GENERAL NOTICES

NOTICE 203 OF 2006
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 investigation conducted by the Committee pursuant to Notice 2137 as published in Government Gazette No. 26833, dated 23 September 2004, as set out in the Schedule.

MANDISI 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 71 OF 1988)

REPORT No. 121

AN INVESTIGATION INTO PUBLIC PROPERTY SYNDICATION SCHEMES

AN INVESTIGATION INTO PUBLIC PROPERTY SYNDICATION SCHEMES

7. *What is a property syndication scheme?*

Property ownership is regarded by many investors as an essential element of any investment portfolio. Direct investment in retail, commercial and industrial property used to be confined to large institutions and wealthy individuals. Smatler investors were excluded by limited capital and insufficient time and expertise to manage the investment. In recent times more opportunities have arisen for small investors to access available property investments. The property sector on the Johannesburg Securities Exchange (JSE) has expanded exponentially during the last decade. Investors can now invest in property by buying shares in companies listed under 'Property' on the **JSE.** Since the early nineteen nineties they **could** also invest directly in property, by acquiring shares in property-owning investment consortiums, also known **as** public property syndication schemes.

The promoter of the consortium forms a separate entity (companies, trusts, partnerships or close corporations.[(1)]) This separate entity then acquires ownership of the property. The property could be commercial, retail or industrial property. investors usually buy one share at par value in the company, which is linked to a compulsory loan account. For example, the investor may invest **RIO** 000 and this investment is made up of the purchase of one share at R1 and a loan account of R9 999, interest free, to the company. The main purpose of this arrangement is that the profits of the company are taxed in the hands of the investors. The investors share in **the** profits and losses of those properties and enjoy the benefits of net rental growth therefrom through a proportionate share of income together with such future capital growth as may be reflected by the increased value of the shares held by the investor.

investors receive income on their investments regularly in arrears from the net rentals paid by tenants occupying the property. Net rental growth is dependent upon increases in gross rentals, offset by any ancillary increases in the costs of operating the property. Investors also share in the costs (which could also rise) of owning the property. These may include rates and' taxes, commissions payable to leasing brokers, tenant installation costs on re-letting, maintenance and the administration fee for managing the property for the syndicate.

(I) Hereafter **called companies.**

Capital growth is achieved from the increase in share value and *is* realised on the sale of the investment. **As** with any property investment, the real benefits are gained over time and property syndications are long-term investments. They perform best over ***a*** minimum period of five to seven years.

The investor's anticipated return is based on projections made by the promoter at the launch of the syndication. investors should carefully examine these projections, as they may be difficult to meet.

2. Types of Syndication schemes

Essentially there are two types of property syndication schemes, namely private and public schemes. Public property syndication schemes relate to syndications where members of the public, via radio, television, newspaper and magazine advertising or direct mail, are invited to participate in such schemes. When the public are not invited to take up shares but only "friends and family" are approached, the property syndication scheme is a private scheme. It is important that public property syndication schemes(2) are properly structured and that sufficient information is made available to enable investors to make proper decisions. The Committee is focussing only on public schemes, as it is not the intention of the Committee to influence private arrangements between family and friends. However, when members *of* the public who do not know the promoters and who may be influenced by advertising materiats, are invited to participate in such schemes, the Committee is of the view that it is important for there to be adequate safeguards in place to protect vulnerable and inexperienced consumers.

3. Marketability of shares

The marketability of shares in unlisted property syndication schemes is restricted. This, of course, applies to all shares in unlisted companies. There are two ways of achieving a return on capital on shares in property syndication schemes. The investors may find their own buyers for the shares or the property may be disposed of by the company followed by a proportional capital payment to the investors.

(2) **Public property syndication schemes will hereafter be referred to as property syndication schemes**

The Committee has found during investigations into such schemes that promoters often state that, should the investors wish to sell these shares at a iater stage, the promoters will find buyers for their shares. Such a statement may create a false sense of security in the mind of the investor. The calculation of the share price is also always a major problem because of the non-existence of a market mechanism to determine the price. The possibility of an inflated price, for various reasons, cannot be ruled out.

