

South Australia

# Small Business Commissioner Act 2011

An Act to establish the office of the Small Business Commissioner; to provide for the powers and functions of the Commissioner; to make associated amendments to the *Fair Trading Act 1987* and the *Retail and Commercial Leases Act 1995*; and for other purposes.

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### The Parliament of South Australia enacts as follows:

#### 1—Short title

This Act may be cited as the *Small Business Commissioner Act 2011*.

#### 2—Commencement

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

#### 3—Interpretation

In this Act, unless the contrary intention appears—

**Commissioner** means the person holding or acting in the office of the Small Business Commissioner;

**Deputy** means the Deputy Small Business Commissioner;

**industry code** has the same meaning as in Part 3A of the *Fair Trading Act 1987* and includes a code whether or not prescribed for the purposes of that Act or any other Act of the State or the Commonwealth.

#### 4—Small Business Commissioner

- (1) There will be a Small Business Commissioner.
- (2) The Commissioner will be appointed by the Governor and is an agency of the Crown.

#### 5—Functions

- (1) The functions of the Commissioner are—
  - (a) to receive and investigate complaints by or on behalf of small businesses regarding their commercial dealings with other businesses and to facilitate resolution of such complaints through measures considered appropriate by the Commissioner such as mediation or making representations on behalf of small businesses; and
  - (b) to assist small businesses on request in their dealings with State and local government bodies; and
  - (c) to disseminate information to small businesses to assist them in making decisions relevant to their commercial dealings with other businesses and their dealings with State and local government bodies; and
  - (d) to administer Part 3A (Industry codes) of the *Fair Trading Act 1987* and the *Australian Consumer Law (SA)* to the extent that responsibility for that administration is assigned to the Commissioner under the *Fair Trading Act 1987*; and
  - (e) to monitor, investigate and advise the Minister about—

- (i) non-compliance with industry codes that may adversely affect small businesses; and
    - (ii) market practices that may adversely affect small businesses; and
  - (f) to report to the Minister on matters affecting small businesses at the request of the Minister; and
  - (g) to report to the Minister on any aspect of the Commissioner's functions at the request of the Minister or on the Commissioner's own initiative; and
  - (h) to take any other action considered appropriate by the Commissioner for the purpose of facilitating and encouraging the fair treatment of small businesses in their commercial dealings with other businesses or assisting small businesses in their dealings with State or local government bodies; and
  - (i) any other functions conferred on the Commissioner by or under this or any other Act.
- (2) The Commissioner is to perform the functions with a view to the development and maintenance in South Australia of relationships between small businesses and other businesses, and small businesses and State and local government bodies, that are based on dealings conducted fairly and in good faith.

## 6—Ministerial direction

- (1) Subject to this section, the Minister may give directions to the Commissioner.
- (2) The Minister—
  - (a) may not give a direction in relation to the investigation, mediation or resolution of a particular complaint or dispute; and
  - (b) must consult with the Commissioner before giving a direction.
- (3) A Ministerial direction to the Commissioner—
  - (a) must be communicated to the Commissioner in writing; and
  - (b) must be included in the annual report of the Commissioner under the *Public Sector Act 2009*.

## 7—Terms and conditions of appointment

- (1) The Commissioner will be appointed for a term not exceeding 5 years and on conditions determined by the Governor and, at the end of a term of appointment, will be eligible for reappointment.
- (2) The appointment of the Commissioner may be terminated by the Governor on the ground that the Commissioner—
  - (a) has been guilty of misconduct; or
  - (b) has been convicted of an offence punishable by imprisonment; or
  - (c) has become bankrupt or has applied to take the benefit of a law for the relief of insolvent debtors; or
  - (d) has been disqualified from managing corporations under Chapter 2D Part 2D.6 of the *Corporations Act 2001* of the Commonwealth; or

- (e) has, because of mental or physical incapacity, failed to carry out duties of the position satisfactorily; or
  - (f) is incompetent or has neglected the duties of the position.
- (3) The appointment of the Commissioner is terminated if the Commissioner—
  - (a) becomes a member, or a candidate for election as a member, of the Parliament of a State or the Commonwealth or a Legislative Assembly of a Territory of the Commonwealth; or
  - (b) is sentenced to imprisonment for an offence.
- (4) The Commissioner may resign by notice in writing to the Minister of not less than 3 months (or such shorter period as is accepted by the Minister).

