



**FREE STATE PROVINCE**

# **PROVINCIAL GAZETTE**

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# **PROVINSIALE KOERANT**

**PROVINSIE VRYSTAAT**

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OFFICE OF THE PREMIER	KANTOOR VAN DIE PREMIER
No. 14 19 June 1998	No. 14 19 Junie 1998
It is hereby notified that the Premier has assented to the following Act which is hereby published for general information:-	Hierby word bekend gemaak dat die Premier die onderstaande Wet bekragtig het, wat hierby ter algemene inligting gepubliseer word:-
No. 14 of 1998: Free State Consumer Affairs (Unfair Business Practices) Act, 1998	No. 14 van 1998: Vrystaat Wet op Verbruikersake (Onbillike Sakepraktyke), 1998

# ACT

To provide for the investigation, prohibition and control of unfair business practices in the interest of the protection of consumers, and for that purpose to establish an Office for the Investigation of Unfair Business Practices and a Consumer Affairs Court; to amend the laws governing local authorities so as to authorise local authorities to establish consumer advice offices; and to provide for matters connected therewith.

**BE IT ENACTED** by the Provincial Legislature of the Free State Province, as follows:-

*(English text signed by the Premier.)  
(Assented to 15 June 1998.)*

## Definitions

1. In this Act, unless the context otherwise indicates -

“arrangement” means an arrangement or undertaking negotiated and concluded by the office under section 11;

“business” means any business, undertaking or person -

(a) who offers, supplies or makes available any commodity; or

(b) who solicits, or to whom is supplied or made available, any investment;

“business practice” includes -

(a) any agreement, accord, arrangement, understanding or undertaking, whether legally enforceable or not, between two or more persons;

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

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

(d) any act or omission on the part of any person, whether acting independently or in concert with any other person; and

(e) any situation arising out of the activities of any person or group of persons,

but does not include a restrictive practice, acquisition or monopoly situation as defined in section 1 of the Maintenance and Promotion of Competition Act, 1979 (Act No 96 of 1979);

“commodity” means any property, whether corporeal or incorporeal and whether movable or immovable, including any make or brand of commodity and any service, whether personal, professional or otherwise, including any storage, transportation, insurance or banking service, but excluding service due in terms of a contract of employment;

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“consumer” means a person envisaged in section 2(1);

“Consumer Protector” means a person appointed in terms of section 4(1)(a);

“court” means the Consumer Affairs Court established under section 13;

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“investigating officer” means an investigating officer appointed under section 9(1) or deemed in terms of section 9(2) to have been so appointed;

“investigation” means an investigation by the office as contemplated in section 7;

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“investment” means any money or other property, or any facility, intended for use in connection with any venture or scheme for the acquisition of gain, or purported to be so intended;

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“office” means the Office for the Investigation of Unfair Business Practices established by section 3;

“prescribed” means prescribed by regulation;

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“Province” means the Free State Province;

“regulation” means a regulation made under section 28;

“responsible Member” means the member of the Executive Council of the Province responsible for Finance, Expenditure and Economic Affairs;

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“this Act” includes the regulations;

“unfair business practice” means any business practice which, directly or indirectly, has or is likely to have the effect of prejudicing unreasonably or deceiving any consumer.

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## Consumers

2. (1) The following shall be consumers for purposes of this Act:
- (a) Any natural person to whom any commodity is offered, supplied or made available where that person does not intend to apply the commodity for the purposes of resale, lease, the provision of services or the manufacture of goods for gain; 5
  - (b) any natural person from whom is solicited, or who supplies or makes available, any investment; and 10
  - (c) any other person whom the responsible Member declares to be a consumer in terms of subsection (2). 15
- (2) The responsible Member may, with the concurrence of the committee, declare any person to be a consumer by notice in the *Provincial Gazette* and may withdraw, vary or amend any such notice.

## Establishment of Office for the Investigation of Unfair Business Practices 20

3. (1) There is hereby established, in the Department of Finance, Expenditure and Economic Affairs of the Province, an office called the Office for the Investigation of Unfair Business Practices. 25
- (2) The functions of the office shall be performed by the Consumer Protector.

