

South Australia



FAIR TRADING (MISCELLANEOUS) AMENDMENT ACT 1996

No. 64 of 1996

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ANNO QUADRAGESIMO QUINTO

ELIZABETHAE II REGINAE

A.D. 1996

No. 64 of 1996

An Act to amend the Fair Trading Act 1987.

[Assented to 15 August 1996]

The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Fair Trading (Miscellaneous) Amendment Act 1996*.
- (2) The *Fair Trading Act 1987* is referred to in this Act as "the principal Act".

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Amendment of s. 8—Functions of the Commissioner

3. Section 8 of the principal Act is amended by inserting after paragraph (h) of subsection (1) the following paragraph:

(ha) to license and register traders under other Acts;

Amendment of s. 14—Application

4. Section 14 of the principal Act is amended by striking out paragraph (b) of subsection (2) and substituting the following paragraph:

(b) if an invitation arises from a communication (other than a communication by way of printed or written material or an advertisement referred to in paragraph (a)) initiated by the supplier or dealer, or a person acting on behalf of the supplier or dealer, the invitation is to be regarded as having been solicited;

or

- (c) if—
- (i) an invitation results from the delivery or return of one or more tickets or forms that have been distributed, published or otherwise made available by or on behalf of the supplier or dealer;
- and
- (ii) the delivery or return of the tickets or forms is a condition, or one of a number of conditions, compliance with which gives rise, or apparently gives rise, to an entitlement, chance or opportunity to receive a prize, gift or other benefit,
- the invitation is to be regarded as having been solicited.

Substitution of Part IX

5. Part IX of the principal Act is repealed and the following Part is substituted:

PART IX THIRD-PARTY TRADING SCHEMES

Interpretation

44. In this Part—

"**approved third-party trading scheme**" means a third-party trading scheme in relation to which a notice has been given under section 45;

"**prohibited third-party trading scheme**" means a third-party trading scheme that is the subject of a declaration under section 45A;

"**third-party trading scheme**" means a scheme or arrangement under which the acquisition of goods or services by a consumer from a supplier is a condition, or one of a number of conditions, compliance with which gives rise, or apparently gives rise, to an entitlement to a benefit from a third party in the form of goods or services or some discount, concession or advantage in connection with the acquisition of goods or services.

Power of Minister to approve third-party trading schemes

45. (1) The Minister may, on application, give notice in writing that a specified third-party trading scheme is an approved third-party trading scheme.

(2) The Minister must not approve a third-party trading scheme under this section unless satisfied that the scheme is genuine, reasonable and not contrary to the interests of consumers.

(3) An approval under this section may be given subject to such conditions as the Minister thinks fit and specifies in the notice to the applicant.

(4) An application under this section must be supported by such evidence as the Minister may require.

Power of Minister to prohibit third-party trading schemes

45A. (1) The Commissioner may recommend to the Minister that a third-party trading scheme be declared to be a prohibited third-party trading scheme if—

(a) the scheme is not an approved third-party trading scheme and the Commissioner is of the opinion that the scheme is not genuine and reasonable or is contrary to the interests of consumers;

or

(b) in the case of an approved third-party trading scheme—a condition of the approval has been contravened or not complied with.

(2) The Minister may, on the recommendation of the Commissioner, by notice published in the *Gazette*, declare a third-party trading scheme to be a prohibited third-party trading scheme.

(3) The Minister may, by notice published in the *Gazette*, revoke a declaration under this section.

Offences

45B. A person who—

(a) acts as a promoter of a prohibited third-party trading scheme;

(b) as a party to a prohibited third-party trading scheme, supplies goods or services;

or

(c) publishes an advertisement relating to a prohibited third-party trading scheme or causes such an advertisement to be published,

is guilty of an offence.

Penalty: \$5 000.

Regulations

45C. The Governor may make regulations prescribing codes of practice to be complied with by persons who act as promoters of third-party trading schemes or supply goods or services as parties to such schemes.

