

SOUTH AUSTRALIA

SECRET COMMISSIONS PROHIBITION ACT, 1920

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SECRET COMMISSIONS PROHIBITION ACT, 1920

being

Secret Commissions Prohibition Act, 1920, No. 1425 of 1920
[Assented to 27 October 1920]¹

¹ Came into operation 1 January 1921: s. 2.

An Act for the prohibition of secret commissions, and for the prevention of fraud, 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:

Preliminary

Short title

1. This Act may be cited as the *Secret Commissions Prohibition Act, 1920*.

Commencement of Act

2. This Act shall come into operation on the first day of January, 1921.

Repeal of Act 1006 of 1910

3. The *Secret Commissions Act, 1910*, is hereby repealed.

Interpretation

4. (1) In the Construction of this Act, unless the context otherwise requires—

"agent" includes any corporation, firm, or person acting or having been acting, or desirous or intending to act, for or on behalf of any corporation, firm, or person, whether as agent, partner, co-owner, clerk, servant, employee, banker, broker, auctioneer, architect, clerk of works, charterer, master mariner, purser or any member of the crew of a vessel, engineer, barrister, solicitor, surveyor, buyer, salesman, foreman, trustee (as hereinafter defined), liquidator, receiver, director, manager or other officer or member of the committee or governing body of any corporation, club, partnership, or association, or in any other capacity, either alone or jointly with any other corporation, firm, or person, and whether in his own name or in the name of his principal or otherwise, and a person serving under the Crown;

"contract" includes contract of sale or of employment, or any other contract whatever, including an order for any commodity;

"court" means a special magistrate or justices having jurisdiction with respect to an offence against this Act;

"principal" includes a corporation or other person for or on behalf of whom the agent acts, has acted, or is desirous or intending to act;

"trustee" includes the Public Trustee, an executor, administrator, liquidator, official assignee, or trustee in insolvency or bankruptcy, or under any composition or scheme of arrangement with creditors, or any assignment for the benefit of creditors, receiver, committee or guardian of any lunatic or person of unsound mind or of his estate, person having power to appoint a trustee, or person entitled to obtain probate of the will or letters of administration to the estate of a deceased person, or any other person occupying a fiduciary position;

"valuable consideration" includes any money, loan, office, place, employment, agreement to give employment, benefit, or advantage whatsoever, and any commission or rebate, payment in excess of actual value of the goods or service, deduction or percentage, bonus or discount, or any forbearance to demand any money or money's worth or valuable thing, and the acceptance of any of the said things shall be deemed the receipt of a valuable consideration;

3.

The offer of any valuable consideration includes any offer of any agreement or promise to give, and every holding out of any expectation of valuable consideration;

The receipt of any valuable consideration includes any acceptance of any agreement, promise, or offer to give, or of any holding out of any expectation of valuable consideration;

The words "solicit any valuable consideration" and "valuable consideration solicited", and words to the like effect, shall be construed with the following directions, namely:—That every agent who diverts, obstructs, gives untruthful reports, or interferes with the proper course of business or manufacture, or impedes or obstructs, or fails to use due diligence in the prosecution of, any negotiation or business with the intent to obtain the gift of any valuable consideration from any other person interested in the said negotiation or business, or with intent to injure any such person, shall be deemed to have solicited a valuable consideration from a person having business relations with the principal of such agent;

The words "person having business relations with the principal" include every corporation or other person, whether as principal or agent, carrying on or having carried on or desirous or intending to carry on any negotiation or business with any principal or engaged or interested or having been engaged or interested in the performance of any contract with or in the execution of any work or business for or in the supply of any goods or chattels to any principal, and also include any agent or employee of such corporation or other person;

The words "in relation to his principal's affairs or business" imply the additional words "whether within the scope of his authority or course of his employment as agent or not"; and

The words "advice given" and words to the like effect, include every report, certificate, statement, and suggestion intended to influence the person to whom the same is made or given, and every influence exercised by one person over another.

Prohibition of indirect acts

(2) Any act or thing prohibited by this Act is prohibited whether done directly or indirectly by the person mentioned or by or through any other person.

Offences against this Act

Receipt or solicitation of secret commission by an agent

5. If any agent corruptly receives or solicits from any person for himself or for any other person any valuable consideration—

- (a) as an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or
- (b) the receipt or any expectation of which would in any way tend to influence him to show, or to forbear to show, favour or disfavour to any person in relation to his principal's affairs or business; or

if any person corruptly gives or offers to any agent any valuable consideration—

4.

- I. as an inducement or reward for or otherwise on account of the agent doing, or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or
- II. the receipt or any expectation of which would in any way tend to influence the agent to show, favour or disfavour to any person in relation to his principal's affairs or business,

he shall be guilty of an offence against this Act.

Secret gifts received by parent, wife, child, partner, etc., of agent

6. (1) Any valuable consideration received or solicited by any parent, husband, wife, or child of any agent, or by his partner, clerk, or employee, from any person having business relations with the principal of such agent, shall be deemed to have been received or solicited by the agent, unless it is proved that the valuable consideration was so received or solicited without the consent, knowledge, or privity of the agent.

(2) Any valuable consideration given or offered to any parent, husband, wife, or child of any agent, or to his partner, clerk, or employee, or at the agent's request to any person by any person having business relations with the principal of such agent, shall be deemed to have been given or offered to the agent.

False or misleading receipt or account

7. If, with intent to deceive or defraud the principal, any person gives to any agent, or any agent receives or uses or gives to the principal, any receipt, invoice, account, or document in respect of which, or in relation to a dealing, transaction, or matter in which, the principal is interested, and which—

- (a) contains any statement which is false or erroneous or defective in any important particular, or contains an overcharge, or is in any way likely to mislead the principal; or
- (b) omits to state explicitly and fully the fact of any commission, percentage, bonus, discount, rebate, repayment, gratuity, or deduction having been made, given, or allowed, or agreed to be made, given, or allowed,

he shall be guilty of an offence against this Act.

