
PROVINCE OF WESTERN CAPE

**WESTERN CAPE CONSUMER
AFFAIRS (UNFAIR BUSINESS
PRACTICES) ACT, 2002**

PROVINSIE WES-KAAP

**WES-KAAPSE WET OP
VERBRUIKERSAKE (ONBILLIKE
SAKEPRAKTYKE), 2002**

No 10, 2002

ACT

To provide for the investigation, prohibition and control of unfair business practices; to establish an Office of the Consumer Protector and Consumer Affairs Tribunals; and to provide for matters incidental thereto.

PREAMBLE

WHEREAS consumers have the right not to be exploited;

AND WHEREAS consumers are inadequately protected against consumer abuse in our modern society;

THEREFORE BE IT ENACTED by the Provincial Parliament of the Province of the Western Cape, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates —
- (1) **“arrangement”** means an arrangement or undertaking negotiated and concluded by the office in terms of section 12; 5
 - (2) **“business”** means—
 - (a) offering, supplying or making available a commodity, or
 - (b) soliciting or receiving an investment;
 - (3) **“business practice”** includes— 10
 - (a) an agreement, accord or undertaking in connection with business whether legally enforceable or not, between two or more persons;
 - (b) a scheme, practice or method of trading in connection with business, including a method of marketing or distribution;
 - (c) advertising, a type of advertising or another means of soliciting business; 15
 - (d) an act or omission in connection with business on the part of a person, whether acting in a representative capacity, independently or in concert with another person, and
 - (e) any situation in connection with the business activities of any person or group of persons, 20
but does not include a prohibited practice as regulated by the Competition Act, 1998 (Act 89 of 1998);
 - (4) **“committee”** means the standing committee of the Provincial Parliament responsible for consumer affairs;
 - (5) **“commodity”** means— 25
 - (a) any property, whether corporeal or incorporeal and whether movable or immovable, including any make or brand of commodity, or
 - (b) any service, excluding service due in terms of a contract of employment;
 - (6) **“consumer”** means a person contemplated in section 3(1);
 - (7) **“Consumer Protector”** means the person appointed in terms of section 5(1)(a); 30
 - (8) **“investigation officer”** means an investigating officer appointed in terms of section 10(1) or regarded in terms of section 10(2) to have been so appointed;
 - (9) **“investment”** means any money or other property or any facility intended for use in connection with a venture or scheme for profit, or purported to be so intended; 35

- (10) “**office**” means the Office of the Consumer Protector established in terms of section 4;
- (11) “**prescribed**” means prescribed by regulation in terms of section 30 of this Act;
- (12) “**Province**” means the province of the Western Cape; 5
- (13) “**regulation**” means a regulation made under section 30;
- (14) “**responsible Minister**” means the Minister responsible for economic affairs in the Province;
- (15) “**this Act**” includes a regulation made under this Act;
- (16) “**tribunal**” means an administrative body established in terms of section 14 and known as a Consumer Affairs Tribunal; 10
- (17) “**unfair business practice**” means a 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; 15
 - (c) deceiving any consumer;
 - (d) unfairly affecting any consumer, or
 - (e) unfairly discriminating against any consumer on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth. 20

Application of Act

2. This Act does not apply to any business, business practice or commodity performed or supplied by a person who is a member of a profession that is regulated by a statutorily appointed body. 25

Consumers

3. (1) The following are consumers for the purposes of this Act:
- (a) a natural person to whom a commodity is offered, supplied or made available, if that person does not intend to use the commodity for the purpose of resale, lease, the provision of services or the manufacture of goods for gain; 30
 - (b) a natural person from whom is solicited, or who supplies or makes available, an investment, and
 - (c) a person whom the responsible Minister declares to be a consumer in terms of subsection (2).

(2) The responsible Minister may, with the concurrence of the committee, declare a person to be a consumer by notice in the *Provincial Gazette* and may withdraw, vary or amend such a notice. 35

Establishment of Office of Consumer Protector

4. (1) An office called the Office of the Consumer Protector is hereby established in the Department responsible for economic affairs in the Province. 40

(2) The functions of the office will be performed by the Consumer Protector and his or her office.

Consumer Protector and staff of office

5. (1) Subject to the laws governing the Public Service, the responsible Minister—
- (a) must appoint a person as Consumer Protector; 45
 - (b) may from time to time appoint an acting Consumer Protector to perform the duties of the Consumer Protector whenever the Consumer Protector is for any reason unable to perform those duties or pending the appointment of a person as Consumer Protector.

(2) The staff required for the proper performance of the functions of the office and the administration of this Act is appointed in terms of the Public Service Act, 1994. 50

(3) The Consumer Protector may, in the performance of his or her functions, also be assisted by a person or body whose service the Consumer Protector obtains for the purpose of a particular investigation.

(4) A person or body contemplated in subsection (3) may be paid the remuneration, allowances and expenses determined by the appropriate national department, with the concurrence of the responsible Minister.

