

CONSUMER PROTECTION ACT, 2018

No. 5



of 2018

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An Act to provide for the protection of the interests of consumers by means of investigation, prohibition and control of unfair business practices; and to provide for matters incidental thereto.

Date of Assent: 27/03/2018

Date of Commencement: ON NOTICE

ENACTED by the Parliament of Botswana.

Part I — *Preliminary*

1. This Act may be cited as the Consumer Protection Act, 2018, and shall come into operation on such date as the Minister may, by Order published in the Gazette, appoint. Short title and commencement

2. In this Act, unless the context otherwise requires — Interpretation

“arrangement” means an arrangement or undertaking negotiated and concluded by the Authority in accordance with section 34;

“Authority” means the Competition and Consumer Authority established under the Competition Act;

“Board” means the Competition and Consumer Board established under the Competition Act;

“business” includes —

(a) offering, supplying or making available any commodity or services for stated consideration; or

(b) soliciting or receiving any investment;

“business practice” includes —

(a) any agreement, accord or undertaking of a business nature;

(b) any scheme, practice or method of trading, including any method of marketing or distribution; or

(c) any advertising, type of advertising or any other manner of soliciting business;

“commodity” means —

(a) any property, whether corporeal or incorporeal and whether fixed or movable, including any make or brand of commodity; or

(b) any service, excluding service due in terms of a contract of employment;

“consent agreement” means the written agreement between the Authority and the supplier to settle any dispute that may arise;

“consumer” means any person or non-profit making organisation to whom or to which any commodity is offered, supplied or made available, where such person or organisation does not intend to apply the commodity for the purposes of resale, lease, rendering services or the manufacture of goods for gain; Cap. 46:09

- “consumer organisation” means an advocacy group that seeks to protect —
- (a) consumers from unfair business practices; or
 - (b) any other consumer rights that may be set out under any other legislation;
- “curator” means a person or body of persons appointed by the High Court under section 42;
- “identity card” means an identity card issued to an investigating officer under section 4;
- “investigating officer” means an investigating officer appointed under section 4;
- “investment” means any money or other property, or any facility intended for use in connection with any venture or scheme for profit, or purported to be so intended;
- “merchantable” in relation to a commodity means a commodity that is fit for the purposes for which commodities of that kind are usually purchased, as it is reasonable to expect in light of the relevant circumstances;
- “supplier” means the person with whom the consumer concludes a contract for the sale of a commodity or for the purchase of a service, and includes the manufacturer of a commodity; and
- “Tribunal” means the Competition and Consumer Tribunal Botswana established under section 63 of the Competition Act; and
- “unfair business practices” means any business practice which, directly or indirectly, has or is likely to unfairly affect any consumer.

Part II — *Functions of Competition and Consumer Authority and investigating officers*

Functions of
Authority

- 3.** (1) The Authority shall be responsible for the administration of this Act.
- (2) Without derogating from the generality of subsection (1), the Authority shall —
- (a) advise the Minister on agreements, laws and regulations and other measures necessary for the enhancement of consumer protection;
 - (b) disseminate information and promote awareness of consumer rights and responsibilities amongst consumers and businesses;
 - (c) formulate and implement consumer education programmes on its own initiative or with the assistance and cooperation of any person, regulator or consumer organisation;
 - (d) conduct comprehensive surveys on consumer behaviour, consumption patterns, market prices, size and quality of products, business practices and any other related matters, as well as publish reports on the findings of the surveys;
 - (e) collect and analyse information on harmful and unsafe products, publish reports on the findings and make recommendations on safety standards to the Government;

- (f) receive and investigate complaints from consumers and consumer organisations on breaches of the provisions of the Act;
- (g) obtain warrants to search, seize and cause the testing, where necessary, of products on the market to ensure that specifications, performance, quality and safety standards, as may be determined by the Authority under section 30, are met;
- (h) refer unresolved complaints of breaches of the provisions of this Act arising from unfair business practices to the Tribunal, on behalf of a consumer or a class of consumers;
- (i) enter into an agreement with any person or enterprise, or receive undertakings from them and refer such to the Tribunal; and
- (j) do all such things as may be necessary for the better carrying out of the provisions of this Act and for the protection of consumers.

(3) Subject to the provisions of this Act, the Authority may permit and consider representations made by any class of consumers and consumer organisation on any matter of consumer protection, and may cooperate with and support the activities carried out by consumer organisations as may be reasonably considered by the Authority.

4. (1) The Authority may designate such number of persons as investigating officers, as it may deem necessary.

Investigating
officers

(2) Each investigating officer shall be issued with an identity card, in the prescribed form, and shall have the identity card in his or her possession when performing his or her functions under this Act.

PART III — *False, misleading and deceptive conduct*

5. A supplier shall not, in relation to the marketing of goods or services, by way of words or conduct falsely represent —

Prohibition of
false or
misleading
representations

- (a) that goods are of a particular standard, quality, value, grade, composition, style, model, or that the goods have a particular history or previous use;
- (b) that goods are new or reconditioned;
- (c) that goods or services have sponsorship, approval, affiliation, performance characteristics, accessories, uses or benefits that they do not have;
- (d) that goods or services have been used for a certain period to an extent or in a manner that is materially different from the facts;
- (e) that goods or services are available or can be delivered within a specified time;