## **8—Deputy and Acting Commissioner**

- (1) The Minister may appoint a person (who may be a Public Service employee) to be the Deputy Small Business Commissioner.
- (2) The Deputy may—
  - (a) act as the Commissioner during any period for which—
    - (i) no person is for the time being appointed as the Commissioner; or
    - (ii) the Commissioner is absent from, or unable to discharge, official duties; and
  - (b) when not so acting, perform functions or exercise powers of the Commissioner by delegation from the Commissioner.
- (3) The Minister may appoint a person (who may be a Public Service employee) to act as the Commissioner during any period for which—
  - (a) no person is for the time being appointed as the Commissioner or the Commissioner is absent from, or unable to discharge, official duties; and
  - (b) no person is for the time being appointed as the Deputy or the Deputy is absent from, or unable to discharge, official duties.
- (4) The terms and conditions of appointment of the Deputy or other person appointed to act as the Commissioner will be determined by the Minister.

## **9—Honesty and accountability**

The Commissioner, the Deputy and any other person appointed to act as the Commissioner are senior officials for the purposes of the *Public Sector (Honesty and Accountability) Act 1995*.

## **10—Staff etc**

- (1) The Commissioner's staff consists of—
  - (a) Public Service employees assigned to assist the Commissioner; and
  - (b) persons employed by the Commissioner, with the consent of the Minister and on terms and conditions determined by the Minister, to assist the Commissioner.

- (2) The Commissioner may, under an arrangement established by the Minister administering an administrative unit of the Public Service, make use of the services or staff of that administrative unit.

## **11—Delegation**

- (1) The Commissioner may delegate to a person (including a person for the time being performing particular duties or holding or acting in a particular position) a function or power under this or any other Act (except a prescribed function or power).
- (2) A function or power may only be delegated to a person who is not a Public Service employee with the consent of the Minister.
- (3) A delegation—
  - (a) must be by instrument in writing; and
  - (b) may be absolute or conditional; and
  - (c) does not derogate from the power of the delegator to act in a matter; and
  - (d) is revocable at will.
- (4) A delegated function or power may, if the instrument of delegation so provides, be further delegated in accordance with that instrument.

## **12—Power to require information**

- (1) The Commissioner may, by written notice served personally or by post, require a person to give the Commissioner, within a reasonable time specified in the notice, information in the person's possession that the Commissioner requires for the performance of the Commissioner's functions under this Act.
- (2) A person required to give information under this section must provide the information within the time stated in the notice.  
Maximum penalty: \$20 000.
- (3) A person cannot be compelled to give information under this section if the information might tend to incriminate the person of an offence or is privileged on the ground of legal professional privilege.

## **13—Confidentiality**

- (1) A person must not divulge or communicate personal information, information relating to trade secrets or business processes or financial information acquired by reason of being, or having been, employed or engaged in, or in connection with, the administration of this Act, except—
  - (a) with the consent of the person to whom the information relates; or
  - (b) as authorised by the Commissioner or the person's employer; or
  - (c) in connection with the administration of this Act; or
  - (d) to a police officer or a member of the police force of another State, a Territory of the Commonwealth or the Commonwealth; or

(e) to a person concerned in the administration of another law of the State, or a law of another State, a Territory of the Commonwealth or the Commonwealth, relating to trade or commercial practices or the protection of consumers; or

(f) for the purposes of legal proceedings.

Maximum penalty: \$20 000.

(2) Information that has been disclosed under this section for a particular purpose must not be used for any other purpose by—

(a) the person to whom the information was disclosed; or

(b) any other person who gains access to the information (whether properly or improperly and whether directly or indirectly) as a result of that disclosure.

Maximum penalty: \$20 000.

## **14—Regulations**

(1) The Governor may make such regulations as are contemplated by this Act or as are necessary or expedient for the purposes of this Act.

(2) Without limiting the generality of subsection (1), the regulations may fix fees in respect of measures designed to resolve a complaint taken by the Commissioner and provide for their payment, recovery or waiver.

