

Legislative Council

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South Australia

Second-hand Vehicle Dealers (Cooling-off Rights) Amendment Bill 2009

A BILL FOR

An Act to amend the *Second-hand Vehicle Dealers Act 1995*; and to make a consequential amendment to the *Magistrates Court Act 1991*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

Part 2—Amendment of *Second-hand Vehicle Dealers Act 1995*

- 4 Amendment of section 3—Interpretation
- 5 Insertion of section 3A
 - 3A Close associates
- 6 Amendment of section 4—Application of Act
- 7 Amendment of section 7—Dealers to be licensed
- 8 Amendment of section 13—Incorporated dealer's business to be properly managed and supervised
- 9 Insertion of section 13A
 - 13A Salespersons
- 10 Amendment of section 14—Registration of dealer's business premises
- 11 Insertion of heading to Part 3 Division 1 Subdivision 1
- 12 Amendment of section 15—Application of Division
- 13 Insertion of heading to Part 3 Division 1 Subdivision 2
- 14 Amendment of section 16—Notices to be displayed
- 15 Amendment of section 17—Form of contract
- 16 Amendment of section 18—Notices to be provided to purchasers of second-hand vehicles
- 17 Insertion of Part 3 Division 1 Subdivision 3
 - Subdivision 3—Cooling-off
 - 18A Interpretation
 - 18B Cooling-off
 - 18C Legal title to vehicle remains with dealer during cooling-off period
 - 18D Trade-in vehicles
 - 18E Option to purchase vehicle subject to contract for sale
- 18 Amendment of section 20—Notices to be displayed in case of auction
- 19 Amendment of section 21—Notices to be provided to purchasers of second-hand vehicles
- 20 Amendment of section 22—Trade auctions
- 21 Amendment of section 26—Interpretation
- 22 Amendment of section 27—Cause for disciplinary action

23	Amendment of section 31—Disciplinary action
24	Amendment of section 32—Contravention of orders
25	Amendment of section 33—No waiver of rights
26	Amendment of section 34—Interference with odometers prohibited
27	Amendment of section 41—False or misleading information
28	Amendment of section 42—Name in which dealer may carry on business
29	Amendment of section 50—Evidence
30	Amendment of section 53—Regulations
31	Amendment of Schedule 3—Second-Hand Vehicles Compensation Fund

Schedule 1—Related amendment

Part 1—Amendment of *Magistrates Court Act 1991*

1	Amendment of section 3—Interpretation
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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Second-hand Vehicle Dealers (Cooling-off Rights) Amendment Act 2009*.

2—Commencement

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

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Second-hand Vehicle Dealers Act 1995*

4—Amendment of section 3—Interpretation

- (1) Section 3, after the definition of *authorised officer* insert:

business day means a day other than a Sunday or other public holiday;

close associate—see section 3A;

- (2) Section 3, definition of *credit contract*—delete the definition and substitute:

cooling-off period, in relation to a contract for the sale of a second-hand vehicle, means the period commencing when the contract is made and concluding at the end of the second clear business day after the day on which the contract is made;

- (3) Section 3, definition of *dealer*—before "selling" insert:

buying or

- (4) Section 3—after the definition of *model designation* insert:

offer for sale—an offer for sale includes exposure for sale, an invitation to treat and the publishing, or authorising the publication, of an advertisement;

- (5) Section 3, after the definition of *registered premises* insert:

salesperson means a person who, for or on behalf of a dealer—

- (a) buys or sells second-hand vehicles; or
- (b) induces or attempts to induce, or negotiates with a view to inducing, a person to buy or sell a second-hand vehicle; or
- (c) performs a function of a kind prescribed by regulation for the purposes of this paragraph;

- (6) Section 3, definition of *sell*—delete "includes sell on behalf of another person and" and substitute:

includes exchange, and sell on behalf of another person; and

5—Insertion of section 3A

After section 3 insert:

3A—Close associates

- (1) 2 persons are *close associates* if—
- (a) 1 is a spouse, domestic partner, parent, brother, sister or child of the other; or
 - (b) they are members of the same household; or
 - (c) they are in partnership; or
 - (d) they are joint venturers; or
 - (e) they are related bodies corporate; or
 - (f) 1 is a body corporate and the other is a director, manager, secretary or public officer of the body corporate; or
 - (g) 1 is a body corporate (other than a public company whose shares are quoted on a prescribed financial market) and the other is a shareholder in the body corporate; or
 - (h) 1 is a body corporate whose shares are quoted on a prescribed financial market and the other is a substantial shareholder (within the meaning of the *Corporations Act 2001* of the Commonwealth) in the body corporate; or
 - (i) 1 has a right to participate (otherwise than as a shareholder in a body corporate) in income or profits derived from a business conducted by the other; or
 - (j) 1 is in a position to exercise control or significant influence over the conduct of the other.

