

SOUTH AUSTRALIA

FAIR TRADING ACT 1987

*This Act is reprinted pursuant to the Acts Republication Act 1967 and incorporates all amendments in force as at **10 March 1997**.*

It should be noted that the Act was not revised (for obsolete references, etc.) by the Commissioner of Statute Revision prior to the publication of this reprint.

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FAIR TRADING ACT 1987

being

Fair Trading Act 1987 No. 42 of 1987
[Assented to 30 April 1987]¹

as amended by

Tobacco Products Control Act Amendment Act 1988 No. 42 of 1988 [Assented to 5 May 1988]²

Fair Trading (Miscellaneous) Amendment Act 1991 No. 48 of 1991 [Assented to 21 November 1991]

Statutes Repeal and Amendment (Commercial Tribunal) Act 1995 No. 82 of 1995 [Assented to 30 November 1995]³

Statutes Amendment and Repeal (Common Expiation Scheme) Act 1996 No. 34 of 1996 [Assented to 2 May 1996]⁴

Fair Trading (Miscellaneous) Amendment Act 1996 No. 64 of 1996 [Assented to 15 August 1996]⁵

¹ Came into operation 26 October 1987: *Gaz.* 24 September 1987, p. 940.

² Came into operation 1 January 1989: *Gaz.* 26 May 1988, p. 1333.

³ **Came into operation (except s. 9) 10 March 1997: *Gaz.* 6 March 1997, p. 1114; s. 9 had not been brought into operation at the date of, and the amendments effected by that provision have not been included in, this reprint.**

⁴ Came into operation 3 February 1997: *Gaz.* 19 December 1996, p. 1923.

⁵ Came into operation 26 September 1996: *Gaz.* 26 September 1996, p. 1209

NOTE:

- Asterisks indicate repeal or deletion of text.
- Entries appearing in bold type indicate the amendments incorporated since the last reprint.
- For the legislative history of the Act see Appendix.

An Act to provide for the appointment and powers and functions of the Commissioner for Consumer Affairs, to make provision in respect of certain unfair or undesirable trade practices, and for other purposes.

The Parliament of South Australia enacts as follows:

**PART 1
PRELIMINARY**

Short title

1. This Act may be cited as the *Fair Trading Act 1987*.

Commencement

2. (1) This Act shall come into operation on a day to be fixed by proclamation.

(2) The Governor may, in a proclamation fixing a day for this Act to come into operation, suspend the operation of specified provisions of this Act until a subsequent day fixed in the proclamation, or a day to be fixed by subsequent proclamation.

Interpretation

3. (1) In this Act, unless the contrary intention appears—

"**auction**" means a sale at which prospective purchasers are invited to bid and includes a sale at which bids are suggested and the suggested amounts progressively reduced until a bid is actually made;

"**auctioneer**" means the person by whom an auction is conducted;

"**authorised officer**" means a person who is an authorised officer under section 7;

"**business**" includes a trade or profession;

"**the Commissioner**" means the Commissioner for Consumer Affairs;

"**consumer**" means a person who—

- (a) acquires, or proposes to acquire, goods or services; or
- (b) purchases or leases, or proposes to purchase or lease, premises,

not being a person acting in the course of a business or in the course of setting up a business;

"**consumer affairs authority**" means—

- (a) the Commissioner; or
- (b) a person or authority that has, under a law of the Commonwealth or another State or Territory of the Commonwealth, powers and functions similar to those of the Commissioner;

"**credit**" includes any form of financial accommodation;

"**District Court**" means the Administrative and Disciplinary Division of the District Court;

"**goods**" includes anything growing on, or attached to, land that is severable from the land;

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"**premises**" includes land;

"**related Act**" means an Act or a provision of an Act—

- (a) of which the Commissioner is stated, in that Act, to have the administration; or
- (b) that is prescribed by the regulations to be a related Act;

"**rescission**", in relation to a contract, means the avoidance of the contract as from its beginning;

"**retail**" connotes a sale of goods to the ultimate consumer or user of the goods;

"**services**" includes benefits of any kind except—

- (a) the supply of goods; or
- (b) an interest in, or right in respect of, land;

"**supplier**", in relation to a contract or proposed contract for the supply of goods or services, means the person by whom the goods or services are, or are to be, supplied under the contract or proposed contract;

"**supply**" includes—

- (a) in relation to goods, the conferral of a right to goods or a right to the possession or use of goods; and
- (b) in relation to services, the conferral of a right to services;

"**trade premises**", of a supplier, means premises that constitute an established place of business of the supplier, or an agent of the supplier;

"**trader**" means a person who in the course of a business—

- (a) supplies, or offers to supply, goods or services; or
- (b) sells or lets, or offers to sell or let, premises;

"**trading debt**" means a debt owed to a trader.

(2) In this Act, a reference to the supply of goods or services extends to the supply of both goods and services.

(3) A reference in this Act to a person involved in a contravention of a provision of this Act is a reference to a person who—

- (a) aids, abets, counsels or procures the contravention; or
- (b) induces (by threats, promises or in any other manner) a person to commit the contravention; or
- (c) conspires to effect the contravention; or

(d) is in any other way directly or indirectly, knowingly concerned in, or party to, the contravention.

(4) Where a word or phrase is given a particular meaning in this Act, any cognate word or phrase has, unless the contrary intention appears, a corresponding meaning.

Crown bound

4. This Act binds the Crown in right of the State and also, so far as the legislative power of the State extends, in all its other capacities.

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**PART 2
ADMINISTRATION**

Commissioner for Consumer Affairs

5. (1) There shall be a Commissioner for Consumer Affairs.

(2) The Commissioner shall be a person employed in the Public Service of the State.

Administration of this Act

6. (1) The Commissioner has the administration of this Act.

(2) In the administration of this Act, the Commissioner is subject to direction by the Minister.

Authorised officers

7. (1) The following persons are authorised officers for the purposes of this Act:

(a) the Commissioner; and

(b) any person appointed under subsection (2).

(2) The Minister may, on the recommendation of the Commissioner, appoint persons employed in the Public Service of the State to be authorised officers for the purposes of this Act.

Functions of the Commissioner

8. (1) The functions of the Commissioner are—

(a) to conduct research into matters concerning the interests of consumers generally or a particular class of consumers; and

(b) to conduct consumer education programmes and to publish reports and disseminate information on matters concerning the interests of consumers; and

(c) to give advice to consumers in relation to their rights and obligations under this Act or any other law, or in relation to transactions entered into by them as consumers; and

(d) to attempt to resolve by conciliation disputes between consumers and traders; and

(e) to monitor business activities (to which this Act and the related Acts apply) that affect consumers and investigate practices that may adversely affect the interests of consumers generally or a particular class of consumers; and

(f) to encourage trade, industry and professional associations to develop, disseminate to their members and enforce codes of practice designed to promote fair trading and to safeguard the interests of consumers; and

(g) to prepare and disseminate guidelines to traders in relation to their obligations under this Act and related Acts; and

(h) to enforce the requirements of this Act and related Acts by the prosecution of offences and other appropriate action; and

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

(i) to make reports to the Minister on matters referred to the Commissioner by the Minister and on the exercise of the functions of the Commissioner; and

- (j) any other functions conferred on the Commissioner by or under this or any other Act.
- (2) The Commissioner shall not attempt to resolve a dispute by conciliation except—
 - (a) at the request or with the consent of the consumer; or
 - (b) at the request of a court, board or tribunal in which proceedings have been taken in relation to the dispute.

Co-operation

9. The Commissioner may, in the interests of consumers, co-operate with public or private bodies or persons within or outside the State.

Delegations

10. (1) The Commissioner may delegate to a person employed in the Public Service of the State or, with the Minister's consent, to a person not so employed any of the Commissioner's powers under this Act or a related Act.

- (2) The Minister may delegate any of the Minister's powers under this Act.
- (3) A delegation under this section—
 - (a) must be in writing; and
 - (b) may be made subject to such conditions as the delegator thinks fit; and
 - (c) if made to the holder of a specified office or position, empowers any person for the time being holding or acting in that office or position to exercise the delegated powers; and
 - (d) is revocable at will; and
 - (e) does not prevent the delegator from acting personally in any matter.

Secrecy

11. A person shall not divulge or communicate information acquired by reason of being, or having been, employed or engaged in, or in connection with, the administration of this Act or a related Act, except—

- (a) with the consent of the person to whom the information relates; or
- (b) in connection with the administration of this Act or a related Act; or
- (c) to a member of the police force of this State or of the Commonwealth or another State or a Territory of the Commonwealth; or
- (d) to a person concerned in the administration of another law of the State, or a law of the Commonwealth or another State or a Territory of the Commonwealth, relating to trade or commercial practices or the protection of consumers; or
- (e) for the purposes of legal proceedings.

Penalty: \$10 000.

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Annual report

12. (1) The Commissioner shall, on or before 31 October in each year, submit to the Minister a report on the administration of this Act during the year ended on the preceding 30 June.

(2) The Minister shall cause a copy of the report to be laid before each House of Parliament within 14 sitting days of that House after receiving the report.

**PART 3
DOOR-TO-DOOR TRADING**

DIVISION 1—PRELIMINARY

Interpretation

13. (1) In this Part, unless the contrary intention appears—

"**contract to which this Part applies**" means a contract to which this Part applies by virtue of section 14;

"**cooling-off period**", in relation to a prescribed contract, means the period of 10 days commencing on and including the day on which the contract is made;

"**dealer**" means a person who in the course of door-to-door trading—

(a) enters into negotiations with another person with a view to the making of a contract for the supply of goods or services to that other person; or

(b) calls on another person for the purpose of entering into such negotiations,

whether or not that person is or is to be the supplier of the goods or services;

"**door-to-door trading**" means the trading practice under which—

(a) a person—

(i) goes from place to place; or

(ii) makes telephone calls,

seeking out persons who may be prepared to enter, as consumers, into contracts for the supply of goods or services; and

(b) that person or some other person then or subsequently enters into negotiations with those prospective consumers with a view to the making of such contracts;

"**negotiation**" includes any discussion or dealing directed towards the making of a contract (whether or not the terms of the contract are open to negotiation);

"**prescribed contract**" has the meaning assigned by section 16;

"**related contract or instrument**", in relation to a contract to which this Part applies, means—

(a) a contract of guarantee or indemnity that is related to the contract; or

(b) an instrument related to the contract that creates a mortgage or charge in favour of the supplier or dealer, or a person nominated by the supplier or dealer; or

(c) any other contract or instrument (not being an instrument of the kind referred to in paragraph (b)) that is collateral or related to the contract.

