situation.

*Clause 33* deletes the definition of “supply” in section 84(4) of the Act. This definition is no longer necessary as Clause 4 of the Bill extends the definition of “supply” in section 5 of the Act to cover this situation.

*Clause 34, Subclause 1* replaces the heading of “Definitions” with “Definitions for div 3” to more accurately reflect the contents of section 84A.

*Clause 34, Subclause 2* omits the definition of “supply” from section 84A. This definition is no longer necessary as Clause 4 of the Bill extends the definition of “supply” in section 5 of the Act to cover this situation.

*Clause 35* repeals Division 4, Part 4 (i.e. section 88) of the Act.

*Clause 36* renumbers Division 5, Part 4 as Division 4, Part 4 as a consequence of the current Division 4 being repealed by Clause 35 of the Bill.

*Clause 37* replaces the heading of “Division 1—Powers of inspectors” with “Division 1—powers of commissioner and inspectors”, reflecting the fact that subsequent clauses of the Bill insert new provisions giving the Commissioner for Consumer Affairs new powers.

*Clause 38* inserts a new section 88B into the Act which provides the Commissioner for Consumer Affairs with the power to ask for written

proof that supports any representations made in any statement promoting the supply of goods or services. This is similar to the power given to the Commissioner for Consumer Affairs under section 42 of the South Australian *Fair Trading Act 1987*.

The Bill requires the Commissioner to believe, on reasonable grounds, that a statement is false or misleading before he or she may issue a substantiation notice, and requires the Commissioner to include in the notice the day (at least 14 days after service) on which the notice must be responded to and a warning that it is an offence not to respond by that day unless the person has a reasonable excuse.

The Bill also provides that while it is not a reasonable excuse to fail to respond to a substantiation notice on the grounds that the information given in the response might be incriminating, any incriminating information given will not be admissible in evidence—

- in the case of an individual—in any criminal proceedings, including proceedings under the Act; and
- in the case of a body corporate—in any criminal proceedings, other than proceedings under the Act.

The provisions relating to the admissibility of incriminating information provided by a body corporate are consistent with the High Court's decision in *Environmental Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477* and the Full Federal Court's decision in *TPC v Abbco Ice Works Pty Ltd [1994] ATPR 41-342*. They are also consistent with section 155(6)(b) of the *Trade Practices Act 1974* and section 187 of the *Commonwealth Evidence Act 1995*.

*Clause 39* amends section 90 (Power to obtain information) of the Act to ensure that the admissibility of incriminating information provided under section 90 is consistent with the admissibility of incriminating information provided in response to a substantiation notice under new section 88B of the Act.

*Clause 40* inserts a new Division 1A (General powers of inspectors to seize goods), Part 5 in the Act. The new section 91A spells out the circumstances in which inspectors can seize goods and the quantities of the goods which may be seized. Before inspectors may exercise their powers under this section, they must reasonably believe that goods have been supplied in contravention of the Act, other than section 86. The seizure of

goods supplied in contravention of section 86 is already dealt with in section 87.

The new section 91B provides for the return of the seized goods to their owners in certain circumstances.

The new section 91C outlines where and how an appeal against the seizure of goods may be commenced. The new section 91D sets out hearing procedures for appeals against the seizure of goods. The new section 91E sets out the powers of the Magistrates Court when hearing such appeals. The new section 91F provides that Magistrates' decisions may be appealed against to the District Court, but only on questions of law. The new section 91G gives the court the power, in proceedings for offences for which the goods were seized, to order the forfeiture of those goods to the Crown. Where goods have been forfeited to the Crown, they may be disposed of in any way the Minister directs.

*Clause 41* inserts a new Division 1B, Part 5 into the Act. The new section 91H gives the Commissioner for Consumer Affairs the power to accept an undertaking from a person in circumstances where that person is required to give the Commissioner an undertaking as a condition of an exemption from the door-to-door trading provisions of the Act granted under new section 71A.

