

# CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT (EASTERN CAPE) NO. 5 OF 1998

[ASSENTED TO 31 AUGUST, 1998]

[DATE OF COMMENCEMENT: 1 OCTOBER, 1998]

*(English text signed by the Premier)*

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## ACT

**To provide for the investigation, prohibition and control of unfair business practices in the interest of the protection of consumers, and for that purpose to establish an office for the Investigation of Unfair Business Practices and Consumer Affairs Tribunals; to amend applicable local government legislation so as to authorise local authorities to establish consumer advice offices; and to provide for matters connected therewith.**

**Preamble.**—WHEREAS people have the right not to be exploited as consumers;

AND WHEREAS in our modern society and in the light of the common law, people are inadequately protected against consumer abuse;

Now therefore:—

**1. Definitions.**—In this Act, unless context otherwise indicates—

“**arrangement**” means an arrangement or undertaking negotiated by the office under section 11;

“**business**” means any business, undertaking or person who—

- (a) offers, supplies or makes available any commodity; or
- (b) solicits or receives any investments or to whom any investment is supplied or made available;

“**business practice**” includes—

- (a) any agreement, accord, arrangement, understanding or undertaking, whether legally enforceable or not, between two or more persons;
- (b) any scheme, practice or method of trading, including any method of marketing or distribution;
- (c) any advertising, type of advertising or any other manner of soliciting business;
- (d) any act or omission on the part of any person, whether acting independently or in concert with any other person; and
- (e) any situation in connection with the activities of any person or group of persons,

but does not include a restrictive practice, acquisition or monopoly situation as defined in section 1 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979);

“**committee**” means the Standing Committee of the Provincial Legislature responsible for consumer affairs;

“**commodity**” means any property, whether corporeal or incorporeal and whether movable or immovable and also any make or brand of any commodity and any service, whether personal, professional or otherwise, including any storage, transportation, insurance or banking service but excluding service due in terms of a contract of employment;

“**consumer**” means any person envisaged by section 2 (1);

“**Consumer Protector**” means the person appointed in terms of section 4 (1) (a);

“**creditor**” includes a consumer who is the beneficiary of an order issued in terms of section 22 (2) (a);

“**investigating officer**” means an investigating officer appointed under section 9 (1) or deemed in terms of section 9 (2) to have been so appointed;

“**investment**” means any money or other property or any facility intended for utilization in connection with any venture or scheme for the acquisition of gain or purported to be so intended;

“**magistrate**” means a magistrate as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);

“**MEC**” means the Member of the Executive Council of the Province responsible for economic affairs;

“**office**” means the Office for the Investigation of Unfair Business Practices established by section 3;

**“prescribed”** means prescribed by regulation;

**“Province”** means the Province of the Eastern Cape and Provincial shall have an apposite meaning;

**“regulation”** means a regulation made under section 29;

**“this Act”** includes the regulations;

**“tribunal”** means an administrative body established by section 13 and known as a Consumer Affairs Tribunal;

**“unfair business practice”** means any business practice which, directly or indirectly, has or is likely to have the effect of—

- (a) harming the relations between businesses and consumers;
- (b) unreasonably prejudicing any consumer;
- (c) deceiving any consumer; or
- (d) unfairly affecting any consumer.

**2. Consumers.**—(1) The following shall be consumers for purposes of this Act:

- (a) any natural person to whom any commodity is offered, supplied or made available;
- (b) any natural person from whom any investment is solicited or who supplies or makes available any investment;
- (c) any other person who the MEC declares to be a consumer in terms of subsection (2);
- (d) any person whom the Minister responsible for trade in the National Government declares to be a consumer in terms of the Harmful Business Practices Act, 1988 (Act No. 71 of 1988);
- (e) any person who is a consumer for the purposes of this Act or the Harmful Business Practices Act, 1988 (Act No. 71 of 1988) in terms of any other law.

(2) The MEC may, after consultation with the committee, declare any person to be a consumer by notice in the *Provincial Gazette* and may withdraw, vary or amend any such notice.

**3. Establishment of Office for the Investigation of Unfair Business Practices.**—(1) There is hereby established, in the Department responsible for economic affairs in the Province, an office called the Office for the Investigation of Unfair Business Practices.

(2) The functions of the office shall be performed by the Consumer Protector.

**4. Consumer Protector and staff of the office.**—(1) Subject to the laws governing the public service, the MEC

- (a) shall appoint a person as Consumer Protector;
- (b) may from time to time appoint an acting Consumer Protector to discharge the duties of the Consumer Protector whenever the Consumer Protector is for any reason unable to perform those duties or while the appointment of a person as Consumer Protector is pending; and
- (c) may appoint one or more persons to assist with the performance of the functions of the office, subject to the control and directions of the Consumer Protector.