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(2) In this Part—

- (a) a reference to the consumer or supplier under a contract for the supply of goods or services extends to any person to whom the rights of the original consumer or supplier under the contract are assigned or transferred, or pass by operation of law; and
- (b) a reference to negotiation of a contract to which this Part applies is a reference to negotiation of a contract that would, on its formation, be a contract to which this Part applies.

(3) For the purposes of this Part, a contract is a contract for the supply of goods or services to a person (being a party to the contract) if it provides for the supply of goods or services either to that person or to some other person but on the order of that person.

Application

14. (1) Subject to this section, this Part applies to a contract for the supply of goods or services to a consumer (whether or not the law of South Australia is the proper law of the contract) if the following conditions are satisfied:

- (a) negotiations leading to the formation of the contract (whether or not they are the only negotiations that precede the formation of the contract) take place between the consumer and a dealer in each other's presence in South Australia at a place other than trade premises of the supplier;
- (b) the dealer attends at that place—
 - (i) in the course of door-to-door trading; and
 - (ii) otherwise than at the unsolicited invitation of the consumer.

(2) For the purposes of subsection (1)(b)—

- (a) in determining whether an invitation is solicited or unsolicited, any solicitation by way of—
 - (i) printed or written material delivered but not addressed personally to the consumer; or
 - (ii) advertisement addressed to the public or a substantial section of the public, shall be disregarded; but
- (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.

(3) This Part does not apply to a contract of a kind excluded by the regulations from the application of this Part.

(4) This Part does not derogate from section 552 of the *Companies (South Australia) Code*.

DIVISION 2—CONTRACTS

Prohibition of certain contractual terms

15. (1) A contract to which this Part applies must not contain—

- (a) a provision purporting to provide that the contract, or any proceeding arising from the contract, is governed by the law of a place other than South Australia; or
- (b) a provision purporting to provide that legal proceedings arising out of, or in relation to, the contract are justiciable only by the courts of a place other than South Australia; or
- (c) a provision purporting to exclude, restrict or modify any right conferred on a consumer by this Part.

(2) Where a contract to which this Part applies contains a provision contrary to subsection (1), the provision is void and the supplier and the dealer are each guilty of an offence.

Penalty: \$5 000.

(3) In this section, "**contract to which this Part applies**" includes a related contract or instrument.

Prescribed contract

16. (1) Subject to this section, a contract to which this Part applies is a prescribed contract if the total consideration payable by the consumer under, or in respect of, the contract—

- (a) is not ascertainable at the time of the making of the contract; or
- (b) is ascertainable at the time of the making of the contract and exceeds the prescribed amount.

(2) Where—

- (a) two or more contracts relate to substantially the same transaction; and
- (b) the transaction could have been effected by a single contract which would, in that case, have constituted a prescribed contract,

then each of the contracts that would not, if it stood alone, constitute a prescribed contract becomes a prescribed contract and, for the purpose of ascertaining the cooling-off period in relation to such a contract, it shall be deemed to have been made when the last of the contracts was made.

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(3) The following are not prescribed contracts:

- (a) a contract of insurance;
- (b) a contract solely for the provision of credit;
- (c) a contract of a kind declared by the regulations not to be a prescribed contract.

(4) In proceedings in which it is alleged that a contract for the supply of goods or services is a prescribed contract, the contract shall be presumed to be such a contract in the absence of proof to the contrary.

(5) In this section, "**the prescribed amount**" means \$50 or, if another amount is prescribed in the regulations, that other amount.

Requirements in relation to prescribed contracts

17. (1) The following requirements must be complied with in relation to a prescribed contract:

- (a) the contract must set out in full all the contractual terms, including—
 - (i) the total consideration to be paid or provided by the consumer or, if the total consideration is not ascertainable at the time the contract is made, the manner in which it is to be calculated; and
 - (ii) if the contract provides for the carrying out of work of a prescribed nature—detailed particulars of the work (including any such particulars required by the regulations);
- (b) the contractual terms must be printed or typewritten (apart from any insertions or amendments to the printed or typewritten form, which may be handwritten);
- (c) the making of the contract must be completed by the consumer signing the contract after it has already been executed by or on behalf of the supplier;
- (d) the consumer must be given a duplicate of the contract immediately after the making of the contract;
- (e) where the dealer is not the supplier, the contract must set out the full name and address of the dealer and identify that person as the dealer;
- (f) the contract must contain immediately above the place provided for the signature of the consumer the statement "THIS CONTRACT IS SUBJECT TO A COOLING-OFF PERIOD OF TEN DAYS" printed in upper case in type not smaller than 18-point;
- (g) the consumer must be given two notices at or immediately before the making of the contract—
 - (i) one being a notice, in the prescribed form, explaining the right of the consumer to rescind the contract; and
 - (ii) the other being a notice, in the prescribed form, that may be used by the consumer to rescind the contract;

- (h) the notices referred to in paragraph (g) must—
 - (i) be printed or typewritten (apart from any insertion, which may be handwritten); and
 - (ii) set out the full name and address of the supplier and identify that person as the supplier; and
 - (iii) be separate from, and not attached to, any other document;
- (i) the printing or typewriting of the contract, the statement referred to in paragraph (f) and the notices referred to in paragraph (g), must be readily legible and conform with the requirements of the regulations;
- (j) any handwriting (apart from a signature or initial) in the contract or a notice referred to in paragraph (g) must be readily legible.

(2) If any of the requirements of subsection (1) is not complied with, the supplier and the dealer are each guilty of an offence.

Penalty: \$5 000.

(3) Where a consumer acknowledges, in writing, receipt of a document required to be given under subsection (1), the acknowledgement is evidence, but not conclusive evidence, that the document was given to the consumer, as required by that subsection.

Acceptance of consideration, etc.

18. (1) If a supplier or dealer accepts any money or other consideration from a consumer under a prescribed contract or a related contract or instrument before the expiration of the cooling-off period, the supplier and the dealer are each guilty of an offence.

Penalty: \$5 000.

(2) Subject to subsection (3), if services are supplied under a prescribed contract before the expiration of the cooling-off period, the supplier is guilty of an offence.

Penalty: \$5 000.

(3) Subsection (2) does not apply to the supply of services of a kind excluded by the regulations from the application of that subsection.

DIVISION 3—DOOR-TO-DOOR TRADING PRACTICES

Prohibition hours

19. Except by prior appointment, no dealer shall call on a person—

- (a) at any time on a Sunday or a public holiday;
- (b) on a Saturday—
 - (i) between midnight and 9.00 a.m.; or
 - (ii) between 5.00 p.m. and midnight;

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- (c) on any other day—
 - (i) between midnight and 9.00 a.m.; or
 - (ii) between 8.00 p.m. and midnight,

for the purpose of negotiating a contract to which this Part applies or for an incidental or related purpose.

Penalty: \$5 000.

Duties of dealers

20. (1) A dealer who calls at premises for the purpose of negotiating a contract to which this Part applies or for an incidental or related purpose shall leave the premises at the request of the occupier of the premises or any person acting with the actual or implied authority of the occupier.

Penalty: \$5 000.

(2) A dealer who calls on a person for the purpose of negotiating a contract to which this Part applies or for an incidental or related purpose shall, as soon as it is practicable to do so—

- (a) make known to that person the purpose of the call; and
- (b) produce to that person an identity card setting out—
 - (i) the dealer's full name and address; and
 - (ii) if the dealer is not the supplier, the supplier's full name and address.

Penalty: \$5 000.

Harassment or coercion

21. (1) No dealer or other person shall, for the purpose of, or in the course of, negotiating a contract to which this Part applies, harass or coerce a consumer.

Penalty: \$5 000.

(2) No dealer or other person shall harass or coerce a consumer for the purpose of dissuading or preventing the consumer from exercising a right conferred on the consumer by this Part.

Penalty: \$5 000.

DIVISION 4—RESCISSION OF CONTRACTS

Right of rescission

22. (1) A consumer may rescind a contract to which this Part applies (whether or not the contract is a prescribed contract) within 6 months of the date of the contract—

- (a) if the contract or a related contract or instrument contains a provision contrary to section 15; or
- (b) if there has been a contravention of, or failure to comply with, Division 3 in the course of, or in relation to, the negotiations leading to the formation of the contract.

- (2) A consumer may rescind a prescribed contract—
 - (a) at any time before the expiration of the cooling-off period; or
 - (b) if there has been a contravention of, or failure to comply with, section 17 or 18 in relation to the contract or a related contract or instrument—within 6 months of the date of the contract.
- (3) A right of rescission conferred by this section may be exercised—
 - (a) notwithstanding affirmation of the contract by the consumer; and
 - (b) notwithstanding that the contract has been fully executed.

Exercise of right of rescission

23. (1) A consumer exercises a right of rescission conferred by this Division by giving notice of rescission to the supplier.

- (2) The notice of rescission—
 - (a) must be in writing in the form prescribed by the regulations or in a form that clearly indicates an intention on the part of the consumer to rescind the contract; and
 - (b) must (except in the case of a notice given in respect of a prescribed contract during the cooling-off period) state the ground of rescission; and
 - (c) must be given to the supplier—
 - (i) by delivering it personally to the supplier; or
 - (ii) by delivering it, or sending it by post, in an envelope addressed to the supplier, to the supplier's address.

(3) A notice of rescission sent by post to a supplier in accordance with subsection (2) shall be deemed to have been given to the supplier at the time of posting.

- (4) In this section, a reference to the supplier's address is a reference to—
 - (a) a place at which the supplier resides or carries on business; or
 - (b) the supplier's address as shown on a notice given to the consumer under this Part.