Secret commission or offer of secret commission for advice given or offered

8. (1) Whenever any advice is given by one person to another, and such advice is in any way intended or likely to induce or influence the person advised—

- (a) to enter into a contract with any third person; or
- (b) to appoint or join with another in the appointment, or to vote for or to aid in obtaining the election or appointment, or to authorize or join with another in authorizing the appointment, of any third person as trustee, director, manager, or official,

and any valuable consideration is, without the assent of the person advised, given by such third person to the person giving the advice, the gift or receipt of the valuable consideration shall be an offence against this Act; but this subsection shall not apply when the person giving the advice was, to the knowledge of the person advised, the agent of such third person, or when the valuable consideration was not given in respect of such advice.

(2) Any offer or solicitation of a valuable consideration in respect of any advice given, or to be given, by one person to another with a view to induce or influence the person advised—

- (a) to enter into a contract with the person offering or solicited; or
- (b) to appoint or join with another in appointing, or to vote for or to aid in obtaining the election or appointment or to authorize or join with another in authorizing the appointment of, the person offering or solicited as trustee, director, manager, or official,

and with the intent that the gift or receipt of such valuable consideration is not to be made known to the person advised, shall be an offence against this Act; but this subsection shall not apply when such first-mentioned person is the agent of the person offering or solicited.

Secret commission to trustee in return for substituted appointment

9. If any person offers or gives any valuable consideration to a trustee, or if any trustee receives or solicits any valuable consideration for himself or for any other person without the assent of the persons beneficially entitled to the estate or of a judge of the Supreme Court, as an inducement or reward for appointing or having appointed, or for joining or having joined with another in appointing, or for authorizing or having authorized, or for joining or having joined with another in authorizing any person to be appointed in his stead or instead of him and any other person as trustee, he shall be guilty of an offence against this Act.

Aiding and abetting offences within or outside South Australia

10. Any person who, being within South Australia, knowingly aids, abets, counsels, or procures, or attempts or takes part in or is in any way privy to—

- (a) the doing of any act or thing in contravention of this Act; or
- (b) the doing of any act or thing outside South Australia, or partly within and partly outside South Australia, which if done within South Australia, would be in contravention of this Act,

shall be guilty of an offence against this Act.

Liability of director, etc., acting without authority

11. Any director, manager, or officer of a company, or any officer or member of the crew of any vessel, or any person acting for another, who knowingly takes part in or is in any way privy to doing, or attempts to do, any act or thing without authority which, if authorized, would be in contravention of any of the provisions of this Act, shall be guilty of an offence against this Act.

Penalty on conviction

12. Any person guilty of any offence against this Act shall—

- (a) be liable, if a corporation, to a penalty not exceeding two thousand dollars, and if any other person to imprisonment for any period not exceeding six months, or to a penalty not exceeding one thousand dollars, or to both imprisonment and penalty as aforesaid; and

6.

- (b) in addition be liable to be ordered to pay to such person and in such manner as the court directs, the amount or value, according to the estimation of the court, of any valuable consideration received or given by him, or any part thereof, and such order shall be enforceable in the same manner as an order of the court.

Procedure

Court may order withdrawal of trifling or technical cases

13. If in any prosecution under this Act it appears to the court that the offence charged is, in the particular case, of a trifling or merely technical nature, or that in the particular circumstances it is inexpedient to proceed to a conviction, the court may in its discretion, and for reasons stated on the application of the accused, dismiss the case.

Witness giving answers incriminating himself

14. (1) A person who is called as a witness in any proceeding under this Act shall not be excused from answering any question relating to any offence against this Act on the ground that the answer thereto may criminate, or tend to criminate, him.

(2) An answer to a question in any such proceeding shall not, except in the said proceeding or in the case of any prosecution for perjury in respect of such answer, be in any proceeding, civil or criminal, admissible in evidence against the person so answering.

Certificate to witness and effect thereof

15. (1) A witness in any proceeding under this Act who, in the judgment of the court, answers truly all questions which he is required by the court to answer shall be entitled to receive a certificate from the court stating that such witness has so answered.

(2) When a person has received a certificate as aforesaid, and any criminal proceeding is at any time instituted against him in respect of the offence which was in question in the proceeding in which the said person was called as a witness, the court having cognizance of the case shall, on proof of the certificate and of the identity of the offence in question in the two cases, stay the proceedings.

Custom of itself no defence

16. (1) In any prosecution under this Act it shall not amount to a defence to show that the receiving, soliciting, giving, or offering of any valuable consideration therein mentioned or referred to is customary in any trade, business, or calling.

Burden of proof that gift not secret commission

(2) If in any prosecution under this Act it is proved that any valuable consideration has been received or solicited by an agent from or given or offered to an agent by any person having business relations with the principal, without the assent of the principal, the burden of proving that such valuable consideration was not received, solicited, given, or offered in contravention of any of the provisions of this Act shall be on the accused.

Limit of time for prosecution

(3) No prosecution under this Act shall be commenced after the expiration of two years from the commission of the offence charged, or six months from the first discovery thereof by the principal or the person advised, as the case may be, whichever expiration first happens.

7.

Summary proceedings for offences

17. All proceedings in respect of offences against this Act shall be disposed of summarily.

Appeal

18. There shall be an appeal in respect of proceedings in respect of offences against this Act.

Special case

19. In the event of an appeal in respect of proceedings in respect of offences against this Act, a special case may be stated.