- (f) that an employee, representative or agent of the supplier has the necessary authority to negotiate the terms of an agreement or contract between the supplier and consumer, whilst that employee, representative or agent does not have such authority;
 - (g) the price of any goods or services;
 - (h) the availability of facilities for the repair of any goods or spare parts for goods within a specified period;
 - (i) the place of origin of goods; or
 - (j) the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.
- 6.** (1) A supplier shall not use force, coercion, undue influence, pressure, duress, harassment, unfair tactics or any other similar conduct against a consumer, in connection with —
- (a) the marketing of any goods or services;
 - (b) the supply of goods or services;
 - (c) the negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services; or
 - (d) the recovery of goods.
- (2) In addition to any conduct contemplated in subsection (1), a supplier shall not knowingly take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, inability to understand the language of an agreement or contract, or any other similar factor.
- 7.** (1) A supplier shall not advertise any particular goods or services as being available at a specified price in a manner that may result in consumers being misled or deceived as to the actual availability of those goods or services from that supplier, at the advertised price.
- (2) A supplier who advertises goods or services with the intention not to supply the reasonably expected quantity of the goods or services to meet public demand, shall be guilty of an offence and shall be liable upon conviction, to a fine not exceeding P50 000 or to imprisonment for a term not exceeding three years, or to both.
- (3) Subject to the provisions of subsection (2), a supplier shall disclose in an advertisement a limitation in the quantity of goods or services in immediate conjunction with the advertised goods or services.
- (4) A supplier who places an advertisement for goods or services shall be required to include the duration on which the goods or services will be available.
- (5) Where a supplier does not specify the period for which the goods or services advertised will be available, the goods or services shall be deemed to be available for one month from the date of the advertisement.
- (6) Where a supplier and a consumer have entered into a contract for the supply of goods or services on the basis of an advertisement, and such goods or services are not availed as advertised, the consumer shall have the right to cancel the contract.

Prohibition of
certain conduct

Bait advertising

(7) Where a contract is cancelled in accordance with subsection (6), the supplier shall refund the consumer the amount paid for the goods or services.

(8) A supplier who engages in any misleading or deceptive advertising commits an offence and shall be liable upon conviction, to a fine not exceeding P50 000 or to imprisonment for a term not exceeding three years, or to both.

(9) The Authority shall, where a supplier engages in any misleading or deceptive advertising —

- (a) order the supplier to stop the advertisement immediately by removing the misleading advertisement; and
- (b) order the supplier to publish a corrected version of the advertisement in the medium that carried the misleading information.

(10) Where a supplier under subsection (9) fails to comply, such supplier commits an offence and shall be liable to an offence under subsection (8).

(11) The Authority shall pursue any voluntary undertaking or assurance of compliance from traders, and enforce undertaking by such traders where there is non-compliance, with subsection (9).

8. (1) A supplier shall not offer any gift, prize or other free item with the intention of not providing such gift, prize or other free item in the manner it is offered.

Gifts, prizes
and free offers

(2) A supplier shall not increase the purchase price of goods, or reduce the quantity or quality of goods or services, on the basis of gifts, prizes or other free items offered for acquiring the goods or services.

9. (1) A person shall not directly or indirectly promote, or knowingly join, enter or participate, or cause any other person to promote, join, enter or participate in —

Pyramid and
related schemes

- (a) a pyramid scheme;
- (b) a multiplication scheme;
- (c) a chain letter scheme; or
- (d) any other scheme declared as such by the Minister in terms of subsection (3).

(2) For the purposes of this section —

- (a) a “pyramid scheme” is an arrangement, agreement, practice or scheme where participants in the scheme receive compensation derived primarily from their respective recruitment of other persons as participants, rather than from the sale of any goods or services;
- (b) a “multiplication scheme” is an arrangement, agreement, practice or scheme where a person offers, promises or guarantees to a participant an effective annual interest rate that is above the market rate; and
- (c) a “chain letter scheme” is an arrangement, agreement, practice or scheme in which —

- (i) there are various levels of participation,
- (ii) existing participants canvass and recruit new participants in order to keep the activity on-going, and
- (iii) each successive newly recruited participant is required to make some form of payment which would be distributed to some of the previously existing participants, irrespective of whether the new participant receives any goods or services in exchange for that payment.

(3) The Minister may, by order published in the *Gazette*, declare any arrangement, agreement, practice or scheme to be a scheme contemplated in subsection (1) (d), if it is similar in purpose or effect to a scheme contemplated in that subsection.

(4) A person who participates in an arrangement, agreement, practice or scheme under subsection (2) commits an offence and shall be liable, upon conviction, to a fine not exceeding P100 000 or to imprisonment for a term not exceeding five years, or to both.

PART IV — *Information on goods and services*

Information to be provided in plain and understandable language

10. A supplier shall —

- (a) provide information which is accurate, clear and complete in relation to goods and services offered to consumers; and
- (b) provide information about goods or services that includes —
 - (i) the characteristics of the goods or services,
 - (ii) the price of the goods or services,
 - (iii) the instructions to use the goods or services,
 - (iv) the warnings as to any risks in the maintenance of the goods or services, and
 - (v) the terms for the supply of the goods or services.

Display of price of goods and services

11. (1) A supplier shall not display goods or services without displaying the price of the goods or services, and the price shall be displayed —

- (a) in Pula currency;
- (b) in clear and legible letters on the goods or services; and
- (c) in a prominent position where the goods or services are being supplied.

(2) The price of goods or services shall be deemed to have been adequately displayed if a written indication on the price is —

- (a) annexed to, printed, stamped or located upon the goods or services sold;
- (b) represented in a manner which may reasonably be inferred that the price is the price applicable to the goods or services in question; or
- (c) published in relation to the goods and services in a catalogue, brochure or any publication presented to a consumer at a particular time.

(3) A supplier shall not charge a consumer more than the price indicated or displayed for goods or services.

12. (1) A supplier selling a product to a consumer shall attach a label on the product as required by the mandatory safety standards on labelling of goods for the relevant class of goods set by the Botswana Bureau of Standards or any other international body recognised by the Botswana Bureau of Standards.