4. Background

During **1999** the former Business Practices Committee (the BPC), the predecessor of the Consumer Affairs Committee (the Committee)[(3)], developed a Consumer Code for Public Property Syndication Schemes in co-operation with the Public Property Syndication Association (PPSA), an autonomous body formed under the aegis of the South African Property Owners Association (SAPOA). Many syndication companies became members of the PPSA and their syndication prospectuses were submitted to the PPSA for information and comment. Investigating officials of the Committee were afforded observation status on the PPSA.

During June 2001 the Committee resolved that it will not develop any new consumer codes for various industries nor will it update any of the existing consumer codes released by the former BPC[(4)] The Committee, in line with its policy regarding consumer codes, therefore does not intend to recommend to the Minister[(5)] of Trade and Industry[(6)] that the former Consumer Code for Public Property Syndication should be upgraded.

The PPSA eventually became dormant because public interest in property syndications

(3) The Committee had found that the Codes were only effective where there were industry bodies in existence as *these* bodies were tasked with giving effect to the relevant Codes. Where there was an industry body in existence this body would be responsible for updating the applicable Code. Where no such body existed within an Industry the Code was ineffective and thus regulation was preferable

(4) The Consumer Affairs Committee administers the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988. For a brief discussion of the Consumer Affairs Committee anti its functions, see annex C.

(5) Hereafter the Minister.

(6) the dti.

waned. However, there is renewed interest in this form of investment and there are some efforts by some parties to rekindle the **PPSA.**

On 2 June 2004, Finance Week Property reported on a 'subculture' in the property syndication industry where shares are being sold without a prospectus being issued. Sake-Rapport, on 4 July 2004, referred to "... the negative image of the unlisted property syndication industry". This negative image led to the establishment of a regionally based association of businesses involved in property syndication for the purpose of protecting the status of the industry and its investors.

Officials of the Consumer Investigations Directorate, that is, the Directorate which undertakes the necessary investigations in terms of the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988 (the **Act),** of the dti, discussed property syndication schemes and the problems associated with these schemes with officials of SAPOA.

The Committee has over the last 3 (three) years received a number of complaints concerning property syndications. At its meeting held on *5* August 2004, the Committee resolved to undertake a section 8(1)(b) investigation in terms of the Act into syndication schemes. The Committee was of the opinion that an investigation in terms of section 8(1)(b) was preferable to *adhoc* investigations into the business practices of individual companies in terms of section 8(1)(a). The definition of an unfair business practice and the difference between section 8(1)(a) and section 8(1)(b) investigations in terms of the Act are set out in annexure C.

5. *Notice of the invesfigafion and subsequent events*

Notice of the investigation was published under Notice 2137 in Government Gazette 26833 of 23 September 2004. The notice read as follows:

> **"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 public property syndication schemes. Public property syndication comprises the assembly of a group of investors**

who pool their funds to invest in entities, which could be companies, close corporations, partnerships or individuals whose sole asset(s) are commercial, retail or industrial properties. investors share in the profits and losses of those properties and enjoy the benefits of net rental growth therefrom through proportionate share of income. In public property syndications members of the public are invited, through the use of electronic and print media such as *inter alia* radio, television, tetephone, newspaper and magazine advertising, brochures and direct mail, to participate in such schemes.

Any person may within a period of twenty-one **(21)** days from the date of this notice make written representations and proposals regarding the above-mentioned investigation to: The Director, Consumer Investigations Directorate, Private Bag X84, Pretoria, 0001. Tel: **012-394-1542**, Fax: **012-394-2542**, E-mail: ebimo@thedti.gov.za. Enquiries: Mr **E** Mohamed.