## Consumer Protector and staff of office

4. (1) Subject to the laws governing the public service, the responsible Member - 30
- (a) shall appoint a person as Consumer Protector;
  - (b) may from time to time appoint an acting Consumer Protector, to discharge the duties of the Consumer Protector whenever the Consumer Protector is for any reason unable to perform those duties or while the appointment of a person as Consumer Protector is pending; and 35

- (c) may appoint one or more persons to assist with the performance of the functions of the office, subject to the control and directions of the Consumer Protector.
- (2) The Consumer Protector shall in the performance of his or her functions also be assisted by any person or body whose service is obtained by him or her for the purposes of a particular investigation. 5
- (3) A person contemplated in subsection (2) shall be paid such remuneration, allowances and expenses as the Consumer Protector, with the concurrence of the responsible Member may determine. 10

#### Functions of office

- 5. (1) The office shall - 15
  - (a) receive and investigate complaints of alleged harmful business practices which have been lodged with the office as contemplated in section 6, and dispose of such complaints in terms of this Act; and 20
  - (b) perform the other functions assigned to it by or under this Act.
- (2) (a) The office shall as soon as practicable after 31 December in each year submit to the responsible Member a report on its functions during the year ending on that date. 25
- (b) The responsible Member shall lay a copy of the annual report submitted in terms of subsection (1) upon the table in the Provincial Legislature within 14 days after its receipt if the Legislature is then sitting or, if the Legislature is not then sitting, within 14 days after the commencement of its next ensuing ordinary sitting. 30

#### Lodging of complaints with office

- 6. (1) Any person may lodge a complaint with the office regarding an alleged unfair business practice. 35
- (2) A complaint contemplated in subsection (1) which is not in writing shall be reduced to writing by the office.

## Investigations by office

7. (1) The office may, whether or not a complaint has been lodged in terms of section 6, institute such investigation as may be necessary into - 5
- (a) any unfair business practice which there is reason to suspect exists or may come into existence; 10
- (b) any 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, and which there is reason to suspect is commonly applied for the purposes of or in connection with the creation or maintenance of unfair business practices. 15
- (2) If the responsible Member refers a matter contemplated in subsection (1) to the office, the office shall conduct an investigation into that matter. 20
- (3) The office may by notice in the *Provincial Gazette* make known any investigation which it is conducting, and that any person may within a period specified in the notice make written representations regarding the investigation to the office. 25
- (4) The office may, for the purposes of an investigation, have regard to any investigation, finding or measure taken by the Business Practices Committee established by section 2 of the Harmful Business Practices Act, 1988 (Act No 71 of 1988), or the Minister of Trade and Industry in terms of that Act, or by any competent authority in another province. 30
- (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 any investigation or aspect thereof to such other authority, including an authority in another province: Provided that the office may at any time resume the investigation in relation to that matter. 35

## Summoning and questioning of persons and production of books and documents 35

8. (1) For the purposes of an investigation, the Consumer Protector or a person in the service of the office authorised by him or her may -

- (a) summon any 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 under his or her control any 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 5
  - (b) question that person, under oath or affirmation administered by the Consumer Protector or another person in the service of the office authorised by the Consumer Protector, and examine or retain for further information or for safe custody such a book, document or other object. 10
- ✕ (2) A summons referred to in subsection (1)(a) shall -
- (a) be in the prescribed form; 15
  - (b) contain particulars of the matter in connection with which the person concerned is required to appear;
  - (c) be signed by the Consumer Protector or another person in the service of the office authorised by the Consumer Protector; and 20
  - (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 any person of his or her choice;
  - ✕ (b) shall be entitled to the prescribed witness fees. 30
- (4) A person shall be guilty of an offence if he or she, having been summoned in terms of this section -
- (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 he or she has been excused from further attendance; 35
  - (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;
  - (d) fails to produce any 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 5
  - (e) makes a false statement to the Consumer Protector or other person in the service of the office designated by the Consumer Protector, knowing such statement to be false or not knowing or believing it to be true. 10
- (5) A person who has been summoned to appear in terms of this section shall not be entitled to refuse to answer any question or to produce any book, document or object on the ground that he or she would hereby be exposed to a criminal charge: Provided that, to the extent that such answer, book, document or article does expose the person concerned to a criminal charge, no evidence thereof shall be 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 No 56 of 1955). 15  
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### Investigating officers