Product labelling, trade descriptions and reconditioned goods

(2) A supplier shall not apply a trade description to goods that is likely to mislead consumers as to any matter expressed in the description.

(3) A supplier shall not alter or remove a trade description or trade mark applied to any goods in a manner calculated to mislead consumers.

(4) A supplier who offers any goods that —
 (a) have been reconditioned, rebuilt or re-made; and
 (b) bear the trade mark of the original producers, shall label the goods, stating clearly that the goods have been reconditioned, rebuilt or re-made, as the case may be.

13. (1) A supplier who offers used goods shall inform a consumer that the goods sold are used goods by —

Used goods

(a) placing a label on the goods that indicates that such goods are used goods; and

(b) placing a notice on the invoice issued to a consumer.

(2) For the purposes of this section, “used goods” means goods that have previously been supplied to a consumer, but does not include goods that have been returned to the supplier in terms of any provision of this Act.

(3) A supplier who —

(a) contravenes this section; or

(b) sells or offers for sale, used goods that are not safe for use, commits an offence and shall be liable, upon conviction, to a fine not exceeding P50 000 or to imprisonment for a term not exceeding three years, or to both.

PART V — *Safety and quality of goods and services*

14. (1) Where a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to —

Consumer's right to demand quality service

(a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;

(b) the performance of the services in a manner and quality that consumers are reasonably entitled to expect; and

(c) the use, delivery or installation of goods that are free of defects and are of a quality that consumers are reasonably entitled to expect, if any such goods are required for performance of the services,

having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.

Consumer's
right to safe
and good
quality goods

- (2) Where a supplier fails to perform a service to the standards contemplated in subsection (1), the Authority may require the supplier to —
- (a) remedy any defect in the quality of the services performed or goods supplied; or
 - (b) refund the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

15. (1) A consumer has the right to receive goods which are of good quality, in good working order and free of defects, unless the opposite is clearly disclosed.

(2) In determining whether any particular goods satisfy the requirements of subsection (1), the circumstances of the supply of those goods shall be considered, including —

- (a) the purpose for which the goods were marketed, the use of any trade description, instructions for use, warnings with respect to the use of the goods;
- (b) the range of activities that might be reasonably anticipated to be done in relation to the use of the goods; and
- (c) the time when the goods were produced and supplied.

(3) The provisions of subsection (2) shall not apply to a transaction where a consumer was informed that particular goods are offered in a specific condition and the consumer consented to taking the goods in such condition.

(4) A supplier shall not supply or offer to supply goods which do not conform to the mandatory safety standards for the class of goods set by the Botswana Bureau of Standards or other internationally bodies recognised by the Botswana Bureau of Standards.

(5) Where the Authority discovers that a supplier is supplying unsafe goods or goods which do not conform to the mandatory safety standards referred to in subsection (4), the Authority may —

- (a) re-call such goods;
- (b) halt the production, supply, advertisement or importation of such goods;
- (c) disclose to the public any information relating to the characteristics of the goods which render such goods unsafe; or
- (d) direct the supplier to replace the goods, refund any consumer who bought the unsafe goods or compensate the consumer for any damage suffered by the consumer in using the unsafe goods at an amount determined by the Authority.

Implied warranty
of quality

16. (1) A transaction or agreement for the supply of goods to a consumer shall contain a provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in this section, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.

(2) A consumer may return goods to a supplier in their merchantable or original state, within six months after the delivery of the goods, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in this section.

(3) Where a consumer has returned goods to a supplier in accordance with subsection (2), the supplier shall —

- (a) repair or replace the defective goods; or
- (b) refund the consumer the amount already paid as consideration for the goods.

(4) Where a supplier repairs goods returned by a consumer under subsection (2), and within three months the same problem recurs in the goods, the supplier shall —

- (a) replace the goods; or
- (b) refund the consumer the amount paid by the consumer as consideration for the goods.

17. (1) A supplier shall give a warranty on every new or re-conditioned part installed during any repair or maintenance work, and the labour required to install it, for a period of three months after the date of installation of the part or such longer period as the supplier may specify, in writing.

Warranty on repaired goods

(2) A warranty in terms of this section shall —

- (a) be concurrent with any other deemed, implied or express warranty;
- (b) be void if the consumer has subjected the part, or the goods or property in which it was installed, to misuse or abuse; and
- (c) not apply to ordinary wear and tear, having regard to the circumstances in which the goods are intended to ordinarily be used.

18. (1) Subject to the provisions of subsection (2), a supplier is liable for —

- (a) any damage caused by supplying unsafe goods; or
- (b) any product failure, defect or hazard in any goods, where the supplier had prior knowledge of the potential damage, product failure, defect or hazard.

Liability for damage caused on goods

(2) A supplier shall not be liable for any damage caused to goods supplied by the supplier where —

- (a) the unsafe product characteristic, failure, defect or hazard that results in the damage is wholly attributable to noncompliance with the product manual instructions;
- (b) the claim for damages is brought outside the period prescribed under the Prescriptions Act from the date the alleged damage took place or when the consumer had prior knowledge of the potential damage to the goods; or
- (c) the damage is caused by mishandling of the product by the consumer.

Cap. 13:01

Part VI — *Direct and mail order sales*Direct
marketing

19. (1) A consumer may expressly or implicitly request or agree to direct marketing.

(2) A person who negotiates direct marketing shall produce an identity document containing the following information —

- (a) the names of the person;
- (b) the contact details of the person; and
- (c) the name of the company, if any, that the person represents.

