



# Government Gazette

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**AIDS HELPLINE: 0800-0123-22 Prevention is the cure**

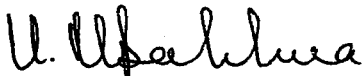
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**GENERAL NOTICES**

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**NOTICE 2177 OF 2004****DEPARTMENT OF TRADE AND INDUSTRY  
CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988**

I, Mandisi Mpahlwa, Minister of Trade and Industry, do hereby, in terms of section 10(3) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), publish the report of the Consumer Affairs Committee on the result of an investigation made by the Committee pursuant to General Notice 213 of 2002 as published in Government Gazette No.23118 dated 15 February 2002, as set out in the Schedule.

**M MPAHLWA****MINISTER OF TRADE AND INDUSTRY****SCHEDULE**

## CONSUMER AFFAIRS COMMITTEE

### REPORT IN TERMS OF SECTION 10(1) OF THE CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988 (ACT NO. 71 OF 1988)

#### Report No 113

*An investigation in terms of section 8(1)(b) of the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988, into the advertising practices of mail-order and/or distance purchasing entities with particular reference to statements in brochures and advertisements, such as prizes won and free merchandise, which directly, indirectly or by implication is likely to mislead the consumer*

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**THE ADVERTISING PRACTICES OF MAIL-ORDER AND/OR DISTANCE  
PURCHASING ENTITIES WITH PARTICULAR REFERENCE TO STATEMENTS IN  
BROCHURES AND ADVERTISEMENTS, SUCH AS PRIZES WON AND FREE  
MERCHANDISE, WHICH DIRECTLY, INDIRECTLY OR BY IMPLICATION IS  
LIKELY TO MISLEAD THE CONSUMER**

**1. THE CONSUMER AFFAIRS COMMITTEE**

The Consumer Affairs (Unfair Business Practices) Act, 71 of 1988 (the Act), is administered by the Consumer Affairs Committee (the Committee), a statutory body in the Department of Trade and Industry (**the DTI**). The purpose of the Act is to provide for the prohibition or control of certain business practices. These "certain business practices" are unfair business practices. An unfair business practice is 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<sup>(1)</sup> any consumer;
- (c) deceiving<sup>(2)(3)</sup> any consumer; or
- (d) unfairly affecting any consumer.

It is important to take note of the words "directly or indirectly", "has" and "... likely to have the effect ...".

The Act is enabling and not prescriptive. The main body of the Act deals with various administrative procedures, the investigative powers of its investigating officials, the types of investigations the Committee could undertake and the powers of the Minister of Trade and Industry (the Minister). The Act confers wide investigative powers on the Committee. The investigations deemed necessary by the Committee are undertaken by the Consumer Investigations Directorate of the *dti*.

The vast majority of the investigations concern unfair business practices as applied by individuals or specific business entities. These investigations are undertaken in terms of section 8(1)(a) of the Act. In terms of section 8(1) (b), the Committee may also investigate a general business that is being commonly applied by a number of business entities involved in a particular industry.

Should the Committee, following a section 8(1)(b) investigation, find that an unfair business practice(s) exists, it recommends corrective action to the Minister to ensure the discontinuance of that practice.<sup>(4)</sup> If the Minister accepts the recommendation of the Committee, an order is published in the *Government Gazette*. An infringement of an order by the Minister is a criminal offence, punishable by a fine of R200 000 or five years imprisonment or both a fine and imprisonment.

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- (1) Disadvantage or harm: disadvantage or harm caused to somebody or something (see *Encarta World English Dictionary* 1999, 2000 Microsoft Corporation).
  - (2) Deceive: *transitive verb*, intentionally trick or mislead somebody: to mislead somebody or hide the truth deliberately (see *Encarta World English Dictionary* 1999, 2000 Microsoft Corporation).
  - (3) To practice deceit on, to mislead deliberately, impose on, delude: to put under a delusion. Smith, AH and O'Loughlin (Ed), *Odham's Dictionary of the English Language*, Odham Books Ltd, London.
  - (4) The powers of the Minister are set out in section 12 of the Act

## 2. MAIL-ORDER RETAILING

Mail-order retailing has been defined as "a form of selling by description".<sup>(5)</sup> Buyers usually do not see the actual product until it arrives in the mail. Mail-order sellers contact buyers through direct mail, catalogs, television, radio, magazines, and newspapers.<sup>(6)</sup> Direct selling (marketing) by mail-order entities means that these entities generally do business without ever meeting their customers. Some mail-order entities have, aside from their main warehouses, a limited number of showrooms. Most of their sales are, however, effected from their main warehouses and so their direct mail, brochures and fliers are their shop windows. The Direct Marketing Association (DMA) explains that "this material forms the foundation of the customer relationship, and has to draw the recipients' attention to at least read enough to know whether they are at all interested in the products or services."<sup>(7)</sup> It is this marketing material which has caused concern amongst consumers and the Committee although the DMA explains that most direct marketers seek to develop long term relationships with customers, and marketing campaigns are designed to promote this objective. Reputable marketers will not intentionally act in such a manner as to threaten positive relationships.<sup>(8)</sup>

## 3. TEMPTING OFFERS BY MAIL ORDER ENTITIES

As pointed out by a mail-order entity, in its submission to the Committee, competitions are regularly run by mail order retailers for customers in which prizes consisting of cash, cars and other items are given away. To generate excitement and add value to the customer's experience, certain offers also include free gifts.

The following are examples (together with comments by the Committee) of actual statements made by mail-order retailers in their brochures and fliers which are sent to consumers, ostensibly "... to generate excitement and add value to the consumers' experiences".

### 3.1 Prizes

- (a) A bold and colourful headline proclaims: "**A R100 000,00 cheque is awaiting guaranteed delivery on return of the completed winning forms**". Although more information is contained in the small print of the promotional material, the Committee adheres to the principle that a misrepresentation in the main headline is not excused by providing corrective information in the body of the document. The sentence clearly implies that a cheque is awaiting the recipient of the letter. The Committee is therefore of the view that the headline was probably designed to mislead and is therefore deceptive.

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(5) Pride, WM and Ferrell, OC: Marketing, Basic Concepts and Decisions, Houghton Mifflin Company, Boston, Fourth Edition, p.274.