Restitution

24. (1) Where a contract to which this Part applies is rescinded under this Division, restitution shall be made by the parties to the contract as follows—

- (a) the supplier shall return or refund to the consumer any consideration or the value of any consideration given by the consumer under the contract or a related contract or instrument;
- (b) the consumer shall—
 - (i) return or refund to the supplier any goods or the value (as at the date of supply) of any goods received from the supplier under the contract; and

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- (ii) pay to the supplier the value of any services supplied under the contract up to the time of rescission (but not including the value of any such services supplied under a prescribed contract before the expiration of the cooling-off period in contravention of this Part).

(2) Where the consumer makes goods available for collection by the supplier at the place at which they were received from the supplier for the period of 28 days from the date of rescission of the contract and the supplier fails to collect the goods before the expiration of that period, the consumer shall be deemed to have made restitution in respect of those goods as required by subsection (1) and the goods shall become the property of the consumer free of any other right or interest.

(3) Where the consumer returns goods to the supplier under this section but has failed to take reasonable care of the goods, the consumer is liable to pay compensation to the supplier for the damage to or depreciation in the value of the goods, but the consumer is not liable for any such damage or depreciation attributable to normal use of the goods or circumstances beyond the control of the consumer.

(4) Where restitution of goods is not possible (because the goods have been consumed or affixed to land, because a third party has acquired an interest in the goods, or for any other reason), the impossibility of restitution of the goods is not a bar to rescission under this Division but, in that event, the consumer is liable to pay to the supplier the value of the goods as at the date of supply.

(5) The obligations imposed by this section may be enforced by action in any court of competent jurisdiction.

(6) A court convicting a supplier of an offence against this Part is competent to make orders, on the application of the prosecutor, for the enforcement of obligations imposed by this section.

(7) A person who fails to comply with an order under subsection (6) is guilty of an offence.

Penalty: \$5 000.

Related contracts or instruments

25. Where a contract to which this Part applies is rescinded under this Division, any related contract or instrument is void.

Waiver of rights

26. The consumer under a contract to which this Part applies is not competent to waive any right conferred by this Division.

Prohibition of certain actions

27. (1) Where a contract to which this Part applies has been rescinded, or is capable of being rescinded, under this Division, no person shall, for the purpose of recovering an amount alleged to be payable by the consumer under the contract or a related contract or instrument—

- (a) bring, or assert an intention to bring, legal proceedings against the consumer; or
- (b) place the name of the consumer, or cause the name of the consumer to be placed, on any list of defaulters or debtors, or assert an intention of placing the name of the consumer, or causing the name of the consumer to be placed, on any such list; or

- (c) take any other action against the consumer.

Penalty: \$5 000.

- (2) Subsection (1)(a) does not prohibit—

- (a) the bringing of, or the asserting of an intention to bring, legal proceedings to determine whether or not a contract to which this Part applies has been, or is capable of being, rescinded under this Division; or
- (b) the continuation of such proceedings (for the purpose of recovering an amount alleged to be payable by the consumer under the contract or a related contract or instrument) where it is determined that the contract has not been, or is not capable of being, so rescinded.

(3) It is a defence to a charge for an offence against subsection (1) to prove that, at the time of the alleged offence, the defendant did not know, and could not reasonably be expected to have known, that the contract had been rescinded or was capable of being rescinded.

(4) Where a person is convicted of an offence against subsection (1)(b), the court may order the person responsible for keeping any list on which the name of the consumer has been wrongfully placed to remove the name from that list.

- (5) A person who fails to comply with an order under subsection (4) is guilty of an offence.

Penalty: \$5 000.

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**PART 4
MOCK AUCTIONS**

Prohibition of mock auctions

28. (1) A person shall not promote or conduct a mock auction of goods.

Penalty: \$2 000.

(2) Subject to subsection (3), an auction of goods is a mock auction if, but only if, during the course of the auction—

- (a) goods are sold for less than the highest bid made by the purchaser, or part of the purchase price is repaid or credited to the purchaser; or
- (b) the right to bid for any goods is restricted to persons who have bought or agreed to buy other goods; or
- (c) any goods are given away or offered as gifts.

(3) An auction of goods is not a mock auction by virtue of subsection (2)(a), if it is proved that the reduction in price or the repayment or credit (as the case may be) was made—

- (a) because of a defect of which the auctioneer became aware after the highest bid had been made; or
- (b) because of damage sustained after that bid was made.

(4) For the purposes of proceedings for an offence against this section—

- (a) a statement, purporting to be a statement of fact, made by or on behalf of the auctioneer during the course of an auction of goods and tending to show that the auction is a mock auction is admissible as conclusive evidence of the fact stated; and
- (b) anything done, before or after an auction, in or about the place where the auction has been or is to be held, if done in connection with the auction, shall be taken to be done during the course of the auction.

**PART 5
FAIR REPORTING**

Interpretation

29. (1) In this Part, unless the contrary intention appears—

"**file**" means any repository or record in which information relating to any person is recorded or retained, in any manner or form, by a reporting agency;

"**prescribed benefit**" means—

- (a) a benefit of a commercial nature; or
- (b) a benefit in or affecting employment; or
- (c) a lease of premises or a licence conferring a right to occupy premises;

"**prescribed report**" means a communication made to a trader by a reporting agency or another trader of information relating to a person, not being a communication made with the knowledge of, and of information known to, that person;

"**reporting agency**" means a person that carries on the business of providing prescribed reports.

(2) For the purposes of this Part, where a prescribed report consists of a communication by electronic or mechanical means (except by telephone or other means of voice transmission) the report shall be regarded as being written.

Application of Part

30. This Part applies to and in relation to a reporting agency or trader where—

- (a) the reporting agency or trader provides a prescribed report to a person carrying on a business or letting premises in the State; and
- (b) the person to whom the report relates is domiciled or resident in the State.

Procedures in respect of prescribed reports

31. (1) A reporting agency or trader shall adopt all procedures reasonably practicable for ensuring accuracy and fairness in the contents of prescribed reports provided by the agency or trader.

(2) A reporting agency or trader shall not include in any prescribed report—

- (a) any information based on evidence that is not the best evidence reasonably available; or
- (b) any unfavourable personal information based upon hearsay evidence unless the agency or trader has made reasonable efforts to substantiate the evidence on which the personal information is based and, where the information is unsubstantiated, the lack of substantiation is stated in any report in which the information is given.

(3) A reporting agency or trader shall not include in any prescribed report information as to the race, colour or religious or political belief or affiliation of any person.

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Duties of traders

32. Where a trader—

- (a) denies a prescribed benefit sought by a person; or
- (b) grants a prescribed benefit sought by a person but upon terms less favourable than those upon which the trader grants similar benefits to other persons in the course of the trader's business,

and the trader has during the last preceding 6 months received a prescribed report in relation to that person, the trader shall at the written request of that person—

- (c) inform the person that the trader has received that report; and
- (d) give the person the name and address of the reporting agency or other trader who provided that report.

Duties of reporting agencies

33. (1) A reporting agency shall, on the written application of a person in relation to whom the agency has recorded information, disclose without charge—

- (a) all information in its files relating to that person at the time the request; and
- (b) the name and address of every person to whom a prescribed report relating to that person has been provided within the year preceding the date of the request; and
- (c) a copy of every such prescribed report that was in writing.

(2) A reporting agency may require any person seeking disclosure of information under this section to produce reasonable evidence of the person's identity.

(3) A reporting agency shall take reasonable steps to ensure that information to which a person is entitled under this section is disclosed in a form that is readily intelligible to that person and shall permit that person to make a copy of, or to take an extract from, the information so disclosed.

(4) A reporting agency shall not require a person to give any undertaking, or to waive any right that the person may have, as a condition of disclosing information under this section.

Correction of errors

34. (1) A person who disputes the accuracy or completeness of any information compiled by a reporting agency in relation to the person or included in a prescribed report relating to the person provided by a reporting agency or trader may, by notice in writing served upon the agency or trader, object to the inaccuracy or incompleteness of the information.

(2) Where, pursuant to subsection (1), a person disputes the accuracy or completeness of any information, the reporting agency or trader shall, within a reasonable time, use its best endeavours to verify or supplement the information in accordance with good practice.

(3) A reporting agency or trader upon whom a notice of objection is served under this section shall, within 30 days after the date of service of the notice, inform the person by whom the objection was made—

- (a) whether the agency or trader has made any amendment or supplementation to or deletion from the information; and

(b) if so, the nature of the amendment, supplementation or deletion.

(4) Where information is altered under this section by amendment, supplementation or deletion, the following provisions apply:

(a) where a reporting agency makes such an alteration, the agency shall give notice in writing of the alteration to—

(i) every person provided by the agency with a prescribed report based on the information within the period of 60 days before the making of the alteration; and

(ii) every person provided by the agency with such a prescribed report before the commencement of that period and nominated by the person to whom the information relates;

(b) where a trader makes such an alteration, the trader shall give notice in writing of the alteration to every person provided by the trader with a prescribed report based on the information and nominated by the person to whom the information relates.

(5) A person by whom an objection has been made under this section may appeal to the Magistrates Court against any failure on the part of a reporting agency or trader to make any deletion from or amendment or supplementation to information.

(6) Upon the hearing of an appeal under this section, the Magistrates Court may make such orders as it considers just.

(7) Where an objection or appeal has been made or instituted under this section and a prescribed report is made by the reporting agency or trader before the determination by the agency or trader or by the Magistrates Court of the matters raised in the objection or appeal, the agency or trader shall include in the report a statement to the effect that those matters are subject to an objection or appeal under this Part.

(8) In this section—

"**Magistrates Court**" means the Civil (Consumer and Business) Division of the Magistrates Court.

Qualified privilege

35. (1) Subject to subsection (2), any communication to a reporting agency or trader or to a trader by a reporting agency or another trader of information relating to the credit-worthiness of any person is protected by qualified privilege.

(2) Subsection (1) does not apply where information is communicated in contravention of an order made under this Part

Offences

36. Subject to this Part, a person that—

(a) contravenes, or fails to comply with, a provision of this Part; or

(b) contravenes, or fails to comply with, an order made under this Part (other than an order under section 37); or

(c) knowingly provides false or misleading information to another person, being a person who is engaged in compiling information for a prescribed report; or

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- (d) divulges information relating to another person from the files of a reporting agency without proper authority to do so or except for the purposes of legal proceedings; or
- (e) obtains information relating to another person from a reporting agency or trader by false pretences,

is guilty of an offence.

