

Article Information

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New Year - New consumer disclosure obligations in New South Wales - Disclosure of Intermediary Arrangements

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 second of two insights, Sarah Johnson reviews businesses' key obligations under the changes.

Under the amendments to the *Fair Trading Act 1987* (NSW) (**Act**), intermediaries must take reasonable steps to ensure consumers are aware of the existence of any commission or referral arrangement that provides for the intermediary to receive a financial incentive.

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 47B of the Act provides that an "intermediary" is a person who, under an arrangement that provides for a financial incentive, arranges for the supply of goods or services from another supplier or as an agent or refers consumers to another supplier of goods or services. "Financial incentive" is defined under the same section as a commission or referral fee or any other payment prescribed by regulations made under the Act.

Arrangements may be formal and recorded in a written contract or may be verbal.

NSW Fair Trading Guidance on these disclosure obligations lists common types of intermediaries as agents (such as real estate agents and travel agents), brokers including mortgage brokers and persons who receive referral fees, spotter's fees or finder fees (such as an aggregator website).

The disclosure must be made before the intermediary acts under the arrangement in which they receive the commission or referral fee. The Guidance makes it clear that intermediaries are not required to disclose the nature or value of the financial incentive.

The Guidance 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 commission or referral arrangements in respect of consumers in New South Wales, including transactions occurring online and where the one of the parties to the arrangement is 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 Prejudicial Terms under the Fair Trading Act 1987 (NSW) [click here](#)