(6) Ibid

(7) Information obtained from a submission by the Direct Marketing Association

(8) Ibid

- (b) Printed in bold: ***"If you have and return one of these pre-selected Vouchers with your order in the next 14 days, you are guaranteed to receive an instant cash payment of R1 000"***. The recipients of this promotional material will be misled into believing that they will receive a cash payment of R1 000. Again there is corrective information in the body of the brochure and the Committee's comments in (a) above are relevant.
- (c) "We are ready to send you, "Mev A Nother", a signed cheque for R50 000.00 if you return the correctly completed form and it includes the winning number. All the other people - shown in the list above - have already returned their winning/control number. ***They also did not forget to place an order. So they all received cashable cheques for up to R50 000.00. But you are still missing.***
- (d) "Even if your name, J Surname, ***was drawn by our prize allocation officer as the winner***, I would still be obliged to pass this cheque for R50 000.00 on to another person, if you do not respond by returning your Order/Entry Form within 10 days and in accordance with the rules of the competition. The rules are in much smaller print. However, because the recipient infers from the first line that she must respond quickly to avoid the cheque being passed on to another person, she will probably fail to see or read these rules. The statement was probably designed to mislead and is therefore deceptive.
- (e) "A cash Entry Voucher worth R50 000.00 has been sent out, have you received it?"
- (f) "I am very happy to inform you that ***you have been selected as the winner of an Instant Cash Prize in our latest R100 000,00 Bonanza Cash Draw***". (The Committee's underlining). Again a consumer will probably misunderstand this statement and will assume that she has won R100 000.
- (g) Our prize processing centre is ***waiting to issue your payout***".
- (h) ***"Please understand that this cash prize is already yours ... it is not subject to a draw"***. A recipient who can read and understand the fine print will realise that the cash prize may be as low as R10.
- (i) "... you are already entitled to your Cash Prize ***right now***". The "right now" implies that the customer has to do nothing more than collect the prize..
- (j) In a brochure the following is printed in small print: "Let it be known to all if the specifications are met and you are the grand prize winner, you will receive a prize winners cheque and this congratulatory message". This small print is followed by:

## “YOU ARE THE GRAND PRIZE WINNER OF R65 500.00!

### OFFICIAL PRIZE ANNOUNCEMENTS!

| NAME        | PRIZE       | STATUS               |
|-------------|-------------|----------------------|
| John        | R61 460.00  | PAID IN FULL         |
| Complainant | R65 500.00  | PRIZE STATUS PENDING |
| Louise      | R114 315.62 | PAID IN FULL         |
| ME D.....   | R92 190.00  | PAID IN FULL         |
| Lillian     | R116 774.00 | PAID IN FULL         |

Because the words “if the specifications are met” are written in small print and followed by much larger print “YOU RE THE GRAND PRIZE WINNER “ it is highly likely that the recipient will not even read the qualifications regarding the granting of the prize.

- (k) “You are ***One Of Our Two R50 000.00 Cash Prize Winners***”. Here the impression is clearly created that the recipient is only one of two people to have won a prize.
- (l) The leaflet of mail-order “D”, a division of mail-order “B” states “... we’ve been advised that you are a guaranteed winner”. The recipient is not informed in the same letter type that the “guaranteed” winner could receive as little as R2.
- (m) “Yes, P Surname, your Cash Award is fully guaranteed and you will receive your entitlement as soon as we receive your Order & Claim Form. It will be sent to you by post along with the goods you order. The Committee is of the view that the words “... fully guaranteed”, “... you will receive” and “... will be sent to you by post along with the goods you order” are designed to mislead.
- (n) “These packs are designated only for our most loyal and latest customers, and have been allocated ...”. The packs were probably designated to all the active clients on the mailing list.
- (o) “... you have definitely been awarded an immediate and guaranteed Cash Prize and you could get as much as R120 000.00!! However, The recipient is not clearly informed that “... you can get as little as R10”.
- (p) In the main body of the brochures consumers are informed that they “... have definitely been awarded a cash prize”. The prize categories, however, are tucked away on the reverse of the brochures or on a separate leaflet.



- (q) Mail-order "B" offered "... sparkling faux<sup>(9)</sup> diamonds" to its clients. The Committee is of the opinion that very few of "B's" customers will understand that "faux diamonds" are really imitation diamonds. The word "faux" was probably chosen to deceive consumers. If "B" wanted to convey a truthful message to its clients, it should have referred to "imitation diamonds". "Faux" is not a word commonly used in English and the Committee is of the view that the choice of such a word is designed to mislead.
- (r) The "Official Entry/Order Form" in a number of brochures suggests that consumers are required to order merchandise to receive a free gift or prize. The words "No purchase is necessary" are usually tucked away on the reverse of the brochures. Equal emphasis should be placed on the fact that "no purchase is necessary."
- (s) Even statements on the envelopes at time contains misleading statements. Three examples will suffice:
- (i) "Our first and last notification before passing on the cheque to the value of R50 000".
  - (ii) On the reverse of an envelope addressed to a prospective client was printed: "OFFICIAL DOCUMENTS". This is misleading. Only government bodies issue "official" documents.
  - (iii) On the face of an envelope were printed "Audited Delivery" and "Delivery of this Notice is being tracked and audited. Any illegal interference or delay in the speedy delivery of this notice will be prosecuted to the full extent of the law" These words and sentences were designed to impress and mislead the uninformed.
- (t) The following was received from mail-order "A". It clearly creates the impression that a consumer who orders for more than R150-00 will be entitled to a vacuum cleaner

R50 000.00 VIP Cash Draw

Dear TV-Talk Subscriber, You've Really Struck It Lucky This Time!

Your Cash Draw Number: 0844339

You don't receive good news like this everyday so allow me to congratulate you.

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(9) Faux: imitation, made in imitation of a natural material, for example leather or fur. [Late 20th century. Via French, from, ultimately, Latin *fa/sus*, (see FALSE).] (see Encarta World English Dictionary © & (P) 1999, 2000 Microsoft Corporation)

Our computer has selected you to be the bearer of the lucky cash draw number above which automatically qualifies you to enter into the R50 000.00 Prize Draw, regardless of whether you place an order or not. All you have to do is return your duly completed Personal Order/Reply Form to us as soon as possible.