Penalty: \$5 000.

Powers of District Court

37. (1) The District Court may, upon the application of the Commissioner, make such orders against a reporting agency or trader as may be necessary or expedient in the opinion of the Court to ensure that the reporting agency or trader complies with this Part or any provision of this Part.

(2) Where a reporting agency or trader—

- (a) commits an offence against this Part; or
- (b) does any act that, in the opinion of the District Court, shows the agency or trader to be unfit to provide prescribed reports,

the Court may, on the application of the Commissioner, make an order—

- (c) prohibiting the agency or trader from providing prescribed reports; or
- (d) requiring the agency or trader to comply with conditions specified in the order in relation to the provision of prescribed reports.

(3) An order under subsection (1) or (2) shall be effective for such period as may be specified in the order or until further order of the Court.

(4) A reporting agency or trader that contravenes, or fails to comply with, an order under subsection (1) or (2) is guilty of an offence.

Penalty: \$5 000 or imprisonment for not more than 2 years.

**PART 6
RETAIL TRANSACTIONS**

Limited offers and failing to supply as demanded

38. (1) A trader shall not advertise or offer goods for sale by retail upon condition that no more than a specified or limited quantity or number of the goods may be purchased by any one purchaser.

Penalty: \$2 000.

(2) A trader who offers goods for sale by retail shall not refuse or fail, on demand of a quantity or number of the goods and tender of the appropriate price, to supply the goods in the quantity or number demanded.

Penalty: \$2 000.

(3) It is a defence to a charge for an offence against subsection (1) to prove that on the occasion in question—

- (a) the defendant neither had, nor had ready access to, a sufficient quantity or number of the goods—
 - (i) to meet a demand for a quantity or number of the goods greater than that specified or limited in the advertisement; or
 - (ii) to meet such a demand in addition to the estimated demands of the defendant's other customers; or
- (b) the defendant was acting in accordance with a practice for the time being approved by the Commissioner.

(4) It is a defence to a charge for an offence against subsection (2) to prove that on the occasion in question—

- (a) the defendant neither had, nor had ready access to, a sufficient quantity or number of the goods—
 - (i) to meet the demand; or
 - (ii) to meet the demand in addition to the estimated demands of the defendant's other customers; or
- (b) the defendant was acting in accordance with a practice for the time being approved by the Commissioner.

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Price tickets

40. Where any statement of price or conditions of sale (relating to the availability of discounts or trade-in or other allowances) imprinted on, attached to or exhibited with any goods offered for sale by retail does not set out in a prominent position and in clear and legible figures the price at which the goods can be bought for cash, the trader who offers the goods is guilty of an offence.

Penalty: \$2 000.

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**PART 7
ADVERTISEMENTS**

Approval of consumer affairs authority not to be implied

41. A person shall not, without the approval of the Commissioner, publish, or cause to be published, a statement promoting, or apparently intended to promote, the supply of goods or services or the sale or letting of premises that states, either expressly or by implication, that a consumer affairs authority has approved or refrained from disapproving—

- (a) the statement; or
- (b) any particular contained, or claim made, in the statement; or
- (c) any goods or services referred to in the statement.

Penalty: \$5 000.

Substantiation of claims

42. (1) The Commissioner may, by notice in writing, require a person, who publishes or causes to be published a statement promoting, or apparently intended to promote, the supply of goods or services or the sale or letting of premises by the person, to provide the Commissioner, within the period specified in the notice, with proof of any claim or representation made in the statement.

- (2) A person, on whom a notice under this section is served, who—
 - (a) fails to provide proof sufficient to support the claim or representation; or
 - (b) fails to provide that proof by the time specified in the notice,

is guilty of an offence.

Penalty: \$5 000.

PART 8
RECOVERY OF TRADING DEBTS

Unlawful actions and representations

43. (1) A creditor, or the agent of a creditor, shall not, for the purpose of recovering a trading debt of the creditor—

- (a) make any demand for payment without indicating the creditor's identity and the balance owing to the creditor and, where the demand is made by the agent, the agent's identity and authority to make the demand; or
- (b) demand payment of any amount that the creditor or agent does not honestly believe to be due and owing to the creditor; or
- (c) persist in demanding payment from a person who has denied liability without making reasonable inquiries to ensure that the demand is based on reasonable grounds; or
- (d) make any personal calls or telephone calls for the purpose of demanding payment—
 - (i) on a public holiday; or
 - (ii) between the hours of 10.00 p.m. of one day and 7.00 a.m. of the next; or
- (e) except as reasonably necessary to determine the debtor's whereabouts, communicate with an employer, acquaintance, friend, relative or neighbour of the debtor (not being a guarantor).

Penalty: \$2 000.

(2) A creditor, or the agent of a creditor, shall not, for the purpose of recovering a trading debt—

- (a) falsely represent that criminal or other proceedings will lie for non-payment of the debt; or
- (b) falsely pretend to be authorised in some official capacity to claim or enforce payment; or
- (c) falsely represent that a document has some official character that it does not have.

Penalty: \$2 000 or imprisonment for 6 months.

(3) In this section—

"agent" includes an employee of a creditor whose main duty of employment is to seek to recover trading debts owed to the creditor.

**PART 9
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; or

(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.

PART 10
TRADE PRACTICES—APPLICATION OF COMMONWEALTH PROVISIONS

DIVISION 1—PRELIMINARY

Interpretation

46. (1) In this Part, unless the contrary intention appears—

"**acquire**" includes—

- (a) in relation to goods—acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase; and
- (b) in relation to services—accept;

"**arrive at**", in relation to an understanding, includes reach or enter into;

"**business**" includes a business not carried on for profit;

"**covenant**" means a covenant (including a promise not under seal) annexed to or running with an estate or interest in land (whether at law or in equity and whether or not for the benefit of other land), and "**proposed covenant**" has a corresponding meaning;

"**document**" includes—

- (a) a book, plan, paper, parchment or other material on which there is writing or printing, or on which there are marks, symbols or perforations having a meaning for persons qualified to interpret them; and
- (b) a disc, tape, paper or other device from which sounds or messages are capable of being reproduced;

"**give effect to**", in relation to a provision of a contract, arrangement or understanding, includes do an act or thing in pursuance of or in accordance with or enforce or purport to enforce;

"**goods**" includes—

- (a) ships, aircraft and other vehicles; and
- (b) animals, including fish; and
- (c) minerals, trees and crops, whether on, under or attached to land or not; and
- (d) gas and electricity;

"**market**", in relation to goods or services, means a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, those goods or services;

"**price**" includes a charge of any description;

"**provision**", in relation to an understanding, means any matter forming part of the understanding;

"**require**", in relation to the giving of a covenant, means require or demand the giving of a covenant, whether by way of making a contract containing the covenant or otherwise, and whether or not a covenant is given in pursuance of the requirement or demand;

"**send**" includes deliver, and "**sent**" and "**sender**" have corresponding meanings;

"**services**" includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under—

- (a) a contract for or in relation to—
 - (i) the performance of work (including work of a professional nature), whether with or without the supply of goods; or
 - (ii) the provision of, or of the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
 - (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or
- (b) a contract of insurance; or
- (c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
- (d) any contract for or in relation to the lending of moneys,

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service;

"**supply**", when used as a verb, includes—

- (a) in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and
- (b) in relation to services—provide, grant or confer,

and, when used as a noun, has a corresponding meaning, and "**supplied**" and "**supplier**" have corresponding meanings;

"**unsolicited goods**" means goods sent to a person without any request made by or on behalf of the person;

"**unsolicited services**" means services supplied to a person without any request made by or on behalf of the person.

(2) In this Part, a reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including—

- (a) the making of, or the giving effect to a provision of, a contract or arrangement; or
- (b) the arriving at, or the giving effect to a provision of, an understanding; or

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(c) the requiring of the giving of, or the giving of, a covenant.

(3) In this Part, a reference to conduct, when that expression is used as a noun otherwise than as mentioned in subsection (2), shall be read as a reference to the doing of or the refusing to do any act, including—

(a) the making of, or the giving effect to a provision of, a contract or arrangement; or

(b) the arriving at, or the giving effect to a provision of, an understanding; or

(c) the requiring of the giving of, or the giving of, a covenant.

(4) In this Part, a reference to refusing to do an act includes a reference to—

(a) refraining (otherwise than inadvertently) from doing that act; or

(b) making it known that that act will not be done.

(5) In this Part, a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition (as the case may be).

Application of provisions rendering contracts, etc., unenforceable

47. Where a provision of this Part is expressed to render a provision of a contract, or to render a covenant, unenforceable if the provision of the contract or the covenant has or is likely to have a particular effect, that provision of this Part applies in relation to the provision of the contract or the covenant at any time when the provision of the contract or the covenant has or is likely to have that effect notwithstanding that—

(a) at an earlier time the provision of the contract or the covenant did not have that effect or was not regarded as likely to have that effect; or

(b) the provision of the contract or the covenant will not or may not have that effect at a later time.

Consumers

48. (1) For the purposes of this Part, unless the contrary intention appears—

(a) a person shall be taken to have acquired particular goods as a consumer if, and only if—

(i) the price of the goods did not exceed the prescribed amount; or

(ii) where that price exceeded the prescribed amount—the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle, and the person did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; and

(b) a person shall be taken to have acquired particular services as a consumer if, and only if—

(i) the price of the services did not exceed the prescribed amount; or

- (ii) where that price exceeded the prescribed amount—the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.
- (2) For the purposes of subsection (1)—
- (a) the prescribed amount is \$40 000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount; and
 - (b) subject to paragraph (c), the price of goods or services purchased by a person shall be taken to have been the amount paid or payable by the person for the goods or services; and
 - (c) where a person purchased goods or services together with other property or services, or with both other property and services, and a specified price was not allocated to the goods or services in the contract under which they were purchased, the price of the goods or services shall be taken to have been—
 - (i) the price at which, at the time of acquisition, the person could have purchased from the supplier the goods or services without the other property or services; or
 - (ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier except together with the other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier without other property or services—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or
 - (iii) if, at the time of the acquisition, goods or services of the kind acquired were not available for purchase from any supplier except together with other property or services—the value of the goods or services at that time; and
 - (d) where a person acquired goods or services otherwise than by way of purchase, the price of the goods or services shall be taken to have been—
 - (i) the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier; or
 - (ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier or were so available only together with other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or
 - (iii) if goods or services of the kind acquired were not available, at the time of the acquisition, for purchase from any supplier or were not so available except together with other property or services—the value of the goods or services at that time; and
 - (e) without limiting by implication the meaning of the expression "**services**" in section 46 the obtaining of credit by a person in connection with the acquisition of goods or services by the person shall be deemed to be the acquisition by the person of a service and any amount by which the amount paid or payable by the person for the goods or services is increased by reason of the person so obtaining credit shall be deemed to be paid or payable by the person for that service.