Functions of office

6. (1) The office must— 5
- (a) receive and investigate complaints of alleged unfair business practices which have been lodged with the office and dispose of those complaints in terms of this Act, and
 - (b) perform the other functions assigned to it under this Act.
- (2) (a) The office must as soon as practicable after 31 March in each year, submit to the responsible Minister an annual report on its functions during the year ending on that date. 10
- (b) The responsible Minister must table a copy of the annual report in the Provincial Parliament within 14 days after its receipt if the Provincial Parliament is then sitting or, if the Provincial Parliament is not then sitting, within 14 days after the commencement of its next ensuing ordinary sitting. 15

Lodging of complaints with office

7. (1) Any person may lodge a complaint with the office regarding an alleged unfair business practice.
- (2) A complaint contemplated in subsection (1) that is not in writing must be reduced to writing by the office and be confirmed as correct and signed by the complainant. 20

Investigations by office

8. (1) The office may, where a complaint which is not manifestly frivolous or vexatious is lodged, institute any investigation that is necessary into— 25
- (a) an alleged unfair business practice which there is reason to suspect exists or may come into existence, and
 - (b) a business practice or type of business practice, in general or in relation to a particular commodity or investment or any kind of commodity or investment or a particular business or any class or type of business or a particular area, which there is reason to suspect is commonly applied for the purpose of or in connection with the creation or maintenance of unfair business practices. 30
- (2) If the responsible Minister refers a matter contemplated in (1)(a) or (b) to the office, the office must conduct an investigation into that matter.
- (3) The office may by notice in the *Provincial Gazette*, make known any investigation which it is conducting, and state that any person may within a period specified in the notice make written representations regarding the investigation to the office. 35
- (4) The office may, for the purpose of an investigation, take into account any investigation carried out or finding of any measure taken by the Consumer Affairs Committee established in terms of section 2 of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act 71 of 1988), or by the national Minister of Trade and Industry in terms of that Act, or by another competent authority, including an authority in another province. 40
- (5) If the Consumer Protector is of the opinion that a complaint may more appropriately be dealt with by another competent authority, he or she may at any time refer an investigation or aspect thereof to that other authority, including an authority in another province or a national authority: provided that the office may, after consultation with the authority to which the matter has been referred, at any time resume the investigation into that matter. 45
- (6) If any competent authority refers a complaint to the office, the office must conduct an investigation into that complaint. 50
- (7) If the Consumer Protector is of the opinion, at any time during the investigation of a complaint, that no reasonable prospect exists that such investigation will result in the institution of proceedings in a tribunal, he or she may order the termination of the investigation: provided that, if the Consumer Protector becomes aware of facts that in

the Consumer Protector's opinion may warrant the resumption of the investigation, the office may at any time resume the investigation into that matter.

(8) If the office decides not to initiate an investigation, the Consumer Protector must inform the complainant of the office's decision and of the reasons for its decision.

Summons and questioning of persons and production of books and documents 5

9. (1) For purposes of an investigation, the Consumer Protector or a person in the service of the office authorised thereto by the Consumer Protector may—

- (a) summons a person who is believed to be able to furnish any information on the subject of the investigation or to have in his or her possession or custody or under his or her control a book, document or other object relating to that subject, to appear before a person in the service of the office at a time and place specified in the summons, to be questioned or to produce that book, document or other object, and 10
- (b) question that person, under oath or affirmation administered by the Consumer Protector or another person in the service of the office authorised thereto by the Consumer Protector, and examine or retain for further information or for safe custody that book, document or other object. 15

(2) A summons referred to in subsection (1)(a) must—

- (a) be in the prescribed form;
- (b) contain particulars of the matter in connection with which the person concerned is required to appear; 20
- (c) be signed by the Consumer Protector or another person in the service of the office authorised thereto by the Consumer Protector, and
- (d) be served in the prescribed manner.

(3) A person appearing by virtue of subsection (1)(a)— 25

- (a) may be assisted at the examination by a person of his or her choice, and
- (b) is entitled to the prescribed witness fees.

(4) A person is guilty of an offence if he or she, having been summoned in terms of this section, without sufficient cause does any of the following—

- (a) fails 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; 30
- (b) refuses to take the oath or make an affirmation;
- (c) refuses to answer, or to answer fully and satisfactorily to the best of his or her knowledge and belief, any question lawfully put to him or her; 35
- (d) fails to produce a book, document or object in his or her possession or custody or under his or her control, which he or she was required to produce, and
- (e) makes a false statement to the Consumer Protector or other person designated by him or her in the service of the office, knowing such statement to be false or not believing it to be true. 40

(5) A person summoned to appear in terms of this section may not refuse to answer a question or to produce a book, document or object on the ground that he or she would thereby be exposed to a criminal charge: provided that, to the extent that the answer, book, document or object does expose the person to a criminal charge, no evidence thereof is admissible in any criminal proceedings against that person, except where that person stands trial on a charge contemplated in subsection (4)(c) to (e), or in section 319(3) of the Criminal Procedure Act, 1955 (Act 56 of 1955). 45

(6) The law regarding privilege as applicable to a witness giving evidence before, or summoned to produce a book, document or other object to, a High Court, shall apply in relation to any person summoned under this section. 50

Investigation officers

10. (1) The Consumer Protector may appoint persons in the service of the office or other suitable persons as investigating officers.