The intended notice of the investigation **was** brought to the attention of the companies **(the** respondents) listed on the Johannesburg Securities Exchange as well as *two* property associations on 7 September 2004. It was stated in the letter to these companies and associations that their presentations and proposals regarding the investigation, in the interest **of** consumers, would be sincerely appreciated. Only **a** small number of respondents commented on the notice *of* the investigation. **Those who** did respond welcomed the investigation, but had no further comments.

The Committee was approached **by** *two* **groups** *of* attorneys representing major syndication companies and requested to bring "... some type *of* order in the market". ***An*** attorney wrote on 7 October 2004:

"Our client **is** probably the largest promoter of unlisted syndication".

and

"Our client wholeheartediy agrees that the industry should **be** regulated".

This attorney forwarded a draft code *of* conduct for syndication schemes to the Committee. An association also forwarded a draft code of conduct to the Committee. Both drafts relied heavily on the former **BPC** Consumer Code for Public Property Syndication Schemes.

The Directorate also received an e-mail from a consumer who did not agree that an investigation was necessary. **He** wrote:

> I am a financial planner and previously one **of** the top 25 executives in the **.....** Group. **I** have significant expertise in the marketing of financial services. **I** am happy to provide further input if required, however my view is that through the companies Act and the Collective Investments Act there are sufficient statutory measures in place to enforce the regulation of property syndications. In my experience all the syndications fall into either of these laws. Together with the recently launched **FAIS** Act there is no need for further intervention other than aggressive application of existing law@.

The directorate informed him that requests for some type of order in property syndication had come from the industry itself.

Discussions were held with officials of the Financial Services Board (FSB), who administer the Collective Investments Schemes Control Act, Act No. **45** of 2002 (CISCA). CISCA makes provision for the regulation of collective investment schemes in property. It emerged from these discussions, that the **FSB** does not currently regulate property syndication schemes. It is however concerned about the inappropriate behaviour of promoters of property syndication schemes as this can lead to investor losses.

Since the publication of the notice of the investigation in September 2004 to the end of April 2005 investigating officials have held discussions with a number of people who are actively involved in syndication schemes, such **as** promoters, attorneys and property valuators.

From these discussions it has emerged that there are a number of problems with syndications. The major problem is that properties are offered to the public at inflated prices. Mr EG Rode of Rode and Associates stated that the reasons for this could be attributed to:

{a) the difference (mark-up) between the wholesale value[7] and retail value[8] of the property. It is always not easy to decide whether the mark-up is such that consumers are being exploited but investors should be properly informed about the mark-up.

(b) the fact that promoters are not usually property practitioners and do not or seldom employ professional valuers. Their in-house valuations could be way above a true valuation. This could be by accident or by design. Promoters can easily sell such investments to unsuspecting and vulnerable consumers. In particular it is the Committee's experience that elderly consumers are lured by promises of returns which are higher than what they earn on their existing investments. These consumers are often unable to query any risks[9] which may be attached to the underlying investments.

(c) the fact that the capitalization rate[10] is too low, given factors such as, *inferalia,* the grade and age of the property, its tenants and its location, For example: assume the expected net operating income for [the first year] is R100 000 and the purchase price of the property was R1 million. The capitalization rate is therefore 10 per cent. Assume further that R100 000 is the correct net operating income, but that the purchase price (for the shareholders) was R1.2 million. The capitalization rate is now only 6.67 per cent.

(d) the capitalization of escalated contractual rental income rather than market rental income. This is a major problem where escalated rentals

---

(7) The estimated price that a share or shares of a syndicated property-holding company would fetch (excluding winding -up costs) should the holding company be dissolved and the underlying property sold as a normal, non-syndicated property. The description of this and other terms, unless stated otherwise, were taken from Rode, EG Glossary of terms and abbreviations, Updated 10 November 2004.

(8) The price at which a property-holding company=s shares are sold to the public or the price at which these shares trade.

(9) Risks include the location of the property, the number of tenants whether a single tenant contributes the major share of the rental income and the expiry date of any leases.