But there is more good news! At our latest exclusive VIP Gift Draw, where our Prize Management has selected an exciting range of Gift Awards, our computer selected your name, and now I am delighted to report:

**YES, AS A TV-TALK SUBSCRIBER YOU HAVE MADE IT!**

As one of the subscribers selected from an exclusive group you may now say:

**THE CARPET STAR WET & DRY VACUUM CLEANER IS MINE!**

Perhaps you don't believe your good fortune, but your VIP gift envelope proves it: You've really struck it lucky this time because you will receive your new Carpet Star Wet & Dry Vacuum Cleaner - absolutely free, delivered to you with the parcel of the articles that you have ordered. This is mail-order "A"'s way of saying thank you for your order. *It now appears that an order must be placed.* (The underlined sentence is comment by the Committee).

**And it so easy to claim your exclusive VIP gift!**

Just open the sealed envelope which contains all the documentation you need in order to claim your VIP gift. You will see immediately what you have to do in order to obtain your gift. And you will see that you were quite right to order and return your duly completed Personal Order/Reply Form with your duly attached VIP gift sticker.

**And now here is some more good news:**

Increase your chances of winning **R150 000.00** in the Arcadia Grand "Biggest Ever" Draw by as much as **FIVE TIMES!** Scratch the Arcadia Lucky Wheel and see what your combination awards you. You could really be our next **BIG WINNER!** (see Arcadia Lucky Wheel for details)

So rush us your order today so that you can enjoy this special offer with your gift and lots of other exciting items.

Congratulations! I look forward to receiving your Personal Order/Reply Form.

Valerie Walker

Special Promotions Manager

P.S. And don't forget: by placing an order you automatically enter our next R100 000.00 Quarterly Customer Draw!"

### 3.2 *Outright scams*

A number of consumers informed the Committee about marketing materials which can only be described as outright scams. The following are self-explanatory examples:

- (a) "The letter (from an "Australian company called WWSC) said I was chosen among many as the lucky winner of more than R7 million. All I had to do was sent R200 to the following address: Postnet, Suite 100, Private Bag X3, Roggebaai, 8012. They never attach a real phone number where you can lodge complaints directly"
- (b) The International Cash & Merchandise Award Centre, Suite 129, Private Bag X3, Roggebaai, 8012 sent the following to a prospective client. "This urgent notice its to advise you regarding your share of Cash Awards Guaranteed in excess of R64 million to R320 million. All that is required is a one-time administrative processing fee of R170 (includes express handling and merchandise incentive offer).
- (c) Mail-order "D" made the following claim in a flier: "This is your Warehouse-Marketing Notice of claim to redeem a parcel we are ready to deliver to you. It is being held pending identification followed by free delivery to the confirmed recipient. All we ask is confirmation of your identity and inclusion of an administrative-routing fee. This notice to you is our identification process". The administration fee was R99.95 and the product was a "genuine amethyst and diamond pendent".
- (d) A consumer was informed by an entity (with a Rivonia address) that she had won one of the following items: A colour television, R5 000 cash, a Bellini diamond accent watch, a video recorder, R1 000 cash or a high-fidelity set. Consumers were also informed: "All we ask for you to do is complete the shipping authorisation form enclosed and include the acquisition contribution (which includes packaging, delivery and insurance) of R129.95".

It must be noted that the value of the actual prizes was not mentioned. The Committee is of the view that the majority (if not all) of the prizes would have been inexpensive watches valued at well below the contribution of R129.95

- (e) **NOTICE OF UNPAID CASH.** Attention J Surname: If you are the J Surname living at P O Box 123, we are very pleased to have reached you. This notice is in respect of an "OPEN & UNCLAIMED" cash prize from a mail order prize draw totaling R140 000.00. We are most anxious to have this money paid out to its rightful owner. J Surname, I am

pleased to inform you that you have been deemed officially eligible to be awarded this open payment”.

Interested consumers were required to enclose R89.95 ostensibly “to cover express handling of the file”.

#### **4. NOTICE OF THE SECTION 8(1)(a) INVESTIGATION**

Investigating officials of Consumer Affairs Directorate have in the past discussed misleading brochures with a number of mail-order entities. In addition, the representatives of two of the major mail-order businesses have addressed the Committee on the issue. The Committee, however, continued to receive complaints against these entities and therefor resolved to publish the following notice in the *Government Gazette*.

“In terms of the provisions of section 8(4) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No 71 of 1988), notice is hereby given that the Consumer Affairs Committee intends undertaking an investigation in terms of section 8(1)(b) of the said Act into the advertising practices of mail-order and/or distance purchasing entities with particular reference to statements in brochures and advertisements, such as prizes won and free merchandise, which directly, indirectly or by implication is likely to mislead the consumer.

Any person may within a period of thirty (30) days from the date of this notice make written representations and proposals regarding the above-mentioned investigation to: The Secretary, Consumer Affairs Committee, Private Bag X84, Pretoria, 0001. Tel: 012-310-9562, Fax: 012-320-0579. Enquiries: Ms Lana van Zyl”.<sup>(10)</sup>

#### **5. COMMENTS FROM CONSUMERS ABOUT MAIL-ORDER ENTITIES**

This heading concerns comments and information which the Committee received from mail-order customers:

(a) A customer sent the following letter to a mail-order entity:

“Some time ago I received in the mail a copy of your mail order catalogue. Upon perusal my wife and I decided to order some of the advertised merchandise. When the rubbish was delivered by mail I could not believe my eyes. Below I list my complaints. ... I do not want my money back, this is too easily an escape for you. Instead I intend to keep the rubbish and sent a copy of this letter to the national newspapers suggesting that anyone who cannot view your products at your (place

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(10) Notice of the investigation was published under Notice 213 of 2002, in *Government Gazette* 23118 dated 15 February 2002.

name) shop should rather come and view what I have before they commit themselves to an order”.

(b) A consumer had this to say:

“In my opinion they are blatantly exploiting the consumer’s legal and technical illiteracy, by ambiguous juggling of words:

- A fictitious list of numbers creates the impression that the client’s number was allocated by an official draw,
- That the given numbers are limited, and that the customer is a legitimate winner. They advertised an Apple Cider Vinegar product at R99.99 for 90 tablets, when we received the order, they have reduced the quantity to 60 tablets with an apology blaming it on a misprint. The package was returned unopened by registered post December 2000, but we had no response to date. Mail-order “A” is still advertising the product at R99.99 for 90 tablets”.