(2) The Consumer Protector is deemed to be appointed an investigating officer under subsection (1). 55

(3) An investigating officer who is not in the full-time service of the State shall be appointed on the prescribed conditions and remuneration.

(4) An investigating officer must be provided with a certificate of appointment signed by or on behalf of the Consumer Protector, in which it is stated that he or she is an investigating officer appointed in terms of section 10(1) of this Act. 5

(5) An investigating officer must have the certificate of appointment on his or her person when performing a function in terms of this Act.

Search and seizure

11. (1) In order to obtain information required by the office in relation to an investigation an investigating officer may, subject to the provisions of this section, enter premises on or in which a book, document or other object connected with that investigation is or is suspected to be, and may— 10

- (a) inspect or search those premises, and there make the enquiries that are necessary for the purpose of obtaining that information;
- (b) examine an object found on or in the premises which has or might have a bearing on the investigation and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information about that object; 15
- (c) make copies of or extracts from a book or document found on or in the premises which has or might have a bearing on the investigation in question, and request from any person who is suspected of having the necessary information, an explanation of any entry therein, and 20
- (d) seize, against the issue of a receipt, anything on or in the premises which has or might have a bearing on the investigation in question, if the investigating officer needs to retain it for further examination or for safe custody. 25

(2) Unless the owner or person in charge of the premises concerned has consented thereto in writing, an investigation officer may only enter premises and exercise powers contemplated in subsection (1) under a search warrant issued by a judge or magistrate if it appears to that judge or magistrate from information given to such judge or magistrate on oath or solemn affirmation or by sworn affidavit that there are reasonable grounds to suspect— 30

- (a) that an unfair business practice exists or may come into existence, and
- (b) that a book, document or other object which may afford evidence of that unfair business practice is on or in those premises.

(3) A search warrant contemplated in subsection (2) must— 35

- (a) authorise an investigating officer mentioned in the warrant to enter the premises identified in the warrant for the purpose of exercising a power contemplated in subsection (1);
- (b) be executed between the hours of 07:00 and 19:00, unless the judge or magistrate authorises the execution thereof by night, and 40
- (c) be of force until it is executed, cancelled by a judge or magistrate, or a period of one month from the day of issue expires, whichever occurs first.

(4) An investigating officer executing a search warrant under this section must, before its execution—

- (a) show his or her certificate of appointment to a person whose rights may be affected, and 45
- (b) hand a copy of the warrant to that person.

(5) A person from whose possession or charge a book or document has been taken under this section must, as long as it is in the possession or charge of the investigating officer or of the office, be allowed on request to make copies thereof or to take extracts therefrom at any reasonable time at his or her own expense and under the supervision of that investigating officer or a person in the service of the office. 50

(6) A person is guilty of an offence if he or she—

- (a) obstructs or hinders an investigating officer in the performance of his or her functions in terms of this section; 55
- (b) during enquiries made under subsection (1)(a), or having been requested to give information or an explanation under subsection (1)(b) or (c)—
 - (i) without sufficient cause refuses to answer, or to answer fully and satisfactorily to the best of his or her knowledge and belief, such enquiry or request for information, or 60

- (ii) gives an answer or information or an explanation which is false or misleading, knowing it to be false or misleading.

(7) A person from whom information or an explanation is requested in terms of this section is not entitled to refuse to answer a question or to produce a book, document or object on the ground that he or she would thereby be exposed to a criminal charge: 5
provided that, to the extent that the answer, book, document or object does expose the person to a criminal charge, no evidence thereof will be admissible in criminal proceedings against that person, except where that person stands trial on a charge contemplated in subsection (6)(a) or (b), or in section 319(3) of the Criminal Procedure Act, 1955 (Act 56 of 1955). 10

Negotiation of arrangements to discontinue unfair business practice

- 12.** (1) The office may negotiate and conclude an arrangement with any person for—
- (a) the stay or prevention of an unfair business practice;
 - (b) the reimbursement, with interest, of affected consumers;
 - (c) the stay or prevention of any aspect of an unfair business practice, or 15
 - (d) any other matter relating to an unfair business practice.
- (2) An arrangement—
- (a) may be concluded at any time after the institution of an investigation, but before the making of a final order by a tribunal;
 - (b) must be in writing and signed by the parties thereto; 20
 - (c) must, if proceedings have been instituted in terms of section 19 or 21(7), be subject to confirmation by a tribunal in accordance with section 22, and
 - (d) may be confirmed by a tribunal in accordance with section 22 without proceedings having yet been instituted in terms of section 19 or 21(7).