The new section 91I gives the Commissioner the power to accept an undertaking in circumstances where the Commissioner reasonably believes a person has contravened, or been involved in the contravention of, a provision of the Act or a code of practice. Section 91I is equivalent to section 87B of the *Trade Practices Act 1974*.

The new section 91J sets out the circumstances in which an undertaking may be varied or withdrawn.

The new section 91K sets out the orders the Court may make if satisfied a person has contravened a term of an undertaking. Of those orders, the orders in section 91K(2)(a)-(c) are equivalent to the orders available under section 87B of the *Trade Practices Act 1974*, and the orders in section 91K(d)-(e) are based on the recommendations of the Australian Law Reform Commission in its report on *Compliance with the Trade Practices Act 1974*, 1994, Report No. 68, pages 131-2. In addition to the orders the Commissioner may seek for a breach of the terms of an enforceable undertaking under section 91K, the Commissioner may also seek orders for injunctive relief under section 98 of the Act, as amended by Clause 46 of this Bill.

*Clause 42, Subclauses 1-2* inserts a heading for the current section 92(3) of the Act and renumbers section 92(3) as section 92A.

*Clause 42, Subclause 3* removes the words “or attempts to induce” from section 92(1)(c) of the Act as, with the insertion of a new section 92B (attempts to commit offences) by Clause 43 of the Bill, these words are no longer necessary.

*Clause 42, Subclause 4* amends section 92(1) of the Act so that it provides that a person who contravenes or aids, abets, counsels, procures, induces, conspires etc to contravene a provision of the Act for which a penalty is provided commits an offence against the Act. The *Fair Trading Amendment Act 1994* repealed section 92(2) of the Act, the general offence provision, and inserted specific penalties for particular offences. By mistake, section 92(1) of the Act was not amended at that time to make it clear that a person only commits an offence against the Act in circumstances where a specific penalty is provided for that offence. This amendment rectifies that oversight.

*Clause 42, Subclause 5* inserts new section 92(2)-(6) in the Act.

It is currently unclear how section 92 operates with the usual rules about parties to offences set out in section 7 of the Criminal Code. Subclause 5 is therefore intended to clarify how section 92 is to operate with section 7 of the Code. It applies rules in section 7 of the Code to the matters mentioned in section 92 that are the same as or similar to the matters dealt with by section 7. However, conspiracy is left as a separate offence, which is how it is dealt with in the Code.

New section 92(2) of the Act deems each of the persons referred to in section 92(1)(1)-(d) of the Act to have committed the offence that is the contravention of the provision and allows them to be charged with actually committing the offence.

New section 92(3) of the Act allows a person who counsels, procures or induces another person to contravene the Act to be charged with either committing the offence or with counselling, procuring or inducing the commission of the offence.

New section 92(4) of the Act provides that a conviction for counselling, procuring or inducing the commission of an offence has the same consequences as a conviction of actually committing the offence. In addition, it also provides that a conviction for conspiring to commit an

offence, has the same consequences as a conviction of actually committing the offence.

New section 92(5) of the Act clarifies that section 96(1)(b)-(d) only applies when there is a contravention of a provision of the Act. In other words, a person can only commit an offence by aiding, abetting, counselling etc a contravention that actually happens.

New section 92(6) of the Act expressly provides that section 92 of the Act is in addition to, and does not limit the application of, Chapter 2 (Parties to offences) of the Criminal Code) and section 41A (Penalty other than at end of provision) of the *Acts Interpretation Act 1954*.

*Clause 43* inserts a new section 92B(1) which makes it clear that it is an offence to attempt to commit the offences against the Act set out in section 92B(2). Section 92B(3) applies section 4 (Attempts to commit offences) of the Criminal Code to section 92B(1) of the Act. Section 92B(4) is designed to deal with any difficulties a Court may experience in deciding whether a person has committed an offence or only attempted it and is generally consistent with section 583(1) of the Criminal Code.