9. (1) The Consumer Protector may appoint person in the service of the office or any other suitable persons as investigating officers. 25
- (2) The Consumer Protector shall be deemed to have been appointed as an investigating officer under subsection (1).
- (3) An investigating officer who is not in the full-time service of the State shall be appointed on such conditions and at such remuneration as the responsible Member may determine. 30
- (4) An investigating officer shall be provided with a certificate of appointment signed by or on behalf of the Consumer Protector and in which it is stated that he or she is an investigating officer appointed in terms of this Act. 35
- (5) An investigating officer shall, when performing any function in terms of this Act, have his or her certificate of appointment in his or her possession.



## Search and seizure

10. (1) In order to obtain any information required by the office in relation to an investigation, an investigating officer may, subject to the provisions of this section, enter any premises on or in which any book, document or other object connected with that investigation is or is suspected to be, and may - 5
- (a) inspect or search those premises, and there make such inquiries as may be necessary for the purpose of obtaining any such information; 10
  - (b) examine any object found on or in the premises which has or might have a bearing on the investigation in question, 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 regarding that object; 15
  - (c) make copies of or extracts from any 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; 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 investigating officer shall enter premises and exercise any power contemplated in subsection (1), only under a search warrant, which may only be issued by the court if it appears to the court from information given to the court on oath or solemn affirmation 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 such unfair business practice is on or in those premises. 35
- (3) A search warrant contemplated in subsection (2) shall -
- (a) authorise an investigating officer mentioned in the warrant to enter the premises identified in the warrant for the purpose of exercising any power contemplated in subsection (1); 40

- (b) be executed by day, unless the court authorises the execution thereof by night;
  - (c) be of force until it is executed, cancelled by the court, or a period of one month from the day of its issue expires, whichever occurs first. 5
- (4) An investigating officer executing a search warrant under this section shall, before such execution, upon demand by any person whose rights may be affected -
  - (a) show that person his or her certificate of appointment; 10
  - (b) hand to that person a copy of the warrant.
- (5) A person from whose possession or charge a book or document has been taken under this section shall, as long as it is in the possession or charge of the investigating officer concerned 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. 15
- (6) A person shall be guilty of an offence if he or she - 20
  - (a) obstructs or hinders an investigating officer in the performance of his or her functions in terms of this section; 25
  - (b) when an enquiry has been made of him or her under subsection (1)(a), or if he or she has been requested to furnish information or an explanation under subsection (1)(b) or (c) -
    - (i) 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 30
    - (ii) gives an answer or information or an explanation which is false or misleading, knowing it to be false or misleading. 35
- (7) A person from whom information or an explanation has been requested in terms of this section shall not be entitled to refuse to answer any question or to produce any 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 such answer, book, document or article does expose the person concerned to a criminal charge, no evidence thereof shall be admissible in any criminal proceedings against that person, except where that person stands trial on a charge of contravening any provision of this section. 40

### **Negotiation of arrangements to discontinue unfair business practice**

- 11.** (1) The office may negotiate and conclude an arrangement with any person for-
- (a) the discontinuance or avoidance of an unfair business practice; 5
  - (b) the reimbursement, with interest, to affected consumers;
  - (c) the discontinuance or avoidance of any aspect of an unfair business practice; or 10
  - (d) any other matter relating to the unfair business practice.
- (2) An arrangement - 15
- (a) may be concluded at any time after the institution of an investigation, but before the making of a final order by the court;
  - (b) shall be in writing and signed by the parties concerned; and 20
  - (c) shall be subject to confirmation by the court in accordance with section 21.

### **Institution of proceedings after completion of investigation**

- 12.** (1) Upon the completion of an investigation, the Consumer Protector - 25
- (a) shall furnish the responsible Member with a report on the findings of such investigation; and
  - (b) may institute proceedings in the court of the area concerned- 30
    - (i) against the person alleged to be responsible for the unfair business practice in question; or
    - (ii) generally, with a view to the prohibition of any 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 type of business or a particular area, and which is commonly applied for the purposes of or in connection with the creation or maintenance of unfair business practices. 35 40

- (2) If the office decides not to institute proceedings, the Consumer Protector shall inform the complainant.