Mail order
sales

20. A supplier advertising the supply of goods or services through mail order shall give out the following information in the advertisement —

- (a) the name and licence number of the supplier;
- (b) the contact details of the supplier;
- (c) a detailed description of the goods or services offered;
- (d) the places and times where a sample of the goods may be inspected;
- (e) the price of the goods or services offered;
- (f) the cost of delivery, the manner of delivery and the time when the goods or services are expected to be delivered; and
- (g) the manner and form in which a complaint may be lodged.

Direct or mail
order sales
contracts

21. A contract in respect of direct sales or mail order sales shall —

- (a) be in writing;
- (b) have a cooling-off period of 10 working days;
- (c) be signed by both the supplier and the consumer;
- (d) be delivered to the consumer; and
- (e) allow the consumer the right to cancel the contract anytime as long as it is within the cooling-off period.

Consumer's
right to
cooling-off
Act No. 14
of 2014

22. (1) This section shall not apply to transactions regulated under the Electronic Communications and Transactions Act.

(2) A consumer may rescind a transaction resulting from any direct sale or mail order sale without reason or penalty, by notice to the supplier, in writing, within 10 working days after the date on which —

- (a) the transaction or contract between the supplier and consumer was concluded; or
- (b) the goods that were the subject of the transaction were delivered to the consumer:

Provided that the goods are in the same merchantable quality as they were when the supplier delivered them to the consumer.

(3) A supplier shall —

- (a) return any payment received from the consumer in terms of the transaction within 15 working days after —
 - (i) receiving notice of the rescission, if no goods had been delivered to the consumer in terms of the transaction, or
 - (ii) receiving from the consumer any goods supplied in terms of the transaction; and
- (b) not attempt to collect any payment in terms of a rescinded transaction.

(4) A supplier shall not deliver goods or services in respect of a direct sale or mail order sale, until the cooling-off period has elapsed.

(5) Where a consumer has requested a supplier, in writing, within 72 hours of the entering into a contract, to supply goods or services before the expiry of the cooling-off period, the consumer shall be deemed to have waived his right to cancel the contract.

Part VII — *Contracts*

23. (1) A supplier shall not enter into a contract, agreement or any other arrangement with any consumer for the supply of goods or services which —

Unfair,
unreasonable
or unjust
contract terms

- (a) enables the supplier to unilaterally amend the terms of the contract or agreement;
- (b) enables the supplier to price the goods or services in a manner that is unfair, unreasonable or unjust;
- (c) enables the supplier to impose terms and conditions that are unfair, unreasonable or unjust;
- (d) enables the supplier to market goods or services in a manner that is unfair, unreasonable or unjust; or
- (e) requires a consumer, or other person to whom any goods or services are supplied at the direction of the consumer —
 - (i) to waive any right,
 - (ii) to assume any obligation under the contract or agreement, and
 - (iii) to waive any liability of the supplier.

(2) Without limiting the generality of subsection (1), a contract, agreement or any other arrangement is unfair, unreasonable or unjust if —

- (a) a term or condition of the contract, agreement or any other arrangement was arrived at by means of duress on either party;
- (b) the consumer was given false, misleading or deceptive representation about the goods or services; or
- (c) the contract, agreement or any other arrangement was subject to other terms or conditions that were not brought to the attention of the consumer, or a term or condition of the contract, agreement or any other arrangement was positioned in such a manner that they could not be obvious to an ordinary consumer.

(3) A contract, agreement or any other arrangement that contravenes the provisions of this Part shall not be enforceable against a consumer.

24. (1) A supplier shall ensure that every term and condition in a contract is brought to the attention of the consumer, especially terms or conditions that —

Obligation to
make consumers
aware of certain
terms and
conditions
in contracts

- (a) limit the liability of the supplier;
- (b) constitute an assumption of risk or liability by a consumer;
- (c) impose an obligation on a consumer not to hold the supplier responsible for any loss or cause; or
- (d) requires a consumer to be aware of any risk associated with a good or service, that under normal circumstances the consumer could not be expected to be aware of.

A.240

(2) A supplier shall explain the implications of the terms and conditions specified in subsection (1) to a consumer before the consumer makes a decision to consent to the terms and conditions.

(3) A supplier shall ensure that where a consumer consents to the terms and conditions specified in subsection (1), the consumer shows such consent by signing or initialling next to each term and condition that the consumer consents to.

(4) The terms and conditions specified under subsection (1) shall be written in plain and clear language, in a manner that could be expected to be comprehended or understood by an ordinary consumer.

Written
contracts

25. (1) A contract shall —

- (a) be written in any of the official languages;
- (b) be in clear and plain language; and
- (c) include the following information —
 - (i) the name and contact details of the supplier,
 - (ii) a description of the goods or services to be supplied,
 - (iii) an itemised list of the price of the goods or services, including all associated costs payable by the consumer,
 - (iv) the instalments, if applicable, to be paid by the consumer, including the total amount to be paid for the goods or services and the method of payment,
 - (v) the time and place for the delivery of the goods or for the performance of services, and
 - (vi) the rights and obligations of the parties to the contract in case of breach of contract.

(2) A supplier shall furnish a consumer with a copy of a written contract, at the time the transaction between the supplier and the consumer is entered into.

(3) A supplier shall grant a consumer the right to make an early settlement under the contract and obtain a rebate on the cost of any credit charged.

(4) A supplier shall issue receipts when supplying goods or services and such receipts shall contain —

- (a) the trade name and address of the supplier;
- (b) the date of purchase by a consumer; and
- (c) the amount of money paid including a separate statement of any amount paid as tax.

Prohibited terms
or conditions
in contracts

26. A supplier shall not enter into a transaction or contract subject to any term or condition that —

- (a) misleads or deceives consumers;
- (b) could deprive a consumer of any right protected under any other law;
- (c) waives the supplier's obligations in terms of this Act and any other law; or
- (d) exempts the supplier from any liability for any loss associated with the consumption of goods or services.