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(3) Where it is alleged in any proceeding under this Part or in any other proceeding in respect of a matter arising under this Part that a person was a consumer in relation to particular goods and services, it shall be presumed, unless the contrary is established, that the person was a consumer in relation to those goods and services.

(4) In this section—

"**commercial road vehicle**" means a vehicle or trailer acquired for use principally in the transport of goods on public roads.

Acquisition, supply and re-supply

49. In this Part, unless the contrary intention appears—

- (a) a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods in pursuance of a supply of the goods; and
- (b) a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services; and
- (c) a reference to the supply or acquisition of goods includes a reference to the supply or acquisition of goods together with other property or services, or both; and
- (d) a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services, or both; and
- (e) a reference to the re-supply of goods acquired from a person includes a reference to—
 - (i) a supply of the goods to another person in an altered form or condition; and
 - (ii) a supply to another person of goods in which the first-mentioned goods have been incorporated.

References to purpose or reason

50. For the purposes of this Part—

- (a) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if—
 - (i) the provision was included in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for purposes that included or include that purpose; and
 - (ii) that purpose was or is a substantial purpose; and
- (b) a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if—
 - (i) the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and
 - (ii) that purpose or reason was or is a substantial purpose or reason.

Leases and licences of land and buildings

51. In this Part—

- (a) a reference to a contract shall be construed as including a reference to a lease of, or a licence in respect of, land or a building or part of a building and shall be so construed notwithstanding the express references in this Part to such leases or licences; and
- (b) a reference to making or entering into a contract, in relation to such a lease or licence, shall be read as a reference to granting or taking the lease or licence; and
- (c) a reference to a party to a contract, in relation to such a lease or licence, shall be read as including a reference to any person bound by, or entitled to the benefit of, any provision contained in the lease or licence.

Loss or damage to include injury

52. In this Part—

- (a) a reference to loss or damage, other than a reference to the amount of any loss or damage, includes a reference to injury; and
- (b) a reference to the amount of any loss or damage includes a reference to damages in respect of an injury.

Severability

53. If the making of a contract after the commencement of this section contravenes this Part by reason of the inclusion of a particular provision in the contract, then, subject to any rights arising under Part 3 or any order made under section 85 or 86, nothing in this Act affects the validity or enforceability of the contract otherwise than in relation to that provision insofar as that provision is severable.

Representations

54. (1) For the purposes of this Part, where a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the person does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.

(2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a person with respect to any future matter, the person shall, unless the person adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.

(3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Part to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

Application

55. (1) This Part applies to and in relation to transactions that take place, conduct that occurs and representations that are made within the State, whether wholly or partly.

(2) For the purposes of the application in relation to a provision of Division 2 or 3 of any other provision of this Act—

- (a) this Division applies also to that other provision; and
- (b) words and expressions used in that other provision have the same meanings as in this Division.

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DIVISION 2—TRADE PRACTICES

Misleading or deceptive conduct

56. (1) A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).

Unconscionable conduct

57. (1) A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to another person, engage in conduct that is, in all the circumstances, unconscionable.

(2) Without in any way limiting the matters to which a court may have regard for the purposes of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of goods or services to another person (in this subsection referred to as the "consumer"), a court may have regard to—

- (a) the relative strengths of the bargaining positions of the person and the consumer; and
- (b) whether, as a result of the conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the person; and
- (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person or a person acting on behalf of the person in relation to the supply or possible supply of the goods and services; and
- (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the person.

(3) A person shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to another person by reason only that the person—

- (a) institutes legal proceedings in relation to that supply or possible supply; or
- (b) refers a dispute or claim in relation to that supply or possible supply to arbitration.

(4) For the purposes of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of goods or services to another person—

- (a) a court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
- (b) a court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(5) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

(6) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.

False or misleading representations

58. A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services—

- (a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or
- (b) falsely represent that services are of a particular standard, quality, value or grade; or
- (c) falsely represent that goods are new; or
- (d) falsely represent that a particular person has agreed to acquire goods or services; or
- (e) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits that they do not have; or
- (f) represent that the person has a sponsorship, approval or affiliation that the person does not have; or
- (g) make a false or misleading representation with respect to the price of goods or services; or
- (h) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods; or
- (i) make a false or misleading representation concerning the place of origin of goods; or
- (j) make a false or misleading representation concerning the need for any goods or services; or
- (k) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Representations and conduct in relation to land

59. (1) A person shall not, in trade or commerce, in connection with the sale or grant, or possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land—

- (a) represent that the person has a sponsorship, approval or affiliation that the person does not have; or
- (b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land; or
- (c) offer gifts, prizes or other free items with the intention of not providing them or of not providing them as offered.

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(2) A person shall not use physical force or undue harassment or coercion in connection with the sale or grant, or the possible sale or grant, of an interest in land or the payment for an interest in land.

(3) Nothing in this section shall be taken as implying that other provisions of this Division do not apply in relation to the supply or acquisition, or the possible supply or acquisition, of interests in land.

(4) In this section, "**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.

Misleading conduct in relation to employment

60. A person shall not, in relation to employment that is to be, or may be, offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment.

Requirement to state cash price

61. A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, make a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the goods or services unless the person also specifies the cash price for the goods or services.

Offering gifts and prizes

62. A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, offer gifts, prizes or other free items with the intention of not providing them, or of not providing them as offered.

Misleading conduct in relation to goods

63. A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

Misleading conduct in relation to services

64. A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

Bait advertising

65. (1) A person shall not, in trade or commerce, advertise for supply at a specified price, goods or services if there are reasonable grounds, of which the person is aware or ought reasonably to be aware, for believing that the person will not be able to offer for supply those goods or services at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the person carries on business and the nature of the advertisement.

(2) A person who has, in trade or commerce, advertised goods or services for supply at a specified price shall offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the person carries on business and the nature of the advertisement.

(3) In a prosecution of a person in relation to a failure to offer goods or services to another person (in this subsection referred to as the "customer") in accordance with subsection (2), it is a defence if the person establishes that—

- (a) the person offered to supply, or to procure another person to supply, goods or services of the kind advertised to the customer within a reasonable time, in a reasonable quantity and at the advertised price; or
- (b) the person offered to supply immediately, or to procure another person to supply within a reasonable time, equivalent goods or services to the customer in a reasonable quantity and at the price at which the first mentioned goods or services were advertised,

and, in either case, where the offer was accepted by the customer, the person has so supplied, or procured another person to supply, goods or services.

Referral selling

66. A person shall not, in trade or commerce, induce a consumer to acquire goods or services by representing that the consumer will, after the contract for the acquisition of the goods or services is made, receive a rebate, commission or other benefit in return for giving the person the names of prospective customers or otherwise assisting the person to supply goods or services to other consumers, if receipt of the rebate, commission or other benefit is contingent on an event occurring after that contract is made.

Acceptance of payment

67. A person shall not, in trade or commerce, accept payment or other consideration for goods or services where, at the time of the acceptance—

- (a) the person intends—
 - (i) not to supply the goods or services; or
 - (ii) to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is accepted; or
- (b) there are reasonable grounds, of which the person is aware or ought reasonably to be aware, for believing that the person will not be able to supply the goods or services within the period specified by the person or, if no period is specified, within a reasonable time.

Misleading representations about business activities

68. (1) A person shall not, in trade or commerce, make a representation that is false or misleading in a material particular concerning the profitability or risk or any other material aspect of any business activity that the person has represented as one that can be, or can be to a considerable extent, carried on at or from a person's place of residence.

(2) Where a person, in trade or commerce, invites, whether by advertisement or otherwise, other persons to engage or participate, or to offer or apply to engage or participate, in a business activity requiring—

- (a) the performance by the other persons concerned of work; or

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- (b) the investment of moneys by the other persons concerned and the performance by them of work associated with the investment,

the person shall not make, with respect to the profitability or risk or any other material aspect of the business activity, a representation that is false or misleading in a material particular.

Harassment and coercion

69. A person shall not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

Pyramid selling

70. (1) A person contravenes this section if—

- (a) the person is a promoter of, or (if there are more than one) one of the promoters of, or is a participant in, a trading scheme to which this section applies; and
- (b) a person who is a participant in that trading scheme, or has applied or been invited to become a participant in that trading scheme, makes any payment to or for the benefit of the person referred to in paragraph (a), being a payment that the person is induced to make by reason that the prospect is held out to the person of receiving payments or other benefits in respect of the introduction (whether by the person or by another person) of other persons who become participants in that trading scheme.

(2) A person also contravenes this section if—

- (a) the person is a promoter of, or (if there are more than one) one of the promoters of, is a participant in, or is otherwise acting in accordance with, a trading scheme to which this section applies; and
- (b) the person, by holding out to another person the prospect of receiving payments or other benefits in respect of the introduction (whether by that other person or by another person) of other persons who become participants in that trading scheme, attempts to induce that other person—
 - (i) if that other person is already a participant in that trading scheme, to make any payment to or for the benefit of the promoter or any of the promoters or to or for the benefit of a participant in that trading scheme; or
 - (ii) if that other person is not already a participant in that trading scheme, to become such a participant and to make a payment of a kind mentioned in subparagraph (i).

