

## **Legislative Council—No 44A**

As reported with amendments, report adopted, recommitted, reported with a further amendment, report adopted, Standing Orders suspended and passed remaining stages, 30 April 2009

South Australia

# **Statutes Amendment and Repeal (Fair Trading) Bill 2008**

A BILL FOR

An Act to amend the *Building Work Contractors Act 1995*, the *Civil Liability Act 1936*, the *Conveyancers Act 1994*, the *Fair Trading Act 1987*, the *Land Agents Act 1994*, the *Plumbers, Gas Fitters and Electricians Act 1995*, the *Second-hand Vehicle Dealers Act 1995*, the *Security and Investigation Agents Act 1995* and the *Travel Agents Act 1986*; and to repeal the *Consumer Transactions Act 1972* and the *Recreational Services (Limitation of Liability) Act 2002*.

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60	Repeal of <i>Recreational Services (Limitation of Liability) Act 2002</i>

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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 *Statutes Amendment and Repeal (Fair Trading) Act 2008*.

5 **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.

10 **Part 2—Amendment of *Building Work Contractors Act 1995***

**4—Amendment of section 9—Entitlement to be licensed**

(1) Section 9(1)(c)—delete "an undischarged bankrupt" and substitute:

an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth

15 (2) Section 9(2)(b)(ii)—delete "an undischarged bankrupt" and substitute:

an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth

## 5—Insertion of Part 3A

After Part 3 insert:

### **Part 3A—Suspension of licence in urgent circumstances**

#### **19A—Suspension of licence in urgent circumstances**

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- (1) If the Commissioner is of the opinion that—
    - (a) there are reasonable grounds to believe that a licensed building work contractor has engaged or is engaging in conduct that constitutes grounds for disciplinary action under Part 4; and
    - (b) it is likely that the contractor will continue to engage in that conduct; and
    - (c) there is a danger that a person or persons may suffer significant harm, or significant loss or damage, as a result of the contractor's conduct unless action is taken urgently,  
the Commissioner may, by notice served on the contractor—
      - (d) suspend the contractor's licence for a specified period (which may not exceed 6 months); and
      - (e) direct the contractor, within 7 days of service of the notice, to surrender the suspended licence to the Commissioner.
  - (2) A licensed building work contractor who, without reasonable excuse, fails to surrender his or her licence in accordance with a direction under subsection (1)(e) is guilty of an offence.  
Maximum penalty: \$1 250.
  - (3) If, during the suspension of a licence under this section, the Commissioner is satisfied that the facts and circumstances that gave rise to the suspension have so altered that the suspension should be terminated, the Commissioner must, by further notice specifying the date of termination, terminate the suspension without delay and restore the licence to the person.
  - (4) A person whose licence has been suspended under this section may appeal to the District Court against the decision of the Commissioner to suspend the licence.
  - (5) Subject to subsection (7), an appeal must be instituted within 1 month of the making of the decision appealed against.
  - (6) The Commissioner must, if so required by the person whose licence has been suspended, state in writing the reasons for the Commissioner's decision to suspend the licence.

- 5
- (7) If the reasons of the Commissioner are not given in writing at the time of making the decision and the person (within 1 month of the making of the decision) requires the Commissioner to state the reasons in writing, the time for instituting an appeal runs from the time at which the person receives the written statement of those reasons.
- (8) The District Court must hear and determine an appeal under this section as expeditiously as possible.
- 10
- (9) This section applies in relation to conduct occurring before or after the commencement of this section.

### **6—Amendment of section 46—Registers**

Section 46—after subsection (2) insert:

- 15
- (2a) If any of the following events occur in relation to a person who is licensed as a building work contractor, or is a director of a body corporate that is licensed as a building work contractor, the Commissioner may record a note of the event on the register:
- 20
- (a) the person is 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;
- (b) the person becomes an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth;
- 25
- (c) a body corporate is wound up for the benefit of creditors and the person was a director of the body corporate—
- (i) when the body corporate was being so wound up; or
- (ii) within the period of 12 months preceding the commencement of the winding up;
- 30
- (d) the person, being a body corporate, is being wound up or is under official management or in receivership.

## **Part 3—Amendment of *Civil Liability Act 1936***

### **7—Amendment of section 4—Application of Act**

Section 4(3)—delete subsection (3)

### **8—Amendment of section 38—No duty to warn of obvious risk**

35

Section 38(2)(b)—delete paragraph (b) and substitute:

- (b) the defendant is required to warn the plaintiff of the risk by a written law; or

## Part 4—Amendment of *Conveyancers Act 1994*

### 9—Amendment of section 7—Entitlement to be registered

Section 7(1)(d)—delete "an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors" and substitute:

5                   an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth

### 10—Amendment of section 54—Register of conveyancers

Section 54—after subsection (2) insert:

- 10                   (2a) If any of the following events occur in relation to a person who is registered as a conveyancer, or is a director of a company that is registered as a conveyancer, the Commissioner may record a note of the event on the register:
- 15                   (a) the person is convicted of an offence of dishonesty;
  - (b) the person is 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;
  - (c) the person becomes an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth;
  - 20                   (d) a body corporate is wound up for the benefit of creditors and the person was a director of the body corporate—
    - (i) when the body corporate was being so wound up; or
    - (ii) within the period of 6 months preceding the commencement of the winding up;
  - 25                   (e) the person, being a company, is being wound up or is under official management or in receivership.