Institution of proceedings upon completion of investigation 25

- 13.** (1) Upon completion of an investigation, the Consumer Protector may institute proceedings in the tribunal of the area concerned—
- (a) against the person alleged to be responsible for the unfair business practice, or
 - (b) with a view to the prohibition of a business practice or type of business practice, in general or in relation to a particular commodity or investment or any kind of commodity or investment or a particular business or any class or type of business or a particular area, which is commonly applied for the purpose of or in connection with the creation or maintenance of unfair business practices. 30
- (2) When the office decides whether or not to institute proceedings, the Consumer Protector must inform the complainant of the decision reached and the reasons for this decision. 35

Establishment of Consumer Affairs Tribunal

- 14.** (1) The responsible Minister must establish one or more Consumer Affairs Tribunals for the Province by notice in the *Provincial Gazette*. 40
- (2) A tribunal must be established for the area defined in that notice.
- (3) The responsible Minister may, in like manner—
- (a) vary such an area, and
 - (b) withdraw such a notice and abolish such a tribunal.
- (4) The seat or seats of a tribunal must be at such place or places as the responsible Minister may from time to time determine in general or in relation to particular proceedings. 45

Appointment of tribunal members

- 15.** (1) Members of a tribunal must be appointed by the responsible Minister in concurrence with the committee. 50
- (2) A tribunal must consist of four persons, namely—
- (a) a chairperson, who must be—
 - (i) a retired judge of the High Court, or
 - (ii) an attorney, advocate, retired magistrate or a lecturer in law at a

university with not less than ten years cumulative experience in one or more such capacities, and

(b) three additional members having special knowledge or experience of consumer advocacy, economics, industry or commerce.

(3) The responsible Minister may appoint an alternate member for every member of a tribunal. 5

(4) The responsible Minister must, by notice in the *Provincial Gazette* and an advertisement in the printed media regarded as appropriate by the responsible Minister, invite interested parties to nominate candidates, within 21 days of the publication of the notice and the advertisement, for consideration as members of a tribunal. 10

(5) The names of the nominees must thereafter be published in the *Provincial Gazette* and the said printed media for comment.

(6) Interviews with nominees are open to the public.

(7) Interviews must be conducted by the responsible Minister, or by an official of the Department duly appointed for this purpose by the responsible Minister, and such members of the committee as the chairperson of the committee, in concurrence with the responsible Minister, may appoint for this purpose. 15

(8) A member and an alternate member of a tribunal must, before assuming office, make or subscribe an oath or a solemn affirmation in the prescribed form before the responsible Minister. 20

(9) A member and an alternate member of a tribunal must be appointed for the period and be paid the remuneration and allowances determined by the responsible Minister, and the remuneration and allowances may vary for different members and alternate members, as determined.

Persons disqualified from being members of tribunals 25

16. (1) A person may not be appointed or remain a member of a tribunal if he or she is not a fit and proper person or—

(a) is not a citizen of the Republic of South Africa residing in the Province;

(b) is a public servant;

(c) at the time is, or during the preceding twelve months was, an office bearer or employee of any party, movement, organisation or body of a party political nature; 30

(d) is an unrehabilitated insolvent;

(e) has at any time been convicted, whether in the Republic or elsewhere, of theft, fraud, forgery or uttering a forged document, perjury, an offence under this Act or the Corruption Act, 1992 (Act 94 of 1992), or any offence involving dishonesty; 35

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

(g) is absent from two or more consecutive meetings of a tribunal without leave of the chairperson. 40

(2) A person may not remain a member of a tribunal if he or she fails to disclose an interest which would require him or her to be recused, unless the responsible Minister, in concurrence with the committee, decides otherwise.

Constitution of tribunal 45

17. (1) Subject to subsection (4), the quorum of a tribunal court consists of three members.

(2) Except where otherwise provided, a decision of the majority of members of a tribunal present is the decision of the tribunal.

(3) A member of a tribunal must recuse himself or herself from proceedings on the grounds of an interest or association likely to affect his or her impartiality with regard to the matter under discussion, or which is likely to be seen to do so. 50

(4) If at any stage during the proceedings before a tribunal—

(a) the chairperson becomes incapable of acting or is absent, the proceedings must begin afresh; 55

(b) any other member sitting in the proceedings becomes incapable of acting or is absent, the proceedings must continue before the remaining members, and

- (c) two or more members become incapable of acting or are absent, the proceedings must begin afresh unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining members.