### Establishment of Consumer Affairs Court

13. (1) The responsible Member shall, by notice in the *Provincial Gazette*, establish one or more Consumer Affairs Courts for the Province. 5
- (2) A court shall be established for an area defined in such notice. 10
- (3) The responsible Member may, in like manner -
- (a) vary any such area;
- (b) withdraw such a notice and abolish any such court. 15
- (4) The seat or seats of a court shall be at such place or places as the responsible Member may from time to time determine in general or in relation to particular proceedings. 20

### Composition of court

14. (1) A court shall consist of three or five persons appointed by the responsible Member, namely - 25
- (a) a chairperson, who shall be -
- (i) a retired judge of the High Court; or
- (ii) an attorney, advocate, retired magistrate or lecturer in law at a university, with not less than ten years' cumulative experience in one or more such capacities; 30
- (b) four additional members, having special knowledge or experience of consumer advocacy, economics, industry or commerce. 35
- (2) The responsible Member may appoint an alternate member for every member of the court.

- (3) To enable the responsible Member to make the appointments contemplated in subsections (1) and (2), the responsible Member shall cause a notice to be published in the *Provincial Gazette* and an advertisement in the printed media inviting interested persons to submit within a specified period, which shall not be shorter than one month after such publication, nominations for such appointments. 5
- (4) A member and alternate member of the court shall, before assuming office, make and subscribe an oath or solemn affirmation in the prescribed form before the responsible Member. 10
- (5) A member and alternate member of the court shall -
- (a) be appointed for such period as the responsible Member may determine; and 15
- (b) be paid such remuneration and allowances as the responsible Member may determine, 20
- and different periods, remuneration and allowances may be so determined in respect of different members and alternate members. 20

#### **Persons disqualified from being members of court**

15. (1) No person shall be appointed or remain a member or alternate member of a court if such person - 25
- (a) is a public servant;
- (b) at the relevant time is, or during the preceding 12 months was, an office-bearer or employee of any party, movement, organisation or body of a party political nature; 30
- (c) is an unrehabilitated insolvent;
- (d) 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 No 94 of 1992), or any offence involving dishonesty; 35
- (e) is a member of Parliament, any provincial legislature or local authority, or any council, commission or house of traditional leaders established in terms of the Constitution; or 40

- (f) has at any time been removed from an office of trust on account of misconduct or dishonourable conduct.
- (2) No person shall remain a member of the court if he or she fails to disclose an interest which would require him or her to be recused as contemplated in section 16(3). 5

### **Constitution of court**

- 16. (1) Subject to subsection (4), the quorum of a court shall be three members. 10
- (2) Except where otherwise provided, a decision of the majority of members of a court present shall be the decision of the court.
- (3) A member of a court shall recuse himself or herself from proceedings on the grounds of any interest or association likely to affect his or her impartial consideration of the matter, or which is likely to be seen to do so. 15
- (4) If at any stage during the proceedings before a court - 20
  - (a) the chairperson becomes incapable of acting or is absent, the proceedings shall begin afresh; 20
  - (b) any other member becomes incapable of acting or is absent, the proceedings shall continue before the remaining members; and 25
  - (c) two or more other members become incapable of acting or are absent, the proceedings shall begin afresh unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of remaining members. 30
- (5) In the event that the proceedings continue before an even number of members and there is a split decision, the chairperson's decision shall be decisive.

### **Functions, powers and duties of court** 35

- 17. (1) A court -
  - (a) shall hear, consider and make a decision on any matter which is before the court; 40

- (b) may award costs, on a scale to be prescribed or for an amount determined by the court, against any person found to have conducted the unfair business practice concerned and who is found to have acted fraudulently or grossly unreasonably; 5
  - (c) may generally deal with all matters necessary or incidental to the performance of its functions under this Act; and
  - (d) shall exercise any other powers, and perform the functions and duties assigned to it by this Act. 10
- (2) Orders of the court shall have legal force throughout the Province.
- (3) The responsible Member shall, subject to the laws governing the public service, appoint - 15
- (a) a clerk of the court to perform the administrative work incidental to the functions of the court; and
  - (b) such other persons to assist the clerk of the court as may be necessary. 20