## Part 5—Amendment of *Fair Trading Act 1987*

### 11—Amendment of section 3—Interpretation

- 30                   (1) Section 3(1), definition of *consumer*—delete "not being" and substitute:  
                    but does not include (other than in Part 10 Division 2A)
- (2) Section 3(1)—after the definition of *goods* insert:  
                    *Magistrates Court* means the Civil (Consumer and Business) Division of the Magistrates Court;
- 35                   (3) Section 3(4)—delete subsection (4)

### 12—Amendment of section 8—Functions of Commissioner

Section 8(2)—delete subsection (2)

### 13—Insertion of section 8A

After section 8 insert:

#### 8A—Conciliation

- 5 (1) The Commissioner must not attempt to resolve a dispute between a consumer and trader 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.
- 10 (2) The Commissioner may call voluntary or compulsory conferences of the parties to the dispute for the purpose of attempting to resolve the dispute by agreement.
- (3) If—
- (a) the Commissioner is requested to resolve a dispute between a consumer and trader by conciliation; and
  - 15 (b) the consumer, without reasonable excuse, fails to attend a conference called for that purpose when asked to do so by the Commissioner,

the Commissioner may refuse to take any further action in relation to the dispute.

- 20 (4) A trader who is asked by the Commissioner to attend a conference under this section must attend the conference if the Commissioner indicates in the request that attendance is compulsory.

Maximum penalty:

- 25 (a) in the case of a minor offence—\$5 000;
- (b) in any other case—\$10 000.

Expiation fee: In the case of a minor offence—\$315.

- 30 (5) A conciliation conference may be conducted by telephone or other electronic means (and a person who participates in a conference by such means will, for the purposes of this section, be taken to have attended the conference).
- (6) The following provisions govern representation in conciliation proceedings:
- (a) representation of a party by a lawyer will not be permitted unless—
- 35 (i) another party to the dispute is a lawyer; or
  - (ii) each of the parties to the dispute agrees; or
  - (iii) the Commissioner is of the opinion that the party would be unfairly disadvantaged if not represented by a lawyer;



(b) if a party to the dispute is a body corporate, the Commissioner must, if the party seeks to be represented by an officer or employee who is not a lawyer, permit such representation;

5 (c) the Commissioner may permit a party to the dispute to be assisted by a person who is not a lawyer but only if that person is not acting for fee or reward.

10 (7) If an agreement that is reached as a result of conciliation is recorded in a written instrument and signed by the Commissioner and the parties to the agreement—

(a) a copy of the instrument must be given to each party; and

15 (b) in the event that a party to the agreement fails to carry out the party's obligations under the agreement—the Commissioner or the other party may apply to the Magistrates Court for an order enforcing the terms of the agreement.

20 (8) Evidence of anything said or done in the course of conciliation proceedings under this section is only admissible in subsequent proceedings by consent of the Commissioner and all parties to the proceedings.

(9) An application to the Magistrates Court under subsection (7)(b) is a minor statutory proceeding for the purposes of the *Magistrates Court Act 1991*.

25 (10) In this section—

*minor offence* means an offence where the value of the goods or services the subject of the dispute is not more than \$1 000 or, if some other amount is prescribed by the regulations, that amount.

#### **14—Amendment of section 11—Secrecy**

Section 11, penalty provision—delete the penalty provision and substitute:

30 Maximum penalty: \$20 000.

#### **15—Amendment of section 15—Prohibition of certain contractual terms**

Section 15(2), penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$10 000.

#### **16—Amendment of section 17—Requirements in relation to prescribed contracts**

35 Section 17(2), penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$10 000.

Expiation fee: \$500.

**17—Amendment of section 18—Acceptance of consideration etc**

- (1) Section 18(1), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.  
Expiation fee: \$500.

- 5 (2) Section 18(2), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.  
Expiation fee: \$500.

**18—Amendment of section 19—Prohibition hours**

- Section 19, penalty provision—delete the penalty provision and substitute:  
10 Maximum penalty: \$10 000.  
Expiation fee: \$500.

**19—Amendment of section 20—Duties of dealers**

- (1) Section 20(1), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.

- 15 (2) Section 20(2), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.

**20—Amendment of section 21—Harassment or coercion**

- (1) Section 21(1), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.

- 20 (2) Section 21(2), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.

**21—Amendment of section 24—Restitution**

- Section 24(7), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.

25 **22—Amendment of section 27—Prohibition of certain actions**

- (1) Section 27(1), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.

- (2) Section 27(5), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.

30 **23—Amendment of section 28—Prohibition of mock auctions**

- Section 28(1), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$5 000.

**24—Amendment of section 36—Offences**

- Section 36, penalty provision—delete the penalty provision and substitute:  
35 Maximum penalty: \$10 000.

**25—Amendment of section 37—Powers of District Court**

Section 37(4), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000 or imprisonment for 2 years.