(5) If the proceedings continue before an even number of members and there is a split decision, the chairperson's decision is decisive. 5

Powers, functions and duties of tribunal

18. (1) A tribunal—

(a) must hear, consider and make a decision on any matter which is before it by virtue of proceedings envisaged by this Act; 10

(b) may award costs, on a scale to be prescribed or in an amount determined by the tribunal, against any person found to have conducted the unfair business practice concerned and to have acted in a fraudulent or grossly unreasonable manner;

(c) may generally deal with all matters necessary or incidental to the performance of its functions under this Act, and 15

(d) must exercise any other powers and perform the functions and duties assigned to it under this Act.

(2) Process of a tribunal runs throughout the Province and orders of a tribunal have force throughout the Province. 20

(3) The responsible Minister must, subject to the laws governing the Public Service, appoint—

(a) a secretary for every tribunal to perform the administrative work incidental to the functions of the tribunal, and

(b) any other persons that are necessary to assist the secretary of a tribunal. 25

Proceedings of tribunals

19. (1) Proceedings before tribunals must be instituted by the Consumer Protector and, except in respect of proceedings instituted in terms of section 21, be instituted by summons in the prescribed form, to be served on the person concerned in any manner that is prescribed, which may include service outside the Province. 30

(2) A tribunal may direct that the public or a member thereof may not attend proceedings of the tribunal or a portion thereof, if this is justified in the interests of—

(a) the conduct of the proceedings or the consideration of the matter in question, or

(b) the protection of the privacy of a person alleged to be involved in the unfair business practice in question or of the confidentiality of information relating to that person. 35

(3) All proceedings of a tribunal are, subject to the provisions of subsection (2), open to the public.

(4) Proceedings before a tribunal must be prosecuted by the office, which may be represented or assisted by an advocate, attorney, or any other person approved by the Consumer Protector. 40

(5) Subject to section 21(4), a person against whom proceedings are instituted or who may be adversely affected by those proceedings, is entitled to participate in the proceedings, and may appear in person or be represented or assisted by an advocate, attorney or any other person. 45

(6) A tribunal must keep a record of its proceedings.

Summoning of witnesses and production of documents

20. (1) For the purpose of ascertaining any matter relating to proceedings before a tribunal, a tribunal may— 50

(a) by summons in the prescribed form and under the hand of the secretary of the tribunal addressed to any person, including the person alleged to have performed the unfair business practice and served in the prescribed manner, require such person to appear before the tribunal at a time and place specified

- in the summons, to give evidence and to produce a book, document or object in the possession or custody or under the control of the person which may be reasonably necessary, material and relevant in connection with those proceedings;
- (b) require such person to take an oath or make an affirmation, and 5
- (c) question such person and examine any book, document or object which he or she was required to produce.
- (2) A person is guilty of an offence if he or she, when summoned in terms of this section, without sufficient cause—
- (a) fails 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 by a tribunal from further attendance; 10
- (b) refuses to take the oath or make an affirmation;
- (c) refuses to answer, or to answer fully and satisfactorily to the best of his or her knowledge or belief, any question lawfully put to him or her; 15
- (d) fails to produce a book, document or object in his or her possession or custody or under his or her control, which he or she was required to produce, or
- (e) makes a false statement before a tribunal knowing such statement to be false or not knowing or believing it to be true.
- (3) A person who is summoned to appear in terms of this section may not refuse to answer a question or to produce a book, document or object on the ground that he or she would thereby be exposed to a criminal charge: provided that, to the extent that the answer, book, document or object does expose the person to a criminal charge, no evidence thereof is admissible in any criminal proceedings against that person, except where that person stands trial on a charge contemplated in subsection (2)(c) to (e), or in section 319(3) of the Criminal Procedure Act, 1955 (Act 56 of 1955). 25
- (4) A person who has attended the proceedings of a tribunal as a witness is entitled to the prescribed witness fee.

Urgent temporary orders

- 21.** (1) A tribunal may, upon presentation of information by the office, issue a temporary order, subject to the provisions of subsection (2) or (3)— 30
- (a) prohibiting a person mentioned in the order from performing an act connected with the unfair business practice in question;
- (b) attaching money or other property or assets, whether corporeal or incorporeal, movable or immovable, held by that person; 35
- (c) making any other order that may be necessary to prevent the prejudice in question, and
- (d) authorising an investigating officer or a person in the service of the office to take the action specified in the order.
- (2) An order contemplated in subsection (1)(a) may not be made unless the tribunal— 40
- (a) has a reasonable suspicion that an unfair business practice exists involving the person under investigation;
- (b) has a reasonable apprehension that without such action a consumer or a group or a class of consumers will be irreparably harmed;
- (c) is satisfied that there is no alternative legal remedy available, and 45
- (d) after considering what is stated above, is satisfied that the prospect of harm to consumers if the order is not granted, outweighs the harm to the interests of the affected person or persons if the order were granted.
- (3) An order contemplated in subsection (1)(b) may not be made unless, in addition to meeting the requirements contained in subsection (2), the tribunal has a reasonable suspicion that the affected person has or will have the intention to defeat the claims of consumers by concealing, dissipating or alienating the money or other property or assets. 50
- (4) Where the interests of justice cannot otherwise be served, an urgent temporary order under this section may be issued without notice to the affected person. 55