Substitution of heading to Part XI Division II

6. The heading to Part XI Division II of the principal Act is repealed and the following heading is substituted:

DIVISION II—ASSURANCES AND ENFORCEMENT ORDERS.**Substitution of s. 79**

7. Section 79 of the principal Act is repealed and the following section is substituted:

Assurances

79. (1) The Commissioner may accept an assurance given by a trader as to the trader's conduct.

(2) If it appears to the Commissioner that a trader has engaged in—

(a) conduct that constitutes a contravention of, or failure to comply with, a provision of this Act or a related Act;

or

(b) conduct that constitutes grounds for disciplinary action against the trader,

the Commissioner may seek an assurance from the trader that the trader will refrain from engaging in such conduct.

(3) An assurance under this section must be in writing.

(4) A trader may, with the consent of the Commissioner, withdraw or vary an assurance given under subsection (1) at any time.

(5) If the Commissioner accepts an assurance, the Commissioner must not proceed against the trader in respect of the conduct specified in the assurance, unless it appears to the Commissioner that the trader has acted contrary to, or has failed to comply with, the assurance.

Substitution of s. 82

8. Section 82 of the principal Act is repealed and the following section is substituted:

Enforcement orders

82. (1) If the District Court is satisfied, on the application of the Commissioner, that a trader has in the course of business acted contrary to, or failed to comply with, an assurance accepted by the Commissioner, the Court may make any or all of the following orders:

(a) an order prohibiting the trader from engaging in specified conduct;

(b) an order directing the trader to take specified action to comply with the assurance;

(c) an order directing the trader to pay to the Crown an amount up to the amount of any financial benefit that the trader has obtained directly or indirectly and that is reasonably attributable to the breach of, or non-compliance with, the assurance;

(d) any order that the Court considers appropriate directing the trader to compensate any person who has suffered loss or damage as a result of the breach of, or non-compliance with, the assurance;

(e) any other order that the Court considers appropriate.

(2) The Court may make an interim order under subsection (1)(a) pending final determination of the application.

(3) The Court may, on the application of the Commissioner or a trader, vary or discharge an order under subsection (1)(a).

(4) An order under subsection (1)(a) may be made subject to such conditions as the Court thinks fit.

(5) The Court must not make an order under this section (other than an interim order) unless satisfied on the balance of probabilities that proper grounds for the order have been established.

Insertion of ss. 91A and 91B

9. The following sections are inserted in Part XII of the principal Act before section 92:

Public warning statements

91A. (1) The Minister or the Commissioner may, if satisfied that it is in the public interest to do so, make a public statement identifying and giving warnings or information about any of the following:

- (a) goods that are unsatisfactory or dangerous and persons who supply those goods;
- (b) services supplied in an unsatisfactory manner and persons who supply those services;
- (c) unfair business practices and persons who engage in those practices;
- (d) any other matter that adversely affects or may adversely affect the interests of persons in connection with the acquisition by them of goods or services from suppliers.

(2) A statement under subsection (1) may identify particular goods, services, business practices and persons.

Immunity from liability

91B. (1) The Minister, the Commissioner or an authorized officer incurs no personal liability for an honest act or omission in the exercise or discharge, or purported exercise or discharge, of a power, function or duty under this Act.

(2) Subject to subsection (3), a liability that would, but for subsection (1), lie against a person lies instead against the Crown.

(3) The Crown incurs no liability for a statement made by the Minister or the Commissioner in good faith in the exercise or purported exercise of powers under section 91A.

(4) No liability is incurred by a person for publishing in good faith—

- (a) a statement referred to in subsection (3);
- or
- (b) a fair report or summary of such a statement.

Amendment of s. 97—Regulations

10. Section 97 of the principal Act is amended by striking out from subsection (3) "this section" and substituting "this Act".

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

E. J. NEAL Governor