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GENERAL NOTICE • ALGEMENE KENNISGEWING

NOTICE 1023 OF 1997

DEPARTMENT OF TRADE AND INDUSTRY

CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) BILL, 1997

The above-mentioned Bill is hereby published for comment.

Interested persons are invited to furnish written comment and representations before or on 8 August 1997 to:

The Director-General
Department of Trade and Industry
Private Bag X84
PRETORIA
0001

[For attention: Ms Lana van Zyl
Tel: (01 2) 310-9562
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KENNISGEWING 1023 VAN 1997

DEPARTEMENT VAN HANDEL EN NYWERHEID

WYSIGINGSWETSONTWERP OP VERBRUIKERSAKE (ONBILLIKE SAKEPRAKTYKE), 1997

Die bogenoemde Wetsontwerp word hiermee vir kommentaar gepubliseer.

Belanghebbende persone word versoek om voor of op 8 Augustus 1997 hulskriftelike kommentaar en vertoë te verskaf aan:

Die Direkteur-generaal
Departement van Handel en Nywerheid
Privaatsak X84
PRETORIA
0001

[Vir aandag: Me. Lana van Zyl
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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Harmful Business Practices Act, 1988, so as to harmonise the Act **with** the provincial legislation; to reconstitute the Committee; to provide for an executive **committee**; to authorise an investigating **officer** to enter a premise with a search warrant; to provide for appeals against **decisions** of **competent** authorities in the **provinces**; to provide for the establishment of a permanent **Special Court**; to reconstitute the **Special Court**; to provide for the staying of proceedings in a **civil** court; to provide that the said Aot shall apply throughout the Republic; and to provide for matters connected therewith

B E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Aot 71 of 1938, as substituted by section 2 of Act 64 of 1991 and amended by section 4 of Act 33 of 1993

1. Section 1 of the Harmful Business Practices Act, 1988 (herein after referred to as the principal Act), is hereby amended—

(a) by the insertion before the definition of “benefit” of the following definition:

“ ‘arrangement’ means an arrangement or undertaking negotiated by the Committee;”;

(b) by the substitution for the definition of “business” of the following definition:

“ ‘business’ means any business, undertaking or person **who—**

(a) offers, supplies, or makes available any commodity;

(b) who solicits or receives any investment or to whom any investment is supplied or made available;”;

(c) by the substitution for the definition of “business practice” of the following definition:

“ ‘business practice’ **includes—**

(a) any agreement, accord, arrangement, [or] understanding or under-taking, 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, [or] 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;

(e) any situation in connection with the activities of any person or class or group of persons,

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

(d) by the substitution for the definition of “chairman” of the following definition:

“ ‘chairperson’ means the [chairman] chairperson referred to section 2(2) ;”;

(e) by the substitution for the definition of “committee” of the following definition:

“ ‘committee’ means the [Business **Practices**] Consumer Affairs Committee established by section 2;”;

(f) by the substitution for the definition of “commodity” of the following definition:

“ ‘commodity’ means any property, whether corporeal or incorporeal and whether movable or immovable and also any make or brand of any 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;”;

(g) by the substitution for the definition of “consumer” of the following definition:

“ ‘consumer’ means [a]-

(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 Minister with the concurrence of the Committee declares to be a consumer in terms of the Act;

(d) any person who is a consumer for the purposes of this Act in terms of any other law;”;

(h) by the substitution for the definition of ‘harmful business practice’ of the following definition:

“ ‘[harmful] 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; [or]

(c) deceiving any consumer; or

(d) unfairly affecting any consumer;”;

- (i) by the insertion after the definition of “investigating officer” of the following definition:

“ ‘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;” and

- (j) by the substitution for the definition of “Minister” of the following definition:

“ ‘Minister’ means the Minister of **[Economic Affairs and Technology]** Trade and Industry;”.