(5) An order in terms of subsection (1), and any amendment, withdrawal or extension thereof in terms of subsection (6), must be served on the persons affected thereby, together with the reasons relied upon by the tribunal when issuing that order and a notification of the right of those persons under subsection (6)(a), as well as the right to appeal against the decision of the tribunal in terms of section 26, and, where a tribunal so directs, be made known by notice in the *Provincial Gazette* and in the other media regarded to be appropriate by a tribunal. 5

(6) A temporary order contemplated in subsection (1)—

- (a) may be amended or withdrawn by a tribunal on application by the office or by a person affected thereby, and 10
- (b) remains in force for any period or extended period that a tribunal may from time to time determine, provided that a temporary order still in force at the finalisation of proceedings instituted under section 13(1) or 21(7) may not remain in force beyond that date.

(7) The service of an order in terms of subsection (1) will, where proceedings are not already before a tribunal, be regarded as the institution of proceedings before a tribunal. 15

Confirmation of arrangements negotiated by office

22. (1) The office may apply to a tribunal for confirmation of an arrangement concluded in terms of section 12: provided that where proceedings have been instituted in terms of section 13(1) or 21(7), the Consumer Protector must seek confirmation of any arrangement. 20

(2) A tribunal may, with due regard to the interests of affected consumers, issue an order—

- (a) confirming the arrangement;
- (b) confirming the arrangement with the modifications agreed to by the persons concerned and subject to the conditions agreed to by those persons, as a tribunal may deem fit, or 25
- (c) setting aside that arrangement if, after the persons involved in the arrangement have been given an opportunity to be heard, it is satisfied that the arrangement will not ensure the stay or prevention of the unfair business practice in question, and thereafter continue with proceedings if they have been instituted, or recommend that proceedings be formally instituted if not formally instituted. 30

(3) An order in terms of subsection (2)(a) or (b) must be published in the *Provincial Gazette* and will have the same effect as an order in terms of section 23 or 25. 35

Order by tribunal prohibiting unfair business practice

23. (1) If a tribunal, at the conclusion of any proceedings instituted in the tribunal in terms of section 13(1) or section 21(7), at which a reasonable opportunity to make representations has been afforded to all persons who may be adversely affected by the outcome thereof, is satisfied that an unfair business practice exists or may come into existence and has not confirmed an arrangement as contemplated in section 22(2), a tribunal may issue any order that may be necessary to ensure the stay or prevention of the unfair business practice in question, and that order may, without prejudice to the generality of the foregoing, direct— 40

- (a) a person concerned in the unfair business practice to take any action, including steps for the dissolution of a body, whether corporate or unincorporated, or the severance of a connection or form of association between two or more persons, including such bodies, that may be necessary to ensure the stay or prevention of the unfair business practice, and 45
- (b) a person who is or was party to an agreement, understanding or omission, or who uses or has used advertising or a type of advertising, or applies or has applied a scheme, practice or method of trading, including a method of marketing or distribution, or commits or has committed an act, or brings or has brought about a situation, or has or has had an interest in business or a type of business or derives or has derived any income from a business or type of 50
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- business which is connected with the unfair business practice and which may be specified in the order to—
- (i) terminate or cease to be a party to that agreement, understanding or omission;
 - (ii) refrain from using that advertising or that type of advertising; 5
 - (iii) refrain from applying that scheme, practice or method of trading;
 - (iv) cease to commit that act or to bring about that situation;
 - (v) cease to have an interest in that business or that type of business or to derive income therefrom;
 - (vi) refrain from at any time— 10
 - (aa) becoming a party to any agreement, understanding or omission;
 - (bb) using any type of advertising;
 - (cc) applying any scheme, practice or method of trading, or
 - (dd) committing any act or bringing about any situation of a nature specified in the order, 15
 which a tribunal is satisfied is likely to be applied for purposes of or in connection with the creation or maintenance of an unfair business practice, and
 - (vii) refrain from at any time obtaining any interest in or deriving any income from a business or a type of business specified in the order. 20
- (2) If a tribunal finds that money was accepted from consumers in the course of an unfair business practice, and it is necessary to limit or prevent financial loss to those consumers, a tribunal may—
- (a) order a person to repay that money to the affected consumers, together with interest at the prescribed rate; 25
 - (b) appoint a curator to perform the functions set out in section 24;
 - (c) give directions regarding security which the curator must furnish for the proper performance of his or her duties;
 - (d) determine the powers and duties of the curator, and
 - (e) give directions concerning the performance of the functions of the curator, or the management of the affairs of the person concerned, or any other matter incidental thereto, regarded as necessary. 30
- (3) Irrespective of whether or not money to be recovered from the person involved in the unfair business practice in terms of an order of a court of law has been received by that person, if a tribunal is of the opinion that such an order has the effect of enforcing an unfair business practice, it may make any order that is necessary to restore the consumer to the position he or she would have been in if that unfair business practice had not taken place. 35
- (4) At any time after a tribunal has granted an order in terms of this section, a tribunal may approve the correction of an omission or error or the clarification of a provision in the order if such correction or clarification is necessary, and such a correction or clarification must be made known by notice in the *Provincial Gazette*. 40
- (5) An order of a tribunal in terms of subsection (1)—
- (a) must be made known by notice in the *Provincial Gazette*, and
 - (b) may be made known in any other manner, including a notice in a newspaper or magazine or on radio or television. 45

