

Article Information

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New Year - New consumer disclosure obligations in New South Wales - Disclosure of prejudicial terms

Whilst new consumer disclosure obligations in the Fair Trading Act 1987 (NSW) came into effect on 1 July 2020, Fair Trading took an educational approach to compliance until the end of 2020. Now that this transitional period has expired, in the first of two insights, Sarah Johnson reviews businesses' key obligations under the changes.

Under the amendments to the *Fair Trading Act 1987* (NSW) (**Act**), businesses must take reasonable steps to make consumers aware of the substance and effect of any term or condition of sale that may substantially prejudice their interests.

The term "consumer" encompasses a wide range of customers. The Act provides that the term has the meaning given in the Australian Consumer Law, which provides that a person will be taken to have acquired the goods as a "consumer" if the amount paid or payable for the goods or services:

1. does not exceed \$40,000; or
2. exceeds \$40,000 but the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption,

but does not extend to any person acquiring any goods for the purpose of re-supply or in the course of production, manufacture, repair or treating other goods or fixtures on land.

Specifically, both individuals and businesses fall within the definition of "consumer" if the above criteria is met. In addition, the recently passed *Treasury Laws Amendment (Acquisition as Consumer - Financial Thresholds) Regulations 2020* has amended the definition of "consumer" by increasing the monetary threshold from \$40,000 to \$100,000. This amendment will commence on 1 July 2021.

Section 47A(2) of the Act specifically deems that the following provisions "may substantially prejudice the interests of the consumer":

1. terms excluding the liability of the supplier;
2. terms providing that the consumer is liable for damage to goods that are delivered;
3. terms permitting the supplier to provide data about the consumer or provided by the consumer to a third party in a form that may enable the third party to identify the consumer; and
4. terms requiring the consumer to pay an exit fee, balloon payment or similar payment.

The list above is not exhaustive - any term that substantially prejudices the interests of consumers must be disclosed. There is no definition of "substantially prejudice" in the Act.

The disclosure must be made before the business supplies the goods or services, that is, at the time the consumer signs the contract, makes a payment or otherwise commits to the supply of the goods and/or services.

Guidance issued by NSW Fair Trading provides that disclosures should be "clear, upfront and automatic", that is, the disclosure should be easily understood by consumers, not require the consumer to seek out the information themselves and comprise a standard part of each transaction.

The above requirements apply to conduct both in and outside of New South Wales that:

- is in connection with goods or services supplied in New South Wales;
- affects a person in New South Wales; or
- results in loss or damage in New South Wales.

In particular, the requirements will apply to any supply of goods or services to consumers in New South Wales, including online and from interstate.

Failure to comply with the above requirements attracts a maximum financial penalty of \$110,000 for corporations and \$22,000 for individuals. The Court also has other broad powers under the Act, including to order the supplier to compensate the consumer for any loss or damage they have suffered. In addition, NSW Fair Trading can issue a penalty notice of \$1,100 per offence for a corporation and \$550 per offence for an individual.

If you would like advice regarding your disclosure obligations under these provisions of the Fair Trading Act, please contact [Sarah Johnson](#).

To read about New Disclosure Requirements for Intermediary Arrangements under the Fair Trading Act 1987 (NSW) [click here](#)