Amendment of section 2 of Act 71 of 1988, as amended by section 2 of Act 33 of 1993

2. Section 2 of the principal Act is hereby amended—

- (a) by the substitution of subsection (1) of the following:

“(1) There is hereby established a committee to be known as the [Business Practices] Consumer Affairs Committee.”;

- (b) by the substitution for paragraph (a) of subsection (2) of the following paragraph:

“(2)(a)(i) The Committee shall consist of **[not fewer than four and not more than seven]** nine members appointed by the Minister on the grounds of having special knowledge [of consumer affairs or knowledge of] or experience **[in]** of consumer advocacy, economics, industry [,] or commerce, [law or the conduct of public affairs], of whom the Minister shall designate one as chairperson and one as vice-chairperson.

The Chairperson should be—

(aa) a retired judge of the Supreme Court or

(bb) an attorney, advocate, retired magistrate or lecturer in law at an university.

(2)(a)(ii) In an assisting capacity and to ensure effective co-operation between the committee and a competent authority responsible for business practices or consumer protection within the jurisdiction of the government of a province, the heads of consumer affairs in the provincial departments will be invited to participate in the committee meetings but will not have the right to vote in respect of any decision of the committee.”;

- (c) by the insertion after paragraph (d) of subsection (7) of the following paragraph:

“(e) The quorum for the meetings of the committee shall be the chairperson or the vice-chairperson and four other members of the committee.”.

Substitution of section 3 of Act 71 of 1988

3. The following section is hereby substituted for section 3 of the principal Act—

“3. Executive Committee.—(1) The committee shall—

(a) with the consent of the Minister, appoint an executive committee, consisting of at least the chairperson or vice-chairperson and two other members of the committee;

- (b) delegate any power conferred on it by this Act to the executive committee, or authorise the executive committee to perform any duty imposed on the committee by this Act, either in general or in a particular case or in cases of a particular nature.”.

Repeal of section 3A of Act 71 of 1988, as amended by section 3 of Act 33 of 1993

4. Section 3A of the principal Act is hereby repealed.

Amendment of section 4 of Act 71 of 1988, as amended by section 4 of Act 64 of 1991 and section 4 of Act 33 of 1993

5. Section 4 of the principal Act is hereby amended—

(b) by the insertion in subsection (1) after paragraph (b) of the following paragraph:

“(bA) shall receive and dispose of particulars of the result of any investigation made by a competent authority responsible for business practices or consumer protection within the jurisdiction of the government of a province, in relation to any matter with which it may deal in terms of this Act.”;

(b) by the insertion in subsection (1) after paragraph (d) of the following paragraph:

“(3) may delegate any investigation in terms of this Act, or part thereof, to any other competent authority, including a similar office established by provincial legislation.”.

Amendment of section 7 of Act 71 of 1988, as amended by section 4 of Act 64 of 1991

6. Section 7 of the principal Act is hereby amended—

(a) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:

“(3) In order to ascertain whether this Act is being observed by any person to whom it applies, or to obtain any information required by the committee in relation to a preliminary investigation or an investigation by it in terms of this Act, an investigating officer may, subject to the provisions of this section, at all reasonable times enter any premises on or in which any commodity, investment, book, statement, document or other object connected with that observation or information is or is suspected to be, and may—”;

(b) by the substitution for paragraphs (b) and (e) of subsection (3) of the following paragraphs:

“(b) examine that commodity or investment, and request from the owner or person in charge of those premises, information regarding that commodity or investment;”;

“(e) seize against the issue of a receipt that book, statement, document or object, if it appears to provide proof of a contravention of a provision of this Act, or if he wishes to retain it [from] ~~to~~ further examination or for safe custody: Provided that a person from whose possession or charge that book, statement or document has been taken under this section

shall, as long as it is in the possession or charge of the investigating officer concerned, at such person's request allowed, at his or her own expense and under the supervision of that investigating officer, or other powers in the service of the committee, to make copies thereof or to take extracts therefrom at any reasonable time.”;

(d) by the insertion in subsection (3) after paragraph (e) of the following paragraphs:

“(4) Unless the owner or person in charge of the premises concerned has consented thereto in writing, an investigating officer shall enter premises and exercise any power contemplated in subsection (3) only under a search warrant, which may only be issued by the chairperson if it appears to him or her from information given on oath or solemn affirmation that there are reasonable grounds to suspect—

(a) that an unfair business practice exists or may come into existence; and

(b) that a book, document or other object which may afford evidence of such an unfair business practice is on or in those premises.