Functions of curator appointed by tribunal

- 24.** (1) A curator appointed under section 23(2) may, to the extent authorised by a tribunal and subject to any conditions imposed by it—
- (a) realise those assets of the person involved in the unfair business practice in question that are necessary for the reimbursement of the consumers concerned, and distribute them among the consumers; 50
 - (b) take control of and manage all or any part of the business or affairs 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 a tribunal, and any other person vested with the management of the business or affairs of that person shall be divested thereof;
- (c) suspend or restrict, as from the date of his or her appointment as curator or any subsequent date, the right of creditors of the person involved in the unfair business practice to claim or receive any money owing to them by that person until the due performance of the order of a tribunal; 5
 - (d) make payments, transfer property or take steps for the transfer of property of the person involved in the unfair business practice at the time, in the order and in the manner deemed fit by the curator; 10
 - (e) open and maintain banking or similar interest-bearing accounts;
 - (f) enter into agreements on behalf of the person involved in the unfair business practice;
 - (g) convene from time to time, in the manner deemed fit by him or her, a meeting of creditors of the person involved in the unfair business practice for the purpose of establishing the nature and extent of the indebtedness of that person to the creditors and for consultation with the creditors in so far as the curator deems it necessary; 15
 - (h) negotiate with any creditor of the person involved in the unfair business practice with a view to the final settlement of the affairs of that creditor against that person; 20
 - (i) make and carry out, in the course of the management by the curator of the business or affairs of the person involved in the unfair business practice, any decision which in terms of the provisions of the Companies Act, 1973 (Act 61 of 1973), would have been required to be made by means of a special resolution contemplated in section 199 of that Act; 25
 - (j) by public auction, tender or negotiation, dispose of any asset of the person involved in the unfair business practice, including—
 - (i) any advance or loan, or
 - (ii) any asset for the disposal of which approval is necessary in terms of section 228 of the Companies Act, 1973, and 30
 - (k) perform any further incidental or ancillary duties or functions that are necessary to give effect to any order of a tribunal.
- (2) A tribunal may at any time after it has appointed a curator, amend, withdraw or vary a power granted to the curator, and any such amendment, withdrawal and variation may be made known by notice in the *Provincial Gazette*. 35
- (3) At the appointment of a curator—
- (a) the management of the business or affairs of the person involved in the unfair business practice vests in the curator, subject to the supervision of a tribunal, and any other person vested with the management of the business or affairs of that person is divested of that management, and 40
 - (b) the curator must recover and take possession of those assets of the person involved in the unfair business practice that may be necessary.
- (4) A curator who is not in the full-time service of the State must, in respect of the services rendered by him or her, be paid out of the funds of the person involved in the unfair business practice, the remuneration that 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 must be paid from provincial funds any further remuneration and allowances that the responsible Minister may determine. 45
- (5) The curator must report to a tribunal on his or her administration of the business or affairs of the person involved in the unfair business practice and must at the request of the tribunal provide any other information set out in that request. 50
- (6) The curator must 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.

Declaration of certain business practices to be unlawful

25. (1) If a tribunal, pursuant to proceedings instituted in a tribunal in terms of section 13(1) or section 21(7) is satisfied that it is in the public interest that a particular business practice or type of business practice which was the subject of the proceedings in question should be declared unlawful, it may— 5
- (a) declare the business practice or type of business practice concerned, unlawful, either generally or in respect of a particular area, depending upon whether the investigation was of a general nature or was undertaken in relation to a particular area; 10
 - (b) declare an agreement, accord or undertaking or a term thereof void; 10
 - (c) prohibit a person from entering into or being or continuing to be a party to an agreement, arrangement or understanding, or from using advertising, or from applying a scheme, practice or method of trading, or from committing an act or bringing about a situation which was the subject of the proceedings, either wholly or to the extent specified by a tribunal or subject to a condition or exemption so specified or to an exemption contemplated in subsection (4), and 15
 - (d) regulate a business practice or type of business practice which was the subject of the proceedings by determining conditions or requirements to be complied with in respect thereof. 20
- (2) An order of a tribunal in terms of subsection (1)—
- (a) must be made known by notice in the *Provincial Gazette*, and
 - (b) may be made known in any other manner, including a notice in a newspaper or magazine or on radio or television.
- (3) A notice under subsection (1) may at any time, on application by the Consumer Protector after further investigation by the office, be withdrawn by a tribunal or be amended by it in a manner that is fitting. 25
- (4) A tribunal may, on application by a person and after hearing the Consumer Protector and any other interested person, grant exemption from a provision, condition or requirement contemplated in subsection (1), to the extent and for the period and subject to the conditions specified in the exemption. 30
- (5) The provisions of section 23(2) shall *mutatis mutandis* apply to an order, a withdrawal or an amendment or exemption contemplated in this section.
- (6) The person or body seeking an order in terms of subsection (3) or (4) must make that intention known by notice in the *Provincial Gazette*, and interested persons must be invited to make objections to such an order. 35