## **Schedule 1—Associated amendments and transitional provisions**

### **Part 1—Preliminary**

#### **1—Amendment provisions**

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

### **Part 2—Amendment of *Fair Trading Act 1987***

#### **2—Amendment of long title**

Long title—delete the long title and substitute:

An Act to provide for the appointment and functions of the Commissioner for Consumer Affairs; to provide for the administration of certain aspects of the Act by the Small Business Commissioner; to apply the Australian Consumer Law as a law of South Australia; to make provision for industry codes; to otherwise regulate unfair or undesirable practices affecting business and other consumers; and for other purposes.

#### **3—Amendment of section 3—Interpretation**

(1) Section 3(1), definition of *authorised officer*—delete "section 7" and substitute:

Part 7 Division 1A

- (2) Section 3(1), definition of *Commissioner*—delete the definition and substitute:  
*Commissioner for Consumer Affairs* means the person holding or acting in the office of Commissioner for Consumer Affairs;
- (3) Section 3(1), definition of *consumer affairs authority*—delete "Commissioner" wherever occurring and substitute in each case:  
Commissioner for Consumer Affairs
- (4) Section 3(1)—after the definition of *consumer affairs authority* insert:  
*contravene* includes fail to comply;
- (5) Section 3(1), definition of *related Act*, (a)—delete "Commissioner" and substitute:  
Commissioner for Consumer Affairs or the Small Business Commissioner
- (6) Section 3(1)—after the definition of *related Act* insert:  
*Small Business Commissioner* means the person holding or acting in the office of Small Business Commissioner;
- (7) Section 3(3)—after "Act" insert:  
or a specified provision of this Act

#### 4—Insertion of section 4B

After section 4A insert:

##### 4B—Administration of Act

- (1) Subject to this section, the Commissioner for Consumer Affairs is responsible for the administration of this Act (including the *Australian Consumer Law (SA)*).
- (2) The Small Business Commissioner is responsible for the administration of—
- (a) the *Australian Consumer Law (SA)* to the extent specified by the Minister by notice in the Gazette made on the recommendation of the Minister responsible for the administration of the *Small Business Commissioner Act 2011*; and
  - (b) Part 3A in relation to an industry code or provisions of an industry code if the regulations prescribing the code or provisions for the purposes of that Part declare that the Commissioner is to have that responsibility.
- (3) However, the Small Business Commissioner may only be assigned responsibility for administration of the *Australian Consumer Law (SA)* or Part 3A in relation to an industry code or provisions of an industry code insofar as the Law, code or provisions apply to persons who acquire or propose to acquire goods or services for the purpose of trade or commerce or regulate the conduct of traders towards other traders.



- (4) To the extent that the Commissioner for Consumer Affairs is responsible for the administration of this Act, the Commissioner is subject to direction by the Minister.
- (5) To the extent that the Small Business Commissioner is responsible for the administration of this Act, the Commissioner is subject to direction by the Minister responsible for the administration of the *Small Business Commissioner Act 2011* in accordance with section 6 of that Act.

## **5—Substitution of heading to Part 2**

Heading to Part 2—delete the heading and substitute:

### **Part 2—Commissioner for Consumer Affairs**

## **6—Repeal of sections 6 and 7**

Sections 6 and 7—delete the sections

## **7—Amendment of section 8—Functions of Commissioner for Consumer Affairs**

Section 8(1)—delete "Commissioner" first occurring and substitute:

Commissioner for Consumer Affairs

## **8—Amendment of section 8A—Conciliation**

Section 8A(1)—delete "Commissioner" and substitute:

Commissioner for Consumer Affairs

## **9—Amendment of section 9—Co-operation**

Section 9—delete "Commissioner" and substitute:

Commissioner for Consumer Affairs

## **10—Amendment of section 10—Delegations**

Section 10(1)—delete "Commissioner" and substitute:

Commissioner for Consumer Affairs

## **11—Repeal of section 11**

Section 11—delete the section

## **12—Amendment of section 12—Annual report**

- (1) Section 12(1)—delete "Commissioner" and substitute:

Commissioner for Consumer Affairs

- (2) Section 12(1)—after "Act" insert:

by the Commissioner

### 13—Amendment of section 16—Meaning of generic terms used in Australian Consumer Law

Section 16, definition of *regulator*—delete the definition and substitute:

*regulator* means—

- (a) the Commissioner for Consumer Affairs; or
- (b) the Small Business Commissioner (but only if the Small Business Commissioner is responsible for the administration of any aspect of the *Australian Consumer Law (SA)*).