27. (1) A consumer may, where the goods are still in merchantable quality as supplied by the supplier, cancel a contract by giving a supplier 14 days' written notice, indicating the intention to cancel the contract.

Cancellation of contracts

(2) The consumer shall serve the notice specified in subsection (1), by delivering the notice personally to the supplier.

(3) The consumer may, upon giving a justification to so do, and upon the approval of the Authority, serve the notice referred to in subsection (1) on a supplier by posting it using a registered mail unless the goods were received by registered mail.

(4) Where the notice specified in subsection (1) has been served in accordance with subsection (3), such notice shall be deemed to have been served on a supplier on the lapse of three days from the date the notice was posted.

PART VIII — *Industry code of conduct*

28. The Minister may, on the recommendation of the Authority, prescribe an industry code of conduct regulating the conduct of participants in a particular industry with respect to their relationship with consumers.

Industry code of conduct

Part IX — *Complaints and investigations*

29. (1) A consumer, class of consumers or consumer organisation may lodge with the Authority a complaint against violations of the provisions of this Act.

Lodging of complaint

(2) The Authority shall assist a complainant where necessary to submit a written complaint.

(3) The Authority shall conduct a preliminary analysis of a complaint and make a report containing recommendations as to whether or not there are sufficient grounds to warrant the investigations of an unfair business practice.

30. (1) The Authority may, either on its own initiative or upon receipt of information or a complaint from any person, investigate any allegation of an unfair business practice by any business —

Investigations by Authority

(a) to determine whether the business is operating in accordance with the set standards of practice of that business; or

(b) where it has reasonable grounds to suspect that the unfair business practice in question violates the provisions of this Act.

(2) Where the Authority decides not to carry out an investigation, having received a complaint or a request to investigate any unfair business practice in terms of subsection (1), the Authority shall, in writing, inform the complainant of the reasons for its decision.

A.242

Power to
summon and
question

31. (1) The Authority may summon any person who is able to furnish any information on the subject of an investigation or who has in his or her possession or under his or her control any document, book or other object relating to such subject, to appear before the Authority to be questioned or to produce the document, book or other object.

(2) The Authority shall as soon as is practicable serve a person summoned in terms of subsection (1), in the prescribed Form.

(3) Where the Authority considers that to serve the summons in accordance with subsection (2) would materially prejudice the exercise of its powers to enter and search any premises in terms of section 32, it may defer serving the summons until those powers have been exercised.

(4) A person summoned under subsection (1) shall be questioned under oath or affirmation.

(5) A person summoned to appear before the Authority —

(a) may be assisted at the hearing by any person who is reasonably acquainted with the facts of the subject of the investigation; and

(b) shall be entitled to the prescribed witness fees.

(6) A person summoned to appear before the Authority shall not be entitled to refuse to answer any question or to produce any book, document or other object on the grounds that such answer, document, book or other object would incriminate him or her.

(7) Subject to subsection (8), incriminating evidence, arising out of the answers a person may give to the Authority in answer to the questions posed by the Authority, shall not be admissible in any criminal trial against that person.

(8) A person who has been summoned to appear before the Authority who —

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

(b) refuses to take oath or make affirmation;

(c) fails to produce, when requested, any document, book or other object in his or her possession or under his or her control; or

(d) knowingly makes a false statement,

commits an offence.

Arrangements to discontinue unfair business practice

Search and
seizure

32. (1) Where the Authority has reasonable grounds to suspect that any book or document, or other object connected to any investigation under this Act is being concealed within specified premises, the Authority may authorise, in writing, the entry and search of the premises of any person or enterprise by an investigating officer.

(2) Subject to subsection (3), an investigating officer may, at any time during business hours —

(a) enter into premises where information or documents are being kept;

- (b) search any person on the premises if there are reasonable grounds for believing that the person has possession of any documents or article that has a bearing on the investigation;
- (c) examine any document or article found on the premises that has a bearing on the investigation;
- (d) require information to be given about any document or article by —
 - (i) the owner of the premises,
 - (ii) the person in control of the premises,
 - (iii) any person who has control of the document or article, or
 - (iv) any other person who may have the information;
- (e) if documents or information are not provided, require any of the persons specified in paragraph (d) to state to the best of their knowledge, where the documents are to be found or how the relevant information may be retrieved;
- (f) take extracts from, or make copies of, any book or document found on the premises that has a bearing on the investigation;
- (g) use any computer system on the premises or require the assistance of any person on the premises to use the computer system to —
 - (i) search any data contained in or available to that computer system,
 - (ii) reproduce any record from that data, and
 - (iii) seize any output from that computer system for examination and copying; and
- (h) attach and if necessary, remove from the premises for examination and safeguarding, any document or article that has a bearing on the investigation.

(3) An investigating officer authorised under subsection (1) may not enter upon and search any premises unless the investigating officer obtains a warrant authorising such entry and search in accordance with subsection (4).

(4) If a magistrate's court is satisfied, upon an application made on oath or affirmation, that there are reasonable grounds for suspecting that it is necessary, in order to ascertain or establish whether any person has engaged in, is engaging in or is about to engage in any unfair business practice, for an investigating officer to exercise the powers conferred by subsection (1), the magistrate may grant a warrant authorising a named investigating officer to exercise those powers in relation to any premises specified in the warrant.

(5) Upon first entering any premises under a warrant, the investigating officer shall —

- (a) provide to owner of the premises or the person in control of the premises proof of —
 - (i) the investigating officer's authority to enter the premises by handing a copy of the warrant to that person, and
 - (ii) the investigating officer's identity card;
- (b) where none of the persons mentioned in paragraph (a) is present, affix a copy of the warrant to the premises in a prominent and visible position;

- (c) provide on request, a document from the Authority indicating the subject matter and purpose of the investigation and the nature of the practice under investigation; and
- (d) allow an enterprise under investigation a reasonable period within which to obtain legal advice.