**26—Amendment of section 38—Limited offers and failing to supply as demanded**

- (1) Section 38(1), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$5 000.
- (2) Section 38(2), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$5 000.

**27—Amendment of section 40—Price tickets**

Section 40, penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$5 000.  
Expiation fee: \$315.

**28—Amendment of section 41—Approval of consumer affairs authority not to be implied**

Section 41, penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.

**29—Amendment of section 42—Substantiation of claims**

Section 42(2), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.

**30—Amendment of section 43—Unlawful actions and representations**

- (1) Section 43(1), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$5 000.
- (2) Section 43(2), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$5 000 or imprisonment for 6 months.

**31—Amendment of section 43A—Prohibition on trading or carrying on business as Starr-Bowkett society**

Section 43A(1), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.

**32—Amendment of section 45B—Offences**

Section 45B, penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.

**33—Amendment of section 46—Interpretation**

- (1) Section 46(1), definition of *document*—delete the definition

(2) Section 46(1), definition of *goods*, (d)—delete paragraph (d) and substitute:

(d) gas, electricity, water, sewerage and telecommunications; and

(e) any component part of, or accessory to, goods;

(3) Section 46(1), definition of *services*, (a)—after subparagraph (i) insert:

5 (ia) the provision of gas or electricity or the provision of any other form of energy; or

### **34—Amendment of section 55—Application**

Section 55(2)—after "Division 2" insert:

, 2A

### **35—Substitution of section 67**

Section 67—delete the section and substitute:

#### **67—Acceptance of payment**

(1) A person who, in trade or commerce, accepts payment or other consideration for the supply of goods or services, and who—

15 (a) does not supply all the goods or services within the period specified by the person or, if no period is specified, within a reasonable time; or

(b) supplies goods or services that are materially different from the goods or services to which the agreement to supply is related,

20 is guilty of an offence.

(2) Subsection (1) applies whether or not the payment or other consideration accepted by the person represents the whole or a part of the payment or other consideration for the supply of the goods or services.

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### **36—Insertion of Part 10 Division 2A**

Part 10—after Division 2 insert:

#### **Division 2A—Conditions and warranties in consumer transactions**

#### **74A—Interpretation and application**

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(1) In this Division—

(a) a reference to the quality of goods includes a reference to the state or condition of the goods; and

(b) a reference to negotiations in relation to a contract for the supply by a person of goods to a consumer is a reference to any negotiations or arrangements conducted or made with the consumer by another person in the course of a business carried on by the other person in respect of which the consumer was induced to make the contract or that otherwise promoted the transaction to which the contract relates.

(2) Goods of any kind are of *merchantable quality* within the meaning of this Division if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances.

(3) This Division does not affect the operation of the *Sale of Goods Act 1895*, or of any other Act or law in relation to contracts for the supply of goods or services except to the extent that this Division is inconsistent with the provisions of the *Sale of Goods Act 1895*, or the other Act or law.

(4) This Division does not apply to or in respect of a contract made before the commencement of this Division.

#### **74B—Application of provisions not to be excluded or modified**

(1) Subject to section 74H, a term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying—

- (a) the application of all or any of the provisions of this Division; or
- (b) the exercise of a right conferred by such a provision; or
- (c) the liability of a person for breach of a condition or warranty implied by such a provision,

is void.

(2) A term of a contract will not be taken to exclude, restrict or modify the application of a provision of this Division unless the term does so expressly or is inconsistent with that provision.

#### **74C—Implied undertakings as to title, encumbrances and quiet possession**

(1) In every contract for the supply of goods by a person (the *supplier*) to a consumer, other than a contract to which subsection (3) applies, there is—

- (a) an implied condition that, in the case of a supply by way of sale, the supplier has a right to sell the goods, and, that in the case of an agreement to sell or a hire-purchase agreement, the supplier will have a right to sell the goods at the time when the property is to pass; and

(b) an implied warranty that the consumer will enjoy quiet possession of the goods except so far as it may lawfully be disturbed by the supplier or by another person who is entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before the contract is made; and

(c) in the case of a contract for the supply of goods under which the property is to pass or may pass to the consumer—an implied warranty that the goods are free, and will remain free until the time when the property passes, from any charge or encumbrance not disclosed or known to the consumer before the contract is made.

(2) A person is not, in relation to a contract for the supply of goods, in breach of the implied warranty referred to in subsection (1)(c) by reason only of the existence of a floating charge over assets of the person unless and until the charge becomes fixed and enforceable by the person to whom the charge is given.

(3) In a contract for the supply of goods to a consumer in the case of which there appears from the contract or is to be inferred from the circumstances of the contract an intention that the supplier should transfer only such title as the supplier or a third person may have, there is—

(a) an implied warranty that all charges or encumbrances known to the supplier and not known to the consumer have been disclosed to the consumer before the contract is made; and

(b) an implied warranty that—

(i) the supplier; and

(ii) in a case where the parties to the contract intend that the supplier should transfer only such title as a third person may have—that person; and

(iii) anyone claiming through or under the supplier or that third person otherwise than under a charge or encumbrance disclosed or known to the consumer before the contract is made,

will not disturb the consumer's quiet possession of the goods.