(2) The Consumer Protector may in the performance of his or her functions also be assisted by any person or body whose service is obtained by him or her for the purpose of a particular investigation.

(3) A person contemplated in subsection (2) may be paid such remuneration, allowances and expenses as the Consumer Protector, with the concurrence of the MEC and the MEC responsible for Finance, may determine.

**5. Functions of the office.**—(1) The office shall—

- (a) receive and investigate complaints of alleged unfair business practices which have been lodged with the office as contemplated in section 5, and dispose of such complaints in terms of this Act; and
- (b) perform the other functions assigned to it by or under this Act.

(2) (a) The office shall as soon as practicable after 31 December in each year submit to the MEC a report on its functions during the year ending on that date.

(b) The MEC shall lay a copy of the annual report submitted in terms of subsection (1) upon the table in the Provincial Legislature within 14 days after its receipt.

**6. Lodging of complaints with the office.**—(1) Any person may lodge a complaint with the office regarding an alleged unfair business practice.

(2) A complaint contemplated in subsection (1) which is not in writing shall be reduced to writing by the office.

**7. Investigations by the office.**—(1) The office may, where no complaint has been lodged, institute such investigation as may be necessary into—

- (a) any unfair business practice which there is reason to suspect exists or may come into existence;
- (b) any business practice or type of business practice, in general or in relation to a particular commodity or investment or any kind of commodity or investment or a particular business or any class or type of business or a particular area, and which there is reason to suspect is commonly applied for the purposes of or in connection with the creation or maintenance of unfair business practices.

(2) If the MEC refers a matter contemplated in subsection (1) to the office, the office shall conduct an investigation into that matter.

(3) The office may by notice in the *Provincial Gazette* make known any investigation which it is conducting, and that any person may within a period specified in the notice make written representations regarding the investigation to the office.

(4) The office may, for the purposes of an investigation, have regard to any investigation, finding or measure taken by the Business Practices Committee established by section 2 of the Harmful Business Practices Act, 1988 (Act No. 71 of 1988), or the Minister as defined in section 1 of that Act, or by any other competent authority, including an authority in another province.

(5) If the Consumer Protector is of the opinion that a complaint may more appropriately be dealt with by another competent authority in another province or at a national level he or she may at any time refer any investigation or aspect thereof to such other authority: Provided that the office may at any time resume the investigation in relation to that matter.

**8. Summoning and questioning of persons and production of books and documents.**—(1) For the purposes of an investigation, the Consumer Protector or a person in the service of the office authorised by him or her may—

- (a) summon any person who is believed to be able to furnish any information on the subject of the investigation or to have in his or her control any book, document or other object relating to that subject, to appear before a person in the service of the office at a time and place specified in the summons, to be questioned or to produce that book, document or other object;
- (b) question that person under oath or affirmation administered by any person qualified to administer an oath or accept an affirmation in terms of the Justice of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963); and
- (c) examine or retain for further information such a book, document or other object.

(2) A summons referred to in subsection (1) (a) shall—

- (a) be in the prescribed form;
- (b) contain particulars of the matter in connection with which the person concerned is required to appear;
- (c) be signed by the Consumer Protector or another in the service of the office authorised by the Consumer Protector; and
- (d) be served in the prescribed manner.

(3) A person appearing by virtue of subsection (1) (a)—

- (a) may be assisted at the examination by any person of his or her choice;
- (b) shall be entitled to the prescribed witness fees.

(4) A person shall be guilty of an offence if he or she, having been summoned in terms of this section—

- (a) fails without sufficient cause to attend at the time and place specified in the summons, or to remain in attendance until the conclusion of the proceedings, or until he or she has been excused from further attendance;

- (b) refuses to take the oath or make an affirmation;
- (c) refuses to answer, or to answer fully and satisfactorily to the best of his or her knowledge and belief, any question lawfully put to him or her;
- (d) fails to produce any book, document or object in his or her possession or custody or under his or her control, which he or she was required to produce; and
- (e) makes a false statement to the person administering the oath or affirmation, the Consumer Protector or any person in the service of the office designated by the Consumer Protector, knowing such statement to be false or not knowing or believing it to be true.

(5) A person who has been summoned to appear in terms of this section shall not be entitled to refuse to answer any question or to produce any book, document or object on the ground that he or she would thereby be exposed to a criminal charge: Provided that, to the extent that such answer, book, document or article does expose the person concerned to a criminal charge, no evidence thereof shall be admissible in any criminal proceedings against that person, except where that person stands trial on a charge contemplated in subsection (4) (c) to (e), or in section 319 (3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

**9. Investigating officers.**—(1) The Consumer Protector may appoint persons in the service of the office or any other suitable persons as investigating officers.

(2) The Consumer Protector shall be deemed to have been appointed as an investigating officer under subsection (1).

(3) An investigating officer who is not in the full-time service of the State shall be appointed on such conditions and at such remuneration as may be prescribed.