### 14—Insertion of Part 3A

After Part 3 insert:

#### **Part 3A—Industry codes**

##### **28D—Interpretation**

In this Part—

*industry code* means a code regulating the conduct of participants in an industry towards other participants in the industry or towards persons to whom goods or services are or may be supplied by participants in the industry.

##### **28E—Contravention of industry codes**

A person must not, in trade or commerce, contravene a prescribed industry code or a prescribed provision of an industry code.

##### **28F—Regulations relating to industry codes**

- (1) The regulations may—
  - (a) prescribe an industry code, or provisions of an industry code, for the purposes of this Part and declare (subject to section 4B(3)) whether the Commissioner for Consumer Affairs or the Small Business Commissioner is to be responsible for the administration of this Part in relation to the code or provisions; and
  - (b) declare that a contravention of section 28E of a particular class (constituted of a contravention of the whole or any specified part of a prescribed industry code or prescribed provisions of an industry code) is to be subject to a civil penalty under Part 7 Division 3A; and
  - (c) fix expiation fees (not exceeding \$6 000 in the case of a body corporate and \$1 200 in the case of a natural person) for alleged civil penalty contraventions within the meaning of Part 7 Division 3A; and

- (d) declare that a specified activity is to be taken to be an industry for the purposes of this Part and that persons of a specified class are to be taken to be participants in the industry.
- (2) A proposal for regulations prescribing an industry code or provisions of an industry code under this section may be initiated by—
  - (a) if the Commissioner for Consumer Affairs is to be responsible for the administration of this Part in relation to the code or provisions—the Minister responsible for the administration of this Act; and
  - (b) if the Small Business Commissioner is to be responsible for the administration of this Part in relation to the code or provisions—the Minister responsible for the administration of the *Small Business Commissioner Act 2011*.
- (3) If a Minister initiates a proposal for regulations prescribing an industry code or provisions of an industry code under this section, the Minister must, before the regulations are made, consult with each organisation that the Minister considers to be representative of an industry likely to be affected by the code or provisions.
- (4) For the purposes of the *Subordinate Legislation Act 1978*, the Minister responsible for the administration of the *Small Business Commissioner Act 2011* is to be taken to be the Minister responsible for the administration of this Act in respect of regulations that declare the Small Business Commissioner to be responsible for the administration of this Part in relation to an industry code or provisions of an industry code.

### **15—Amendment of section 36—Offences**

Section 36(a) and (b)—delete ", or fails to comply with," wherever occurring

### **16—Amendment of section 37—Powers of District Court**

- (1) Section 37(1)—delete "upon the application of the Commissioner" and substitute:  
on the application of the Commissioner for Consumer Affairs
- (2) Section 37(2)—delete "Commissioner" and substitute:  
Commissioner for Consumer Affairs
- (3) Section 37(4)—delete ", or fails to comply with,"

### **17—Amendment of section 41—Advertisements must not state or imply approval of consumer affairs authority**

Section 41—delete "Commissioner" and substitute:  
Commissioner for Consumer Affairs

## 18—Amendment of section 42—Recreational services

Section 42(6)—delete "Commissioner" first occurring and substitute:

Commissioner for Consumer Affairs

## 19—Amendment of section 45A—Power of Minister to prohibit third-party trading schemes

(1) Section 45A(1)—delete "Commissioner" first occurring and substitute:

Commissioner for Consumer Affairs

(2) Section 45A(1)(b)—delete "or not complied with"

(3) Section 45A(2)—delete "Commissioner" and substitute:

Commissioner for Consumer Affairs

## 20—Substitution of heading to Part 7

Heading to Part 7—delete the heading and substitute:

### **Part 7—Enforcement and remedies**

## 21—Insertion of Part 7 Division A1

Part 7—before Division 1 insert:

### **Division A1—Interpretation**

#### **46—Interpretation**

In this Part, unless the contrary intention appears—

*Commissioner* means—

- (a) the Commissioner for Consumer Affairs; or
- (b) the Small Business Commissioner;

*Minister* means—

- (a) the Minister responsible for the administration of this Act;  
or
- (b) the Minister responsible for the administration of the *Small Business Commissioner Act 2011*.