Appeal

26. (1) Subject to section 13(1)(b) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act 71 of 1988), there may be an appeal from any decision of a tribunal to the special court established in terms of section 13(2) of that Act. 40
- (2) If an appeal is lodged with the special court in respect of a decision of a tribunal under section 21(1) of this Act, the operation of that decision may not be suspended unless the special court hearing that appeal, on application by the appellant concerned, so directs.

Giving of notice to competent authorities of unfair business practices and offences 45

27. (1) The Consumer Protector must, if there is reason to suspect that an unfair business practice which is or was the subject of an investigation by the office, exists or may come into existence somewhere in the Republic outside the Province, furnish the Consumer Affairs Committee established in terms of section 2 of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act 71 of 1988), and any competent authority in the province concerned with particulars of the business practice in question and any relevant information which became known in the course of investigations by the office or proceedings before a tribunal. 50
- (2) The Consumer Protector must, if there is reason at any time during or after the completion of an investigation to suspect that there has been or is being committed, or that an attempt has been or is being made to commit— 55

- (a) an offence, notify the Director of Public Prosecutions concerned accordingly, and
- (b) a serious economic offence as defined in the Investigation of Serious Economic Offences Act, 1991 (Act 117 of 1991), lay the matter in question before the Director of the Office for Serious Economic Offences in the manner provided in section 4 of that Act. 5

Confidentiality

28. (1) An investigating officer, a person in the service of the office, a member of a tribunal, a curator or a person contemplated in section 5 or 20 may not disclose information acquired by him or her in the exercise or performance of powers, functions or duties in terms of this Act, except— 10

- (a) in so far as may be necessary for the purpose of the due and proper exercise or performance of a power, function or duty in terms of this Act, or
- (b) on the order of a court of law.

Limitation of liability 15

29. A person, including the State, will not be liable for anything done in good faith under this Act.

Regulations

30. (1) The responsible Minister must, with the concurrence of the committee and after consultation with the chairpersons of tribunals, make regulations relating to— 20

- (a) the practice and proceedings of tribunals;
- (b) any matter which in terms of this Act is required or permitted to be prescribed, and
- (c) any matter in general which is considered necessary or expedient to prescribe in order to achieve the objects of this Act. 25

(2) The responsible Minister must, not less than one month before any regulation is made, cause the text of such regulation to be published in the *Provincial Gazette*, together with a notice declaring the intention to make that regulation and inviting interested persons to furnish comments or make representations which they may wish to furnish or make in regard thereto. 30

(3) The provisions of subsection (2) shall not apply in respect of a regulation which, after the provisions of that subsection have been complied with, is amended by the responsible Minister after consultation with the chairpersons of the tribunals in consequence of comments or representations received on behalf of the responsible Minister in pursuance of such compliance. 35

Offences in relation to prohibited business practices

31. A person who contravenes or fails to comply with an order of a tribunal which has been made known by notice in the *Provincial Gazette*, is guilty of an offence.

Penalties

32. A person who is convicted of an offence in terms of this Act is liable, in the case of an offence referred to in— 40

- (1) section 31, 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, and
- (2) any other provision of this Act, to a fine not exceeding R100 000 or to imprisonment for a period not exceeding 12 months, or to both that fine and that imprisonment. 45

State bound

33. This Act binds the State, except in so far as criminal liability is concerned.

Waiver of benefits

34. Any agreement or contractual term purporting to exclude the provisions of this Act or to limit their application is void. 5

Civil remedies

35. (1) A provision of this Act may not be construed as depriving a person of any civil remedy.

(2) If a person seeks to rely on or enforce an alleged unfair business practice in proceedings before a civil court, that court may, on application by a party to those proceedings, stay those proceedings in the interests of justice until a tribunal has come to a decision in terms of this Act. 10

Short title and commencement

36. (1) This Act is called the Western Cape Consumer Affairs (Unfair Business Practices) Act, 2002. 15

(2) This Act comes into operation on a date determined by the Premier by proclamation in the *Provincial Gazette* and different dates may be determined for the coming into operation of different sections of this Act.