(4) An investigating officer shall be provided with a certificate of appointment signed by or on behalf of the Consumer Protector and in which it is stated that he or she is an investigating officer appointed in terms of this Act.

(5) When an inspector performs any function in terms of this Act, he or she shall have such certificate of appointment in his or her possession and shall show it at the request of any person affected by the performance of that function.

**10.** (1) In order to obtain any information required by the office in relation to an investigation, an investigating officer may, subject to the provisions of this section, enter any premises on or in which any commodity, investment, statement, book, document or other object connected with that investigation is or is suspected to be, and may—

- (a) inspect or search those premises, and there make such inquiries as may be necessary for the propose of obtaining any such information;
- (b) examine any object found on or in the premises which has or might have a bearing on the investigation in question, and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object;
- (c) make copies of or extracts from any book or document found on or in the premises which has or might have a bearing on the investigation in question, and request from any person who is suspected of having the necessary information, an explanation of an entry therein; and
- (d) seize, against the issue of a receipt, anything on or in the premises which has or might have a bearing on the investigation on question, if the investigating officer needs to retain if for further examination or for safe custody.

(2) Unless the owner or person in charge of the premises has consented thereto in writing, an investigating officer shall only enter premises and exercise any power contemplated in subsection (1)—

- (a) under power of a search warrant issued by a magistrate or judge; or
- (b) if that investigating officer is in the company of an officer in the South African Police Service authorised by a warrant or acting in terms of section 22 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(3) A search warrant contemplated in subsection (2) (a)—

- (a) may only be issued by a magistrate or judge if it appears to that magistrate or judge from information provided to him or her under oath or solemn affirmation that there are reasonable grounds to suspect that—
  - (i) an unfair business practice exists or may come into existence; and
  - (ii) a book, document or other object which may afford evidence of such unfair business practice is on or in those premises;
- (b) shall only be issued in respect of an investigating officer who is a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);

- (c) shall authorise an investigating officer mentioned in the warrant to enter the premises identified in the warrant for the purpose of exercising any power contemplated in subsection (1);
- (d) shall be executed by day unless the person issuing the warrant authorizes the execution thereof by night; and
- (e) shall be of force until—
  - (i) it is executed;
  - (ii) it is cancelled by the person who issued it, or if he or she is not available, by a person with like authority; or
  - (iii) a period of a month from its date of issue expires, whichever occurs first.

(4) An investigating officer executing a search warrant under this section shall, before such execution, upon demand by any person whose rights may be affected—

- (a) show that person his or her certificate of appointment; and
- (b) hand to that person a copy of the warrant.

(5) A person from whose possession or charge a book or document has been taken under this section shall, as long as it is in the possession or charge of the investigating officer concerned or of the office, be allowed on request to make copies thereof or to take extracts therefrom at any reasonable time at his or her own expense and under the supervision of that investigating officer or a person in the service of the office.

(6) A person shall be guilty of an offence if—

- (a) he or she obstructs or hinders an investigating officer in the performance of his or her duties in terms of this section;
- (b) he or she falsely represents himself or herself to be an inspector; or
- (c) enquiry having been made of him or her under subsection (1) (a) or after information, or an explanation in terms of section (1) (b) or (c) has been requested from him or her, he or she—
  - (i) refuses to answer, or to answer fully and satisfactorily to the best of his or her knowledge and belief, such enquiry or request for information; or
  - (ii) gives an answer or information or an explanation which is false or misleading, knowing it to be false or misleading.

(7) A person from whom information or an explanation has been requested in terms of this section shall not be entitled to refuse to answer any question or to produce any book, document or object on the ground that he or she would thereby be exposed to a criminal charge: Provided that, to the extent that such answer, book, document or article does expose the person concerned to a criminal charge, no evidence thereof shall be admissible in any criminal proceedings against that person, except where that person stands trial on a charge contemplated in subsection (6).

**11. Negotiation of arrangements to discontinue unfair business practice.**—(1) The office may negotiate and conclude an arrangement with any person for—

- (a) the discontinuance or avoidance of an unfair business practice;
- (b) the reimbursement, with interest, of affected consumers;
- (c) the discontinuance or avoidance of any aspect of an unfair business practice; or
- (d) any other matter relating to the unfair business practice.

(2) An arrangement—

- (a) may be concluded at any time after the institution of an investigation, but before the making of a final order by the tribunal;
- (b) shall be in writing and signed by the parties thereto; and
- (c) shall be subject to confirmation by the tribunal in accordance with section 21.

**12. Institution of proceedings after completion of investigation.**—(1) Upon completion of an investigation, the Consumer Protector may institute proceedings in the tribunal of the area concerned—

- (a) against the person alleged to be responsible for the unfair business practice in question; and
- (b) generally, with a view to the prohibition of any business practice or type of business practice, in general or in relation to a particular commodity or investment or any kind of commodity or investment

or a particular business or any type of business or a particular area, and which is commonly applied for the purposes of or in connection with the creation or maintenance of unfair business practices.

