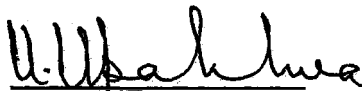

GENERAL NOTICE

NOTICE 457 OF 2006

DEPARTMENT OF TRADE AND INDUSTRY CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988

I, Mandisi Mpaahlwa, 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 **an investigation conducted** by the Committee pursuant to Notice 1068 of 2005 as published in Government Gazette No. 27754, dated 01 July 2005, as set out in the Schedule.



MANDISI MPAHLWA
MINISTER OF TRADE AND INDUSTRY

Schedule

INVESTIGATION REPORT INTO MISLEADING ADVERTISING OF MONTHLY COSTS IN THE CELL PHONE INDUSTRY,

1. The Consumer Affairs Committee

The Consumer Affairs Committee (the Committee) was established in terms of section 2 of the consumer Affairs (Unfair Business Practices) Act¹ ("the Act"). The purpose of the Act is to provide for the prohibition or control of unfair business practices. An "unfair business practice", is any business practice which, directly or indirectly, has or is likely to have the effect of harming the relations between businesses and consumers, unreasonably prejudicing any consumer, deceiving any consumer or unfairly affecting any consumer or natural person. The *raison d'être* of the Committee, and the Act, is thus the interests of consumers and specifically consumers who are likely to be unfairly affected by any business practice.

The Act confers wide investigative powers on the Committee. The Committee can undertake two broad types of investigations, namely particular and general investigations. A particular investigation conducted in terms of section 8(1)(a) focuses on a particular individual(s) or business entity (ies). The subsequent order by the Minister² will only be applicable to that particular individual(s) or entity(ies). A general investigation conducted in terms of section 8(1)(b) focuses on a business practice which is commonly applied within the business community and which may constitute an unfair business practice. The subsequent order of the Minister will be applicable to all individuals and entities utilising those particular business practices.

2. The complaint

The consumer Investigations Directorate³ received a number of complaints from consumers regarding how cell phone contracts were being advertised. These consumers complained that they entered into cell phone contracts expecting to pay the advertised price only to discover later that they had to pay more than the advertised price. The Consumer Affairs Committee (the Committee)

¹ No 71 of 1988

² Minister of Trade and Industry

³ This Directorate (a Directorate within the Department of Trade and Industry) deals with complaints from consumers and undertakes investigations for and on behalf of the Consumer Affairs Committee.

decided to invite a consumer from whom detailed complaints had been received to make a presentation to the Committee. He made his presentation at the meeting held on 24 February 2005.

Mer considering all the complaints, the Committee decided to send a letter to all cell phone providers, their service providers as well as other stakeholders such as the Advertising Standard Authority (ASA) and the Independent Communications Authority of South Africa (ICASA) advising them of the complaints and of any possible investigation. The letter read as follows:

Dear Sir / Madam

POSSIBLE INVESTIGATION INTO CELL PHONE ADVERTISING

The Consumer Investigations Directorate, (the Directorate) of the dti, received a number of complaints about misleading advertisements by cell phone service providers. The Directorate undertakes investigations for the Consumer Affairs Committee (the Committee) in terms of the Consumer Affairs (Unfair Business Practices) Act 71/1988 (the Act).

The Committee is a statutory body, which administers the Act. This enabling Act provides for the investigation into unfair business practices. An unfair business practice is defined in section 1 of the Act as any business practice, which, directly or indirectly, has or is likely to have the effect of harming the relations between businesses and consumers, unreasonably prejudicing any consumer, deceiving any consumer or unfairly affecting any consumer. Business practices include any agreement, accord, arrangement, understanding or undertaking 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.

The main body of the Act is devoted to various administrative procedures to be followed, the investigative powers of its investigating officers, the types of investigations the Committee could undertake and the powers of the Minister of Trade and Industry (the Minister). The Committee is empowered to undertake two broad types of investigations, namely particular and general investigations. The subject matter of this letter is a proposed general investigation, and my remarks will be confined to this type of investigation.

The Committee may, in terms of section 8(1)(b) of the Act, on its own initiative, make such investigation, as it may consider necessary into any business practice or type of business practice,

which in the opinion of the Committee, is commonly applied for the purposes of or in connection with the creation or maintenance of unfair business practices. Please again refer to the definition of an unfair business practice set out above.

Should the Committee find, after an investigation in terms of section 8(1)(b), that a particular business practice is unfair, it recommends corrective action to the Minister. The powers of the Minister, pertaining to a Section 8(1)(b) investigation, are set out in section 12(6)(a) of the Act. If the Minister, after consideration of a report by the Committee in terms of section 8(1)(b), is of the opinion that it is in the public interest, he may by notice in the Government Gazette declare the business practice or type of business practice which was the subject of the investigation to be unlawful. A person shall be liable on conviction of a transgression of the Minister's order 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.

At a recent meeting of the Committee it was resolved to undertake a section 8(1)(b) into the advertising by cell phone providers and in particular the practice of multi-part pricing. Multi-part pricing is the practice of advertising inter alia, the Monthly Subscription, Caller Line Identity, Itemized Billing and perhaps Sim Insurance separately.

Before embarking on such an investigation the Committee would appreciate your written comments on such an investigation by the 25 April 2005.

Yours faithfully

KLAAS MOKABA
Assistant Director
Consumer Investigations Directorate

3. Responses received

A number of organisations (including cell phone providers) responded to the letter and it was evident that most were in a hurry to protect the rights of ordinary consumers. The Committee therefore resolved to proceed with a general investigation in terms of section 8(1)(b).