(5) A search warrant contemplated in subsection (4) shall—

(a) 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 (3);

(b) be executed by day, unless the chairperson authorises the execution thereof at night;

(c) be of force until it is executed, cancelled by the chairperson, or a period of one month from the day or its issue expires; whichever occurs first.”;

(e) by the substitution for subsections (4) and (5) of the following subsections respectively:

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

(a) show that person his or her certificate of appointment;

(b) hand to that person a copy of the warrant.”.

“(5) 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 exposes 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 of contravening any provision of this section.”.

Amendment of section 8 of Act 71 of 1988, as amended by section 1 of Act 43 of 1990 and motion 6 of Act 33 of 1993

7. Section 8 of the principal Act is hereby amended—

(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:

“(b) into any business practice or type of business practice, in general or in relation to a particular commodity or investment or any class or kind of commodity or investment or a particular business or any class or type of

business or a particular area, which in the opinion of the committee or the Minister, as the case may be, is commonly applied for the purposes of or in connection with the creation or maintenance of harmful business practices;”;

(b) by the insertion for paragraph (c) of subsection (1) of the following paragraph:

“(c) into any unfair business practice referred to it in terms of any other law.”.

Amendment of section 12 of Aot 71 of 1988, as amended by section 3 of Act 43 of 1990 and section 8 of Act 33 of 1993

8. Section 12 of the principal Act is hereby amended by the insertion after subsection (7) of the following subsection:

“(8J) The Minister may, with the concurrence of the Committee, declare any person to be a consumer by notice in the *Government Gazette* and may withdraw, vary or amend such notice.”.

Amendment of section 13 of Act 71 of 1988, as amended by section 9 of Act 33 of 1993

9. Section 13 of the principal Act is hereby amended-

(a) by the substitution for the heading of the following:

“Appeals [from the **Minister's** decisions]”

(b) by the substitution for subsection (1) of the following subsection:

“(1) There shall be a right of appeal by any person affected by—

(a) a notice under section 8(5), or 12(1)(b), (c) or (d);

(b) any notice, direction or measure of a competent authority responsible for business practices or consumer protection within the jurisdiction of the government of a province in terms of such provisions of a law in force in such province as has been designated for the purposes of this paragraph by the Minister by notice in the Gazette,

to a special court.”;

(c) by the substitution for subsection (2) of the following subsections:

“(a) The [State] President [may] shall by proclamation in the *Gazette* establish a permanent special court with a permanent registrar, operating on an *ad hoc* basis, with jurisdiction in the area of jurisdiction of [any] one or more provincial or local [division] divisions of the Supreme Court of South Africa;

(b) The President shall by way of proclamation determine the date of dissolution of the special court established before the date of commencement of this Act;

(c) Any application or matter referred to the special court referred to in paragraph (b) before the date of commencement of this Act and not disposed of on that date, shall be continued and disposed of by that special court in terms of the principal Act.”;

- (d) by the substitution for subsection (3) of the following paragraphs:

“(3) A special court shall consist of—

(a) a president, who shall be—

(i) a judge of the Supreme Court of South Africa designated by the Chief Justice; and

(b) two other members appointed by the the President by notice in the Gazette and having special knowledge or experience of consumer advocacy, of economics, industrial, commercial or financial matters.

(3A) The Minister shall invite interested parties, by notice in the Gazette and an advertisement in the media regarded by him as appropriate, to nominate candidates, within 21 days of the publication of such notice, for consideration as members of the court.

(3B) The names of the nominees shall thereafter be published in the Gazette and media for comment.

(3C) Interviews of nominees shall be open to the public.

(3D) No person shall be appointed or remain a member of the court if he or she is not a fit and proper person or—

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

(b) is a public servant;

(c) at the relevant time is, or during the preceding 12 months was, an office-bearer or employee of any party, movement, organisation or body of a party political nature;

(d) is an unrehabilitated insolvent;

(e) 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;

(f) has at any time been removed from an office of trust on account of misconduct or dishonourable conduct.