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

domestic partner means a person who is a domestic partner within the meaning of the *Family Relationships Act 1975*, whether declared as such under that Act or not;

prescribed financial market means a prescribed financial market within the meaning of section 9 of the *Corporations Act 2001* of the Commonwealth;

spouse—a person is the spouse of another if they are legally married.

6—Amendment of section 4—Application of Act

Section 4(2)—delete "Section 17 does" and substitute:

Section 17 and Part 3 Division 1 Subdivision 3 do

7—Amendment of section 7—Dealers to be licensed

- (1) Section 7(1), penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$100 000.

- (2) Section 7(2)(b)—delete "selling" and substitute:

buying or selling

8—Amendment of section 13—Incorporated dealer's business to be properly managed and supervised

Section 13, penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$100 000.

9—Insertion of section 13A

After section 13 insert:

13A—Salespersons

- (1) A dealer must not employ a person as a salesperson unless the person—
- (a) has not—
 - (i) been convicted of an indictable offence of dishonesty; or
 - (ii) during the period of 10 years preceding the employment, been convicted of a summary offence of dishonesty; and
 - (b) is not suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth.

Maximum penalty: \$100 000.

- (2) A person must not act as a salesperson unless the person—

(a) has not—

- (i) been convicted of an indictable offence of dishonesty; or
 - (ii) during the period of 10 years preceding the employment, been convicted of a summary offence of dishonesty; and
 - (b) is not suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth.
- Maximum penalty: \$100 000.
- (3) For the purposes of subsection (2), a person *acts as a salesperson* if the person—
 - (a) is or remains in the service of a dealer as a salesperson; or
 - (b) holds himself or herself out as a salesperson; or
 - (c) otherwise acts as a salesperson.
 - (4) A provision of this section that provides that a person must not be employed or act as a salesperson if the person is convicted, disqualified or suspended applies to a person who is employed as a salesperson, or who is acting as a salesperson, immediately before the commencement of this section only if the person is convicted, disqualified or suspended after the commencement.

10—Amendment of section 14—Registration of dealer's business premises

- (1) Section 14(1), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
Expiation fee: \$315.
- (2) Section 14(5), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
Expiation fee: \$315.

11—Insertion of heading to Part 3 Division 1 Subdivision 1

Part 3 Division 1—before section 15 insert:

Subdivision 1—Application of Division

12—Amendment of section 15—Application of Division

- (1) Section 15(1)—after "This Division" insert:
, other than section 18E,
- (2) Section 15(2)—delete "Except as provided in section 17, this Division" and substitute:
This Division, other than sections 17 and 18E,

13—Insertion of heading to Part 3 Division 1 Subdivision 2

Part 3 Division 1—after section 15 insert:

Subdivision 2—Notices and form of contract

14—Amendment of section 16—Notices to be displayed

- (1) Section 16(1)—delete "or expose"
- (2) Section 16(1), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
Expiation fee: \$315.
- (3) Section 16(3)(b)—delete "or exposing"
- (4) Section 16(3)(c)—delete "or exposing"
- (5) Section 16(3)(f)—delete "or exposed"
- (6) Section 16(5), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
- (7) Section 16(6), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
- (8) Section 16(7), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$2 500.

15—Amendment of section 17—Form of contract

- (1) Section 17(1)(d)—after subparagraph (ii) insert:
 - (iia) if the contract is subject to a cooling-off period—
 - (A) when the cooling-off period will expire; and
 - (B) prescribed information about the rights and obligations of the parties to the sale under Subdivision 3; and
- (2) Section 17(3), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
Expiation fee: \$315.
- (3) Section 17(4), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
- (4) Section 17(5), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
- (5) Section 17(6), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.

16—Amendment of section 18—Notices to be provided to purchasers of second-hand vehicles

Section 18, penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.