The scope of the investigation was **limited** to the practise of advertising monthly subscriptions (excluding call *charges*). It appeared to be a **general practice** that the monthly *charge* for a cell phone was advertised in large, bold letters in cell phone *advertisements*. This large, bold figure did not however include all the monthly costs that consumers had to pay. *other* so called 'mandatory costs' such as itemised billing and call line identity appeared elsewhere in the advertisements, usually in smaller letters. When all the costs were added together, the total sum that consumers had to pay was substantially more than the advertised monthly amount. The Committee was of the view that advertising *the charges* in this manner was misleading and that this was prejudicial to consumers

The following notice was published in the *Government Gazette*:⁴

NOTICE 1068 OF 2005
DEPARTMENT OF TRADE AND INDUSTRY
CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988

In terms of the provision 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 business practices of: -

Cellular phone companies and any employee, *agent*, and/ representatives of the aforementioned regarding misleading advertising of monthly costs (excluding call charges)

Any person may within a period of twenty - one (21) days from the date of this notice make written representations and proposals regarding the abovementioned investigation to: The Assistant Director, Consumer Investigations, Private Bag X84, Pretoria, 0001. Tel : (012) 394 - 1555, Fax: (012) 394 - 2555, e-mail: lucky@thedti.gov.za

Following the publication of this notice cell phone providers raised several queries regarding the investigation and a number of interested parties were *invited* to address the Committee. A particular concern was that the ASA Code of Advertising Practice (the Code) did not prohibit multi-price advertising. Interested parties including the ASA addressed the Committee on 1

⁴ No 27754 1 July 2005

September 2005 and a particular focus of the discussion involved the ASA Code and self-regulation. All parties expressed the view that if possible *the* industry should be allowed to regulate itself.

4. ASA Code: cell phone advertising

Clause 32 of Section iii of the ASA Code of Practice sets out the following principles in respect of cell phone advertisements:

32.1 Print media

The following principle is to be observed regarding the use of monthly costs (excluding calls):

When a total monthly cost is advertised, such cost shall be inclusive of both the cost of the monthly subscription fees and all mandatory costs; or

When the monthly cost is advertised exclusive of mandatory costs, all costs shall be advertised:

with prominence;

*in a print size not less than half of the monthly costs; and
in a manner which does not [create] a misleading impression.*

When a monthly cost is advertised exclusive of mandatory costs, such monthly cost shall be qualified by the words "subscription fee" or "monthly subscription".

5 Committee's concerns

The Committee noted that the practice being investigated was common amongst cell phone providers and their service providers. The Committee stated that it was not against the practice of multi-price advertising but that it was necessary to re-consider the way in which multi-pricing was being advertised. The Committee was of the view that the way in which multi-pricing was being advertised was unfair to consumers because it was misleading. The Committee also established that the so-called mandatory costs were costs that the cell-phone providers themselves imposed upon consumers and were not imposed by some independent body such as ICASA. The Committee

could find no reason why the total cost to consumers including all mandatory costs could not be included in the large, bold figure that was advertised as the monthly charge. The Committee had no objection to this figure being broken down into its component parts below the large, bold print so that consumers would know exactly what services they were receiving for this monthly charge.

The Committee also established that this practice had been investigated in Australia where the Australian Competition and Consumer Commission (ACCC) instituted proceedings against Virgin Mobile Australia (Pty) Ltd (Virgin Mobile).⁵ One of the main issues was that Virgin Mobile's advertisements failed to state the full cash price for the packages. It was held that the advertisements were "likely to mislead consumers as to the minimum and/or total cost commitment of their signing up". This was found to be a contravention of the Trade Practices Act of 1974. The Federal Court in Perth upheld the ACCC's order requiring Virgin Mobile to allow any subscribers who were misled to return their mobile phones, to terminate their contracts without a termination penalty and to obtain a full refund of any upfront payment that had been made.

Because all the parties including the ASA were willing to co-operate it was agreed that the ASA Code should be revisited and revised. The ASA agreed to convene a meeting with all the interested parties and to submit a report to the Committee for consideration at its next meeting.⁶ The Committee re-iterated that it supported self-regulation if the ASA Code could be revised to incorporate its concerns and to ensure that consumers would be protected.

6. Conclusion to the investigation

The ASA submitted a report to the Committee at its meeting of 20 October 2005. It was proposed that its Code should be amended to read as follows:

Advertisements for post-paid cellular telephone services in all media shall prominently state:

*the minimum total monthly costs at which that contract can be entered into;
and*

⁵ Release#MR 106102 Issued 6th May 2002

⁶ To be held on 20 October 2005

the time period for which the contract is valid.

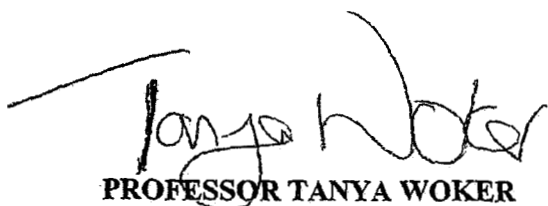
If at the time of submitting an advertisement for publication, the advertiser is aware that the minimum total monthly cost will vary during any period of the contract period, other than by the regulated tariff increases, the following shall be stated in the advertisement, with equal prominence;

The initial minimum total monthly cost and time period for which it is valid; and the subsequent minimum total monthly cost and time period for which it is valid.

Advertisements shall state, [conditions apply].

The Committee resolved to accept these amendments. For practical reasons it was not possible to introduce the changes immediately and it was agreed that a phased in approach should be used. It was however agreed that all the new rules would be operative from 31 January 2006. The Committee was satisfied that these amendments would take care of its concerns and that all those involved in the cell phone industry would comply with the new regulations or would face sanction by the ASA. As a result there is no need for the Minister to take any further action in this matter.

The Committee recommends that the Minister consider this report and authorise its publication in the *Government Gazette*.



PROFESSOR TANYA WOKER

CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE

1 FEBRUARY 2006