(2) If the office decides not to institute proceedings, the Consumer Protector shall inform the complainant.

(3) The Consumer Protector shall, by notice in the *Provincial Gazette* and advertisements in such media as he or she may deem appropriate, give notice of his or her intention to institute proceedings contemplated in subsection (1) (b) and no such proceedings shall be instituted before the expiry of a period of 30 days after publication of such notice and advertisements.

**13. Establishment of tribunals.**—(1) The MEC shall, by notice in the *Provincial Gazette*, establish one or more tribunals for the Province.

(2) A tribunal shall be established for an area defined in such notice.

(3) The MEC may, in like manner—

(a) vary any such area;

(b) withdraw such a notice and abolish any such tribunal.

(4) The seat or seats of a tribunal shall be at such place or places as the MEC may from time to time determine in general or in relation to particular proceedings.

**14. Appointment of tribunal.**—(1) Members of a tribunal shall be appointed by the MEC after consultation with the committee.

(2) A tribunal shall consist of five persons, namely—

(a) a chairperson, who shall be—

(i) a retired judge of the High Court; or

(ii) an attorney, advocate, reared magistrate or lecturer in law at a university, with not less than ten years' cumulative experience in one or more such capacities; and

(b) four additional members having special knowledge or experience of consumer advocacy, economics, industry or commerce.

(3) The MEC may appoint an alternate member for every member of a particular tribunal: Provided that the alternate for the chairperson shall fulfil the requirements of subsection (2) (a) and the alternate for each additional member shall have special knowledge or experience as contemplated in subsection (2) (b).

(4) The MEC shall invite interested parties, by notice in the *Provincial Gazette* and an advertisement in the print media regarded as appropriate by him or her, to nominate candidates within thirty days of the publication of such notice, for consideration as members of a particular tribunal.

(5) The names of the nominees shall thereafter be published in the said *Provincial Gazette* and print media for comment.

(6) Interviews for nominees shall be conducted in the manner prescribed and shall be open to the public.

(7) A member and alternate member of a tribunal shall, before assuming office, make and subscribe an oath or solemn affirmation in the prescribed form before the MEC.

(8) A member and alternate member of a tribunal shall be appointed for such period and paid such remuneration and allowances as the MEC in consultation with the MEC responsible for Finance may determine, and different remuneration and allowances may be determined in respect of different members and alternate members.

**15. Persons disqualified from being member of tribunal.**—(1) No person shall be appointed or remain a member of a tribunal if he or she is not a fit and proper person or—

(a) is not a citizen of the Republic resident in the Province;

(b) is a member of the Provincial Legislature, the House of Traditional Leaders of the Province or a local authority in the Province;

(c) is a public servant;

(d) at the relevant time is, or during the preceding twelve months was, an office-bearer or employee of any party, movement, organisation or body of a party political nature;

(e) is an unrehabilitated insolvent;

(f) has at any time been convicted, whether in the Republic or elsewhere, of theft, fraud, forgery or

uttering a forged document, perjury, an offence under this Act or the Corruption Act, 1992 (Act No. 94 of 1992), or any offence involving dishonesty; or

(g) has at any time been removed from an office of trust on account of misconduct.

(2) No person shall remain a member of a tribunal if he or she fails to disclose an interest which would require him or her to be recused.

**16. Constitution of tribunal.**—(1) Subject to subsection (4), the quorum of a tribunal shall be three members.

(2) Except where otherwise provided, a decision of the majority of members of a tribunal present shall be the decision of that tribunal.

(3) A member of a tribunal shall recuse himself or herself from proceedings on the grounds of any interest or association likely to affect his or her impartial consideration of the matter, or which is likely to be seen to do so.

(4) If at any stage during the proceedings before a tribunal—

(a) the chairperson becomes incapable of acting or is absent, the proceedings shall begin afresh;

(b) any other member becomes incapable of acting or is absent, the proceedings shall continue before the remaining members;

(c) two or more other members become incapable of acting or are absent, the proceedings shall begin afresh unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of remaining members.

(5) In the event that the proceedings continue before an even number of members and there is a split decision, the chairperson's decision shall be decisive.

**17. Functions, powers and duties of tribunal.**—(1) A tribunal—

(a) shall hear, consider and make a decision on any matter which is before it by virtue of proceedings envisaged by this Act;

(b) may award costs, on a scale to be prescribed or in an amount determined by the tribunal, against any person found to have conducted the unfair business practice concerned and who is found to have acted fraudulently or grossly unreasonably;

(c) may generally deal with all matters necessary or incidental to the performance of its functions under this Act;

(d) shall exercise any other powers and perform the functions and duties assigned to it by this Act.