### Proceedings of court

18. (1) Proceedings before a court shall, except in cases contemplated in section 12 and 20, be initiated by summons in the prescribed form which shall be served on the person concerned in the prescribed manner, which may include service outside the Province. 25
- (2) All proceedings of the court shall, subject to the provisions of subsection (3), be open to the public. 30
- (3) A court may direct that the public or any member thereof may not attend any proceedings of the court or any portion thereof, if this is justified in the interests of - 35
- (a) the conduct of the proceedings or the consideration of the matter in question; or
  - (b) the protection of the privacy of any person alleged to be involved in the harmful business practice in question or of the confidentiality of any information relating to that person. 40
- (4) Proceedings before a court shall be prosecuted by the office, who may be represented or assisted by an advocate, attorney or other person approved by the responsible Member. 45

- (5) A person who may be adversely affected by the proceedings shall be entitled to participate in the proceedings.
- (6) Any person against whom proceedings are instituted or who may be adversely affected by such proceedings may appear in person or be represented or assisted by an advocate, attorney or any other person. 5
- (7) A court shall keep a record of its proceedings.

**Summoning of witnesses and production of documents** 10

19. (1) For the purpose of ascertaining any matter to proceedings before a court, the court may -
- (a) by summons addressed to any person in the prescribed form under the hand of the clerk to the court, and served in the prescribed manner, require such person to appear before the court at a time and place specified in such summons, to give evidence and to produce any book, document or object in the possession or custody or under the control of such person and which may be reasonably necessary, material and relevant in connection with those proceedings; 15 20
  - (b) require such person to take an oath or make an affirmation; and
  - (c) question such person and examine any book, document or object which he or she has been required to produce. 25
- (2) A person shall be guilty of an offence if he or she, having been summoned in terms of this section - 30
- (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 he or she has been excused by the court from further attendance; 35
  - (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; 40
  - (d) fails to produce any 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 the court knowing such statement to be false or not knowing or believing it to be true.
- (3) A person who has been summoned to appear in terms of this section shall not be entitled to refuse to answer any question or to produce any 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 such answer, book, document or article does expose the person concerned to a criminal charge, no evidence thereof shall be 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 No 56 of 1955).
- (4) A person who has attended the proceedings of a court as a witness shall be entitled to the prescribed witness fee.

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### **Urgent temporary orders**

20. (1) A court may, if it is satisfied from information placed before it by the office that circumstances relating to a particular matter which is the subject of an investigation render that matter urgent in that irreparable prejudice would be caused if the matter were only to be dealt with by the court at proceedings in due course, issue a temporary order -
- (a) prohibiting any person mentioned in the order from performing any act connected with the unfair business practice in question;
- (b) attaching any money or other property or assets, whether corporeal or incorporeal, movable or immovable, which is held by any person;
- (c) making any order that may be necessary to prevent the prejudice in question; or
- (d) authorising an investigating officer or person in the service of the office to take any action specified in the order that may be necessary to prevent the unfair business practice in question.
- (2) A temporary order contemplated in subsection (1) -
- (a) may be amended or withdrawn by the court on application by the office or by a person affected thereby on good cause shown; and

- (b) shall, unless it is withdrawn, remain in force until the final determination by the court of the matter at proceedings in due course.
- (3) An order in terms of subsection (1), and any amendment or withdrawal thereof in terms of subsection (2)(a), shall be made known by notice in the *Provincial Gazette* and in such other media as the court may deem appropriate. 5

#### **Confirmation of arrangements negotiated by office**

21. (1) The office shall apply to a court for confirmation of an arrangement concluded by it as contemplated in section 11. 10
- (2) The court may, after the person concerned has been given an opportunity to be heard, with due consideration of the interests of affected consumers, issue an order - 15
- (a) confirming the arrangement;
  - (b) confirming the arrangement, with such modifications as may be agreed to by the person concerned, and subject to such conditions as may be agreed to by that person, as the court may deem fit; or 20
  - (c) setting aside the arrangement, if it is satisfied that the arrangement will not ensure the discontinuance or avoidance of the harmful business practice in question. 25
- (3) An order under subsection (2) shall be published in the *Provincial Gazette* and shall have the same effect as an order under section 22.