Further direct quotes:

- (c) “...(They)... often send(s) out mail packs that say ‘you could be the winner’ this time they sent out a mailing that said ‘you ARE the winner’. My mother received one of these. (She is 84) When I phoned the ‘Customer Care Line’ to see if her ‘winning entry’ had been received, as she was very excited about it and had already divided the money amongst her friends and charities. I was told that the ‘YOU ARE THE WINNER’ letter had been sent to 100’s of people, not even a short list ... I had a letter from the Director saying that they had refined their campaigns to be in line with UK, USA and Australia as though that made it OK. ... I think it is time that such pathetic marketing ploys be stopped. Persuading people to part with hard earned money in the hopes of winning some money, is one thing, like a gamble, but telling masses of people that they HAVE won, when you have no intention of giving them all the promised prize is cheating, lies and fraud”.
- (d) “I hereby applying for an assistance from you I’m looking for a help from you. Previous years I’ve been written a letter to you complaining about mail-order “A”, but you assist me with whatever you have been written/explain to me. So, last months in 2nd of August 2001 I received some notice letter from Director of Prize allocation at mail-order “C” telling me that I have been chosen as one of select numbers of cash prize winners in their multinational promotion, but I send back a completed claim form to them with total amount of R230 in cash, but nothing I received from them, they do not fulfill their promise, I think they are the crook I send some information from its copy form”.
- (e) “I have experience regarding mail-order “B”, mail-order “D” and mail-order “A”. On many occasions I received notices that I am a winner and that I must respond within a certain time period. In each case the winning

amount was between R30 000 and R100 000. I was also promised that should I place an order, additional amounts could be won. In a few cases I won prizes that were between R2 and R10".

- (f) "I would have been stinking rich should I have received all the amounts promised to me by mail-order companies".
- (g) "I never received any money, except on one occasion when I received R2 as a prize".
- (h) "We receive a pension only, and each time they informed me that I had won a prize, but that I should order something, I did so. I have yet to receive a prize. PS I already spent thousands of Rand.
- (i) "It also happened previously that they informed me that I had won money. Then I must place an order. You never hear from them again".
- (j) The following is a direct translation from a comment received from an Afrikaans speaking consumer:

"My father is 82 years old and a retired civil servant who has to count the cents to survive on his meager pension. Approximately 9 months ago I realised something was wrong. Every month he collects about 3 to 4 packages with unnecessary merchandise at the post office or it is delivered at home. In some of these packages there are brochures in which my father is congratulated because he is the winner of sums ranging from R25 000 to R140 000. To claim the money he must return the documents within 48 hours to seven days together with his order from a new brochure. The result is that he then writes out a cheque and then, as late as 01h00 in the morning, gets into his car to post the documents. At times his cheques were returned by the bank because of insufficient funds. He then withdraws money from other accounts. He has a wardrobe full of useless merchandise but he believes that his prize money of R100 000 will be delivered at any day. He firmly believes that should he respond timeously, pay the accounts on time and '... remain in their good books', his prize money will be paid. This will then be the end of their (my parents) financial worries".

- (k) "I hereby applying for protection against mail-order "A" shops. They sent me a confirmation letter in which the congratulates me for winning their first prize of R300,000.00. My winning number was 42-24-32. I Claimed the prize and the gift immediately after I had received Confirmation letter, I only received the gift. I had made several calls asking about my prize. The reply was wait we will sent it soon. up to now I did not received it".
- (l) "Prizes are never paid".

- (m) "At times I just order so that I can get my prize, not that I need the thing I've ordered".
- (n) "As a widow such things are not alright to many of us especially needy people like myself."
- (o) "The cash prize amounts are only stated with subsequent correspondence, and vary from R2 to R10. This, according to the company is too small an amount for postage, and becomes a discount on future items purchased. I cannot recall a cash prize being defined as a 'discount'".

## 6. COMMENTS BY MAIL-ORDER ENTITIES

Two mail-order entities commented on Notice 213 of 2002 dated 15 February 2002. It must be stated that as far as these entities are concerned, complaints against them to the Committee are infrequent. The mail-order entities against which the vast majority of complaints are directed did not respond.

The first mail-order entity referred the Committee to comments submitted by the Direct Marketing Association<sup>(11)</sup> (DMA). It stated *inter alia*:

"The fact that a few unscrupulous individuals or organisations are damaging the industry's reputation needs to be addressed and we welcome any action that would help put a stop to such activities".

The other mail-order entity submitted that the DMA rules should be followed by mail-order businesses with *inter alia* the following additions:

"Competition organisers may not offer a prize conditional upon the payment by a customer of a disguised charge for such prize as, for instance, in the case where the contestant is told that he/she has been awarded a prize but that the claimant is required to send a postage, packaging and handling, processing fee (or other) payment in order to 'claim' the so-called prize. This process is more particularly unfair as a business practice if the cost of handling and/or other charges exceeds the value of said prize. A 'prize' should be broadly defined within this context to prevent a contest organiser from by-passing the legislation by using other names such as 'award', 'gift' etc".

The second mail-order entity remarked that:

"Specifically excluded from this should be any process whereby a prize organiser may withhold a prize from a contestant where such contestant has not complied with the stated rules of the contest - for instance in having not paid their account for other goods or services purchased from the company - before being awarded their prize. The essential difference is that the latter payment is not a disguised

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(11) Now the Marketing Federation of South Africa.

payment for the 'prize' but a settlement of a legitimate debt generated by a separate transaction with rules disclosed in advance or simultaneously with the sales agreement and agreed to by the customer".

It has been suggested that the lack of adequate guidelines or rules about advertising and the harsh reality of a competitive commercial environment may contribute to "misleading" advertisements. However, there are general guidelines or rules about advertising. They are to be found in the Code of Practice of the DMA (see below) and the ASA's code of advertising. In any event, business entities should not mislead consumers and the fact that businesses operate in the "harsh reality of a competitive commercial environment" is not an acceptable excuse.

## **7. COMMENTS BY REPRESENTATIVE BODIES**

Two representative bodies, namely the DMA and the Advertising Standards Authority (ASA) commented on Notice 213 of 2002 dated 15 February 2002.