*Clause 44* omits section 94(4)(c) of the Act which provides that should the prosecution elect to prosecute an offence against the Act on indictment, the maximum term of imprisonment to which a person may be sentenced for an offence against the Act is one year.

The original section 94(4)(c) of the Act provided that if an offence was prosecuted on indictment, then section 19(6) of the Criminal Code was to be read as if the longest term for which a person might be sentenced to be imprisoned without fine for any offence against the Act was 12 months. Under section 19(6) of the Criminal Code, a person sentenced on conviction upon indictment to pay a fine could be imprisoned until the fine was paid, in addition to any other punishment to which he or she was sentenced, but the term of imprisonment for non-payment of the fine could not exceed two years.

Section 19 of the Criminal Code was repealed by the *Penalties and Sentences Act 1992*. The *Statute Law (Miscellaneous Provisions) (No.2) Act 1992* subsequently replaced the original section 94(4)(c) in the Act with the current section 94(4)(c).

The current section 94(4)(c) is considered ineffective as a contravention of the Act does not render a person liable to imprisonment and as the

*Penalties and Sentences Act 1992* does not contain a provision corresponding to the repealed section 19(6) of the Criminal Code. By comparison, section 94(5) of the Act provides that the maximum term of imprisonment a Court may order in default of payment of a penalty imposed under the Act is 1 year. Section 94(4)(c) of the Act is therefore considered obsolete.

*Clause 45* inserts a new section 96(2) in the Act which provides that it is a defence to a prosecution under section 96 for a director or member of a body corporate's governing body to prove that incriminating information was obtained from the body corporate under section 88B or 90 of the Act. This amendment is considered necessary because of the new section 88B(5)-(6) inserted by clause 38 of the Bill and the consequential amendments to section 90(5)-(6) made by clause 39 of the Bill.

Section 96 of the Act provides that if a body corporate commits an offence, each director or member of the body corporate's governing body is taken to have committed the offence and is liable to be proceeded against and punished accordingly. As the new section 88B and the amended section 90 of the Act will compel a body corporate to provide incriminating information which may be used against that body corporate in criminal proceedings under the Act, the effect of section 96 would be to leave the directors or members of a body corporate's governing body similarly exposed to criminal prosecution on the basis of that incriminating information. The insertion of a new section 96(2) in the Act is therefore considered necessary to ensure compliance with fundamental legislative principles.

*Clause 46* amends section 98(2)(a)-(f) and (4) of the Act to provide the Court with the statutory power to provide injunctive relief for breaches of a term of an undertaking given under the new section 91H inserted by Clause 41 of the Bill.

*Clause 47* removes the reference to "assistant commissioner" in section 105(a) of the Act. Assistant Commissioners, who by virtue of section 19(5) of the Act may perform the duties of the Commissioner, are no longer required as Clause 7 of the Bill inserts a new section 19A which allows the Commissioner to delegate his or her powers under the Act.

*Clause 48* removes the reference to "assistant commissioner" in section 109(1)(a) of the Act. Assistant Commissioners, who by virtue of section 19(5) of the Act may perform the duties of the Commissioner, are no



longer required as Clause 7 of the Bill inserts a new section 19A which allows the Commissioner to delegate his or her powers under the Act.

*Clause 49* removes the reference to “assistant commissioner” in section 110(2)(a) of the Act. Assistant Commissioners, who by virtue of section 19(5) of the Act may perform the duties of the Commissioner, are no longer required as Clause 7 of the Bill inserts a new section 19A which allows the Commissioner to delegate his or her powers under the Act.

*Clause 50* deems the Commissioner for Consumer Affairs, inspectors and other officers currently appointed under the Act to have been appointed under the *Public Service Act 1996* for the remainder of their terms of appointment.

### **PART 3—REPEAL**

*Clause 51* repeals the *Pyramid Selling Schemes (Elimination) Act 1973* which will be replaced by new sections 55A-D inserted by Clause 23 of the Bill.