(6) Notwithstanding subsection (3), an inspector may, without a warrant, enter any premises other than a private dwelling to exercise the powers conferred by subsection (1) if the owner of the premises or any other person in control of the premises consents to the entry and search of the premises.

(7) An investigating officer exercising the powers conferred by subsection (1) by virtue of a warrant may be accompanied and assisted by other persons specified in the warrant.

(8) An investigating officer who removes anything from any premises in accordance with subsection (2) (*h*) shall —

- (a) issue a receipt for that thing to the owner of the premise or the person in control of the premises; and
- (b) return that thing as soon as it is practicable to do so after achieving the purpose for which it was removed.

(9) On leaving any premises which an investigating officer has entered by virtue of a warrant under this section, the investigating officer shall, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as that investigating officer found them.

Privileged information

33. (1) Nothing in this Part requires a person or a supplier to disclose or produce information or a document if the person or the supplier would in an action in court be entitled to refuse to disclose or produce it on the grounds of legal professional privilege.

(2) A person or a supplier shall, where required to do so by the Authority in the exercise of its powers under this Act, disclose the name and address of a client to the Authority.

Arrangements to discontinue unfair business practice

34. (1) The Authority may conclude an arrangement for —

- (a) the rectification of an unfair business practice or any aspect of the unfair business practice, or conduct that contravenes the provisions of this Act;
- (b) the reimbursement, with interest, if any, to affected consumers;
- (c) the supply of goods or services in terms of any contract entered into in accordance with the provisions of this Act or under the provisions of any other law;
- (d) the replacement or repair of goods supplied;
- (e) the compensation of any damage suffered by consumers;
- (f) the variation or setting aside wholly or partly of any contract; or
- (g) any matter relating to consumer protection.

(2) An arrangement under subsection (1) —

- (a) shall be in writing and signed by the parties to the arrangement; and

(b) may be concluded at any time after the institution of an investigation, but before the institution of proceedings before the Tribunal.

35. (1) Where the Authority has entered into a consent agreement or received an undertaking from any person or supplier, the Tribunal may, upon receipt of the consent agreement or an undertaking from the Authority —

Consent
agreement

- (a) give or withhold its confirmation; or
- (b) return the matter to the Authority with an indication of any changes that need to be made on the consent agreement or undertaking before the Tribunal confirms the consent agreement or undertaking.

(2) The confirmation of the consent agreement or the undertaking by the Tribunal under subsection (1) shall be made in the form of an order and any person or supplier who does not comply with such order commits an offence and shall be liable, upon conviction, to a fine not exceeding P500 000, or to imprisonment for a term not exceeding three years, or to both.

Part X — *Proceedings*

36. (1) Upon the completion of an investigation, or where the Authority has failed to resolve a complaint of unfair business practice through an arrangement under section 34, the Authority shall within one month —

Institution of
proceedings

- (a) subject to subsection (2), refer the complaint to the Tribunal if the Authority determines that an unfair business practice has been established; or
- (b) in any other case, issue a notice of non-referral to the complainant in the prescribed form.

(2) Where the Authority refers a matter to the Tribunal, the Authority —

- (a) may refer all or some of the particulars of the complaint as submitted by the complainant; or
- (b) may make additions to the particulars of the complaint as submitted by the complainant and refer them to the Tribunal.

(3) The Authority shall, in respect of particulars of the complaint as submitted by the complainant not referred to the Tribunal, issue a notice of non-referral to the complainant in accordance with subsection (1)(b).

(4) In a particular case —

- (a) the Authority and the complainant may agree to extend the period in subsection (1); or
- (b) on application by the Authority made to the Tribunal before the end of the period referred to under subsection (2), the Tribunal may extend that period.

(5) Where the Authority —

- (a) does not refer a complaint to the Tribunal; or
- (b) does not issue a notice of non-referral to the complainant within the period referred to in subsection (1), or within the extended period in accordance with subsection (4),

the Authority shall be considered to have issued a notice of non-referral to the complainant.

(6) Where the Authority issues a notice of non-referral to the complainant; and subsection (5) applies, the complainant may refer the complaint directly to the Tribunal subject to its procedure.

(7) A referral to the Tribunal, whether by the Authority or by a complainant, shall —

- (a) be in the prescribed form; and
- (b) by notice in the *Gazette*, be published by the Chairperson of the Tribunal, specifying the name of the respondent and the nature of the conduct that is the subject of the referral.

Hearing of
complaints by
Tribunal

37. The hearing of complaints under this Act shall, with the necessary modifications, be dealt with in accordance with the Competition Act.

General
decisions
made by
Tribunal

38. (1) The Tribunal may make a decision —

- (a) preventing the continuation of an unfair business practice, and where necessary, order compensation and damages against any person alleged to be responsible for the unfair business practice; or
- (b) prohibiting any business practice or any type of business practice, in general or in relation to a particular commodity or investment which is commonly applied for the purposes of or in connection with the creation or maintenance of unfair business practices.

(2) The Tribunal shall publish a decision made under subsection (1) (b).

Urgent
provisional
orders

39. (1) Where the Tribunal is satisfied from the information placed before it by the Authority that the circumstances relating to a particular matter, which matter is a subject of an investigation under this Act, render that matter urgent and that irreparable prejudice would be caused to a consumer or any group or class of consumers if that matter were to be dealt with by the Tribunal at proceedings in due course, the Tribunal may issue a provisional order —

- (a) prohibiting any person mentioned in the order from performing any act connected with the subject of the investigation;
- (b) attaching any money, other property or assets of whatever nature, held by any person;
- (c) preventing, in any other law, the prejudice in question; or
- (d) authorising the Authority to take any action specified in the order.