(2) Process of a tribunal shall run throughout the Province and orders of a tribunal shall have force throughout the Province.

(3) The MEC shall, subject to the laws governing the public service, appoint—

(a) a secretary of the tribunal to perform the administrative work incidental to the functions of the tribunal; and

(b) such other persons to assist the secretary of the tribunal as may be necessary.

**18. Proceedings of tribunal.**—(1) Proceedings before a tribunal shall, except in cases contemplated in sections 12 (1) (b) and 20, be initiated by summons in the prescribed form which shall be served on the person concerned in any manner as may be prescribed, which may include service outside the Province.

(2) All proceedings of a tribunal shall, subject to the provisions of subsection (3), be open to the public.

(3) A tribunal may direct that the public or any member thereof may not attend any proceedings of the tribunal or any portion thereof, if this is justified in the interests of—

(a) the conduct of the proceedings or the consideration of the matter in question; or

(b) the protection of the privacy of any person alleged to be involved in the unfair business practice in question or of the confidentiality of any information relating to that person.

(4) Proceedings before a tribunal shall be prosecuted by the office, which may be represented or assisted by an advocate, attorney or any other person approved by the MEC.

(5) Any person who may be adversely affected by the proceedings shall be entitled to participate in the proceedings.

(6) Any person against whom proceedings are instituted or who may be adversely affected by such

proceedings may appear in person or be represented or assisted by an advocate, attorney or any other person.

(7) A tribunal shall keep a record of its proceedings.

**19. Summoning of witnesses and production of documents.**—(1) For the purpose of ascertaining any matter relating to proceedings before a tribunal, the tribunal may—

- (a) by summons addressed to any person, including the person alleged to have performed the unfair business practice, in the prescribed form under the hand of the secretary to the tribunal, and served in the prescribed manner, require such person to appear before the tribunal at a time and place specified in such summons, to give evidence and to produce any book, document or object in the possession or custody or under the control of such person and which may be reasonably necessary, material and relevant in connection with those proceedings;
- (b) require such person to take an oath or make an affirmation; and
- (c) question such person and examine any book, document or object which he or she has been required to produce.

(2) The oath or affirmation contemplated in subsection (1) (b) may be administered by any person qualified to administer an oath or accept an affirmation in terms of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963).

(3) A person shall be guilty of an offence if he or she, having been summoned in terms of this section—

- (a) fails without sufficient cause to attend at the time and place specified in the summons, or to remain in attendance until the conclusion of the proceedings or until he or she has been excused by the tribunal from further attendance;
- (b) refuses to take the oath or make an affirmation;
- (c) refuses to answer, or to answer fully and satisfactorily to the best of his or her knowledge and belief any question lawfully put to him or her;
- (d) fails to produce any book, document or object in his or her possession or custody or under his or her control, which he or she was required to produce;
- (e) makes a false statement before the tribunal knowing such statement to be false or not knowing or believing it to be true.

(4) A person who has been summoned to appear in terms of this section shall not be entitled to refuse to answer any question or to produce any book, document or object on the ground that he or she would thereby be exposed to a criminal charge: Provided that, to the extent that such answer, book, document or article does expose the person concerned to a criminal charge, no evidence thereof shall be admissible in any criminal proceedings against that person, except where that person stands trial on a charge contemplated in subsection (2) (c) to (e), or in section 319 (3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

(5) A person who has attended the proceedings of a tribunal as a witness shall be entitled to the prescribed witness fee.

**20. Urgent temporary orders.**—(1) A tribunal may, if it is satisfied from information placed before it by the office that circumstances relating to a particular matter which is the subject of an investigation render that matter urgent in that irreparable prejudice would be caused to a consumer or any group or class of consumers if the matter were only to be dealt with by that tribunal at proceedings in due course, issue a temporary order—

- (a) prohibiting any person mentioned in the order from performing any act connected with the unfair business practice in question;
- (b) attaching any money or other property or assets, whether corporeal or incorporeal, movable or immovable, held by any person;
- (c) making any other order that may be necessary to prevent the prejudice in question;
- (d) authorising any investigating officer or person in the service of the office to take any action specified in the order.

(2) A temporary order contemplated in subsection (1)—

- (a) may be amended or withdrawn by the tribunal on application by the office or any person affected thereby;
- (b) shall remain in force for such period or extended period as the tribunal may from time to time determine;
- (c) shall, unless withdrawn or lapsed, remain in force until the main proceedings are finalised.



(3) An order in terms of subsection (1), and any amendment, withdrawal or extension thereof shall, where the tribunal so directs, be made known by notice in the *Provincial Gazette* and in such other media as the tribunal may deem appropriate.

**21. Confirmation of arrangements negotiated by office.**—(1) The office may apply to the relevant tribunal for confirmation of an arrangement concluded in terms of section 11.