### **7.1 Comments by the DMA**

The comments of the DMA are summarised below.

- The practices to be investigated by the Committee are currently regulated through three vehicles: the self-regulatory Code of Advertising Practice of the ASA, the self-regulatory Code of Practice of the DMA and the general provisions for investigations in the Consumer Affairs Act.
- Whilst the self-regulatory bodies are successful in the majority of instances, they have at times failed to protect consumers against disreputable entities who have remained intransigent in the face of self-regulation. The Act has at times proven to be inadequate in achieving timeous and consistent relief against such entities.
- The DMA fully supports the proposed investigation. It noted that the most effective manner of dealing with offending entities is not through the introduction of new legislative mechanisms. Rather, what is required is a co-regulatory framework which provides legislative clarity regarding misleading advertisements together with legislated empowerment of the current self-regulatory environment.
- The DMA recommended that it would be most appropriate to vest this empowerment in the hands of the ASA because it has an enviable self-regulatory track record and has the support of the broad advertising and marketing industry.
- The main purpose of the DMA Code of Practice is twofold. For those in direct marketing it lays down criteria for professional conduct and for the public it gives a clear indication of the self-imposed limitations accepted



by those using or working in direct marketing. Its rules form the basis for arbitration where there is a conflict of interest within the business, or between companies and the general public. The DMA may suspend or revoke membership from companies in contravention of the Code.

- Three arguments were advanced regarding why there is a need for a Code of Practice with legislation protecting the consumer from dishonest and fraudulent trading practices. These arguments were also developed by the ASA (see below).
- Whilst the DMA has direct influence only over its members, it has also, with only a few exceptions, been successful in encouraging non-members to comply with the Code of Practice.
- Across the world thousands of reputable businesses offer incentives in the way of prizes, participation in competition draws and free gifts to encourage consumers to respond to their offers. They do this not only to sell products and services, but also to help them keep their client information up to date. Unfortunately the use of such promotional devices can be contentious and subjective, especially where consumers may not have clearly read or understood the rules of the promotion. Because campaigns with prizes and incentives almost always are more effective, the methodology may be abused by unethical marketers to lure consumers into inappropriate or unwanted transactions.
- Relatively few complaints of misrepresentation are received by the DMA. Most of these relate to campaigns that mislead consumers into believing they have won significant cash prizes. Such campaigns tend to utilise headlines which state categorically that a large prize has been won. However, further copy in the advertisement clarifies that the recipient has only "won" the right to participate in a draw for the prize. Ethical advertisers are careful not to imply that a prize has already been won.

Extracts from the DMA Code of Practice are to be found in Annexure "A".

### **7.1.1 The Committee's comments on the DMA submission**

The DMA concedes that the self-regulatory bodies have at times failed to protect consumers against entities who have remained intransigent in the face of self-regulation. The Committee accepts and agrees with the comment that the Consumer Affairs Act has at times proven to be inadequate in achieving timeous and consistent relief against such entities. The Act sets out the various administrative procedures to be followed when undertaking an investigation and any proceedings that do not fall within the ambit of the Act would be *ultra vires*. Notwithstanding the time it takes from the commencement of an investigation to the resultant publication of the Minister's order in the *Government Gazette*, as well as the inadequate investigating capacity of the Committee, it has to be said that the Committee is relatively successful in controlling unfair business practices.

The DMA is of the opinion that the most effective manner of dealing with offending entities is a co-regulatory framework which provides legislative clarity regarding misleading advertisements together with legislated empowerment of the current self-regulatory environment and that it would be most appropriate to vest this empowerment in the hands of the ASA. This aspect will be discussed in section 7.2.1 below.

It is significant that the bulk of the complaints of misrepresentation received by the DMA are those that relate to campaigns that mislead consumers into believing they have won significant cash prizes.

## **7.2 Comments by the ASA**

The ASA is widely recognised as the definitive body regarding advertising in South Africa. When advertisers fail to co-operate with the ASA, all media members (including newspapers, magazines, television, radio, outdoor, cinema and members of the Printing Industries Federation) have agreed, in the public interest, not to accept advertising which contravenes its Code. In certain instances, however, an advertiser may not be a member of any ASA member body and may not make use of any of the media falling within the ASA's jurisdiction. The direct mail brochures and fliers mailed by mail-order entities to prospective customers are not subject to "control" by independent bodies. There are mail-order entities who are not members of the ASA and hence it has no jurisdiction over the advertising of these non-members.

The submission by the ASA has been reproduced in its entirety, although the numbering thereof has been amended and short paragraphs have been compressed. (In order to indicate that this is the ASA's submission a smaller font has been used)

### ***"The Need for the Regulation of Advertising***

1. The regulation of the communications industry, which includes as its essential component the regulation of the content of advertisements, is a necessity that has received international recognition. As an illustration, the European Economic Community has, through a Council Directive of September 1984, required member States to create procedures whereby misleading advertisements may be challenged either through the Courts or through a parallel administrative process with enforcement powers.
2. Advertising must inspire public confidence: it must be legal, decent, honest and truthful. If bad advertising - dishonest, misleading or offensive - is allowed to go on unchecked, even though it may account for only a small percentage of the whole, it will gradually undermine consumers' confidence and all advertising will suffer. So it is in the interests of the communications industry itself to ensure that advertising is properly regulated.
3. The harm that the regulation of advertising seeks to combat may be broadly placed in two categories. The first category is misleading advertising, a concept that is primarily concerned with the truth of what is stated in the course of advertising products or services. The second category is harmful advertising which is analogous, for South African purposes, to the concept of harmful

business practices, i.e. practices that harm relations between business and consumers or which prejudices or deceives consumers.

4. Seen in this context, the primary object of the regulation of advertising is the protection of consumers. That this is a laudable objective in our society has already been recognized through statutory enactments such as The Usury Act; The Consumer Affairs (Unfair Business Practices) Act, The Independent Broadcasting Authority Act; and The Credit Agreements Act.
5. A further objective of the regulation of advertising is to ensure fair play between advertisers in a competitive relationship. In this regard, regulation bolsters the protection against unfair competition that exists in other areas of our law.