(2) A provisional order issued under subsection (1) —

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

(3) A provisional order issued in accordance with subsection (1), and any amendment, withdrawal or extension of the order shall, where the Tribunal directs, be published in the *Gazette* and in such other media as the Tribunal may deem appropriate.

40. (1) Where in proceedings instituted in terms of this Act the Tribunal is satisfied that it is in the public interest that any particular business practice which is the subject of proceedings before the Tribunal should be declared unlawful, the Tribunal may —

Declaration of certain business practices to be unlawful

- (a) declare the business practice or type of business practice concerned to be unlawful either in relation to a particular area of the business or generally as may be supported by the evidence presented;
- (b) declare any agreement, accord, undertaking or terms of any agreement, accord or undertaking to be void; or
- (c) prohibit, subject to subsection (2), any person from —
 - (i) entering into or being or continuing to be party to an agreement, arrangement or undertaking,
 - (ii) using advertising, or
 - (iii) applying a scheme, practice or method of trading.

(2) The Tribunal may, on application by any person and after hearing the representation of the Authority and any other interested person, grant an exemption from a provision, condition or requirement contemplated in subsection (1), to such extent, for such period and subject to such conditions as may be specified in the exemption.

41. (1) Where the Tribunal, pursuant to proceedings instituted in the Tribunal under this Part, is satisfied that an unfair business practice exists or may come into existence, the Tribunal may issue such order as may be necessary to prevent the continuation of the unfair business practice, and such order may, without prejudice to the generality of the foregoing, direct —

Order prohibiting unfair practice

- (a) any person practising the unfair business practice to take such action, including steps for the dissolution of any body, incorporated or unincorporated, or the severance of any connection or association between two or more persons, necessary for the discontinuance of the unfair business practice; or
- (b) any person who is or was a party to an act or omission which has led, in whatever manner, to the practice and perpetuation of an unfair business practice to cease committing such act or omission.

(2) If the Tribunal finds that money was accepted from consumers in the course of an unfair business practice, and it is necessary to limit or prevent loss to such consumers, the Tribunal may order any person responsible for such loss to repay the money, with interest at the prescribed rate, to the affected consumers.

(3) Where the Tribunal is satisfied that as a direct result of an unfair business practice a consumer has suffered loss, other than monetary loss, it may order the person responsible for the loss to pay such damages as it may determine.

42. (1) Notwithstanding any action taken to compensate any consumer who may have lost money paid into an unfair business practice under section 41, the Tribunal may apply to the High Court for the appointment of a curator to limit or prevent any financial loss to such consumer or group of consumers.

(2) Without derogating from the generality of subsection (1) and subject to such conditions as it may impose, the High Court may authorise the curator to —

- (a) realise such assets of the person responsible for the unfair business practice in question which are necessary for the reimbursement of any of the consumers concerned and distribute them among the said consumers;
- (b) take control of and manage the whole or any part of the business of such a person in which event the management of the business or affairs of the person involved in the unfair business practice shall vest in the curator, subject to the supervision of the Tribunal, and any other person vested with the management of the affairs of that person shall be divested thereof;
- (c) make payments, transfer property or take steps for the transfer of property of the person responsible for the unfair business practice at such time, in such order and in such manner as the curator may deem fit;
- (d) open and maintain banking or similar interest-bearing accounts;
- (e) enter into agreements on behalf of the person responsible for the unfair business practice;
- (f) convene from time to time, in such manner as he or she may deem fit, a meeting of creditors of the person responsible for the unfair business practice for the purpose of establishing the nature and extent of the indebtedness of that person to such creditors and for consultation with such creditors in so far as the curator deems it necessary;
- (g) negotiate with any creditor of the person responsible for the unfair business practice with a view to the final settlement of the affairs of such creditor against that person;
- (h) make and carry out, in the course of the management of the affairs of the person responsible for the unfair business practice, any decision which in terms of the provisions of the Companies Act, would have been required to be made by way of a special resolution;
- (i) dispose of, by public auction, tender or negotiation, any asset of the person responsible for the unfair business practice; and
- (j) perform such further incidental or ancillary duties or functions as may be necessary to give effect to any order of the Tribunal.

(3) The High Court may, at any time, amend, withdraw or vary any power granted to a curator and any such amendment, withdrawal and the Tribunal shall cause the variation to be published by notice in the *Gazette*.

- (4) At the appointment of a curator —
- (a) the management of the business or affairs of the person responsible for the unfair business practice shall vest in the curator, subject to the supervision of the Tribunal, and any other person vested with the management of the affairs of that person shall be divested thereof; and
 - (b) the curator shall recover and take possession of such assets of the person involved in the unfair business practice as may be necessary.
- (5) A curator who is not in the full-time service of the Government shall, out of the funds of the person responsible for the unfair business practice, in respect of the services rendered by him or her, be paid such remuneration as may be prescribed:
- Provided that if the funds of the person involved in the unfair business practice are insufficient to adequately compensate the curator, the curator shall be paid from public funds such further remuneration and allowances as the High Court may determine.
- (6) The curator shall —
- (a) report to the Tribunal on his or her administration of the affairs of the person responsible for the unfair business practice; and
 - (b) at the request of the Tribunal, provide any other information set out in that request.
- (7) The curator shall keep a proper record of the steps taken by him or her in the performance of his or her functions and of the reasons why such steps were taken.
- (8) Any person who, in any way, obstructs, hinders or prevents the curator from discharging or performing any of the directives contained in the High Court order issued under this section commits an offence and shall be liable, upon conviction, to a fine not exceeding P30 000 or to imprisonment for a term not exceeding three years, or to both.