(2) The tribunal may, with due consideration of the interests of affected consumers and other interested parties, issue an order—

- (a) confirming the arrangement;
- (b) confirming the arrangement with such modifications as may be agreed to by the person concerned, and subject to such conditions as may be agreed to by that person, as the tribunal may deem fit; or
- (c) setting aside that arrangement if, after the persons involved in the arrangement have been given an opportunity to be heard, it is satisfied that the arrangement will not ensure the discontinuance or avoidance of the unfair business practice in question.

(3) An order in terms of subsection (2) shall be published in the *Provincial Gazette* and shall thereupon have the same effect as an order in terms of section 24.

**22. Order by tribunal prohibiting unfair business practice.**—(1) If a tribunal is satisfied that an unfair business practice exists or may come into existence, and has not confirmed an arrangement as contemplated in section 21 (2) (a), that tribunal may issue such order as may be necessary to ensure the discontinuance or prevention of the unfair business practice in question, and such order may, without prejudice to the generality of the foregoing, direct—

- (a) any person concerned in the unfair business practice to take such action, including steps for the dissolution of any body, corporate or unincorporate, or the severance of any connection or form of association between two or more persons, including such bodies, as may be necessary to ensure the discontinuance or prevention of the unfair business practice;
- (b) any person who is or was party to an agreement, understanding or omission, or who uses or has used any advertising or type of advertising, or applies or has applied for a scheme, practice or method of trading, including any method of marketing or distribution, or commits or has committed an act, or brings or has brought about a situation, or has or had any interest in a business or type of business or derives or derived any income from a business or type of business which is connected with the said unfair business practice and which may be specified in the order, to—
  - (i) terminate or cease to be a party to that agreement, understanding or omission;
  - (ii) refrain from using that advertising or type of advertising;
  - (iii) refrain from applying that scheme, practice or method of trading;
  - (iv) cease to commit that act or to bring about that situation;
  - (v) cease to have any interest in that business or type of business or to derive any income therefrom;
  - (vi) refrain from at any time—
    - (aa) becoming a party to any agreement, understanding or omission;
    - (bb) using any type of advertising;
    - (cc) applying any scheme, practice or method of trading; or
    - (dd) committing any act or bringing about any situation, of a nature specified in the order and which the tribunal is satisfied is likely to be applied for the purposes of or in connection with the creation or maintenance of any unfair business practice;
  - (vii) refrain from at any time obtaining any interest in or deriving any income from a business or type of business specified in the order.

(2) If a tribunal finds that money was accepted from one or more consumers in the course of an unfair business practice, and that it is necessary to limit or prevent financial loss to those consumers, that tribunal may—

- (a) order any person who has benefited from the unfair business practice to repay such money to such affected consumers, together with interest at the prescribed rate, subject to the provisions of subsection (3);
- (b) appoint a curator to perform the functions set out in section 23;
- (c) give directions regarding any security which the curator shall furnish for the proper performance of his

or her duties;

- (d) determine the powers and duties of the curator;
- (e) give directions concerning the performance of the functions of the curator, or the management of the affairs of the person concerned, of any other matter incidental thereto, as may be deemed necessary.

(3) Any benefit received by a consumer who was disadvantaged by an unfair business practice shall be taken into account when an order contemplated in subsection (2) (a) is made.

(4) At any time after a tribunal has granted an order in terms of this section, that tribunal may approve of the correction of an omission or error or the clarification of any provision in the order if such correction or clarification is necessary, and any such correction or clarification shall be made known by notice in the *Provincial Gazette*.

(5) An order of a tribunal in terms of subsection (1)—

- (a) shall be made known by notice in the *Provincial Gazette*; and
- (b) may be made known in any other manner, including a notice in a newspaper or magazine or on the radio or television.

**23. Functions of curator appointed by tribunal.**—(1) A curator appointed under section 23 (2) may, to the extent authorised by the tribunal which appointed him or her and subject to any conditions imposed by it—