(3) A person also contravenes this section if the person promotes, or takes part in the promotion of, a scheme under which—

- (a) a payment is to be made by a person who participates, or who has applied or been invited to participate, in the scheme to or for the benefit of the person or another person who takes part in the promotion of the scheme or to or for the benefit of another person who participates in the scheme; and
- (b) the inducement for making the payment is the holding out to the person who makes or is to make the payment the prospect of receiving payments from other persons who may participate in the scheme.

(4) For the purposes of subsection (1), (2) or (3)—

- (a) a prospect of a kind mentioned in that subsection shall be taken to be held out to a person whether it is held out so as to confer on the person a legally enforceable right or not; and
- (b) in determining whether an inducement or attempt to induce is made by holding out a prospect of a kind mentioned in that subsection, it is sufficient if a prospect of that kind constitutes or would constitute a substantial part of the inducement; and
- (c) any reference to the making of a payment to or for the benefit of a person shall be construed as including the making of a payment partly to or for the benefit of that person and partly to or for the benefit of one or more other persons.

(5) For the purposes of this section, a scheme is a trading scheme to which this section applies if the scheme includes the following elements:

- (a) goods or services, or both, are to be provided by the person promoting the scheme (in this section referred to as the "promoter") or, in the case of a scheme promoted by two or more persons acting in concert (in this section referred to as the "promoters"), are to be provided by one or more of those persons; and
- (b) the goods or services so provided are to be supplied to or for other persons under transactions arranged or effected by persons who participate in the scheme (each of whom is in this section referred to as a "participant"), being persons not all of whom are promoters.

(6) For the purposes of subsection (5)—

- (a) a scheme shall be taken to include the element referred to in paragraph (b) of that subsection whether a participant who is not a promoter acts in relation to a transaction referred to in that paragraph in the capacity of a servant or agent of the promoter or of one of the promoters or in any other capacity; and
- (b) a scheme includes any arrangements made in connection with the carrying on of a business, whether those arrangements are made or recorded wholly or partly in writing or not; and
- (c) any reference to the provision of goods or services by a person shall be construed as including a reference to the provision of goods or services under arrangements to which that person is a party.

Unsolicited credit and debit cards

71. (1) A person shall not send a prescribed card to another person except—

- (a) in pursuance of a request in writing by the person who will be under a liability to the person who issued the card in respect of the use of the card; or
- (b) in renewal or replacement, or in substitution for—
 - (i) a prescribed card of the same kind previously sent to that other person in pursuance of a request in writing by the person who was under a liability to the person who issued the card previously so sent in respect of the use of that card; or

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- (ii) a prescribed card of the same kind previously sent to that other person and used for a purpose for which it was intended to be used.

(2) Subsection (1) applies only in relation to the sending of a prescribed card by or on behalf of the person who issued the card.

(3) A person shall not take any action that enables a person who has a credit card or a debit card to use the card as a debit card or a credit card, as the case may be, except in accordance with a request in writing by that person.

(4) In this section—

"article" includes a token, card or document;

"credit card" means any article of a kind commonly known as a credit card or any similar article intended for use in obtaining cash, goods or services on credit, and includes any article of a kind commonly issued by persons carrying on business to customers or prospective customers of those persons for use in obtaining goods or services from those persons on credit;

"debit card" means an article intended for use by a person in obtaining access to an account held by the person for the purpose of withdrawing or depositing cash or obtaining goods or services;

"prescribed card" means a credit card, a debit card or an article that may be used as a credit card and a debit card.

Right to payment for unsolicited goods, etc.

72. (1) A person shall not, in trade or commerce, assert a right to payment from another person for unsolicited goods unless the first mentioned person has reasonable cause to believe that there is a right to payment.

(2) A person shall not, in trade or commerce, assert a right to payment from another person for unsolicited services unless the first mentioned person has reasonable cause to believe that there is a right to payment.

(3) A person shall not assert a right to payment from another person of a charge for the making in a directory of an entry relating to the other person or to the other person's profession, business, trade or occupation unless the first mentioned person knows or has reasonable cause to believe that the other person has authorised the making of the entry.

(4) A person is not liable to make any payment to another person, and is entitled to recover by action in a court of competent jurisdiction against another person any payment made by the first mentioned person to the other person, in full or part satisfaction of a charge for the making of an entry in a directory unless the first mentioned person has authorised the making of the entry.

(5) For the purposes of this section, a person shall be taken to assert a right to a payment from another person for unsolicited goods or services, or of a charge for the making of an entry in a directory, if the first mentioned person—

- (a) makes a demand for the payment or asserts a present or prospective right to the payment; or
- (b) threatens to bring any legal proceedings with a view to obtaining the payment; or

- (c) places or causes to be placed the name of the other person on a list of defaulters or debtors, or threatens to do so, with a view to obtaining the payment; or
- (d) invokes or causes to be invoked any other collection procedure, or threatens to do so, with a view to obtaining the payment; or
- (e) sends any invoice or other document stating the amount of the payment or setting out the price of the goods or services or the charge for the making of the entry and not stating as prominently (or more prominently) that no claim is made to the payment, or to payment of the price or charge, as the case may be.

(6) A person shall not be taken for the purposes of this section to have authorised the making of an entry in a directory unless—

- (a) a document authorising the making of the entry has been signed by the person or by another person authorised by that person; and
- (b) a copy of the document has been given to the person before the right to payment of a charge for the making of the entry is asserted; and
- (c) the document specifies—
 - (i) the name of the directory; and
 - (ii) the name and address of the person publishing the directory; and
 - (iii) particulars of the entry; and
 - (iv) the amount of the charge for the making of the entry or the basis on which the charge is, or is to be, calculated.

(7) For the purposes of this section, an invoice or other document purporting to have been sent by or on behalf of a person shall be deemed to have been sent by that person, unless the contrary is established.

(8) In a proceeding against a person in respect of a contravention of this section—

- (a) in the case of a contravention constituted by asserting a right to payment from another person for unsolicited goods or services—the burden lies on the defendant of proving that the defendant had reasonable cause to believe that there was a right to payment; or
- (b) in the case of a contravention constituted by asserting a right to payment from another person of a charge for the making of an entry in a directory—the burden lies on the defendant of proving that the defendant knew or had reasonable cause to believe that the other person had authorised the making of the entry.

(9) In this section—

"directory" includes any publication of a similar nature to a directory but does not include a newspaper published in good faith as a newspaper at regular intervals or a publication published, or to be published, by or under the authority of the Australian Telecommunications Commission;

"making", in relation to an entry in a directory, means including, or arranging for the inclusion of, the entry.

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Liability of recipient of unsolicited goods

73. (1) A person to whom unsolicited goods are supplied by another person, in trade or commerce, is not liable to make any payment for the goods and is not liable for the loss of or damage to the goods other than loss or damage resulting from the doing by the first mentioned person of a wilful and unlawful act in relation to the goods during the period specified in subsection (4).

(2) Subject to subsection (3), where a person sends, in trade or commerce, unsolicited goods to another person—

- (a) neither the first mentioned person nor any person claiming under the first mentioned person is entitled after the expiration of the period specified in subsection (4) to take action for the recovery of the goods from the person to whom the goods were sent; and
- (b) upon the expiration of that period, the goods become, by force of this section, the property of the person to whom the goods were sent freed and discharged from all liens and charges of any description.

(3) Subsection (2) does not apply to or in relation to unsolicited goods sent to a person if—

- (a) the person has at any time during the period specified in subsection (4) unreasonably refused to permit the sender or owner of the goods to take possession of the goods; or
- (b) the sender or owner of the goods has within that period taken possession of the goods; or
- (c) the goods were received by the person in circumstances in which the person knew, or might reasonably be expected to have known, that the goods were not intended for the person.

(4) The period referred to in subsections (1), (2) and (3) is—

- (a) if the person who receives the unsolicited goods gives notice with respect to the goods to the sender in accordance with subsection (5)—
 - (i) the period of one month next following the day on which the notice is given; or
 - (ii) the period of 3 months next following the day on which the person received the goods,

whichever first expires; and

- (b) in any other case—the period of 3 months next following the day on which the person received the goods.

(5) A notice under subsection (4) must be in writing and must—

- (a) state the name and address of the person who received the goods; and
- (b) state the address at which possession may be taken of the goods if it is an address other than that of the person; and
- (c) contain a statement to the effect that the goods are unsolicited goods.

Prescribed information providers

74. (1) Nothing in sections 56, 58, 59, 63, 64 or 68 applies to a prescribed publication of matter by a prescribed information provider, other than—

(a) a publication of matter in connection with—

- (i) the supply or possible supply of goods or services; or
- (ii) the sale or grant, or possible sale or grant, of interests in land; or
- (iii) the promotion by any means of the supply or use of goods or services; or
- (iv) the promotion by any means of the sale or grant of interests in land,

where—

- (v) the goods or services were relevant goods or services, or the interests in land were relevant interests in land, as the case may be, in relation to the prescribed information provider; or
- (vi) the publication was on behalf of, or pursuant to a contract, arrangement or understanding with—
 - (A) a person who supplies goods or services of that kind, or who sells or grants interests in land, being interests of that kind; or
 - (B) a body corporate that is related to a body corporate that supplies goods or services of that kind, or that sells or grants interests in land, being interests of that kind; or

(b) a publication of an advertisement.

(2) For the purposes of this section, a publication by a prescribed information provider is a prescribed publication if—

- (a) in any case—the publication was made by the prescribed information provider in the course of carrying on a business of providing information; or
- (b) in the case of a person who is a prescribed information provider by virtue of paragraph (a), (b) or (c) of the definition of "**prescribed information provider**" in subsection (3) (whether or not the person is also a prescribed information provider by virtue of another operation of that definition)—the publication was by way of a radio or television broadcast by the prescribed information provider.