## 22—Substitution of heading to Part 7 Division 1

Heading to Part 7 Division 1—delete the heading and substitute:

### **Division 1—Legal proceedings and warnings**

## 23—Redesignation of section 76—Conduct of legal proceedings on behalf of consumers

Section 76—redesignate the section as section 47

## 24—Insertion of Part 7 Division 1A heading and section 76

Before section 77 insert:

### **Division 1A—Authorised officers**

#### **76—Authorised officers**

- (1) The following persons are authorised officers for the purposes of this Act:
  - (a) the Commissioner for Consumer Affairs;
  - (b) the Small Business Commissioner;
  - (c) the Deputy Small Business Commissioner;
  - (d) persons appointed under this section.
- (2) The Minister responsible for the administration of this Act may, on the recommendation of the Commissioner for Consumer Affairs, appoint Public Service employees to be authorised officers for the purposes of this Act.
- (3) The Minister responsible for the administration of the *Small Business Commissioner Act 2011* may, on the recommendation of the Small Business Commissioner, appoint Public Service employees or persons employed by the Commissioner to be authorised officers for the purposes of this Act.
- (4) An appointment may be made subject to conditions specified in the instrument of appointment.
- (5) The relevant Minister may, at any time, revoke an appointment of an authorised officer or vary or revoke a condition of appointment or impose a further condition of appointment.
- (6) An authorised officer must be issued with an identity card—
  - (a) containing the person's name and a photograph of the person; and
  - (b) stating that the person is an authorised officer under this Act.
- (7) If the powers of an authorised officer have been limited by conditions, the identity card issued to the authorised officer must indicate those limitations.
- (8) An authorised officer must, at the request of a person in relation to whom the authorised officer intends to exercise powers under this Act, produce for the inspection of the person his or her identity card.

## 25—Amendment of section 78—Entry and inspection

Section 78(4)—delete subsection (4)

## 26—Amendment of section 80—Registration of deeds of assurance

Section 80(1)—after "assurances" insert:  
accepted by the Commissioner

## 27—Amendment of heading to Part 7 Division 3

Heading to Part 7 Division 3—delete "for contravention of this Act"

## 28—Insertion of Part 7 Division 3A

Part 7—after Division 3 insert:

### **Division 3A—Civil penalties and civil expiation notices for contravention of industry codes**

#### **Subdivision 1—Interpretation**

##### **86A—Interpretation**

For the purposes of this Division, a person commits a *civil penalty contravention* if the person—

- (a) contravenes section 28E and the contravention is of a class declared by regulation to be subject to a civil penalty; or
- (b) attempts such a contravention; or
- (c) is involved in such a contravention.

#### **Subdivision 2—Civil penalties**

##### **86B—Civil penalties**

- (1) If the Magistrates Court is satisfied that a person has committed a civil penalty contravention, the Court may make an order (a *civil penalty order*) that the person pay to the Commissioner an amount as a civil penalty not exceeding—
  - (a) in the case of a body corporate—\$50 000; and
  - (b) in the case of a natural person—\$10 000.
- (2) Proceedings for a civil penalty order may be commenced by the Commissioner by application to the Court made within 3 years after the date of the alleged civil penalty contravention.
- (3) In determining the amount to be paid by a person as a civil penalty, the Court must have regard to—
  - (a) the nature and extent of the contravention and any loss or damage suffered as a result of the contravention; and
  - (b) the circumstances in which the contravention was committed; and
  - (c) any financial saving or other benefit that the person stood to gain by committing the contravention; and