- (a) realise such assets of the person involved in the unfair business practice in question as are necessary for the reimbursement of the consumers concerned, and distribute the proceeds of such assets among the said consumers: Provided that no creditor of the person involved in the unfair business practice may be unduly or unfairly advantaged or disadvantaged by such distribution;
- (b) take control of and manage the whole or any part of the business of such a person, in which event the management of the business or affairs of the person involved in the unfair business practice shall vest in the curator, subject to the supervision of the tribunal and any other person vested with the management of the affairs of that person shall be divested thereof;
- (c) suspend or restrict, as from the date of his or her appointment as curator or any subsequent date, the right of creditors of the person involved in the unfair business practice to claim or receive any money owing to them by that person;
- (d) make payments, transfer property or take steps for the transfer of property to any creditor of the person involved in the unfair business practice at such time, in such order and in such manner as the curator may deem it: Provided that no creditor may be unduly or unfairly advantaged or disadvantaged by such distribution;
- (e) open and maintain banking or similar interest bearing accounts;
- (f) enter into agreements on behalf of the person involved in the unfair business practice;
- (g) convene from time to time, in such manner as he or she may deem fit, a meeting of creditors of the person involved in the unfair business practice for the purpose of establishing the nature and extent of the indebtedness of that person to such creditors and for consultation with such creditors in so far as the curator deems it necessary;
- (h) negotiate with any creditor of the person involved in the unfair business practice with a view to final settlement of the affairs of such creditor against that person;
- (i) make and carry out, in the course of the management by the curator of the affairs of the person involved in the unfair business practice, any decision which in terms of the provisions of the Companies Act, 1973 (Act No. 61 of 1973), would have been required to be made by way of a special resolution contemplated in section 199 of that Act; and
- (j) dispose of, by public auction, tender or negotiation, any asset of the person involved in the unfair business practice, including—
  - (aa) any advance or loan; or
  - (bb) any asset for the disposal of which approval is necessary in terms of section 228 of the Companies Act, 1973 (Act No. 61 of 1973);
- (k) perform such further, incidental or ancillary duties or functions as may be necessary to give effect to any order of the tribunal.

(2) A tribunal may at any time amend, withdraw or vary any power granted by it to a curator and any such amendment, withdrawal and variation may be made known by notice in the *Provincial Gazette*.

(3) At the appointment of a curator—

- (a) the management of the business or affairs of the person involved in the unfair business practice shall vest in the curator, subject to the supervision of the tribunal and any other person vested with the management of the affairs of that person shall be divested thereof; and

- (b) the curator shall recover and take possession of such assets of the person involved in the unfair business practice as may be necessary.

(4) A curator who is not in the full-time service of the State shall out of the funds of the person involved in the unfair business practice, in respect of the services rendered by him or her, be paid such remuneration as may be prescribed: Provided that if the funds of the person involved in the unfair business practice are insufficient to adequately compensate the curator, the curator shall be paid from provincial funds such further remuneration and allowances as the MEC may determine.

(5) The curator shall report to the tribunal on his or her administration of the affairs of the person involved in the unfair business practice, and shall at the request of the tribunal provide any other information set out in that request.

(6) The curator shall keep a proper record of the steps taken by him or her in the performance of his or her functions and of the reasons why such steps were taken.

(7) The curator shall not unfairly or unduly benefit or prejudice any debtor or creditor of the person placed under curatorship.

**24. Declaration of certain business practices to be unlawful.**—(1) If a tribunal, pursuant to proceedings instituted in that tribunal in terms of section 12 (1) (b), is satisfied that it is in the public interest that any particular business practice or type of business practice which was the subject of the proceedings in question should be declared to be unlawful, it may—

- (a) declare the business practice or type of business practice concerned to be unlawful, either generally or in respect of a particular area, depending upon whether the investigation was of a general nature or was undertaken in relation to a particular area;
- (b) declare any agreement, accord or undertaking, or term thereof to be void;
- (c) prohibit any person from entering into or being or continuing to be a party to an agreement, arrangement or understanding, or from using advertising, or from applying a scheme, practice or method of trading, or from committing an act or from bringing about a situation which was the subject of the proceedings, either wholly or to the extent specified by the tribunal or subject to a condition or exemption so specified or to an exemption contemplated in subsection (3);
- (d) regulate any business practice or type of business practice which was the subject of the proceedings, by determining conditions or requirements which must be complied with in respect thereof.

(2) A tribunal may at any time—

- (a) on application by the Consumer Protector after further investigation by the office and after hearing any person who may be adversely affected thereby, withdraw or amend an order in terms of subsection (1) issued by that tribunal in such manner as may be fitting; and
- (b) on application by any person and after hearing the Consumer Protector and any other interested person,

grant exemption from a provision, condition or requirement contemplated in subsection (1), to such extent and for such period and subject to such conditions as may be specified in the exemption.

(3) The provisions of section 22 (5) shall *mutatis mutandis* apply in relation to an order, withdrawal, amendment or exemption contemplated in this section.

(4) The person or body seeking an order in terms of subsection (2) shall make their intention known by notice in the *Provincial Gazette*, and interested persons shall be invited to make objections to any such order.

**25. Appeal.**—There shall be an appeal from any decision of a tribunal which is final and binding to the special court established in terms of section 13 of the Harmful Business Practices Act, 1988 (Act No. 71 of 1988).

**26. Giving of notice to competent authorities of unfair business practices and offences.**—(1) The Consumer Protector shall, if there is reason to suspect that an unfair business practice which is or was the subject of an investigation by the office, exists or may come into existence elsewhere in the Republic than in the Province, furnish the Business Practices Committee established by section 3 of the Harmful Business Practices Act, 1988 (Act No. 71 of 1988), and any competent authority in the province concerned, with particulars of the business practice in question and any relevant information relating thereto which became known in the course of investigations by the office or of proceedings before the tribunal.