(10) This is the expected net operating income for year 1, assuming the entire building is let at open-marker rentals, divided by the purchase/transaction price, normally expressed as a percentage. The calculation excludes VAT, transfer duty and income tax.

exceed the market rentals.

(e) the fact that no provision is made for long-term vacancies.

6. The rights of consumers

Consumers have the right to invest in any investment vehicle they wish, provided they are aware of the facts and can make informed decisions regarding their investment.[11].

7. Conclusion and recommendation

The withholding of relevant information from consumers, whether by accident or design, is an unfair business practice in terms of the Act and cannot be justified in the public interest. Consumers can invest in a variety of investment vehicles and the information about the majority of these vehicles is easily understood and readily available. For example, interest rates offered by a particular bank on various deposits are known and comparable to the interest rates of other banks on similar deposits. The value of an investment in a particular company's shares, listed on the Johannesburg Securities Exchange, can easily be determined by referring to the daily share prices reported by most major newspapers.

Investment in property syndication by non-professional investors, such as uninformed elderly consumers contains many risks. It is very difficult to properly evaluate these schemes and investors do not know what the real value of their investment (shares) is. A market, where share prices are determined by supply and demand does not exist for these unlisted shares. In circumstances where the promoter does manage to sell existing unlisted shares to new buyers, the parties (buyer and seller) have no way of knowing whether they have received or paid a realistic price for their investment.

The business practices of promoters that market property syndications schemes may adversely affect many investors. Therefore the Committee is of the view that this is a

---

(11) For a full discussion on consumer rights see: Marx S and Dekker HJ, Marketing Management, Principles and decisions, HAUM, Pretoria, 1986, p.111.

business practice, which in the public interest, needs to be controlled. The Committee recommends that prescribed minimum information must be made available to investors (consumers) who wish to invest in syndication schemes. This information must be made available in a disclosure document, the details of which are set *out* in Annexure A. Promoters must, in addition to providing the required minimum information, also sign an affidavit[12] in which they declare, *inter alia,* that they have complied with the requirements.

The requirements set out in annex A and annex **B** are in terms of section 12(6)(a)(iii) of the Act. **A** person who does not comply with these requirements is committing a criminal offence and shall be liable on conviction under section 12, to **a** fine not exceeding R200 000 or to imprisonment for a period not exceeding five years or to **both** that fine and that imprisonment[13].

PROFESSOR TA WOKER

CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE

11 August 2005

---

(12) See annex B.

(13) See annex C for a discussion of section 12(6)(a)(iii) *of the* Act.

ANNEXURE A

REQUIREMENTS: MINIMUM INFORMATION TO BE CONTAINED IN A PROPERTY SYNDICATION DISCLOSURE DOCUMENT

Promoters include companies and their directors, close corporations and their members, partnerships and their partners, trusts and their trustees and all other persons who are actively involved in the forming and establishment of a public property syndication (hereafter called 'syndication'). Promoters exclude persons acting in a professional capacity on behalf of promoters. A reference to a company and its directors also refers to a close corporation and its members, or to a trust and its trustees, or to a partnership and its partners or to a sole proprietorship. An investor includes a potential investor.

1. Underlying principles regarding the disclosure document

(a9 Statements, presentations and descriptions shall not convey false or misleading information about the syndication scheme and/or omit material information. Material information is information which an investor needs in order to make an informed decision.

(b) Investors shall be informed that syndication is a long-term investment, usually not less than five years.

(c) investors must be informed in writing that there is a substantial risk in that the investor may not be able to sell his shares should be wish to do so in the future. Investors must also be informed that it is not the function of the promoter to find a buyer should the investor wish to sell. his shares. It is the investor's responsibility to find his own buyer.

2. Investor protection

(a) Investors shall be informed that all funds received from them prior to transfer/finalisation are to be deposited in a registered estate agent's trust account, a legal practitioner's trust account or a certified chartered accountants trust account.