- (d) whether the person has previously been found by a court in proceedings under this Act to have committed similar contraventions; and
  - (e) any other matter it considers relevant.
- (4) If conduct constitutes 2 or more civil penalty contraventions—
- (a) an amount may be recovered from the person under this section in relation to any 1 or more of the contraventions; but
  - (b) the person is not liable to pay more than 1 amount as a civil penalty in respect of the same conduct.
- (5) If, in proceedings for a civil penalty order against a person, the person establishes facts and circumstances that would have amounted to a defence under section 88 had the civil penalty contravention constituted an offence against this Act, the person is not liable to a civil penalty.
- (6) If, in proceedings for a civil penalty order against a natural person, the Court is satisfied that the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or partly from liability to a civil penalty.
- (7) The Court may, in proceedings for a civil penalty order, make such orders in relation to the costs of the proceedings as it thinks just and reasonable.

### **Subdivision 3—Civil expiation notices**

#### **86C—Certain civil penalty contraventions may be expiated**

If an expiation fee is fixed by the regulations for a civil penalty contravention, a civil expiation notice may be given to a person alleged to have committed the contravention and the alleged contravention may be expiated in accordance with this Subdivision.

#### **86D—Civil expiation notices**

- (1) A civil expiation notice may only be given by the Commissioner or by an authorised officer who is authorised in writing by the Commissioner to give civil expiation notices for the alleged civil penalty contravention.
- (2) A civil expiation notice—
  - (a) may relate to up to 3 alleged civil penalty contraventions arising out of the same incident (that is, if they are committed contemporaneously, or in succession, 1 following immediately on another); and
  - (b) cannot be given after the expiry of the period of 12 months from the date on which the civil penalty contravention or contraventions were alleged to have been committed; and

- (c) cannot be given to a person if proceedings have been commenced against the person for a civil penalty order for the alleged civil penalty contravention or contraventions.
- (3) If a civil expiation notice is given to a person alleged to have committed a civil penalty contravention, no further civil expiation notice can be given to that person in respect of any other alleged civil penalty contravention arising out of the same incident.
- (4) A civil expiation notice must—
  - (a) be identified by a unique number; and
  - (b) state the date of the notice; and
  - (c) state the name and address of the person to whom it is given; and
  - (d) state that the notice is given on behalf of the Commissioner; and
  - (e) state how the Commissioner may be contacted; and
  - (f) give details of the civil penalty contravention or contraventions allegedly committed by the person, including the date of the alleged contravention or contraventions; and
  - (g) state the maximum civil penalty that the person could be ordered to pay in respect of the alleged civil penalty contravention or contraventions; and
  - (h) specify the expiation fee that is payable in relation to the alleged civil penalty contravention or each alleged contravention; and
  - (i) state that the expiation fee is to be paid within 28 days from (and including) the date of the notice; and
  - (j) state that the expiation fee is payable to the Commissioner; and
  - (k) explain how payment of the expiation fee is to be made; and
  - (l) include any information prescribed by the regulations.

### **86E—Late payment**

The Commissioner may accept late payment of an expiation fee at any time before proceedings are commenced for a civil penalty order for the alleged civil penalty contravention to which the payment relates.



### **86F—Effect of expiation**

- (1) Subject to this Subdivision, if a civil penalty contravention, or contraventions, to which a civil expiation notice relates are expiated in accordance with this Subdivision, proceedings may not be commenced for a civil penalty order against the person to whom the notice was given for that contravention or those contraventions or any other expiable civil penalty contravention arising out of the same incident.
- (2) The expiation of a civil penalty contravention—
  - (a) does not constitute an admission of guilt or of any civil liability; and
  - (b) will not be regarded as evidence tending to establish guilt or any civil liability; and
  - (c) cannot be referred to in a report furnished to a court for the purposes of determining sentence for an offence.

### **86G—Commencement of proceedings if expiation fee not paid**

- (1) If a civil expiation notice relating to only 1 civil penalty contravention is given to a person and the contravention is not expiated in accordance with this Subdivision, proceedings may be commenced for a civil penalty order against the person for the contravention.
- (2) If a civil expiation notice relating to more than 1 civil penalty contravention is given to a person and 1 or more of those contraventions are expiated in accordance with this Subdivision but not all of them, proceedings may be commenced for a civil penalty order against the person for any contravention that is not expiated.