### ***The Constitution and Advertising Regulation***

6. In a country with constitutionally protected rights, such as South Africa, the regulation of advertising has the potential to be controversial. Inevitably, there will be some conflict between restrictions on advertising and the rights to freedom of expression. In other countries where this right is protected the conflict is solved, primarily, by recognizing that harmful or misleading commercial speech is not deserving of constitutional protection, and that its restriction is a permissible limitation of the right.
7. Having recognized this approach, however, in order to survive constitutional challenges advertising regulation must limit the right of expression only to the degree necessary to ensure adequate protection.
8. A further aspect in regard to the interface between advertising regulation and the constitution concerns administrative justice. To the extent that advertising is regulated, such regulations must be administered and applied in a manner that accords with the administrative justice protections in the Constitution and the Administrative Justice Act (which gives legislative effect to this right). This means that the regulation of advertising must, at all times and at all levels, be transparent and accountable.

### ***What is self-regulation?***

9. Self-regulation is a system by which the advertising industry actively polices itself. The three parts of the industry -the advertisers who pay for the advertising, the advertising agencies responsible for its form and content, and the media which carry it -work together to agree advertising standards and to set up a system to ensure that advertisements which fail to meet those standards are quickly corrected or removed.
10. Although in some countries advertising is subject to detailed legislation to such an extent that the scope left for self-regulation is very limited (there is no purpose in rules which simply reproduce legislation), in others there is little detailed legislation and advertising content is efficiently regulated by self-regulatory bodies.

### ***Self-regulation and legislation***

11. Self-regulation is an alternative to detailed legislation, but not to all legislation.

It is widely accepted that self-regulation works best within a framework of legislation. The two complement each other, like the frame and strings of a tennis racquet, to produce a result, which neither could achieve on its own.

12. Legislation is well suited for laying down broad principles, for example that advertising must not mislead, and it provides a last resort in the rare cases when ~~all else has failed~~. It is less effective, however, when dealing with detail: the law is often slow to act, difficult for ordinary consumers to understand and too expensive for them to afford, so the protection it provides in theory may not be so readily available in practice. Also, the content of individual advertisements, although it matters very much to consumers, is often too detailed for the law to concern itself with.
13. Self regulation, on the other hand, is specifically designed to deal with these 'important trivia'. It offers consumers a quick, uncomplicated and (because it is funded by the advertising industry) cost-free means of having their complaints handled. Because it has the support of the advertising industry, advertisers and agencies are often more ready to co-operate voluntarily with a self-regulatory system than with one based on legislation.
14. All the self-regulatory codes in use today have their origins in the International Code of Advertising Practice, published by the International Chamber of Commerce (ICC), but every national code reflects the cultural, legal and commercial traditions of that country. Because the codes are written by the advertising industry itself, which understands its own business and the concerns of its customers, self-regulatory rules are particularly well suited to the needs of both consumers and the industry. But self-regulatory codes do not represent only the interests and concerns of the industry and when they are written or updated, there is often consultation with consumer bodies and other interested parties.

### ***Credibility of Self-Regulation***

15. In many parts of the world self-regulation is seen by marketers, advertisers and the media as the ideal form of regulating advertising. To the industry it is desirable because it reduces government involvement and ensures that disputes are resolved fast and cost-effectively. The rules can be easily adapted to provide for fast changing social and economic circumstances and disputes are kept out of the courts where resolution is slow and costly.
16. Government acknowledges that the funding of self-regulation by the industry relieves government of the financial burden of funding advertising regulation. However, governments are often skeptical of self-regulation, believing that a self-regulated advertising industry puts its own interest ahead of the public interest and is primarily interested in self-protection.
17. In South Africa government representatives have expressed this concern on various occasions. The limited reach of a self-regulatory body, namely only those who voluntarily support a Code of Ethics, is perceived as a weakness of the system and government often sees legislation as a viable alternative.

### ***Possible Approaches To Regulation Of Advertising***

18. The regulation of advertising may take many different forms. At the one end of

a possible spectrum one would find a regulatory model consisting of total self-regulation, with no government involvement at all. At the other end of the spectrum regulation is taken out of the hands of the industry entirely, and becomes wholly the responsibility of government. Other models exist between these extremes.

### ***Voluntary Self-Regulation***

19. To the extent that advertising is regulated in South Africa at present, such regulation primarily takes the form of voluntary self-regulation, with the exception of electronic advertising, which is regulated to an extent by the Independent Broadcasting Authority Act. Self-regulation involves the establishment of a regulatory body by the industry and, if possible, consumers, which body then performs an administrative and adjudicative function in regard to complaints about advertising. The body generally operates according to a defined Code of Practice.
20. Other than South Africa, examples of countries that use a wholly voluntary self-regulatory system are Canada, and to considerably less effect, Australia.

### ***Advantages of Voluntary Self-Regulation***

21. The major advantages of industry-based, voluntary self-regulation may be summarized as follows:
  - (a) It provides for the quick resolution of disputes, by persons with expertise in the field;
  - (b) It is funded by the industry itself, which means that there is no financial burden to the fiscus and disputes can be resolved at no cost to the complainant;
  - (c) The integral industry involvement gives rise to a sense that the regulatory body is supported by the industry, and this promotes adherence to its procedures and rulings;
  - (d) The system is responsive, in that the body can amend its rules and code where necessary without the formality of a legislative process;
  - (e) The 'hands-on' nature of self-regulation give the industry a sense of managing its own affairs;
  - (f) The Code of Practice administered by the regulatory body conforms with international codes, and thus has international credibility -
  - (g) This international conformity allows participation in multi-national structures and encourages investments by providing reassurance as to compliance with international standards.

### ***Disadvantages of Voluntary Self-regulation***

22. Total voluntary self-regulation has certain limitations:
  - (a) The regulatory body cannot compel compliance. It has no statutory 'teeth', and therefore depends on voluntary adherence;
  - (b) The body has no jurisdiction over those participants in the industry who choose not to become members;
  - (c) In practice, while the mainstream of the industry participates in its

- processes, the body has little influence over less formal advertisers, such as money-lenders, where consumers are often most vulnerable;
- (d) The body's ongoing functions are insecure, being dependant always on voluntary support;
  - (e) This support is fickle: advertisers lose their enthusiasm for self-regulation when decisions go against them;
  - (f) Although the body has no statutory authority, it is nevertheless subject to review, enabling recalcitrant parties to frustrate its operation.