Individual investors are to be given written confirmation thereof. It shall be clearly stated who controls the withdrawal of funds from that account. Such an account shall be designated "the xyz syndication issue". In the event of investors paying by cheque, promoters shall ensure that the name **of** the payee is printed in **bold** on the application forms.

(b) Funds shati only be withdrawn from the trust account in the event of the transfer of the property into the syndication vehicle; or underwriting by a disclosed underwriter with details of the underwriter; or repayment to an investor in the event of the syndication not proceeding.

(c) It shall be disclosed whether the property has been bought conditionally or by option, and in either or both cases full details of any condition and or option on which the property was purchased must be disclosed together with the effective date of commencement of the syndication.

(d) Any direct or indirect interest, which a promoter and or any of his/her family member or any other person who is actively involved in the promotion of that syndication has in the property to be purchased, shall be disclosed.

(e) It shall be disclosed how any capital shortfall will be dealt with,

(f) The method of raising the necessary capital to fund the acquisition of the property and the syndication and how any disbursements will be dealt with prior to transfer, shall be disclosed.

(g) Provision shall be made for interest earned to be paid on investors' funds deposited as per 2.1 prior to the effective date of the transfer of the property.

3. *Promoter*

(a) Full details of the promoter of the syndication scheme, such as name, registered company or close corporation number, directors, addresses, telephone and fax numbers and e-mail address shall be given.

(b) Full disclosure shall be made whether the promoter is acting as a principal in the scheme or as an agent for someone else. If the promoter is acting as an agent, he shall provide full details of the principal.

(c) The disclosure document, which is to be dated and signed by the promoter, shall contain a statement of proper due diligence (commercially and legally) with regard to the property and its tenants prior to the unconditional purchase thereof and he/she shall state that this was done and that he/she *is* satisfied with the results thereof.

4. Managemenf

(a) Full details of the syndication vehicle shall be disclosed, including the names and addresses, telephone and fax numbers and the e-mail addresses of the property manager, the company secretary, the board of directors, the auditor, the attorney and the valuer (see section 10 for valuer).

(b) In addition full disclosure shall be made of the fee structure of the management company or manager(s) and any appointments or contracts relating to the syndication.

5. Company description and structure

(a) Full disclosure shall be made of the type of company structure to be used for the syndication scheme and reference shall be made to the legislation governing the company structure chosen. Reference shall be made to the company registration number, or advising that the company is still to be formed, the Memorandum, the Articles of Association, the Shareholder's Agreement, and where applicable, the Partnership Agreement, a Deed *of* Trust and the Founding Statement. The disclosure shall state whether a shareholders' agreement exists or not. If such an agreement exists then it shall be attached as an annex to the disclosure document.

(b) Full details shall be given of: the financial year end; the shares to be issued; the shares to be issued in future; control over unissued shares; shareholders' loans and or debentures; **a** pro-forma balance sheet on acquisition (or in the case **of** new developments, **on** completion); the income distribution plan; minimum and maximum shareholders/participation quota; any special voting rights; gearing, existing and or planned; borrowing powers and how they are to be exercised; external borrowing facilities available to investors *to* finance the acquisition of shares in the investment company; the amount provided in the syndication structure for working capital and reserves.

6. Property investment

(a) Details shall be given of:

(i) the title deed and its number.

(ii) material servitudes or encumbrances if further development is considered with regard to the property.

(iii) zoning and the relevant town planning regulations insofar as further development is intended with regard *to* the property.

(iv) additional development potential.

(v) the buildings erected or dates of original erection with dates of improvements (including lifts, air conditioning and roof structure) thereto, if available.

(vi) the physical address, locality and site area, including a map of the area.

(vii) insurance cover, for example, insurer, types **of** risks covered, amounts covered, policy due date and policy number. **A** copy of a letter from **a** broker or an insurer which provides proof of the insurance details such as insurance cover, types of risks covered, amounts covered, policy due date and policy number shall be attached to the disclosure document.