### **86H—Withdrawal of civil expiation notices**

- (1) The Commissioner may withdraw a civil expiation notice with respect to all or any of the alleged civil penalty contraventions to which the notice relates if—
  - (a) the Commissioner is of the opinion that the person to whom the notice was given did not commit the contravention or contraventions or that the notice should not have been given for the contravention or contraventions; or
  - (b) the notice is defective; or
  - (c) the Commissioner decides that proceedings should be commenced for a civil penalty order against the person for the contravention or contraventions.
- (2) A civil expiation notice may be withdrawn under subsection (1) despite payment of an expiation fee, but in that event the amount paid must be refunded.

- (3) However, a civil expiation notice cannot be withdrawn for the purposes of commencing proceedings for a civil penalty order for a civil penalty contravention if an expiation fee has been paid for the contravention and the period of 60 days from the date of the notice has expired.
- (4) If a civil expiation notice is withdrawn under subsection (1) despite payment of an expiation fee, proceedings for a civil penalty order for a civil penalty contravention to which the notice related may be commenced, but the fact that the person to whom the notice was given paid an expiation fee is not admissible in those proceedings as evidence against the person.
- (5) The Commissioner must withdraw a civil expiation notice if it becomes apparent that the person to whom the notice was given did not receive the notice until after the period for payment of the expiation fee, or has never received it, as a result of error on the part of the Commissioner or failure of the postal system.
- (6) However, a civil expiation notice cannot be withdrawn under subsection (5) if the expiation fee has been paid or proceedings have been commenced for a civil penalty order against the person to whom the notice was given.
- (7) A notice of withdrawal must specify the reason for withdrawal and include any information required by the regulations.
- (8) If a civil expiation notice is withdrawn by the Commissioner in respect of an alleged civil penalty contravention and the notice of withdrawal does not specify that the notice is withdrawn for the purposes of commencing proceedings for a civil penalty order against the person, proceedings cannot be commenced for a civil penalty order for the contravention unless the person has been given a fresh civil expiation notice and allowed the opportunity to expiate the contravention.

#### **86I—Service of civil expiation notice or withdrawal notice**

- (1) A civil expiation notice, or a notice of withdrawal of a civil expiation notice, may be given to a person—
  - (a) by delivering it personally to the person or an agent of the person; or
  - (b) by leaving it for the person at the person's place of residence or business with someone apparently over the age of 16 years; or
  - (c) by posting it to the person or agent of the person at the person's or agent's last known place of residence or business.
- (2) Without limiting subsection (1), a civil expiation notice, or a notice of withdrawal of a civil expiation notice, may be given to a company or registered body within the meaning of the *Corporations Act 2001* of the Commonwealth in accordance with that Act.

## **29—Redesignation of section 86A—Application of Division**

Section 86A—re designate the section as section 86J

## **30—Redesignation and amendment of sections 91A and 91B**

- (1) Section 91A(1)—after paragraph (c) insert:
  - (ca) conduct that the Commissioner has reasonable grounds to suspect may constitute a civil penalty contravention for the purposes of Division 3A that has resulted in or is likely to result in 1 or more persons suffering detriment;
- (2) Section 91B(3)—delete "section 91A" and substitute:

section 48
- (3) Sections 91A and 91B (as amended)—re designate the sections as sections 48 and 49 respectively and relocate them so that they follow section 47

## **31—Redesignation of sections 93, 93A and 94**

Sections 93, 93A and 94—re designate the sections as sections 78D, 78E and 78F respectively and relocate them so that they follow section 78C

## **32—Insertion of sections 96A and 96B**

After section 96 insert:

### **96A—Confidentiality**

- (1) A person must not divulge or communicate personal information, information relating to trade secrets or business processes or financial information acquired by reason of being, or having been, employed or engaged in, or in connection with, the administration of this Act or a related Act, except—
  - (a) with the consent of the person to whom the information relates; or
  - (b) as authorised by the Commissioner for Consumer Affairs or the Small Business Commissioner or the person's employer; or
  - (c) in connection with the administration of this Act or a related Act; or
  - (d) to a police officer or a member of the police force of another State, a Territory of the Commonwealth or the Commonwealth; or
  - (e) to a person concerned in the administration of another law of the State, or a law of another State, a Territory of the Commonwealth or the Commonwealth, relating to trade or commercial practices or the protection of consumers; or
  - (f) for the purposes of legal proceedings.

