

(Reprint No. 1)

SOUTH AUSTRALIA

MISREPRESENTATION ACT, 1972

This Act is reprinted pursuant to the Acts Republication Act, 1967, and incorporates all amendments in force as at 1 October 1991.

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.

SUMMARY OF PROVISIONS**PART I****PRELIMINARY****Section**

1. Short title
2. Commencement
3. Arrangement

PART II**CRIMINAL SANCTIONS AGAINST MISREPRESENTATION IN CERTAIN COMMERCIAL TRANSACTIONS**

4. Misrepresentation made in the course of a trade or business

PART III**EXPANSION OF REMEDIES AVAILABLE AT COMMON LAW AND IN EQUITY FOR MISREPRESENTATION**

5. Interpretation
6. Removal of certain bars to rescission
7. Damages for misrepresentation
8. Exclusion clauses
9. Application of Part

PART IV**AMENDMENT OF THE SALE OF GOODS ACT, 1895-1952**

10. Short titles
11. Amendment of principal Act, s. 11 - Where conditions to be treated as warranty
12. Amendment of principal Act, s. 35 - Acceptance

MISREPRESENTATION ACT, 1972

being

Misrepresentation Act, 1972, No. 46 of 1972 [Assented to 20 April 1972]¹

as amended by

Statutes Amendment (Fair Trading) Act, 1987, No. 43 of 1987 [Assented to 30 April 1987]²

Note: Asterisks indicate repeal or deletion of text. For further explanation see Appendix.

An Act to provide criminal sanctions against misrepresentation in certain commercial transactions; to expand the remedies available at common law and in equity for misrepresentation; to amend the Sale of Goods Act, 1895-1952; and for other purposes.

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

PART I PRELIMINARY

Short title

1. This Act may be cited as the *Misrepresentation Act, 1972*.

Commencement

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

Arrangement

3. This Act is arranged as follows:—

PART I—PRELIMINARY

PART II—CRIMINAL SANCTIONS AGAINST MISREPRESENTATIONS IN CERTAIN COMMERCIAL TRANSACTIONS

PART III—EXPANSION OF REMEDIES AVAILABLE AT COMMON LAW AND IN EQUITY FOR MISREPRESENTATION

PART IV—AMENDMENT OF THE SALE OF GOODS ACT, 1895-1952

¹Came into operation 18 May 1972: *Gaz.* 18 May 1972, p. 1927.

²Came into operation 26 October 1987: *Gaz.* 24 September 1987, p. 940.

PART II

CRIMINAL SANCTIONS AGAINST MISREPRESENTATION IN CERTAIN COMMERCIAL TRANSACTIONS

Misrepresentation made in the course of a trade or business

4. (1) Where, in the course of a trade or business, a misrepresentation is made by the person by whom the trade or business is conducted, a person duly authorized to act on his behalf, or a person acting in the course of his employment—

- (a) for the purpose of causing or inducing any other person to enter into a contract;
or
- (b) for the purpose of causing or inducing any other person to pay any pecuniary amount, or to make over or transfer any real or personal property, to the person by whom the representation is made or any other person,

the person by whom the trade or business is conducted, and the person by whom the representation is made, shall each be guilty of an offence and liable to a penalty not exceeding five hundred dollars.

(2) Where in any proceedings under this section it is proved that a misrepresentation in fact acted as a material inducement to any person—

- (a) to enter into a contract;
or
- (b) to pay any pecuniary amount, or to make over or transfer any real or personal property, to the person by whom the representation was made, or any other person,

and that, in consequence, the person by whom the representation was made, or a person on whose behalf, or in whose employment, that person was acting, derived any direct or indirect consideration or material advantage, it shall be presumed, in the absence of proof to the contrary, that the representation was made for the purpose of inducing the person to whom it was made to enter into that contract, to pay that pecuniary amount, or to make over or transfer that real or personal property, as the case may require.

(3) It shall be a defence to a prosecution under this section—

- (a) that the person by whom the representation was made believed upon reasonable grounds that the representation was true;
or
- (b) where the defendant is not the person by whom the representation was made—
 - (i) that the defendant took all reasonable precautions to prevent the commission of offences against this section by persons acting on his behalf, or in his employment;
or
 - (ii) that the defendant did not know, and could not reasonably be expected to have known, that the representation had been made, or that it was untrue.

(4) For the purposes of this section a representation constitutes a misrepresentation if it is false in any material particular.

(5) Where a body corporate is guilty of an offence under this section, each member of the governing body of the body corporate who knowingly authorizes, suffers or permits the commission of the offence shall be guilty of an offence and liable to a penalty not exceeding five hundred dollars.

(6) This section does not affect any civil remedy, or any other statutory sanction or remedy, in respect of a misrepresentation.

* * * * *

(8) Proceedings for an offence against this section shall be disposed of summarily.