(b) In addition there shall **be** a statement which sets out the following:

The cost of the property to the promoter or the syndication company including acquisition price, cost of renovations, conversion or enhancement including details of any new leases or lease renegotiations which enhance value, marketing and promotional cost fees and the promoter's entrepreneurial mark up, giving rise to the shareholding offer price in the company as at the offer date.

and

The valuation of the property as at the dosing date of the offer, undertaken by a valuer, in accordance with Section 10 of these requirements.

(c) the following details shall be disclosed if the land is to be encumbered by a mortgage bond after the closing date of the offer:

(i) the outstanding balance owing by the mortgagor in terms of the mortgage bond;

(ii) the maximum amount secured by the mortgage bond;

(iii) the terms of the mortgage bond;

(iv) the identity of the mortgagee; and

(v) a statement to the effect that the taking up oι such a loan will not ɒe in contravention of the memorandum and/or articles of association of the promoter.

7. Tenants

Full details shall be given of:

(a) any head lease agreement and subleases together wifh the quantum and location of any vacant space covered by such head lease and subleases. Quantum refers to the square meterage and the value involved.

(b) any gross or net rental guarantees supplied by the vendor of the property.

(c) actual leases concluded with full details of space let, duration of leases, rentals, escalation rates for the leases, tenant names and security for leases, expenses recovered from tenants, lease renewal options, rental review periods and vacant space.

(d) unsigned leases or potential tenancies.

8. Income and expenditure

The income and expenditure statement shall provide:

(a) a detailed pro-forma income statement which shall detail all projected expenses, contractual expenses and fees payable, gross rentals, recoveries, and projected net income for the syndicating company;

(b) a statement as to the long-term vacancy rate with full motivation thereof. A nil rate is unacceptable; and

(c) a statement as to the extent of provision for future maintenance, with full details where applicable.

9. Projections

Full details shall be provided of:

(a) the basis used to calculate projections with regard to net income growth. These shall be based upon rental income derived from leases, less specified and disclosed expenses projections;

(b) **the** basis used to calculate projections on capital value. These may be stated in Rands as estimates, provided they are accompanied by stated, specific assumptions showing how those values are determined. Specific projections as to capital growth are not permissable, bearing in mind the many variables influencing property values; and

(c) whether the validity of the assumptions used in determining projections is based on fact or opinion.

10. Valuer and pro-forma valuation

(a) A valuer is a professional valuer or professional associated valuer registered in terms of section 20(a) of the Property Valuers Profession Act, 2000 with at least five years' experience in the field of attending to valuations of properties (hereafter called a valuer).

(b) The name of the valuer and his/her qualifications and experience shall be disclosed.

(c) The valuer shall take cognisance of the state of repair/condition of buildings and improvements.

(d) A letter from a valuer shall incorporate the following information:

(i) ***An introduction***, stating that the valuer has been instructed by the promoter or whoever and that such valuer has a valid professional indemnity policy. The amount of such cover shall be stated.

(ii) ***The valuation*** undertaken by the valuer. This valuation shall be either an:

(A) Open market value. This means the best price at which the property might reasonably be expected to have been sold unconditionally for a cash consideration on the date of valuation assuming:

(aa) a willing and informed seller and a willing and informed buyer who are not connected persons as defined in Section 1 *of* the Value- Added Tax **Act** No. 89 of 1991; and

(bb) that, prior to the date of valuation, there has been a reasonable period (having regard to the nature of the property and the state of the market) for the proper marketing of the interest, for the agreement of price and terms and for the completion of the sale; and

(iii) that no account is taken of any additional bid by a purchaser with a special interest.

or

(B) Syndication value. This is the aggregate sum of the shareholders' total interest in the syndication vehicle in terms of the disclosure document, recognising that this sum includes an appropriate premium over and above the open market value of the property asset.

(iii) ***Title deed description***

(iv) ***Municipal information*** such as town planning regulations and the municipal valuation of the land and improvements (see also 6(1)(c)).

(v) ***Location of the property***

(vi) ***Brief description*** of the building, such as the method of construction, materials and size.