(3) In this section—

"**consortium**" has the same meaning as that expression has in Part IIIB of the *Broadcasting and Television Act 1942* of the Commonwealth;

"**prescribed information provider**" means a person who carries on a business of providing information and, without limiting the generality of the foregoing, includes—

- (a) a person to whom, or each of the members of a consortium to which, a licence has been granted under Part IIIB of the *Broadcasting and Television Act 1942* of the Commonwealth; and

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- (b) the Australian Broadcasting Corporation; and
- (c) the Special Broadcasting Service;

"**relevant goods or services**", in relation to a prescribed information provider, means goods or services of a kind supplied by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is, by virtue of section 7(5) of the *Companies (South Australia) Code*, related to the prescribed information provider;

"**relevant interests in land**", in relation to a prescribed information provider, means interests in land, being interests of a kind sold or granted by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is, by virtue of section 7(5) of the *Companies (South Australia) Code*, related to the prescribed information provider.

DIVISION 3—OFFENCES AGAINST THIS PART

Offences against this Part

75. (1) A person who contravenes, or is involved in a contravention of, a provision of this Part (other than section 56 or 57) is guilty of a minor indictable offence.

(2) A person guilty of such an offence is, subject to subsection (3), liable to a penalty not exceeding—

- (a) in the case of a body corporate—\$100 000; or
- (b) in any other case—\$20 000.

(3) Where—

- (a) a person is guilty of two or more offences against the same provision of this Part; and
- (b) the offences are of the same or a substantially similar nature and occur at or about the same time,

the aggregate penalty for all of those offences cannot exceed the maximum penalty for a single offence.

**PART 11
ENFORCEMENT**

DIVISION 1—POWERS OF THE COMMISSIONER AND AUTHORISED OFFICERS

Conduct of legal proceedings on behalf of consumers

76. (1) The Commissioner may, on behalf of a consumer and for the purpose of enforcing or protecting the rights of the consumer under this Act, a related Act or some other law, institute, defend or assume the conduct of legal proceedings.

(2) The Commissioner must not institute, defend or assume the conduct of legal proceedings pursuant to this section unless the Commissioner—

- (a) is satisfied that the case raises questions of law affecting the interests of consumers generally or a particular class of consumers or that it is otherwise in the public interest to do so; and
- (b) has first obtained the written consent of the consumer and of the Minister.

(3) The consent of a consumer is irrevocable except with the agreement of the Commissioner or the Minister.

(4) The consent of the Minister may be given subject to such conditions as the Minister thinks fit.

(5) The Commissioner must not institute, defend or assume the conduct of legal proceedings pursuant to this section if the proceedings involve a monetary claim exceeding the prescribed amount.

(6) In subsection (5)—

"the prescribed amount" means—

- (a) where the consumer is or is to be a party to proceedings in the capacity of purchaser or prospective purchaser of premises—\$100 000 or such greater amount as may be prescribed; and
- (b) where the consumer is or is to be a party to proceedings in the capacity of mortgagor of premises—\$50 000 or such greater amount as may be prescribed; and
- (c) in any other case—\$25 000 or such greater amount as may be prescribed.

(7) The following provisions apply in relation to legal proceedings that the Commissioner institutes or defends or the conduct of which the Commissioner assumes pursuant to this section—

- (a) the Commissioner has the same rights in and control over the proceedings as the consumer would have had in the conduct of those proceedings; and
- (b) the Commissioner may, without consulting or seeking the consent of the consumer, conduct the proceedings as the Commissioner thinks appropriate; and
- (c) any money (excluding costs) recovered by the Commissioner must be paid to the consumer without deduction; and

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- (d) any amount (excluding costs) awarded against the consumer is recoverable from the consumer, except if the consumer had, before that judgment was given, given written notice to the Commissioner of the consumer's desire to settle the matter, in which case the amount is recoverable from the Commissioner; and
- (e) the costs of the proceedings shall be borne by or paid to the Commissioner; and
- (f) an unrelated counter-claim by or against the consumer must, if the Commissioner applies for a separate hearing, be heard separately.

Obtaining of information

77. (1) For the purposes of this Act or any related Act, an authorised officer may require any person—

- (a) to answer any questions, orally or in writing; or
- (b) to verify the answer to a question by statutory declaration; or
- (c) to produce books or documents.

(2) A person shall not—

- (a) refuse or fail to comply with a reasonable requirement made under this section; or
- (b) give, in response to a question put under this section, an answer that is false in a material particular.

Penalty: \$10 000.

(3) A person is not required to answer a question or produce a book or document if the answer or the production of the book or document would result in or tend towards self-incrimination.

Entry of inspection

78. (1) For the purposes of this Act or any related Act, an authorised officer may at any reasonable time—

- (a) enter and search any premises; and
- (b) make any inspection, conduct any test and take any samples; and
- (c) take any books or documents.

(2) Where an authorised officer takes any book or document under this section, the officer—

- (a) may retain the book or document—
 - (i) for so long as is necessary to enable it to be inspected and copies of, or extracts from, it to be made or taken; and
 - (ii) if the book or document is required for legal proceedings, until the conclusion of those proceedings; and
- (b) while any such book or document is in the officer's possession, must permit the person entitled to it to inspect it at any reasonable time and must, on request, furnish to that person a copy of the book or document certified as a true copy by the Commissioner.

(3) The powers conferred by subsection (1) must be exercised so as to avoid any unnecessary disruption of, or interference with, the conduct of business or performance of work.

(4) An authorised officer must produce to the person (if any) affording the officer entry to premises under this section a certificate of authority issued to the authorised officer by the Commissioner.

DIVISION 2—ASSURANCES AND ENFORCEMENT ORDERS

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.

Registration of deeds of assurance

80. (1) The Commissioner must maintain a register of assurances.

(2) A person may on payment of the prescribed fee (if any) inspect the register of assurances.

Offence

81. (1) A trader who acts contrary to an assurance accepted by the Commissioner is guilty of an offence.

Penalty: \$5 000.

(2) Proceedings for an offence against subsection (1) must not be commenced except on the authorisation of the Commissioner.

(3) An apparently genuine document purporting to be under the hand of the Commissioner and to authorise the commencement of proceedings under this section must be accepted in legal proceedings, in the absence of proof to the contrary, as proof of the authorisation.

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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.

DIVISION 3—CIVIL REMEDIES FOR CONTRAVENTION OF THIS ACT

Injunctions

83. (1) If the Court is satisfied, on the application of the Minister, the Commissioner or any other person, that a person has engaged or proposes to engage, in conduct that constitutes or would constitute a contravention of a provision of this Act or a related Act, the Court may grant an injunction in such terms as the Court determines to be appropriate.

(2) If the Court is satisfied, on the application of the Minister or the Commissioner, that a person has engaged in conduct constituting a contravention of a provision of this Act (other than section 57) or a related Act, the Court may grant an injunction requiring that person to take specified action (which may include the disclosure of information or the publication of advertisements) to remedy any adverse consequence of that conduct.

(3) An injunction may be granted under this section—

- (a) by the Supreme Court or a District Court in the course of criminal proceedings in which the defendant is alleged to have been guilty of conduct of the kind to which the application relates; or
- (b) by the Supreme Court.

(4) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised—

- (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
- (b) whether or not the person has previously engaged in conduct of that kind; and
- (c) whether or not there is an imminent danger of substantial damage to any other person if the person engages in conduct of that kind.

(5) The power of the Court to grant an injunction requiring a person do an act or thing may be exercised—

- (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
- (b) whether or not the person has previously refused or failed to do that act or thing; and
- (c) whether or not there is an imminent danger of substantial damage to any other person if the person refuses or fails to do that act or thing.

(6) An interim injunction may be granted under this section pending final determination of the application.

(7) A final injunction may, by consent of the parties, be granted under this section without proof that proper grounds for the injunction exist.

(8) Where the Minister or the Commissioner applies for an injunction under this section, no undertaking as to damages will be required.

(9) The Minister may give an undertaking as to damages or costs on behalf of some other applicant and, in that event, no further undertaking will be required.

(10) An injunction under this section may be rescinded or varied at any time.

Action for damages

84. (1) A person who suffers loss or damage by conduct of another in contravention of a provision of Part 10 (other than section 57) may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

(2) An action under subsection (1) may be commenced at any time within three years after the date on which the cause of action accrued.

Orders for compensation

85. (1) If in proceedings under this Act the Supreme Court or a District Court is satisfied that a person has suffered, or is likely to suffer, loss or damage by reason of a contravention of this Act, then whether or not any other order is made or relief granted in those proceedings, the Court may, for the purpose of compensating that person or preventing or reducing the extent of the loss or damage, make orders under this section against the person who committed the contravention or a person involved in the contravention.

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(2) Whether or not other proceedings have been instituted under this Act in relation to a contravention of this Act, the Supreme Court may—

- (a) on the application of a person who has suffered, or is likely to suffer, loss or damage by reason of the contravention; or
- (b) on the application of the Commissioner on behalf of one or more such persons made with the written consent of each such person,

make orders under this section, for the purpose of compensating such a person or preventing or reducing the extent of the loss or damage, against the person who committed the contravention or a person involved in the contravention.

(3) An application under subsection (2) may be commenced—

- (a) in the case of a contravention of section 57—at any time within two years after the day on which the cause of action arose; or
- (b) in any other case—at any time within three years after the day on which the cause of action arose.

(4) For the purpose of determining whether to make an order under this section in relation to a contravention of section 57, the court may have regard to the conduct of the parties to the proceedings since the contravention occurred.

(5) The orders that may be made under this section are of the following kinds—

- (a) an order for payment of the amount of the loss or damage;
- (b) an order avoiding, in whole or part, a contract or instrument (including a contract or instrument relating to real property);
- (c) an order for the variation of a contract or instrument (including a contract or instrument relating to real property);
- (d) an order directing the refund of money or the return of property (including real property);
- (e) an order directing the repair of, or provision of parts for, goods or the supply of specified services.

Sequestration orders

86. (1) Where—

- (a) proceedings have been or may be commenced before the Supreme Court or a District Court against a person in relation to a contravention of this Act; and
- (b) the Court is satisfied, on the application of the Minister or the Commissioner—
 - (i) that certain money or other property may be required to satisfy an order that has been or may be made in those proceedings; and

- (ii) that the making of a sequestration order under this section will not unduly prejudice the rights or interests of any other person,

the Court may make an order for the sequestration of that money or other property.

(2) Subject to subsection (3), an order under this section may be made—

(a) for a specified period; or

(b) until the conclusion of the proceedings referred to in subsection (1)(a).