(2) The Consumer Protector shall, if there is reason at any time during or after the completion of an investigation to suspect that there has been or is being committed, or that an attempt has been or is being made to commit—

- (a) an offence, notify the relevant Attorney-General concerned accordingly;
- (b) a serious economic offence as defined in the Investigation of Serious Economic Offences Act, 1991 (Act No. 117 of 1991), lay the matter in question before the Director of the Office for Serious Economic Offences in the manner provided in section 4 of that Act.

**27. Confidentiality.**—No investigating officer, person in the service of the office, member of a tribunal, curator or person contemplated by section 4 (2) or 19 (2) shall disclose any information acquired by him or her in the exercise or performance of any powers, functions or duties in terms of this Act, except—

- (a) in so far as may be necessary for the purpose of the due and proper exercise or performance of any power, function or duty in terms of this Act;
- (b) on the order of a court of law; or
- (c) in so far as maybe necessary when an investigation is referred to another authority in terms of section 7 (5).

**28. Limitation of Liability.**—No person, including the State, shall be liable in respect of anything done in good faith under this Act.

**29. Regulations.**—(1) The MEC may, after consultation with the committee and, save in the case of the appointment of the first members of any tribunal, the chairpersons of existing tribunals, make regulations relating to —

- (a) the practice and proceedings of tribunals;
- (b) any matter which in terms of this Act is required or permitted to be prescribed;
- (c) in general, any matter which is considered necessary or expedient to prescribe for achieving the objects of this Act.

(2) The MEC shall, not less than one month before any regulation is made, cause the text of such regulation to be published in the *Provincial Gazette* together with a notice declaring his or her intention to make that regulation, and inviting interested persons to furnish any comments thereon or any representations which they may wish to make in regard thereto.

(3) It shall not be necessary to republish a draft regulation as amended in consequence of the comments submitted in terms of subsection (2).

(4) Any regulation made under subsection (1) may provide that any person contravening such regulation or failing to comply therewith shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding 12 months or to both such time and imprisonment.

**30. Offences in relation to prohibited business practices.**—Any person who intentionally or negligently contravenes or fails to comply with any order of a tribunal which has been made known by notice in the *Provincial Gazette* shall be guilty of an offence.

**31. Penalties.**—Any person who is convicted of an offence in teens of this Act shall be liable, in the case of an offence referred to in—

- (a) section 30, to a fine not exceeding R200 000 or to imprisonment for a period not exceeding five years or to both such fine and imprisonment;
- (b) any other provision of this Act, to a fine not exceeding R20 000 or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment.

**32. State bound.**—This Act shall bind the State, except in so far as criminal liability is concerned.

**33. Waiver of benefits.**—Any agreement or contractual term purporting to exclude the provisions of this Act or to limit the application thereof shall be void.

**34. Civil remedies.**—(1) No provision of this Act shall be construed as depriving any person of any civil

remedy.

(2) If any person seeks to enforce or rely on an alleged unfair business practice in proceedings before any civil court, that court may, on the application of any party to those proceedings, stay those proceedings in the interests of justice until such time as the tribunal has come to a decision in terms of this Act.

**35. Amendment of section 185 of Ordinance No. 20 of 1974 (Cape of Good Hope) as amended by section 5 of Act 32 of 1990, section 8 of Act 117 of 1993 and Proclamation 111 of 1989.**—Section 185 of the Municipal Ordinance, 1974 (Ordinance 20 of 1974) (Cape of Good Hope) is hereby amended by the addition after paragraph (c) of the following paragraph:

“(cA) establish and maintain offices and facilities for the provision of advice and other services to consumers;”.

**36. Amendment of section 184 of Act No. 24 of 1979 (Transkei).**—Section 184 of the Municipalities Act, 1979 (Act No. 24 of 1979) (Transkei) is hereby amended by the addition after subsection (22) of the following subsection:

“(22A) establish and maintain offices and facilities for the provision of advice and other services to consumers;”.

**37. Amendment of section 169 of Act No. 17 of 1987 (Ciskei) and amended by section 19 of Act No. 25 of 1988 (Ciskei).**—Section 169 of the Municipal Act, 1987 (Act No. 17 of 1987) (Ciskei) is hereby amended by the addition after subsection (22) of the following subsection:

“(22A) establish and maintain offices and facilities for the provision of advice and other services to consumers;”.

**38. Short title and commencement.**—(1) This Act shall be called the Consumer Affairs (Unfair Business Practices) Act, 1998 (Eastern Cape).

(2) This Act shall come into operation on a date to be determined by the Premier by proclamation in the *Provincial Gazette* and different dates shall be determined for the coming into operation of different sections of the Act.

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