(vii) ***Insurance replacement*** **cost** of the building in accordance with the following definition: The estimated cost of replacing the asset, as it exists, as if new, at prices applicable on the valuation date, inclusive of professional fees, but exclusive of any finance charges, demolition costs or emergency services **costs.**

(viii) ***Tenancy details***, including names of tenants, rentable areas occupied and or vacant, rental escalations, and lease expiry dates. Reference shall be made to comparable market rentals and escalations.

(ix) ***Expenses*** such as the level of anticipated initial annual operating expenses and the rate of collection/commission. Comparison shall be made with market related levels of operating costs and collection commission for comparable buildings.

(x) ***The net income.*** The anticipated net rental income in the first year and comment on any unusual growth or anticipated vacancies in the next 3 years, and what assumptions are made as to the reletting of space over which leases are expiring or are vacant, including anticipated reletting commission and tenant installation costs.

(xi) ***The capitalisation rate***. The appropriate rate at which the net income is capitalised with specific reference to market conditions and open market transactions which have been used as comparables. Shoutd a specific yield be projected it shalt be calculated with reference to the value of the property as determined by the valuer.

(xii) ***Valuations of the property*** as at the closing date of the offer, stating which of the bases set out in 10.4(b) above has been used. Two valuations shall be submitted and shall be undertaken and signed by the valuers.

(xiii) ***Full details about previous transactions*** regarding the property:

(aa) The total cost, confirmed by the contractor in an affidavit, in the case of new property.

(bb) The sales history of the property for the past ten years. The following information shall be stated:

(1) The various legal entities who owned the property according to the title deeds and the selling price of the property with each change of ownership and the relevant dates.

(2) If one or more legal entities owned the property according to the title deeds, any changes in the ownership of the legal entities, the selling price of the property with each change of ownership and the relevant dates.

(e) The fees for valuations shall not be dependent upon the amount of the valuation.

71. Legal liability

Any term, condition or provision in the disclosure document that excludes, limits or purports to exclude or limit the legal liability of the syndication promoter

towards the investor in respect of any malicious, intentional, fraudulent, reckless ar a grossly negligent act of the syndication promoter, his employees, representatives, contractors or subcontractors or any other person used by the syndication promoter or recommended by him to the investor, is prohibited.

ANNEXURE B

AFFIDAVIT BY DEPONENT(S) IN COMPLIANCE WITH THE REQUIREMENTS IN TERMS OF SECTION 16 OF THE CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 71 OF 1988

The deponents are each and every director, member, partner or trustee of the promoters if the promoter is respectively a company, close corporation, partnership or trust.

WE, the undersigned (surname and full names):

.... Principal or agent
.... Principal or agent
.... Principal or agent
.... Principal **or** agent
.... Principal **or** agent
....Principal or agent

(If a deponent is acting **as** an agent, provide **full** details of the principal.................
....)

UNDERTAKE TO:

(1) accept **full** responsibility jointly and severally for the accuracy of the information given in the disclosure document and confirm that to the best of our knowledge and belief there are no facts which could make any statement in **the** disclosure document misleading.

(2) ensure that our employees, representatives and contractors who are responsible for obtaining investments in the syndication shall at ail times comply with the provisions of the Financial Intelligence Centre Act, 2001 **(FICA)** as well **as** the Financial Advisory & Intermediary Services Act, 2002 (FAIS Act).

(3) comply with all the requirements applicable to public property syndication schemes as set in Notice (number), published in Government Gazette (number} of (date).

(4) comply with all relevant laws

(5) keep available for at least three years from the date of any transaction relating to any syndication promoted by us, full and proper financial records of all income and expenditure relating to a particular syndication.

FURTHER DECLARE THAT WE:

(1) are aware of and understand the requirements applicable to public property syndication in terms of section 16 of the Consumer Affairs (Unfair Business Practices) Act, 71 of **1988.**

(2) have complied with the provisions of the requirements contained in Government Notice (number) of (date).