#### **Order by court prohibiting unfair business practice 30**

22. (1) If a court is satisfied that an unfair business practice exists or may come into existence, and has not confirmed an arrangement as contemplated in section 19(2)(a), the court may issue such order as may be necessary to ensure the discontinuance or prevention of the unfair business practice in question, and such order may, without prejudice to the generality of the foregoing, direct - 35
- (a) any person concerned in the unfair business practice to take such action, including steps for the dissolution of any body, corporate or unincorporate, or the severance of any connection or form of association between two or more persons, including such bodies, as may be necessary to ensure the discontinuance or prevention of the unfair business practice; 40

- (b) any person who is or was party to an agreement, understanding or omission, or who uses or has used any advertising or type of advertising, or applies or has applied a scheme, practice or method of trading, including any method of marketing or distribution, or commits or has committed an act, or brings or has brought about a situation, or has or had any interest in a business or type of business or derives or derived any income from a business or type of business which is connected with the said unfair business practice and which may be specified in the order, to - 5
- (i) terminate or cease to be a party to that agreement, understanding or omission; 10
- (ii) refrain from using that advertising or type of advertising;
- (iii) refrain from applying that scheme, practice or method of trading; 15
- (iv) cease to commit that act or to bring about that situation;
- (v) cease to have any interest in that business or type of business or to derive any income therefrom; 20
- (vi) refrain from at any time -
- (aa) becoming a party to any agreement, understanding or omission; 25
- (bb) using any type of advertising;
- (cc) applying any scheme, practice or method of trading; or 30
- (dd) committing any act or bringing about any situation, of a nature specified in the order and which the court is satisfied is likely to be applied for the purposes of or in connection with the creation or maintenance of any unfair business practice; 35
- (vii) refrain from at any time obtaining any interest in or deriving any income from a business or type of business specified in the order.

- (2) If the court finds that money was received from consumers in the course of an unfair business practice, and it is necessary to limit or prevent financial loss to those consumers, the court may -
- (a) order any person to repay such money to the affected consumers, together with interest at the prescribed rate; 5
  - (b) appoint a curator to perform the functions set out in section 23;
  - (c) give directions regarding any security which the curator shall furnish for the proper performance of his or her duties; 10
  - (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, as may be deemed necessary. 15
- (3) Notwithstanding the fact that the monies to be recovered have been received by the person involved in the unfair business practice in terms of an order of a court of law, if the court is of the opinion that such an order has the effect of enforcing an unfair business practice, it may make such order as may be necessary to restore the consumer to the position he or she would have been in if no such unfair business practice had taken place. 20
- (4) At any time after the court has granted an order in terms of this section, the court may approve of the correction of an omission or error or the clarification of any provision in the order if such correction or clarification is necessary, and any such correction or clarification shall be made known by notice in the *Provincial Gazette*. 25
- (5) An order of the court in terms of subsection (1) -
- (a) shall be made known by notice in the *Provincial Gazette*; and 30
  - (b) may be made known in any other manner, including a notice in a newspaper or magazine or on the radio or television. 35

### Functions of curator appointed by court

23. (1) A curator appointed under section 22(2) may, subject to the provisions of this section, realize the assets of the person involved in the unfair business practice in question and distribute them among the consumers concerned, and take control of and manage the whole or any part of the business of such a person. 5
- (2) The powers and duties of the curator shall be determined by the court, which may give directions - 10
- (a) regarding any security which the curator shall furnish for the proper performance of his or her duties; and
- (b) concerning the performance by such curator of his or her duties and functions, or the management of the affairs of the person concerned, or any other matter incidental thereto, as may be deemed necessary. 15
- (3) A curator who is not in the full-time service of the State shall out of the funds of the person involved in the unfair business practice, in respect of the services rendered by him or her, be paid such remuneration as the responsible Member, with the concurrence of the chairperson of the court, may determine : 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 provincial funds such further remuneration and allowances as the responsible Member may determine. 20 25
- (4) A court may empower the curator, subject to any condition which the court may impose, to -
- (a) 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; 30
- (b) make payments, transfer property or take steps for the transfer of property to any creditor of the person involved in the unfair business practice at such time, in such order and in such manner as the curator may deem fit; 35