### ***Dual System***

- 23. To a degree, there is in theory a type of dual system in South Africa, in that the Consumer Affairs (Unfair Business Practices) Act offers some protection against unacceptable advertising. In practice, however, the Advertising Standards Authority plays the role of regulatory body, and the Act is seldom used for these purposes.
- 24. This system retains the functions of a self-regulation body, but puts in place a statutory mechanism to which resort may be had if self-regulation fails. In the United Kingdom, this type of system was put in place to give effect to the European Economic Community Directive referred to earlier. The British Advertising Standards Authority is primarily responsible for the regulation of advertising, on a voluntary basis, and through a Code very similar to that of the South African ASA. However, the Control of Misleading - Advertisements Regulations of 1988 give to the Office of Fair Trading the ultimate statutory authority to intervene to prevent advertising abuses.
- 25. A similar system exists in the United States. There the National Advertising Division (NAD) of the Council of Better Business Bureaus is an industry-created, self-regulatory body which deals with advertising disputes (most often in regard to substantiation). A statutory complaint and enforcement mechanism exists, however, through the Federal Trade Commission, to which parties may turn when self-regulation fails.

### ***The Advantages of a Dual System***

- 26. Because the dual system retains, as its primary mechanism, a voluntary self-regulatory body, the advantages of self-regulation as outlined above are preserved. They need not be repeated here.
- 27. The system has further advantages, in that it in regard to those parties who are not prepared to participate in the voluntary system there is still recourse through the statutory system, and possible problems with effectiveness, enforcement and reach are therefore addressed.

### ***Disadvantages of a Dual System***

- 28. There are certain disadvantages to a dual system such as that described above:
  - (a) The existence of parallel structures leads to confusion as to which should be used, and under what circumstances;
  - (b) The process is slower, in that ultimate relief may sometimes only be obtained from the statutory process after the failure of the voluntary process;

- (c) The existence of a parallel, statutory body creates a financial and administrative burden on government.
- (d) The authority of the self-regulatory body may be undermined if it is perceived that the statutory mechanism is the one with real 'teeth'.
- (e) The system entails the private sector and government playing separate roles, rather than working together in a co-operative partnership.

### ***Compulsory Self-Regulation***

- 29. The preferred model of regulation entails the creation and empowerment, through legislation, of a compulsory self-regulatory body. The establishment, powers, functions, authority and sanctions of such a body are generally defined in the empowering Act, but the body is constituted in such a way that its participants are drawn from all interested parties (in this case, advertisers, government and consumers).
- 30. The model is one that is well known to South African law. Most recently, a similar system has been put in place under the Usury Act, to control Micro-lending through the Micro Finance Regulatory Council.
- 31. Many other professions and trades are regulated in a similar manner. There are more than twenty examples of this in our law, some of which are The Architects' Act, 1970; The Pharmacy Act, 1974; The Attorneys' Act, 1979; The Medical, [Dental and Supplementary Health Services Professions Act, 1974; The Estate Agents' Act, 1976; The Veterinary and Para-Veterinary Professions Act, 1982; The Town and Regional Planners Act, 1984; and The Public Accountants and Auditors Act.

### ***The Advantages of Compulsory Self-Regulation***

- 32. Because a compulsory self-regulatory body is still industry-based, it enjoys most of the advantages of a self-regulatory body. In particular-
  - (a) It can be financed by the industry;
  - (b) It can operate quickly and at no cost to the complainant;
  - (c) Its 'in-house' nature means that it retains credibility and trust;
  - (d) Provided it is not too closely regulated, it can be flexible and adaptable;
  - (e) It can operate according to its own Code of Practice, provided this meets the statutory requirements, which means that it retains its international acceptability.
- 33. A. compulsory self-regulatory body has certain advantages that its voluntary, self-regulatory equivalent does not enjoy:
  - (a) It has the authority, through legislation, to enforce its decisions;
  - (b) It covers the entire industry, not only those who choose to participate, and consumer protection is thus maximized;
  - (c) It eliminates potential confusion by operating as the sole structure for advertising regulation;
  - (d) The scope of its authority and operation is more clearly defined;
  - (e) It is transparent and accountable;
  - (f) It is subject to ultimate government control; and
  - (g) It allows for a partnership between government and the private sector in



the regulation of the industry.

### ***Disadvantages of Compulsory Self-Regulation***

34. The creation of a compulsory self-regulation body solves most of the disadvantages associated with other models. The system is not entirely flawless, some of its problems being:
- (a) Because it is imposed, rather than voluntary, there is a lower level of inherent trust in the body by the industry;
  - (b) For the same reason, the industry may choose to follow the letter, rather than the spirit of its rules;
  - (c) The body becomes a public organ, and as such is subject to a higher degree of scrutiny and control. Whilst this is generally an advantage, it can have the effect of undermining efficiency; and
  - (d) The same factors can lead to recalcitrant parties seeking to frustrate the functions of the body through time-consuming legal processes.

### ***Conclusion***

- 35 It is clear that the present system is not the preferred system for the regulation of advertising. Whilst it is true that no other system will be perfectly suited as an alternative, it is recommended that compulsory self-regulation has the most advantages".

### ***7.2.1 The Committee's comments on the ASA submission***

The Committee does not intend to comment on each statement made by the ASA in its comprehensive submission. The comments made by the ASA regarding the advantages and disadvantages voluntary self-regulation, compulsory self-regulation and a dual system, involving self-regulation and legislation, are accepted by the Committee.

It is noteworthy that the need for advertising to be regulated has received international recognition. Equally noteworthy is the point made by the ASA that misleading advertising, if allowed to go on unchecked and even though it may account for only a small percentage of the whole, will gradually undermine consumers' confidence and all advertising will suffer.

The ASA distinguishes between misleading advertising (the truth of what is stated) and harmful advertising (when relations between business and consumers are harmed or which prejudices or deceives consumers). The Committee does not make this distinction. A misleading advertisement is regarded by the Committee as an unfair business practice.