17—Insertion of Part 3 Division 1 Subdivision 3

Part 3 Division 1—after section 18 insert:

Subdivision 3—Cooling-off

18A—Interpretation

In this Subdivision—

approved form means a form approved by the Commissioner.

18B—Cooling-off

- (1) This section applies to a contract entered into by a dealer after the commencement of this section for the sale of a second-hand vehicle to a natural person, other than a contract for the sale of a vehicle of a prescribed class or the sale of a vehicle in prescribed circumstances.
- (2) Subject to this section, a purchaser under a contract to which this section applies may, by giving the dealer written notice before the expiration of the cooling-off period of the purchaser's intention not to be bound by the contract, rescind the contract.
- (3) The notice may be given—
 - (a) by giving it to the dealer personally; or
 - (b) by posting it by registered post to the dealer's address for service (in which case the notice is taken to have been given when the notice is posted); or
 - (c) by leaving it for the dealer at the dealer's address for service with a person apparently responsible to the dealer; or
 - (d) by transmitting it by fax or email to a fax number or email address provided by the dealer (in which case the notice is taken to have been given at the time of transmission).
- (4) If in legal proceedings the question arises whether a notice has been given in accordance with this section, the burden of proving the giving of the notice lies on the purchaser.
- (5) A dealer, or a person acting on behalf of a dealer, may not demand or require the purchaser of a second-hand vehicle under a contract to which this section applies to make a payment in respect of the sale before the expiration of the cooling-off period, other than payment of a deposit towards the contract price of the vehicle that does not exceed 10% of that price.
Maximum penalty: \$5 000.
- (6) In proceedings for an offence against subsection (5), if it is proved that the defendant received money from the purchaser, it will be presumed, in the absence of proof to the contrary, that the defendant demanded or required the payment of that money.

- (7) If a purchaser rescinds a contract by notice under this section, the dealer must, before the end of the next clear business day after receiving the notice, refund to the purchaser any amount paid in respect of the sale less 2% of the contract price of the vehicle or \$100, whichever is the lesser (which the dealer is entitled to retain).
Maximum penalty: \$5 000.
Expiation fee: \$500.
- (8) For the purposes of subsection (7), a refund may be paid—
- (a) by giving the purchaser payment in cash or by cheque; or
 - (b) by posting a cheque by registered post to the purchaser's last known address (in which case the refund is taken to have been paid when the cheque is posted); or
 - (c) by electronic transfer of funds into an ADI account nominated by the purchaser (in which case the refund is taken to have been paid when the transfer is executed by the dealer); or
 - (d) by any other prescribed method.
- (9) If the purchaser of a second-hand vehicle under a contract to which this section applies enters into a contract for the provision of credit (a *credit contract*) in connection with the purchase, the following provisions apply:
- (a) if the contract for the purchase of the vehicle is rescinded under this section—the credit contract is void and any associated mortgage or other security taken by the credit provider is discharged;
 - (b) if the contract for the purchase of the vehicle is not rescinded—the credit contract does not take effect until—
 - (i) the purchaser waives his or her right to a cooling-off period in relation to the contract for the purchase of the vehicle in accordance with section 33; or
 - (ii) if the right to a cooling-off period is not waived—the expiration of the cooling-off period.

18C—Legal title to vehicle remains with dealer during cooling-off period

Subject to an agreement in the approved form between a dealer and a purchaser under a contract for the sale of a second-hand vehicle to which section 18B applies, the following provisions apply in respect of the contract:

- (a) legal title to the vehicle does not pass from the dealer to the purchaser until the expiration of the cooling-off period in relation to the contract;

- (b) the dealer is entitled to retain possession of the vehicle during the cooling-off period;
- (c) the dealer must allow the purchaser, or a person nominated by the purchaser, reasonable access to the vehicle during the cooling-off period for the purpose of test driving or inspecting the vehicle;
- (d) neither the dealer nor the purchaser, nor a person acting on behalf of the dealer or the purchaser, may drive the vehicle more than 100 kilometres during the cooling-off period;
- (e) the dealer must ensure during the cooling-off period that the vehicle—
 - (i) is roadworthy; and
 - (ii) is insured against loss or damage; and
 - (iii) is registered, or bears trade plates, and is insured in accordance with the requirements of the *Motor Vehicles Act 1959*.