- (c) cancel any agreement between the person involved in the unfair business practice and any other party : Provided that where the arrangement so cancelled is a lease of movable or immovable property entered into by the person involved in the unfair business practice prior to the appointment of a curator, a claim for damages in respect of such cancellation may be instituted against that person after the expiration of one year as from the date of such cancellation unless the court grants permission that such claim may be instituted before the expiry of such period; 5
- (d) enter into agreements on behalf of the person involved in the unfair business practice; 10
- (e) convene from time to time, in such manner as he or she may deem fit, 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 such creditors and for consultation with such creditors in so far as the curator deems it necessary; 15
- (f) negotiate with any creditor of the person involved in the unfair business practice with a view to the final settlement of the affairs of such creditors against that person; 20
- (g) make and carry out, in the course of the management by the curator of the affairs of the person involved in the unfair business practice, any decision which in terms of the provisions of the Companies Act, 1973 (Act No 61 of 1973), would have been required to be made by way of a special resolution contemplated in section 199 of that Act; and 25
- (h) dispose, by public auction, tender or negotiation, of any asset of the person involved in the unfair business practice, including - 30
  - (i) any advance or loan; or
  - (ii) any asset approval for the disposal of which is necessary in terms of section 228 of the Companies Act, 1973. 35
- (5) The court may at any time, amend or withdraw any power granted under subsection (4).

- (6) At the appointment of a curator -
- (a) the management of the business of affairs of the person involved in the unfair business practice shall vest in the curator, subject to the supervision of the court, and any other person vested with the management of the affairs of that person shall be divested thereof; and 5
  - (b) the curator shall recover and take possession of all the assets of the person involved in the unfair business practice. 10
- (7) A curator shall act in the best interest of the clients, debtors and creditors of the person placed under curatorship. 10
- (8) The curator shall report to the court on his or her administration of the affairs of the person involved in the unfair business practice, and shall at the request of the court provide any other information set out in that request. 15
- (9) The curator shall keep 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. 20

#### **Declaration of certain business practices to be unlawful**

24. (1) If a court, pursuant to proceedings instituted in the court in terms of section 12(b)(ii), is satisfied that it is in the public interest that any particular business practice or type of business practice which was the subject of the proceedings in question should be declared to be unlawful, it may - 25
- (a) declare to be unlawful the business practice or type of business practice concerned, 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; 30
  - (b) declare any agreement, accord or undertaking, or terms thereof to be void;
  - (c) prohibit any 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 from bringing about a situation which was the subject of the proceedings, either wholly or to the extent specified by the court, or subject to a condition or exemption so specified or to an exemption contemplated in subsection (3); 35 40

- (d) regulate any business practice or type of business practice which was the subject of the proceedings, by prescribing conditions or requirements which must be complied with in respect thereof.
- (2) A notice under subsection (1) may at any time, on application by the Consumer Protector after further investigation by the office, be withdrawn by the court or be amended by it in such manner as may be fitting. 5
- (3) The court may, on application by any person and after hearing the Consumer Protector, grant exemption from a provision, condition or requirement contemplated in subsection (1), to such extent and for such period and subject to such conditions as may be specified in the exemption. 10
- (4) The provisions of section 22(2) shall *mutatis mutandis* apply in relation to an order, withdrawal, amendment or exemption contemplated in this section. 15
- (5) The person or body seeking any order in terms of subsection (2) or (3) shall make their intention known by notice in the *Provincial Gazette*, and interested persons shall be invited to make objections to any such order. 20

## Appeal

25. There shall be an appeal on any decision of the court to the special court established in terms of section 13 of the Harmful Business Practices Act, 1988 (Act No 71 of 1988). 25

## Giving of notice to competent authorities of harmful business practices and offences

26. (1) The Consumer Protector shall, 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 elsewhere in the Republic other than in the Province, furnish the Business Practices Committee established by section 2 of the Harmful Business Practices Act, 1988 (Act No 71 of 1988), and any competent authority in the Province concerned, with particulars of the business practice in question and any relevant information relating thereto which became known in the course of investigations by the office or of proceedings before the court. 30
- (2) The Consumer Protector shall, 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 - 35
- (a) an offence, notify the attorney-general concerned accordingly; 40



- (b) a serious economic offence as defined in the Investigation of Serious Economic Offences Act, 1991 (Act No 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.