(3E) No person shall remain a member of the court if he or she fails to disclose an interest which would require him or her to be recused.”;

- (e) by the substitution for paragraph (a) of subsection (5) of the following paragraph:

“(a) An appeal in terms of this section shall be lodged with the Minister in writing within six weeks after the date of publication of notice, direction or measure to which the appeal relates or, if no notice is published, the date of the order of the provincial consumer court and shall set forth the grounds on which the appeal is based.”;

- (f) by the substitution for subsections (1 O), (11) and (14) of the following subsections respectively:

“(1 O) A special court may after consideration of an appeal, confirm or set aside the notice, direction or measure to which the appeal relates or, if no notice is published, the date of the order of the provincial consumer court, or may amend it in such manner as it may deem equitable, and may make such orders as to costs as it may deem just.”.

“(1 1) The decision of the majority of the members of **[a]** the special court shall be the decision of the court [, but the president alone shall decide any question of law, and whether any matter constitutes a question of law or a fact, and that **for that purpose he shall sit alone**]. The court shall make its decision on the basis of equity, fact and fairness.”.

“(1 4) **An** order of a special court confirming, setting aside or amending the notice, direction or measure to which the order relates, shall be made known by the Minister by notice in the Gazette, and any amendment made to a notice, direction or measure by such an order shall have effect as if it were an amendment made under section 12(4)(d) or as if it were a notice, direction, measure or amendment thereof made under the applicable provisions referred to in subsection (1)(b) of the law concerned in force in the relevant province.”.

Amendment of section 14 of Act 71 of 1988

10. Section 14 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) No person shall, without the permission of the chairperson, except for the purposes of the performance of his functions in terms of this Act or for the purposes of legal proceedings under this Act or when required to do so by a court of law or under a law, disclose to any other person any information acquired by him in the performance of his functions in terms of this Act and relating to the business or affairs of any other person.”.

Substitution of section 19 of Act 71 of 1988

11. The following section is hereby substituted for section 19 of the principal Act:

“19. 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 Minister or the special court has come to a decision in terms of this Act.”.

Substitution of the words “chairman” and “harmful business practice” in Act 71 of 1988

12. The principal Act is hereby amended by the substitution for the words “chairman” and “harmful business practice” wherever it occurs of the words “chairperson” and “unfair business practice” respectively.

Application of Act 71 of 1988 throughout Republic

13. The principal Act shall apply throughout the Republic.

Short title

14. This Act shall be called the Consumer Affairs (Unfair Business Practices) Act, 1997.

MEMORANDUM ON THE OBJECTS OF THE CONSUMER AFFAIRS
(UNFAIR BUSINESS PRACTICES) ACT, 1997

The purpose of the Bill is to harmonise the national and provincial legislation and to allow for, *inter alia*, provincial representation. Provision is made for a maximum of nine persons having special knowledge or experience of consumer advocacy, economics, industry or commerce on the Committee. In an assisting capacity and to ensure effective co-operation between the Committee and the competent authorities in the provinces, provision is made for the heads of the provincial consumer affairs offices to be invited to participate in the Committee meetings.

With regard to the Committee's functions provision is made for the co-ordination of investigations and the disposal of representations by referring it to the competent authorities in the provinces for investigation. Provision is also made for appeals against decisions of competent authority in the provinces.

The Special Court is reconstituted as a permanent court, with a permanent registrar that operates on an *ad hoc* basis. The Bill also provides for the decision of the Court to be one of equity and fact and on the basis of fairness. Provision is also made for the phasing out of the existing Special Court and the establishment of a newly reconstituted Special Court. Provision is made that the existing Special Court will finalise all the cases lodged with it up until the new Special Court will be established.

Provision is made for the staying of proceedings in a civil court. Due to the secrecy section in the Act, the Committee cannot disclose any information to any other institutions if it becomes aware of contravention that can be handled by them and what, in the interest of the public, should be reported. The secrecy clause is therefore amended to allow the Committee to disclose information should it be necessary. The other amendments in the Bill are of a consequential nature.

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