#### **74D—Supply by description**

(1) In every contract for the supply (otherwise than by way of sale by auction or sale by competitive tender) by a person in the course of a business of goods to a consumer by description, there is an implied condition that the goods will correspond with the description, and, if the supply is by reference to a sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

- (2) A supply of goods is not prevented from being a supply by description for the purposes of subsection (1) by reason only that, being exposed for sale or hire, they are selected by the consumer.

#### **74E—Implied undertakings as to quality or fitness**

- 5 (1) If a person supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by reason only of this section—
- 10 (a) as regards defects specifically drawn to the consumer's attention before the contract is made; or
- (b) if the consumer examines the goods before the contract is made—as regards defects that the examination ought to have revealed.
- 15 (2) If a person (the *supplier*) supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known—
- (a) to the supplier; or
- (b) to the person by whom any negotiations are conducted,
- 20 any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that purpose is one for which such goods are commonly supplied, except where the circumstances show that the consumer
- 25 does not rely, or that it is unreasonable for the consumer to rely, on the skill or judgment of the supplier or the person conducting the negotiations.
- (3) Subsections (1) and (2) apply to a contract for the supply of goods made by a person who in the course of a business is acting as agent for the supplier in the same way as they apply to a contract for the supply of goods made by a person in the course of a business, except where that person is not supplying in the course of a business and either the consumer knows that fact or reasonable steps are taken to bring it to the notice of the consumer before the contract is made.

#### **74F—Supply by sample**

- 35 If in a contract for the supply (otherwise than by way of sale by auction or sale by competitive tender) by a person in the course of a business of goods to a consumer there is a term in the contract, expressed or implied, to the effect that the goods are supplied by
- 40 reference to a sample—
- (a) there is an implied condition that the bulk will correspond with the sample in quality; and

- (b) there is an implied condition that the consumer will have a reasonable opportunity of comparing the bulk with the sample; and
- (c) there is an implied condition that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample.

#### **74G—Warranties in relation to the supply of services**

- (1) In every contract for the supply by a person in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.
- (2) If a person supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the person any particular purpose for which the services are required or the result that the consumer desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connection with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result.
- (3) Subsection (2) does not apply if the circumstances show—
- (a) that the consumer does not rely, or
- (b) that it is unreasonable for the consumer to rely, on the skill or judgment of the person.
- (4) This section does not apply to a contract providing for the carrying out of domestic building work within the meaning of the *Building Work Contractors Act 1995*.

#### **74H—Liability relating to provision of recreational services may be limited**

- (1) Subject to this section, a term of a contract for the supply of recreational services by a person (the *supplier*) to a consumer may exclude, restrict or modify a warranty implied in the contract by section 74G or a substantially similar provision of an Act of the Commonwealth.
- (2) Subsection (1) applies only if—
- (a) the exclusion, restriction or modification contained in the term is limited to excluding, restricting or modifying the liability of the supplier for any personal injury suffered by the consumer or another person for whom or on whose behalf the consumer is acquiring the services (a *third party consumer*); and



- (b) the term contains the prescribed particulars and is in the prescribed form; and
- (c) the term was brought to the attention of the consumer prior to the supply of the services; and
- 5 (d) the consumer has agreed to the term in the prescribed manner; and
- (e) a statement containing any other information prescribed by regulation is made available to the consumer in accordance with the requirements prescribed by regulation.
- 10 (3) Subsection (1) does not operate to exclude, restrict or modify the liability of the supplier for damages for any significant personal injury suffered by the consumer or any third party consumer if it is established (by applying the general principles set out in section 34 of the *Civil Liability Act 1936*) that the reckless conduct of the
- 15 supplier caused the injury.
- (4) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void if it purports to indemnify, or has the effect of indemnifying, a person who supplies recreational services in relation to any liability that may not be excluded, restricted or modified under
- 20 this section.
- (5) Subsection (4) does not apply in respect of a contract of insurance.
- (6) The Commissioner must publish information setting out the rights of consumers in relation to contracts for the supply of recreational
- 25 services on a website determined by the Commissioner.
- (7) In this section—
- conduct** includes any act or omission;
- personal injury** means bodily injury and includes—
- (a) mental and nervous shock; and
- 30 (b) death;
- reckless**—a person's conduct is reckless if the person—
- (a) is aware, or should reasonably have been aware, of a significant risk that his or her conduct could result in personal injury to another; and
- 35 (b) engages in the conduct despite the risk and without adequate justification;
- recreational services** means services that consist of participation in—
- (a) a sporting activity or a similar leisure-time pursuit; or
- 40 (b) any other activity that—
- (i) involves a significant degree of physical exertion or physical risk; and

- (ii) is undertaken for the purposes of recreation, enjoyment or leisure;

*significant* means not nominal, trivial or minor.

#### 74I—Representations etc

5 A statement or representation made in relation to goods or services that are, or subsequently become, subject to a contract for the supply of those goods or services by an employee or a person acting on behalf of the supplier of the goods or services will be taken to be a statement or representation made by that supplier.