(3) will refrain from using and/or disclosing in any manner whatsoever confidential information concerning an investor that has come to our knowledge unless we obtain the prior written consent of the investor.

(4) will not utilise the services of any person to market or give advice on a property syndication whether directly or indirectly, unless such person is licenced as a financial services provider as defined in the FAIS Act (Category **1.8)** or is a representative of a financial services provider and may sell, market or give advice in respect of an investment in that particular syndication or to a person who is exempted from the provisions of the FIAS Act (category 1.8).

(5) will not use the investors' money or any **part** thereof to invest in any other syndication or other financial investment instrument *or* other financial investment

other than the one stipulated for in the disclosure document and/or the application form and/or contract represented to the investor unless the investor has given prior written consent thereto and such other syndication or financial investment instrument is lawful and the proper disclosures have been made to the investor and the promoter in entitled, able and equipped and has the infrastructure and capacity to make the investment in question on behalf of the investor.

(6) will not use the funds invested by investors to pay the amounts due to investors of a previous syndication.

(7) made all reasonable enquiries to ascertain and confirm all the facts in the disclosure.

THUS DONE AND SIGNED on this ..... day of .... 200....

....

....

....

DEPONENTS   DEPONENTS

I certify that each of the deponents have acknowledged that they know and understand the contents of this affidavit which was signed and sworn to before me at .... on the ...... day of ....200...

....

COMMISSIONER OF OATHS

***ANNEXURE* C**

THE CONSUMER AFFAIRS COMMITTEE AND RELATED MATTERS

The Consumer Affairs Cammittee (the Committee) administers the Consumer Affairs (Unfair Business Practices) **Act, 71** of **1988** (the Act), The members of the Committee consist of nine members appointed by the Minister on the grounds of having special knowledge or experience of consumer advocacy, economics, industry, commerce or law, taking into account the need to ensure equitable representation. The Consumer Investigations Directorate of **the dti** undertakes the necessary investigations in terms of the Act.

The Act **is an** enabling act, and the main body of the Act is devoted to the types of investigations that could be undertaken, the procedures to be followed during investigations and the powers of the Minister.

The mandate in terms of the Act is embodied in the preamble of the Act, which states

> "To provide for the prohibition or control of certain business practices; and for matters connected therewith".

The Act therefore has a dual purpose. It provides for the prohibition or certain (unfair) business practices and for the <u>control</u> of other business practices. An "unfair business practice" ***is*** defined as 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.

A "consumer" is defined as **(a)** any natural person to whom any commodity is offered, supplied or made available and (b) any natural person from whom any investment is solicited or who supplies or makes available any investment. The *raison d'être* of the Committee, and the Act for that matter, is thus the interest of the consumer and specifically the consumer who ***is likely*** *to* be subject *to* ***any*** of the *four effects* constituting an unfair business practice.

A business practice includes any scheme, practice or method of trading, including any method of marketing or distribution; any advertising, type of advertising or any other manner of soliciting business; and any act or omission on the part of any person, whether acting independently or in concert with any other person.

The Committee could, in terms of section 8(1)(a) of the Act, investigate the business practices of specific persons or entities. The Committee is also empowered, in terms of section 8(1)(b) of the Act, to undertake investigations into any business practice or type of business practice, which is commonly applied for the purposes of/or in connection with the creation or maintenance of unfair business practices.

The powers of the Minister are set out in section **12** of the **Act.** In terms of section 12(6)(a)(iii) the Minister may, after consideration of a report by the Committee in relation to an investigation in terms of section 8(1)(b), if he is of the opinion that it is in the public interest, control any business practice or type of business practice which was the subject of the investigation. He may do **so** by prescribing conditions or requirements with which certain industries must comply.

A person shall be liable on conviction of an offence under section 12 in relation to a notice published in the *Gazette*, or under section 11(3), *to* a fine not exceeding R200 000 or to imprisonment for a period not exceeding five years or **to both** that fine and that imprisonment.