(3) An order may be made under this section on an *ex parte* application but in that event it will have a maximum life of 30 days.

(4) An order under this section may be varied or revoked at any time.

(5) A person who has notice of a sequestration order under this section shall not deal with property to which the order relates except as may be authorised by the order.

Penalty: In the case of a body corporate—\$100 000.

In any other case—\$20 000.

DIVISION 4—GENERAL

Proceedings

87. (1) Except as otherwise provided, the offences constituted by this Act are summary offences.

(2) Proceedings for an offence against this Act must be commenced within 12 months after the date on which the offence is alleged to have been committed.

Defences

88. (1) Subject to subsection (3), in a prosecution for a contravention of a provision of this Act, it is a defence if the defendant establishes—

(a) that the contravention was due to reasonable mistake; or

(b) that the contravention was due to reasonable reliance on information supplied by another person; or

(c) that—

(i) the contravention was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control; and

(ii) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

(2) In subsection (1)(b) and (c)—

"another person" does not include a person who was—

(a) a servant or agent of the defendant; or

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(b) in the case of a defendant that is a body corporate, a director, servant or agent of the defendant,

at the time when the contravention occurred.

(3) If a defence provided by subsection (1) involves an allegation that a contravention was due to reliance on information supplied by another person or to the act or default of another person, the defendant is not, without leave, entitled to rely on that defence unless the defendant has, not later than seven days before the day on which the hearing of the proceeding commences, served on the person by whom the proceeding was instituted a notice in writing giving such information that would identify or assist in the identification of the other person as was then in the defendant's possession.

(4) In a prosecution for a contravention of a provision of this Act committed by the publication of an advertisement, it is a defence to establish that the defendant is a person whose business it is to publish or arrange for the publication of advertisements and that the defendant received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to a contravention of a provision of this Act.

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Vicarious liability

90. (1) Where an agent or employee is convicted of an offence against this Act, the principal or employer is also guilty of an offence and liable to a penalty not exceeding the maximum prescribed for the offence committed by the agent or employee, unless it is proved that the principal or employer could not, by the exercise of reasonable diligence, have prevented the commission of the offence by the agent or employee.

(2) Where an offence is committed against this Act in relation to the formation of a contract, any person who has derived or would, if the contract were carried out, expect to derive a direct or indirect pecuniary benefit from the contract is also guilty of an offence and liable to a penalty not exceeding the maximum prescribed for the principal offence, unless it is proved that the person could not, by the exercise of reasonable diligence, have prevented the commission of the principal offence.

(3) Where a body corporate is convicted of an offence against this Act, each director is also guilty of an offence and liable to a penalty not exceeding the maximum prescribed for the offence committed by the body corporate, unless it is proved that the director could not, by the exercise of reasonable diligence, have prevented the commission of the offence by the body corporate.

Evidentiary provisions

91. (1) In any proceedings an apparently genuine certificate, purporting to be signed by the Minister, stating that a person named in the certificate is an authorised officer is, in the absence of proof to the contrary, proof that the person is such an officer.

(2) In any proceedings an apparently genuine certificate, purporting to be signed by the Minister or the Commissioner (as the case requires) containing particulars of a delegation under this Act is, in the absence of proof to the contrary, proof of the particulars.

(3) Where it is alleged, in any proceedings under this Act, that a contract for the supply of goods or services is a contract to which Part 3 applies, it shall be presumed, unless the contrary is established, that the contract is such a contract.

(4) Where it is alleged, in any proceedings under this Act, that a person was acting as a dealer within the meaning of Part 3, it shall be presumed, unless the contrary is established, that the person was so acting.

(5) Where the Commissioner institutes, defends or assumes the conduct of proceedings on behalf of a consumer, all preconditions of that action required by this Act shall, in the absence of proof to the contrary, be deemed to have been satisfied.

(6) In any proceedings an apparently genuine copy of any book or document, taken by an authorised officer pursuant to this Act, certified by the Commissioner to be a true copy of the original is proof of the existence of the original and of its contents.

(7) In any proceedings an apparently genuine document purporting to be certified by the Commissioner as a true copy of an assurance given by a trader and accepted by the Commissioner under Division 2 is, in the absence of proof to the contrary, proof of the contents of the assurance and proof that the trader gave the assurance and that the Commissioner accepted it.

(8) A finding of fact made by a court in proceedings under this Act will, in the absence of proof to the contrary, be accepted as proof of that fact in other proceedings (except criminal proceedings) under this Act.

(9) A finding to which subsection (8) applies may be proved by production of a document under the seal of the court by which the finding was made.

(10) In any proceedings in which a civil or criminal liability is dependent on a state of mind—

(a) the state of mind of a director, servant or agent of a body corporate will be imputed to the body corporate; and

(b) the state of mind of a servant or agent of a natural person will be imputed to that person.

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**PART 12
MISCELLANEOUS**

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 authorised 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.

Saving of other rights or remedies

92. Nothing in this Act derogates from any right of action or other right or remedy that a person has apart from this Act.

Hindering an authorised officer

93. A person who hinders an authorised officer acting in the exercise of powers conferred by or under this or any other Act is guilty of an offence.

Penalty: \$2 000.

Impersonating an authorised officer

94. A person who falsely represents, by words or conduct, that the person is an authorised officer is guilty of an offence.

Penalty: \$2 000.

Service

95. Service of a notice, order or other document under this Act may be effected personally or by post.

Contracting out prohibited

96. This Act has effect notwithstanding any stipulation in any contract or agreement to the contrary.

Regulations

97. (1) The Governor may make such regulations as are contemplated by this Act or as are necessary or expedient for the purposes of this Act.

(2) Without limiting the generality of subsection (1), the regulations may—

- (a) prescribe codes of practice to be complied with by traders; or
- (b) exempt a specified person or class of persons or a specified transaction or class of transactions from compliance with this Act or a specified provision of this Act, either absolutely or upon conditions or subject to limitations.

(3) A regulation made under this Act may—

- (a) be of general or limited application; and
- (b) confer powers or impose duties in connection with the regulations on the Minister, the Commissioner or an authorised officer; and
- (c) incorporate, adopt, apply or make prescriptions by reference to, with or without modifications, any document formulated or published by any body or authority as in force at a particular time or from time to time; and
- (d) impose penalties not exceeding \$1 000 for contravention of, or failure to comply with, a regulation; and
- (e) fix expiation fees for alleged offences against the regulations.

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SCHEDULE

Transitional Provisions

The Commissioner

1. The person who immediately before the commencement of section 5 of this Act was the Commissioner for Consumer Affairs under the *Prices Act 1948* becomes on that commencement the Commissioner under this Act.

Authorised officers

2. Any person who immediately before the commencement of section 7 of this Act was an authorised officer under the *Prices Act 1948* becomes on that commencement an authorised officer under this Act.

Application of the repealed Door to Door Sales Act 1971

3. Notwithstanding the repeal of the *Door to Door Sales Act 1971*, effected by the *Statutes Amendment (Fair Trading) Act 1987*, the *Door to Door Sales Act 1971* continues to apply to contracts made before the day on which it was repealed.

Application of Part 3

4. Part 3 applies to a contract made on or after the commencement of that Part notwithstanding that negotiations leading to the formation of the contract may have taken place before that commencement.

APPENDIX

LEGISLATIVE HISTORY

Transitional Provisions

(Transitional provision from Statutes Repeal and Amendment (Commercial Tribunal) Act 1995, s. 11)

11. (1) An order of the Commercial Tribunal in force under section 37 of the principal Act immediately before the commencement of this section continues in force as if it were an order of the District Court subject to that section.

(2) The register of assurances maintained under section 80 of the principal Act immediately before the commencement of this section continues as the register of assurances maintained under that section.

(3) An order of the Commercial Tribunal in force under section 82 of the principal Act immediately before the commencement of this section continues in force as if it were an order of the District Court subject to that section.

(4) An apparently genuine document purporting to be a copy of an assurance certified by the Commercial Registrar under section 91(7) of the principal Act before the commencement of this section will be treated as if it were a copy of an assurance certified by the Commissioner under that section as amended by this Act.

(Transitional provision from Statutes Amendment and Repeal (Common Expiation Scheme) Act 1996, s. 5)

5. An Act repealed or amended by this Act will continue to apply (as in force immediately prior to the repeal or amendment coming into operation) to an expiation notice issued under the repealed or amended Act.

Legislative History

(entries in bold type indicate amendments incorporated since the last reprint)

Section 3(1):	definition of "District Court" inserted by 82, 1995, s. 5(a) definition of "the Tribunal" repealed by 82, 1995, s. 5(b)
Section 8(1):	amended by 64, 1996, s. 3
Section 14(2):	amended by 64, 1996, s. 4
Section 22(1):	amended by 48, 1991, s. 2(a)
Section 22(2):	amended by 48, 1991, s. 2(b)
Section 34(5) - (7):	amended by 82, 1995, s. 6(a)
Section 34(8):	inserted by 82, 1995, s. 6(b)
Section 37(1):	amended by 82, 1995, s. 7(a), (b)
Section 37(2):	amended by 82, 1995, s. 7(c), (d)
Section 37(3):	amended by 82, 1995, s. 7(e)
Section 39:	repealed by 48, 1991, s. 3
	Part 9 comprising ss. 44 and 45 and heading amended by 42, 1988, s. 19; repealed and ss. 44 - 45C and heading inserted in its place by 64, 1996, s. 5
Section 58:	amended by 48, 1991, s. 4
Part 11 Division 2 heading:	substituted by 64, 1996, s. 6
Section 79:	substituted by 64, 1996, s. 7
Section 80(1):	amended by 82, 1995, s. 8
Section 81(2):	substituted by 48, 1991, s. 5
Section 81(3):	inserted by 48, 1991, s. 5
Section 82:	substituted by 64, 1996, s. 8
Section 89:	repealed by 34, 1996, s. 4 (Sched. cl. 15)
Section 91(7):	substituted by 82, 1995, s. 10
Sections 91A and 91B:	inserted by 64, 1996, s. 9
Section 97(3):	amended by 64, 1996, s. 10; 34, 1996, s. 4 (Sched. cl. 15)