#### 74J—Rescission of contract

10 (1) If—

- (a) a person (the *supplier*) supplies goods to a consumer in the course of a business; and
- (b) there is a breach of a condition that is, by reason of a provision of this Division, implied in the contract for the supply of the goods,

15 the consumer is, subject to this section, entitled to rescind the contract by—

- (c) causing to be served on the supplier a notice in writing signed by the consumer giving particulars of the breach; or
- (d) causing the goods to be returned to the supplier and giving to the supplier, either orally or in writing, particulars of the breach.

20 (2) If a consumer purports to rescind under this section a contract for the supply of goods by a person, the purported rescission does not have effect if—

- (a) the notice is not served or the goods are not returned within a reasonable time after the consumer has had a reasonable opportunity of inspecting the goods; or
- (b) in the case of a rescission effected by service of a notice— after the delivery of the goods to the consumer but before the notice is served—
  - 35 (i) the goods were disposed of by the consumer, lost, or destroyed otherwise than by reason of a defect in the goods; or
  - (ii) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable; or
  - 40 (iii) the goods were damaged by abnormal use; or
- (c) in the case of a rescission effected by return of the goods— while the goods were in the possession of the consumer—

- 5
- (i) the consumer caused the goods to become unmerchantable or failed to take reasonable steps to prevent the goods from becoming unmerchantable, or
- (ii) the goods were damaged by abnormal use.
- 10
- (3) If a contract for the supply of goods by a person (the *supplier*) to a consumer has been rescinded in accordance with this section—
- (a) if the property in the goods had passed to the consumer before the notice of rescission was served on, or the goods were returned to, the supplier—the property in the goods re-vests in the supplier on the service of the notice or the return of the goods; and
- 15
- (b) the consumer may recover from the supplier, as a debt, the amount or value of any consideration paid or provided by the consumer for the goods.
- (4) A notice under this section is validly served on a supplier if it is—
- (a) delivered personally to the supplier; or
- 20
- (b) delivered, or sent by post, in an envelope addressed to the supplier, to a place at which the supplier resides or carries on business; or
- (c) transmitted to a fax number or email address provided by the supplier.
- (5) A notice sent by post to a supplier in accordance with subsection (4) will be taken to have been served on the supplier at the time of posting.
- 25
- (6) A notice of rescission transmitted to a fax number or email address in accordance with subsection (4) will be taken to have been served on the supplier at the time of transmission.
- 30
- (7) The right of rescission conferred by this section is in addition to, and does not derogate from, a right of rescission under any other Act or law.

#### **74K—Powers of Magistrates Court in event of rescission**

- 35
- (1) In a dispute arising out of the rescission of a contract for the supply by a person (the *supplier*) of goods or services in the course of a business to a consumer, the Magistrates Court may, on the application of a supplier or consumer, make such orders as may be necessary—
- (a) to give effect to, or to enforce, rights or liabilities consequent on the rescission arising under this Division; or
- 40
- (b) subject to such rights or liabilities—to restore the parties as nearly as practicable to their respective positions prior to the formation of the contract.

- (2) The jurisdiction conferred by this section is not exclusive of any other jurisdiction of a court.

**74L—Nature of writing**

- (1) A provision of a written contract for the supply by a person (the *supplier*) of goods or services to a consumer that—
- (a) is in handwriting that is not clear and legible; or
  - (b) is printed in type the dimensions of which do not comply with the regulations,
- is not enforceable against the consumer by the supplier.
- (2) If a consumer has been supplied with a copy of a contract for the supply by a person of goods or services to the consumer, the contract will not be regarded as being in conformity with subsection (1) unless that copy is in conformity with that subsection.

**74M—Relief against civil consequences of non-compliance with Division**

- (1) If a person has made, or stands to make, a loss in consequence of contravention of or non-compliance with a provision of this Division, the person may apply to the Magistrates Court for relief against the consequences of that contravention or non-compliance.
- (2) An application may be made under subsection (1) in respect of a series of acts or omissions of a similar character.
- (3) If, on an application under subsection (1), the Magistrates Court is satisfied that the contravention or failure to comply with this Division was not, in the circumstances of the case, such as to warrant the consequences prescribed by this Division, it may grant relief against those consequences to such extent as may be just.
- (4) In determining whether it should make an order for relief against the consequences of contravention of, or non-compliance with, a provision of this Division and, if so, the terms on which relief should be granted, the Magistrates Court is to have regard to—
- (a) the gravity of the contravention or non-compliance; and
  - (b) the conduct of the applicant in relation to the transaction to which the application relates; and
  - (c) any prejudice that may result from the making of the order.
- (5) An order for relief against the consequences of contravention of, or failure to comply with, a provision of this Division may be made on such conditions as the Magistrates Court considers just.
- (6) The Commissioner, and a person whose interests would be affected by an order under this section, may appear and be heard in proceedings under this section.
- (7) An order under this section has effect in accordance with its terms despite any other provision of this Division.

- (8) Nothing in this section authorises the Magistrates Court to grant relief against any criminal liability or criminal penalty.

### **37—Amendment of section 77—Obtaining information**

- (1) Section 77(1)(b)—delete paragraph (b)

- (2) Section 77—after subsection (1) insert:

(1a) An authorised officer may, for the purposes of subsection (1), by notice in writing served on a person, require the person to attend at a specified time and place.