Part XI — *General provisions*

43. (1) In this section, “regulator” means any regulatory body or any Government Department that regulates the particular type of business under investigation.

(2) The Authority and a regulator shall establish a mechanism through which they can maintain regular contact regarding the exercise of their respective responsibilities.

(3) The Authority may consult such regulator who regulates the particular type of business under investigation or as may provide similar products or services at a standard recognised nationally or internationally, to determine the set standards of practice for any particular business under investigation by the Authority.

(4) Where the Authority proposes to investigate a matter which does not fall within the scope of section 3 (2) of the Competition Act but involves a business which is in other respects subject to the jurisdiction of a regulator, the Authority shall notify the relevant regulator of the proposed investigation.

Relationship
with sector
regulator

(5) A regulator is entitled to make written representations to the Authority on a matter under investigation which involves a business which is subject to the jurisdiction of the regulator.

(6) The Authority and the regulator shall hold consultations to determine —

- (a) whether the regulator can place sector-specific expertise at the disposal of the Authority and assist with the Authority’s investigation; or
- (b) whether the regulator should give oral evidence at any hearing convened by the Authority to consider the case.

(7) A regulator shall not be inhibited from conducting an investigation on the same basis as that which the Authority could itself conduct the investigation in terms of the provisions of this Act.

(8) The determination of the Authority on any matter falling within the scope of this section shall be final except where consultations in terms of subsection (6) have not been held.

Confidentiality and exemption from personal liability

44. The provisions of the Competition Act shall, with the necessary modifications, apply, with respect to confidentiality and to exemption from personal liability, to persons dealing with matters of consumer protection under this Act.

Excluding or limiting application of Act

45. Any agreement or contractual term purporting to exclude the provisions of this Act or to limit the application of this Act shall be void.

General penalty

46. A person contravening any of the provisions of this Act with regard to which no penalty is expressly provided shall be liable, upon conviction, to a fine not exceeding P500 000, or to imprisonment for a term not exceeding three years, or to both.

Regulations

47. The Minister may make regulations providing for any matter which under this Act is to be prescribed or for the better carrying out of the purposes and provisions of this Act, and without prejudice to the generality of the foregoing, such regulations may make provision —

- (a) prescribing procedures, forms and fees; and
- (b) prescribing an industry code of conduct in terms of section 28.

Repeal of Cap. 42:07

48. The Consumer Protection Act (hereinafter referred to as “the repealed Act”), is hereby repealed.

Savings and transitional provisions

49. (1) Any subsidiary legislation made under the repealed Act and in force immediately prior to the coming into operation of this Act shall, in so far as it is not inconsistent with the provisions of this Act, continue in force and be of effect as if made under this Act.

(2) At the commencement of this Act, the Consumer Protection Office as a Government department shall cease to be a Government department and its functions and duties shall be transferred to, and performed by the Authority.

(3) Every decision made under the repealed Act shall continue to have force and effect according to its substance as if it was made under this Act.

(4) The repeal under section 48 shall not be construed as invalidating any process to resolve an investigation begun or undertaken under or in accordance with the provisions of the repealed Act.

(5) Every contract in respect of any matter, being a contract between the Consumer Protection Office as a Government department and any other party immediately before the commencement of this Act shall thereafter continue to subsist between the Authority and such other party.

(6) Any properties, assets, rights, debts, liabilities and obligations of the Government and the benefit and burden of all contracts made by or on behalf of the Government which are part of, or concern or relate to the Consumer Protection Office as a Government department may, with the consent of the Minister, be transferred to and vest in the Authority.

(7) Any legal proceedings pending immediately before the date of commencement of this Act to which the Consumer Protection Office as a Government department was party shall be continued as if the Authority had been party thereto.

(8) The annual financial estimates approved for the Consumer Protection Office in respect of the financial year in which this Act comes into operation shall be deemed to be annual estimates of the Authority for the remainder of the financial year but those estimates may be varied by the Minister in such manner as the Minister may deem appropriate.

(9) Any penalty in respect of an offence under the repealed Act shall be imposed as if this Act had not come into operation, but where, under this Act, the penalty in respect of the offence is reduced or mitigated in relation to the penalty or punishment that would have been applicable before the coming into operation of this Act, the provisions of this Act relating to penalties shall apply.

(10) A public officer employed by the Consumer Protection Office as a Government department immediately before the coming into operation of this Act shall be deemed to be on secondment to the Authority for a period not exceeding 12 months from the coming into operation of this Act.

(11) A public officer seconded to the Authority under subsection (10) who, within 12 months of the coming into operation of this Act —

- (a) has been offered and has accepted to enter into a written contract of service with the Authority shall be deemed to have terminated his or her service with the Government without right to severance pay but without prejudice to all other remunerations and benefits payable upon termination; or
- (b) has not been offered or has not been accepted to enter into a written contract of service with the Authority shall be redeployed by the Government.

(12) A public officer engaged in terms of subsection (11) (a) shall be employed on such terms and conditions as may be offered by the Authority and agreed by the Authority and that person.

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Cap. 27:01
Cap. 27:03

(13) A person referred to in subsection (12) shall be permitted to continue the contribution to the Pension Act or Pensions and Provident Funds Act, or any other enactment in terms of which they are contributing as the Board, with the approval of the Minister, may determine.

(14) Any enquiry or proceedings, whether of a disciplinary nature or otherwise, instituted or pending in respect of any public officer of the Consumer Protection Office as a Government department before the date of commencement of this Act shall be dealt with, inquired into and determined in accordance with the procedures in place before the commencement of this Act.

PASSED by the National Assembly this 13th day of December, 2017.

BARBARA N. DITHAPO,
Clerk of the National Assembly.