18D—Trade-in vehicles

- (1) If in connection with a contract to which section 18B applies, legal title to a vehicle owned by the purchaser is to pass to the dealer by way of trade-in (the *trade-in vehicle*), the following provisions apply:
 - (a) the purchaser is to retain possession of the trade-in vehicle during the cooling-off period;
 - (b) details of the condition of the trade-in vehicle at the commencement of the cooling-off period must be recorded in the approved form, which must be signed by the dealer and the purchaser;
 - (c) legal title to the trade-in vehicle does not pass to the dealer until the expiration of the cooling-off period.
- (2) If during the cooling-off period the trade-in vehicle, or any part of the trade-in vehicle, is altered in any way or damaged—
 - (a) the dealer may, by written notice in the approved form given personally to the purchaser, rescind the contract to which section 18B applies and any contract made in connection with that contract; and
 - (b) if the contract to which section 18B applies is so rescinded—any contract entered into by the purchaser for the provision of credit in connection with that contract is void and any associated mortgage or other security taken by the credit provider is discharged.

18E—Option to purchase vehicle subject to contract for sale

- (1) A dealer must not, during the cooling-off period in relation to a contract for the sale of a second-hand vehicle—
 - (a) sell or offer for sale the vehicle or an interest in the vehicle other than an option to purchase the vehicle if the contract for the sale of the vehicle is rescinded; or
 - (b) offer for sale more than 1 option to purchase the vehicle.Maximum penalty: \$20 000.
- (2) A dealer proposing to grant an option to a person to purchase a second-hand vehicle during the cooling-off period in relation to a contract for the sale of the vehicle—
 - (a) may require the person to pay a deposit towards the proposed contract price of the vehicle that does not exceed 2% of that price or \$100, whichever is the lesser; and
 - (b) must provide the person with a notice in the approved form—
 - (i) advising that the vehicle is subject to a contract for sale and the person will only be entitled to purchase the vehicle if the contract is rescinded; and
 - (ii) containing other prescribed information.Maximum penalty: \$5 000.
- (3) The holder of an option to purchase a second-hand vehicle subject to a contract for sale is entitled to a refund of any deposit paid in order to secure the option if, and only if, the contract for sale is not rescinded.

18—Amendment of section 20—Notices to be displayed in case of auction

- (1) Section 20(1), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
- (2) Section 20(3), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
- (3) Section 20(5), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
Expiation fee: \$315.
- (4) Section 20(6), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$2 500.

19—Amendment of section 21—Notices to be provided to purchasers of second-hand vehicles

- Section 21, penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
Expiation fee: \$315.

20—Amendment of section 22—Trade auctions

- (1) Section 22(1), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
Expiation fee: \$315.
- (2) Section 22(2), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$5 000.
Expiation fee: \$315.

21—Amendment of section 26—Interpretation

Section 26—after the definition of *director* insert:
salesperson includes a former salesperson.

22—Amendment of section 27—Cause for disciplinary action

Section 27—after subsection (1) insert:

- (1a) There is proper cause for disciplinary action against a salesperson if the salesperson has acted unlawfully, improperly, negligently or unfairly in the course of acting as a salesperson.

23—Amendment of section 31—Disciplinary action

Section 31(1)(b)—delete "\$20 000" and substitute:
\$100 000

24—Amendment of section 32—Contravention of orders

- (1) Section 32(1), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$175 000 or imprisonment for 1 year.
- (2) Section 32(2), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$175 000 or imprisonment for 1 year.

25—Amendment of section 33—No waiver of rights

- (1) Section 33—after subsection (2) insert:
 - (2a) A document for the waiver of the right of a prospective purchaser of a second-hand vehicle under section 18B to rescind a contract for the sale of the vehicle must conform with the following requirements:
 - (a) the document must contain—
 - (i) a statement of the rights of a prospective purchaser under section 18B to rescind the contract; and
 - (ii) a statement warning a prospective purchaser of the legal effect if he or she waives the right to rescind the contract under section 18B;
 - (b) the document must be written in plain English;

- (c) the document may be completed electronically or manually but must be signed by the prospective purchaser and witnessed by a person other than the dealer;
 - (d) the document must contain any other prescribed information.
- (2) Section 33(3), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$20 000
- (3) Section 33(4), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$20 000
- (4) Section 33(5), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$20 000
- (5) Section 33—after subsection (5) insert:
 - (5a) A dealer must not induce or attempt to induce, or make a representation or negotiate with a view to inducing, a prospective purchaser of a second-hand vehicle to waive his or her right under section 18B to rescind a contract for the sale of the vehicle.
Maximum penalty: \$20 000.
 - (5b) If a dealer is found guilty of an offence against subsection (5a), a person who has suffered loss or damage as a result of the offence may apply to the Magistrates Court for an order that the dealer compensate the person for the loss or damage.
 - (5c) The regulations may require a person or body prescribed by the regulations to report to the Minister, in accordance with requirements specified in the regulations, on the extent to which rights in general, or particular rights, conferred by this Act have been waived under subsection (2).