- (3) Section 77(2)—delete subsection (2) and substitute:

- (2) A person must not—

(a) refuse or fail to comply with a reasonable requirement under this section; or

(b) without reasonable excuse, refuse or fail to attend at the time and place specified in a notice under subsection (1a) (or some other time and place allowed by an authorised officer); or

(c) knowingly make a statement that is false or misleading in a material particular (whether by reason of the inclusion or omission of a particular) in an answer given or information provided under this section.

Maximum penalty: \$20 000.

- (2a) An authorised officer may require that the answer to a question under this section be verified by statutory declaration or given under oath.

### **38—Amendment of section 78—Entry and inspection**

- (1) Section 78(1)—after paragraph (a) insert:

(ab) enter and search any vessel or vehicle; and

- (2) Section 78(1)—after paragraph (c) insert:

and

(d) give directions reasonably required in connection with the exercise of a power conferred by any of the above paragraphs or otherwise in connection with the administration, operation or enforcement of this Act.

- (3) Section 78—delete subsection (2) and substitute:

(2) A person who, without reasonable excuse, fails to comply with a direction of an authorised officer under this section is guilty of an offence.

Maximum penalty: \$20 000.

- (4) Section 78(4)—after "premises" insert:

or a vehicle or vessel

### 39—Insertion of section 78A

After section 78 insert:

#### **78A—Use and inspection of books or documents produced or seized**

- 5 (1) This section applies to a book or document that has been produced to an authorised officer or taken by an authorised officer.
- (2) A book or document to which this section applies may be retained for the purpose of enabling the book or document to be inspected and enabling copies of, or extracts or notes from, the book or document to be made or taken by or on behalf of the Commissioner.
- 10 (3) However, if the book or document is required by the Commissioner as evidence for the purposes of legal proceedings, the book or document may be retained until the proceedings are finally determined.
- 15 (4) The Commissioner must permit a person who would be entitled to inspect the book or document if it were not in the possession of the Commissioner to inspect the book or document at any reasonable time.
- 20 (5) Nothing in this section prejudices a lien a person has on the book or document.

### 40—Amendment of section 79—Assurances

(1) Section 79(1) and (2)—delete subsections (1) and (2) and substitute:

(1) The Commissioner may accept an assurance given by—

(a) a trader; or

(b) a director of a body corporate that is a trader,

in connection with a matter in relation to which the Commissioner has a power or function under this Act or a related Act.

(2) Section 79(4)—delete subsection (4) substitute:

(4) A person who has given an assurance may, with the consent of the Commissioner, withdraw or vary the assurance at any time.

(3) Section 79(5)—delete "trader" first occurring and substitute:

person who has given the assurance

(4) Section 79(5)—delete "trader" second occurring and substitute:

person

### 41—Amendment of section 81—Offence

(1) Section 81(1)—delete "trader" and substitute:

person

- (2) Section 81(1), penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$10 000.

**42—Amendment of section 82—Enforcement orders**

Section 82—delete "trader" wherever occurring and substitute in each case:  
5 person

**43—Amendment of section 93—Hindering an authorised officer**

Section 93, penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$5 000.

**44—Insertion of section 93A**

10 After section 93 insert:

**93A—Offence relating to intimidation**

A person must not persuade or attempt to persuade by threat or  
intimidation another person—

- 15 (a) to fail to co-operate with an authorised officer in the  
performance or exercise of powers or functions conferred by  
or under this or any other Act; or
- (b) to fail to provide information or give evidence to an  
authorised officer as authorised or required under this or any  
other Act; or
- 20 (c) to provide information or give evidence that is false or  
misleading in a material particular, or to provide information  
or give evidence or in a manner that will make the  
information or evidence false or misleading in a material  
particular, to an authorised officer under this or any other  
25 Act.

Maximum penalty: \$5 000.

**45—Amendment of section 94—Impersonating an authorised officer**

Section 94, penalty provision—delete the penalty provision and substitute:  
Maximum penalty: \$5 000.

**46—Amendment of section 97—Regulations**

- (1) Section 97(3)—after paragraph (a) insert:  
(ab) make different provision according to the classes of persons, or the  
matters or circumstances, to which it is expressed to apply; and
- (2) Section 97(3)(d)—delete "\$1 250" and substitute:  
35 \$2 500

## Part 6—Amendment of *Land Agents Act 1994*

### 47—Amendment of section 8—Entitlement to be registered as agent

Section 8(1)(d)—delete "an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors" and substitute:

5                   an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth

### 48—Amendment of section 52—Register

Section 52—after subsection (2) insert:

- 10                   (2a) If any of the following events occur in relation to a person who is registered as an agent, or is a director of a body corporate that is registered as an agent, the Commissioner may record a note of the event on the register:
- 15                   (a) the person is convicted of an offence of dishonesty;
  - (b) the person is 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;
  - 20                   (c) the person becomes an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth;
  - (d) a body corporate is wound up for the benefit of creditors and the person was a director of the body corporate—
    - 25                   (i) when the body corporate was being so wound up; or
    - (ii) within the period of 6 months preceding the commencement of the winding up;
  - (e) the person, being a body corporate, is being wound up or is under official management or in receivership.