(9) Proceedings for an offence against this section shall not be commenced unless the Attorney-General has consented to the commencement of those proceedings.

(10) In any proceedings for an offence against this section, an apparently genuine document purporting to record the consent of the Attorney-General to the commencement of those proceedings shall be accepted as proof of that consent in the absence of evidence to the contrary.

PART III

EXPANSION OF REMEDIES AVAILABLE AT COMMON LAW AND IN EQUITY
FOR MISREPRESENTATION**Interpretation**

5. In this Part—

“court” includes an arbitrator.

Removal of certain bars to rescission

6. (1) Where a misrepresentation has been made by reason of which any party to a contract would, but for any one or more of the following considerations—

- (a) that the misrepresentation has become a term of the contract;
 - (b) that the contract has been performed;
- or
- (c) that conveyances, transfers or other documents have been registered at any public registry office in pursuance of the contract,

be entitled to rescind the contract, that contracting party shall be entitled to rescind the contract notwithstanding that consideration or those considerations.

(2) This section does not invest a contracting party with a right to rescind a contract where, in equity, such a right would be barred by reason of the fact that a third party has in good faith and for valuable consideration acquired an interest in the subject-matter of the contract.

(3) This section shall not affect any remedy available under the provisions of the *Land Agents Act, 1955-1964*, or the *Business Agents Act, 1938-1963*.

Damages for misrepresentation

7. (1) Where a contracting party is induced to enter into a contract by a misrepresentation made—

- (a) by another party to the contract;
 - (b) by a person acting for, or on behalf of, another party to the contract;
- or
- (c) by a person who receives any direct or indirect consideration or material advantage as a result of the formation of the contract,

and any person (whether or not he is the person by whom the misrepresentation was made) would, if the misrepresentation had been made fraudulently, be liable for damages in tort to the contracting party subjected to the misrepresentation in respect of loss suffered by him as a result of the formation of the contract, that person shall, subject to subsection (2) of this section, be so liable to that contracting party, in all respects as if the misrepresentation had been made fraudulently and were actionable in tort.

(2) It shall be a defence to an action under subsection (1) of this section—

- (a) that the person by whom the representation was made had reasonable grounds to believe, and did believe, that the representation was true;
- or

(b) that the defendant was not the person by whom the representation was made and did not know, and could not reasonably be expected to have known, that the representation had been made, or that it was untrue.

(3) Where in any proceedings before a court, it is proved that a party to a contract has rescinded, or is entitled to rescind, the contract on the ground of misrepresentation, the court after consideration of the consequences of rescission, and the consequences of a declaration under this section, in the circumstances of the case, may, if it considers it just and equitable to do so, declare the contract to be subsisting and award such damages as it considers fair and reasonable in view of the misrepresentation.

(4) A declaration under subsection (3) of this section shall have effect according to its terms and shall be a bar to rescission.

(5) Where a contract has been rescinded but is subsequently declared to be subsisting under subsection (3) of this section, the respective rights and liabilities of the contracting parties shall be determined in all respects as if the contract had never been rescinded.

(6) In assessing any damages under this section, a court shall take into consideration any award of damages under any other provision of this section, or of damages or compensation under any other law, and in assessing damages or compensation in any proceedings under any other law relating to a contract, a court shall take into consideration any award of damages under this section.

Exclusion clauses

8. If any contract contains a provision that would, but for this section, exclude or restrict—

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made;

or

(b) any remedy available to another party to the contract by reason of such a misrepresentation,

that provision shall be of no effect except to the extent (if any) to which, in any proceedings arising out of the contract, the court may allow reliance on it as being fair and reasonable in the circumstances of the case.

Application of Part

9. This Part shall not apply in relation to a misrepresentation, or a contract, made before the commencement of this Act.

PART IV

AMENDMENT OF THE SALE OF GOODS ACT, 1895-1952

Short titles

10. (1) The *Sale of Goods Act, 1895-1952*, as amended by this Part, may be cited as the *Sale of Goods Act, 1895-1971*.

(2) The *Sale of Goods Act, 1895-1952*, is hereinafter referred to as "the principal Act".

Amendment of principal Act, s. 11—Where conditions to be treated as warranty

11. Section 11 of the principal Act is amended by striking out from subsection (3) the passage "or where the contract is for specific goods, the property in which has passed to the buyer".

Amendment of principal Act, s. 35—Acceptance

12. Section 35 of the principal Act is amended by inserting after the passage "he has accepted them, or" the passage "(subject to section 34 of this Act)".

APPENDIX

Legislative History

Legislative history prior to 3 February 1976 appears in marginal notes and footnotes included in the consolidation of this Act contained in Volume 7 of The Public General Acts of South Australia 1837-1975 at page 368.

Section 4(7): repealed by 43, 1987, s. 18