26—Amendment of section 34—Interference with odometers prohibited

Section 34(1), penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$10 000.

27—Amendment of section 41—False or misleading information

Section 41, penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) if the person made the statement knowing that it was false or misleading—\$25 000;
- (b) in any other case—\$5 000.

28—Amendment of section 42—Name in which dealer may carry on business

Section 42, penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$5 000.

Expiation fee: \$315.

29—Amendment of section 50—Evidence

Section 50(1)—delete subsection (1) and substitute:

- (1) For the purposes of this Act—
 - (a) if a person buys or offers to buy, or sells or offers for sale, at least 4 second-hand vehicles during a period of 12 months, the person will, in the absence of proof to the contrary, be presumed to have been a dealer during that period; and
 - (b) if a person and 1 other person who is a close associate of the person buy or offer to buy, or sell or offer for sale, an aggregate of at least 6 second-hand vehicles during a period of 12 months, the person and that close associate will, in the absence of proof to the contrary, both be presumed to have been dealers during that period; and
 - (c) if the registration of a second-hand vehicle is transferred from 1 person to another—
 - (i) the transferor will be presumed, in the absence of proof to the contrary, to have sold the vehicle to the transferee; and
 - (ii) the transferee will be presumed, in the absence of proof to the contrary, to have bought the vehicle from the transferor.

30—Amendment of section 53—Regulations

- (1) Section 53(2)(a)—after "licensed dealers" insert:
or salespersons
- (2) Section 53(2)(f)—delete "\$2 500" and substitute:
\$5 000
- (3) Section 53(2)(g)—delete "\$210" and substitute:
\$315

31—Amendment of Schedule 3—Second-Hand Vehicles Compensation Fund

- (1) Schedule 3, clause 2(1)—after paragraph (a) insert:
 - (ab) made a payment to a dealer in respect of the purchase of a second-hand vehicle under a contract that has been rescinded in accordance with section 18B; or
- (2) Schedule 3, clause 2(1)(d)—delete "person" and substitute:
claimant
- (3) Schedule 3, clause 2(1)(e)—delete "person" and substitute:
claimant
- (4) Schedule 3, clause 2(1)—delete "that person" and substitute:
the claimant

- (5) Schedule 3, clause 2(2)—delete "This clause" and substitute:

This Schedule

- (6) Schedule 3, clause 2(2)(b)—delete "person making the claim" and substitute:

claimant

- (7) Schedule 3, clause 2—after subclause (2) insert:

- (3) The personal representative of a claimant (including a deceased claimant) is entitled to make the claim on behalf of the claimant or the claimant's estate.

- (8) Schedule 3—after clause 2 insert:

2A—Determination, evidence and burden of proof

- (1) In determining a claim for compensation under this Schedule, any possible reduction to which the claimant's entitlement may be subject because of insufficiency of the Fund must be disregarded.
- (2) Any fact to be proved by a claimant under this Schedule is sufficiently proved if it is proved on the balance of probabilities.
- (9) Schedule 3, clause 3(2)—delete subclause (2) and substitute:
- (2) The following amounts will be paid out of the Fund:
- (a) an amount authorised under this Schedule;
 - (b) expenses incurred in administering the Fund (including expenses incurred in insuring the Fund against possible claims);
 - (c) the costs of investigating compliance with this Act or possible misconduct of dealers or salespersons;
 - (d) any amounts, approved by the Minister, to be paid towards the cost of prescribed educational programs conducted for the benefit of dealers, salespersons or members of the public;
 - (e) any amount required to be paid into the Consolidated Account under subclause (4).

Schedule 1—Related amendment

Part 1—Amendment of *Magistrates Court Act 1991*

1—Amendment of section 3—Interpretation

Section 3(1), definition of *minor statutory proceeding*, (b)—after "Part 4" insert:
or section 33