## Part 7—Amendment of *Plumbers, Gas Fitters and Electricians Act 1995*

### 30 49—Amendment of section 9—Entitlement to be licensed

Section 9(1)(c)—delete "an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors" and substitute:

                    an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth



**50—Insertion of Part 3A**

After Part 3 insert:

**Part 3A—Suspension of licence in urgent  
circumstances**

**18A—Suspension of licence in urgent circumstances**

- (1) If the Commissioner is of the opinion that—
- (a) there are reasonable grounds to believe that a licensed contractor has engaged or is engaging in conduct that constitutes grounds for disciplinary action under Part 4; and
  - (b) it is likely that the contractor will continue to engage in that conduct; and
  - (c) there is a danger that a person or persons may suffer significant harm, or significant loss or damage, as a result of the contractor's conduct unless action is taken urgently,
- the Commissioner may, by notice served on the contractor—
- (d) suspend the contractor's licence for a specified period (which may not exceed 6 months); and
  - (e) direct the contractor, within 7 days of service of the notice, to surrender the suspended licence to the Commissioner.
- (2) A licensed contractor who, without reasonable excuse, fails to surrender his or her licence in accordance with a direction under subsection (1)(e) is guilty of an offence.  
Maximum penalty: \$1 250.
- (3) If, during the suspension of a licence under this section, the Commissioner is satisfied that the facts and circumstances that gave rise to the suspension have so altered that the suspension should be terminated, the Commissioner must, by further notice specifying the date of termination, terminate the suspension without delay and restore the licence to the person.
- (4) A person whose licence has been suspended under this section may appeal to the District Court against the decision of the Commissioner to suspend the licence.
- (5) Subject to subsection (7), an appeal must be instituted within 1 month of the making of the decision appealed against.
- (6) The Commissioner must, if so required by the person whose licence has been suspended, state in writing the reasons for the Commissioner's decision to suspend the licence.

- 5
- (7) If the reasons of the Commissioner are not given in writing at the time of making the decision and the person (within 1 month of the making of the decision) requires the Commissioner to state the reasons in writing, the time for instituting an appeal runs from the time at which the person receives the written statement of those reasons.
- (8) The District Court must hear and determine an appeal under this section as expeditiously as possible.
- 10 (9) This section applies in relation to conduct occurring before or after the commencement of this section.

### **51—Amendment of section 30—Registers**

Section 30—after subsection (2) insert:

- 15 (2a) If any of the following events occur in relation to a person who is licensed as a contractor, or is a director of a body corporate that is licensed as a contractor, the Commissioner may record a note of the event on the register:
- 20 (a) the person is 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;
- (b) the person becomes an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth;
- 25 (c) a body corporate is wound up for the benefit of creditors and the person was a director of the body corporate—
- (i) when the body corporate was being so wound up; or
- (ii) within the period of 6 months preceding the commencement of the winding up;
- 30 (d) the person, being a body corporate, is being wound up or is under official management or in receivership.

## **Part 8—Amendment of *Second-hand Vehicle Dealers Act 1995***

### **52—Amendment of section 9—Entitlement to be licensed**

Section 9(1)(d)—delete "an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors" and substitute:

35 an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth

## 53—Insertion of Part 4A

After Part 4 insert:

### Part 4A—Suspension of licence in urgent circumstances

#### 25A—Suspension of licence in urgent circumstances

- 5
- (1) If the Commissioner is of the opinion that—
- 10
- (a) there are reasonable grounds to believe that a licensed dealer has engaged or is engaging in conduct that constitutes grounds for disciplinary action under Part 5; and
- (b) it is likely that the dealer will continue to engage in that conduct; and
- (c) there is a danger that a person or persons may suffer significant harm, or significant loss or damage, as a result of the dealer's conduct unless action is taken urgently,
- 15
- the Commissioner may, by notice served on the dealer—
- (d) suspend the dealer's licence for a specified period (which may not exceed 6 months); and
- (e) direct the dealer, within 7 days of service of the notice, to surrender the suspended licence to the Commissioner.
- 20
- (2) A licensed dealer who, without reasonable excuse, fails to surrender his or her licence in accordance with a direction under subsection (1)(e) is guilty of an offence.  
Maximum penalty: \$1 250.
- 25
- (3) If, during the suspension of a licence under this section, the Commissioner is satisfied that the facts and circumstances that gave rise to the suspension have so altered that the suspension should be terminated, the Commissioner must, by further notice specifying the date of termination, terminate the suspension without delay and restore the licence to the person.
- 30
- (4) A person whose licence has been suspended under this section may appeal to the District Court against the decision of the Commissioner to suspend the licence.
- (5) Subject to subsection (7), an appeal must be instituted within 1 month of the making of the decision appealed against.
- 35
- (6) The Commissioner must, if so required by the person whose licence has been suspended, state in writing the reasons for the Commissioner's decision to suspend the licence.

- 5
- (7) If the reasons of the Commissioner are not given in writing at the time of making the decision and the person (within 1 month of the making of the decision) requires the Commissioner to state the reasons in writing, the time for instituting an appeal runs from the time at which the person receives the written statement of those reasons.
- (8) The District Court must hear and determine an appeal under this section as expeditiously as possible.
- 10 (9) This section applies in relation to conduct occurring before or after the commencement of this section.

