

South Australia

## **Misrepresentation Act 1972**

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; and for other purposes.

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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 *Misrepresentation Act 1972*.

## Part 2—Criminal sanctions against misrepresentation in certain commercial transactions

### 4—Misrepresentation made in the course of trade or business

- (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 authorised to act on his or her behalf, or a person acting in the course of his or her 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, are each guilty of an offence.

Maximum penalty:

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

- (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 will 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 is 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 or her behalf, or in his or her 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.
- (6) This section does not affect any civil remedy, or any other statutory sanction or remedy, in respect of a misrepresentation.
- (9) Proceedings for an offence against this section must 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 will be accepted as proof of that consent in the absence of evidence to the contrary.

### **Part 3—Expansion of remedies available at common law and in equity for misrepresentation**

#### **5—Interpretation**

In this Part—

*court* includes an arbitrator.

#### **6—Removal of certain bars to rescission**

- (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; or
  - (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 is entitled to rescind the contract despite 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 does not affect any remedy available under the *Land Agents Act 1994*, *Conveyancers Act 1994*, *Land Valuers Act 1994* or *Land and Business (Sale and Conveyancing) Act 1994*.

#### **7—Damages for misrepresentation**

- (1) Where a contracting party is induced to enter into a contract by a misrepresentation made—
  - (a) by another party to the contract; or
  - (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 or she 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 or her as a result of the formation of the contract, that person is, subject to subsection (2), so liable to that contracting party, in all respects as if the misrepresentation had been made fraudulently and were actionable in tort.

- (2) It is a defence to an action under subsection (1)—
  - (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) has effect according to its terms and is a bar to rescission.
- (5) Where a contract has been rescinded but is subsequently declared to be subsisting under subsection (3), the respective rights and liabilities of the contracting parties will be determined in all respects as if the contract had never been rescinded.
- (6) In assessing any damages under this section, a court must 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 must take into consideration any award of damages under this section.

## **8—Exclusion clauses**

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 that party before the contract was made; or
- (b) any remedy available to another party to the contract by reason of such a misrepresentation,

that provision has 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.

## **9—Application of Part**

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

## Legislative history

### Notes

- Please note—References in the legislation to other legislation or instruments or to titles of bodies or offices are not automatically updated as part of the program for the revision and publication of legislation and therefore may be obsolete.
- Earlier versions of this Act (historical versions) are listed at the end of the legislative history.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
1972	46	<i>Misrepresentation Act 1972</i>	20.4.1972	18.5.1972 ( <i>Gazette 18.5.1972 p1927</i> )
1987	43	<i>Statutes Amendment (Fair Trading) Act 1987</i>	30.4.1987	s 18—26.10.1987 ( <i>Gazette 24.9.1987 p940</i> )
1995	62	<i>Misrepresentation (Miscellaneous) Amendment Act 1995</i>	10.8.1995	26.9.1996 ( <i>Gazette 26.9.1996 p1209</i> )
<b>2011</b>	<b>36</b>	<b><i>Statutes Amendment (Directors' Liability) Act 2011</i></b>	<b>22.9.2011</b>	<b>Pt 12 (s 14)—1.1.2012 (<i>Gazette 15.12.2011 p4988</i>)</b>

### Provisions amended since 3 February 1976

- 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.

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
Long title	amended by 62/1995 s 5 (Sch)	26.9.1996
Pt 1		
<i>ss 2 and 3</i>	<i>deleted by 62/1995 s 5 (Sch)</i>	26.9.1996
Pt 2		
s 4		
s 4(1)	amended by 62/1995 ss 3(a), (b), 5 (Sch)	26.9.1996
s 4(2) and (3)	amended by 62/1995 s 5 (Sch)	26.9.1996
s 4(5)	<i>amended by 62/1995 ss 3(c), (d), 5 (Sch)</i>	26.9.1996
	<b><i>deleted by 36/2011 s 14</i></b>	<b>1.1.2012</b>
s 4(7)	<i>deleted by 43/1987 s 18</i>	26.10.1987
s 4(8)	<i>deleted by 62/1995 s 5 (Sch)</i>	26.9.1996
s 4(9) and (10)	amended by 62/1995 s 5 (Sch)	26.9.1996

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#### Pt 3

##### s 6

s 6(1) amended by 62/1995 s 5 (Sch) 26.9.1996

s 6(3) amended by 62/1995 s 4 26.9.1996

##### s 7

s 7(1), (2), (4)—(6) amended by 62/1995 s 5 (Sch) 26.9.1996

ss 8 and 9 amended by 62/1995 s 5 (Sch) 26.9.1996

*Pt 4 deleted by 62/1995 s 5 (Sch) 26.9.1996*

## Historical versions

Reprint No 1—1.10.1991

Reprint No 2—26.9.1996