The Committee agrees in principle with the ASA's views on self-regulation. The major problem with self-regulation is that not all entities in a particular industry become members of the self-regulatory body and they are therefore not bound by the same rules. It appears that these entities prefer not to be members of the self-regulatory body precisely because they do not want to be bound by the rules. A decision not to join an industry self-regulatory body by a particular entity must raise questions.



The ASA stated that government acknowledges that the funding of self-regulation by the industry relieves government of the financial burden of funding advertising regulation. However, it must be noted that governments are often skeptical of self-regulation, believing that a self-regulated industry can put its own interests ahead of the public interest and can be primarily concerned with self-protection. This concern has, according to the ASA, been expressed by South Africa government representatives on various occasions.

The ASA concluded its submission by stating that the present system is not the preferred system for the regulation of advertising and recommended that there should be compulsory self-regulation. Considering this submission is beyond the scope of the Committee's authority and it is recommended that the ASA should approach the Directorate: Consumer and Competition Policy of the Consumer and Corporate Regulatory Division in the *DTI* regarding this point.

## 8. EVALUATION

It is clear from section 3 above "Tempting offers by Mail Order Entities" that many statements made by some mail-order entities, in order "to generate excitement and add value to the consumers' experiences" are misleading. In addition, they appear to have been designed deliberately to mislead and this is regarded by the Committee to be an unfair business practice as defined in the Act.

From the complaints received by the Committee, it appears that many mail-order customers are and were under the impression that they had won prizes. The Committee agrees with the opinion expressed by a complainant who stated: "In my opinion they are blatantly exploiting the consumer's legal and technical illiteracy, by ambiguous juggling of words". Most, if not all, of the statements quoted in section 3 constitute unfair business practices as defined in the Act.

Some consumers who receive the advertising material may be uninformed or semi-literate and will therefore accept the communication without understanding the fine print in the "terms and conditions".

It was stated above that many statements in the brochures of some mail-order entities deceive consumers. Deception of consumers is one of the four elements that constitutes an unfair business practice. In addition, the remaining three elements may also be relevant: (i) the relationship between businesses and consumers is harmed; (ii) consumers may be disadvantaged or unreasonably prejudiced or they may be (iii) unfairly affected. This is supported by the comments made in section 5 "Some Comments of Consumers about Mail-Order Entities". These unfair business practices are not in the public interest.

Some mail-order entities argue that the mailings they conduct in South Africa are adaptations of campaigns already conducted in such countries as Australia, Canada, the United Kingdom and the United States of America. The Committee is of the view that this argument is not relevant in South Africa as the Committee is concerned primarily with conduct which harms South African consumers and must evaluate matters from the perspective of South African consumers, many of whom may not be

sophisticated and well versed in the deceptive practices of certain advertisers.

One mail-order entity stated in its submission to the Committee that "... in the creation of these competitions and offers we are always very careful to adhere to the DMA code of conduct and where warranted, even consult with legal counsel to make sure what we are doing complies with current legislation". This is possibly the reason why consumers do not complain frequently about this mail-order entity. The statement made by the business, however, reflects a particular philosophy. It consults with legal counsel to make sure the competition and offers comply with current legislation. As long as the competitions and offers are within the boundaries of legislation, they are acceptable to the entity. The Committee suggests that instead the entity should ask the question:

"Is it possible that this competition or offer could, directly or indirectly, have or is likely to have the effect of:

- (a) harming the relations between us and our clients;
- (b) disadvantaging any of our clients;
- (c) mislead, even unintentionally any of our clients; or
- (d) unfairly affecting any of clients".

## 9. RECOMMENDATION

There can be no doubt that some mail-order entities, through their advertisements, brochures and fliers are engaged in unfair business practices as defined in the Act. This is not in the public interest.

In its recommendation the Committee is restricted by the scope of the investigation. The intention of the Committee was to investigate the advertising practices of mail-order and/or distance purchasing entities with particular reference to statements in brochures and advertisements, such as prizes won and free merchandise.

It is accordingly recommended that the Minister, in terms of section 12(6) of the Act, declares unlawful the business practice whereby mail-order entities inform consumers or potential consumers, by any means whatsoever, that they have won a sum of money or any other prize,

- (a) where the consumers have not won the money or prize; and/or
- (b) where such money or prize is subject to suspensive conditions prior to entitlement, and the suspensive conditions are not printed, immediately after the announcement of the prize, in the same letter type and size as the announcement of the prize; and/or
- (c) where consumers are required to send any sum of money in order to claim the prize.

**"Mail-order entities"** are manufacturers, wholesalers or retailers who contact buyers through direct mail, catalogs, television, radio, magazines, and newspapers and deliver the goods ordered by their clients to a post office or a physical address nominated by

the clients. It also includes entities which do not necessarily offer goods but require that consumers forward any type of fee in order to receive a prize. "**Prize**" includes, but is not restricted to, awards, bonuses, donations, bonuses, gifts, grants, presents and rewards.

~~It is further recommended that this report be published in the Government Gazette for comment.~~ In terms of section 12(6)(c) of the Act the Minister may, on the recommendation of the Committee, in a particular case, in writing grant exemption from a prohibition promulgated in terms of section 12(6)(a) of the Act.



**PROFESSOR T A WOKER**  
**CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE**

5 August 2004

**Annexure "A"*****Extracts from the DMA Code of Practice*****C: Free**

The use of the word "free" should be in accord with the terms of the Code of Advertising Practice of the Advertising Standards Authority. The word "free" may also be used for conditional offers which require the recipient to buy other goods or services, provided all terms and conditions of the offer are conspicuously stated in conjunction with the word "free" and provided that the price of the main goods is not inflated, or their quality reduced to provide for the cost of the free goods.

**D: Competitions**

Competitions will not be used as a marketing incentive unless:

- 1.1 All prizes are available and awarded as described.
  - 1.2 The judging takes place promptly and fairly and is certified by an independent auditor.
  - 1.3 The rules governing any contest are clearly stated at the point of entry.
  - 1.4 A full list of winners (excluding winners of consolation prizes) must be produced - certified by an independent auditor - and made available to competitors who wish to receive them.
  2. Apart from the supply of goods ordered by competition entrants, no distinction should be made in handling and processing responses unless the advertiser has clearly indicated any distinction he intends to make.
  3. No person or relative connected with the competition promotion, operation or administration of a prize draw shall be eligible to receive a prize in it..
-