#### **54—Amendment of section 39—Register of dealers and premises**

Section 39—after subsection (2) insert:

- 15 (2a) If any of the following events occur in relation to a person who is licensed as a dealer, or is a director of a body corporate that is licensed as a dealer, the Commissioner may record a note of the event on the register:
- (a) the person is convicted of an offence of dishonesty;
- 20 (b) the person is 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;
- (c) the person becomes an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth;
- 25 (d) a body corporate is wound up for the benefit of creditors and the person was a director of the body corporate—
- (i) when the body corporate was being so wound up; or
- (ii) within the period of 6 months preceding the commencement of the winding up;
- 30 (e) the person, being a body corporate, is being wound up or is under official management or in receivership.

### **Part 9—Amendment of *Security and Investigation Agents Act 1995***

#### **55—Amendment of section 9—Entitlement to be licensed**

35 Section 9(1)(e)(i)—delete "an undischarged bankrupt or subject to a composition or deed or scheme of arrangement with or for the benefit of creditors" and substitute:

an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth

## **56—Amendment of section 34—Register of licensed agents**

Section 34—after subsection (2) insert:

(2a) If any of the following events occur in relation to a person who is licensed as an agent, or is a director of a body corporate that is licensed as an agent, the Commissioner may record a note of the event on the register:

- (a) the person is convicted of an offence of a class specified by regulation for the purposes of section 9(1)(b) in relation to the functions authorised by his or her licence;
- (b) the person is 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;
- (c) in the case of a person whose licence is not subject to an employee condition or who is a director of a body corporate that is licensed as an agent—a body corporate is wound up for the benefit of creditors and the person was a director of the body corporate—
  - (i) when the body corporate was being so wound up; or
  - (ii) within the period of 6 months preceding the commencement of the winding up;
- (d) in the case of a person whose licence is not subject to an employee condition—the person becomes an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth;
- (e) the person, being a body corporate, is being wound up or is under official management or in receivership.

## **Part 10—Amendment of *Travel Agents Act 1986***

### **57—Insertion of Part 2 Division 1A**

Part 2—after Division 1 insert:

#### **Division 1A—Suspension of licence in urgent circumstances**

##### **14A—Suspension of licence in urgent circumstances**

(1) If the Commissioner is of the opinion that—

- (a) there are reasonable grounds to believe that a licensed travel agent has engaged or is engaging in conduct that constitutes grounds for disciplinary action under Division 2; and
- (b) it is likely that the travel agent will continue to engage in that conduct; and

(c) there is a danger that a person or persons may suffer significant harm, or significant loss or damage, as a result of the travel agent's conduct unless action is taken urgently,  
the Commissioner may, by notice served on the travel agent—

(d) suspend the travel agent's licence for a specified period (which may not exceed 6 months); and

(e) direct the travel agent, within 7 days of service of the notice, to surrender the suspended licence to the Commissioner.

(2) A licensed travel agent who, without reasonable excuse, fails to surrender his or her licence in accordance with a direction under subsection (1)(e) is guilty of an offence.

Maximum penalty: \$1 250.

(3) If, during the suspension of a licence under this section, the Commissioner is satisfied that the facts and circumstances that gave rise to the suspension have so altered that the suspension should be terminated, the Commissioner must, by further notice specifying the date of termination, terminate the suspension without delay and restore the licence to the person.

(4) A person whose licence has been suspended under this section may appeal to the District Court against the decision of the Commissioner to suspend the licence.

(5) Subject to subsection (7), an appeal must be instituted within 1 month of the making of the decision appealed against.

(6) The Commissioner must, if so required by the person whose licence has been suspended, state in writing the reasons for the Commissioner's decision to suspend the licence.

(7) If the reasons of the Commissioner are not given in writing at the time of making the decision and the person (within 1 month of the making of the decision) requires the Commissioner to state the reasons in writing, the time for instituting an appeal runs from the time at which the person receives the written statement of those reasons.

(8) The District Court must hear and determine an appeal under this section as expeditiously as possible.

(9) This section applies in relation to conduct occurring before or after the commencement of this section.

### **58—Amendment of section 30—Registers**

Section 30—after subsection (2) insert:

(2a) If—

(a) the licence of a person who is licensed as a travel agent is suspended under section 14A; or

- 5 (b) a person who is licensed as a travel agent, or is a director of a body corporate that is licensed as a travel agent, is suspended or disqualified under a corresponding law from holding a licence under the corresponding law or being involved in the direction, management or conduct of the business of a travel agent,

the Commissioner may record a note of the suspension or disqualification on the register.

## **Part 11—Repeal of *Consumer Transactions Act 1972***

### 10 **59—Repeal of *Consumer Transactions Act 1972***

The *Consumer Transactions Act 1972* is repealed.

## **Part 12—Repeal of *Recreational Services (Limitation of Liability) Act 2002***

### 15 **60—Repeal of *Recreational Services (Limitation of Liability) Act 2002***

The *Recreational Services (Limitation of Liability) Act 2002* is repealed.