Maximum penalty: \$20 000.

- (2) Information that has been disclosed under this section for a particular purpose must not be used for any other purpose by—
  - (a) the person to whom the information was disclosed; or
  - (b) any other person who gains access to the information (whether properly or improperly and whether directly or indirectly) as a result of that disclosure.

Maximum penalty: \$20 000.

### **96B—Delegation by Minister responsible for administration of Small Business Commissioner Act**

- (1) The Minister responsible for the administration of the *Small Business Commissioner Act 2011* may delegate to a person (including a person for the time being performing particular duties or holding or acting in a particular position) a function or power under this Act (except a prescribed function or power).
- (2) A delegation—
  - (a) must be by instrument in writing; and
  - (b) may be absolute or conditional; and
  - (c) does not derogate from the power of the delegator to act in a matter; and
  - (d) is revocable at will.
- (3) A delegated function or power may, if the instrument of delegation so provides, be further delegated in accordance with that instrument.

### **33—Amendment of section 97—Regulations**

- (1) Section 97(2)—after paragraph (b) insert:
  - (ba) fix fees in respect of any matter under this Act and provide for their payment, recovery or waiver; and
- (2) Section 97(2)(e)—delete paragraph (e)
- (3) Section 97(2)(h)—delete paragraph (h) and substitute:
  - (h) without derogating from the power to fix expiation fees under section 28F, fix expiation fees for an alleged offence against this Act or the regulations, not exceeding—
    - (i) in the case of an offence against this Act—\$1 200; and
    - (ii) in the case of an offence against the regulations—\$210; and
- (4) Section 97(2)(i)—delete ", or failure to comply with,"

- (5) Section 97—after subsection (3) insert:
- (3a) If a document formulated or published by any body or authority as in force at a particular time or from time to time is incorporated, adopted, applied or referred to in the regulations—
- (a) a copy of the document must be kept available for public inspection, without charge and during ordinary office hours, at an office or offices specified in the regulations; and
- (b) evidence of the contents of the document may be given in any legal proceedings by production of a document apparently certified by the Minister or the Minister responsible for the administration of the *Small Business Commissioner Act 2011* to be a true copy of the document.

## **Part 3—Amendment of *Retail and Commercial Leases Act 1995***

### **34—Amendment of section 3—Interpretation**

Section 3(1), definition of *Commissioner*—delete "Commissioner for Consumer Affairs" and substitute:

the person holding or acting in the office of Small Business Commissioner

### **35—Repeal of section 8**

Section 8—delete the section

### **36—Amendment of section 78—Annual reports**

- (1) Section 78(1)—delete "for Consumer Affairs"
- (2) Section 78(1) and (2)—delete "31 October" wherever occurring and substitute in each case:

30 September

## **Part 4—Transitional provisions**

### **37—Provisions relating to Fair Trading Act**

- (1) A person holding office as an authorised officer under section 7 of the *Fair Trading Act 1987* immediately before the commencement of this clause will continue to hold office as an authorised officer as if the person had been appointed by the Minister responsible for the administration of that Act under section 76 of that Act as amended by this Act.
- (2) A code of practice prescribed by the regulations under the *Fair Trading Act 1987* as in force immediately before the commencement of this clause will be taken to have been prescribed as an industry code under Part 3A of that Act as amended by this Act and the Commissioner for Consumer Affairs will be taken to have been declared to be responsible for the administration of the code.

## Legislative history

### Notes

- Amendments of this version that are uncommenced are not incorporated into the text.
- 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
2011	41	<i>Small Business Commissioner Act 2011</i>	10.11.2011	22.3.2012 ( <i>Gazette 15.3.2012 p992</i> )
2021	50	<i>Fair Trading (Motor Vehicle Insurers and Repairers) Amendment Act 2021</i>	9.12.2021	Sch 1 (cl 1)—28.2.2023 ( <i>Gazette 23.2.2023 p405</i> )