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### Confidentiality

27. No investigating officer, person in the service of the office, member of the court, or person contemplated in section 4(2) or 19(2) shall disclose any information acquired by him or her in the exercise or performance of any powers, functions or duties in terms of this Act, except -

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

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### Regulations

28. (1) The responsible Member may, with the concurrence of a committee of the Provincial Legislature with responsibility for consumer affairs and after consultation with the chairperson of the court, make regulations relating to-

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

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- (2) The responsible Member shall, 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 his or her intention to make that regulation, and inviting interested persons to furnish any comments thereon or any representations which they may wish to make in regard thereto.

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- (3) The provisions of subsection (2) shall not apply in respect of any regulation which, after the provisions of that subsection have been complied with, has been amended by the responsible Member after consultation with the chairperson of the court in consequence of comments or representations received by the court in pursuance of such compliance.

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### **Offences in relation to prohibited business practices**

29. Any person who contravenes or fails to comply with an order of the court which has been made known by notice in the *Provincial Gazette* shall be guilty of an offence.

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### **Penalties**

30. Any person who is convicted of an offence in terms of this Act shall be liable, in the case of an offence referred to in -

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- (a) section 29, to a fine or to imprisonment for a period not exceeding five years or to both that fine and that imprisonment;
- (b) any other provision of this Act, to a fine or to imprisonment for a period not exceeding 12 months or to both that fine and that imprisonment.

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### **State bound**

31. This Act shall bind the State, except in so far as criminal liability is concerned.

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### **Civil remedies not excluded**

32. (1) No provision of this Act shall be construed as depriving any person of any civil remedy.

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

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### **Amendment of laws governing local authorities in force in the province so as to authorise local authorities to establish consumer advice offices**

33. The laws referred to in Schedule 1, in so far as they apply in the Province, are hereby amended to the extent indicated in the third column of that Schedule.

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**Repeal of Act 34 of 1984 (Bophuthatswana), and regulation of status of certain contracts governed by that Act**

34. (1) The laws referred to in Schedule 2, in so far as they apply in the Province, are hereby repealed. 5
- (2) Any right conferred by section 24(1)(b) of the Consumer Affairs Act, 1984 (Bophuthatswana), to cancel a contract that was not registered in accordance with section 23 of that Act and which right has not been exercised by the date of commencement of this Act, shall lapse at such commencement, and any contract concerned shall not be terminated merely by reason that it had not been so registered. 10

**Short title**

35. This Act shall be called the Free State Consumer Affairs (Unfair Business Practices) Act, 1998. 15

**Schedule 1**

**LAWS AMENDED**

**(Section 33)**

Number and year of law	Title of law	Extent of amendment
Ordinance No 8 of 1962 (Orange Free State)	Local Government Ordinance, 1962	The amendment of section 135 by the addition to subsection (1) of the following paragraph: <u>"(m) establish and maintain offices and facilities for the provision of advice and other services to consumers."</u>
Act No 18 of 1988 (Qwaqwa)	Qwaqwa Local Authorities Act, 1988	The amendment of section 39 by the addition to subsection (1) of the following paragraph: <u>"(i) establish and maintain offices and facilities for the provision of advice and other services to consumers."</u>
Ordinance No 20 of 1974 (Cape) as applied to Bophuthatswana by Act No 24 of 1978 (Bophuthatswana)	Municipal Ordinance, 1974	The amendment of section 186 by the insertion in subsection (21) after paragraph (g) of the following paragraph: <u>"(gA) offices and facilities for the provision of advice and other services to consumers."</u>

**Schedule 2**

**LAWS REPEALED**

**(Section 34)**

Number and year of law	Title of law
Act No 34 of 1984 (Bophuthatswana)	Consumer Affairs Act, 1984
Act No 4 of 1985 (Bophuthatswana)	Consumer Affairs Amendment Act, 1985
Act No 7 of 1986 (Bophuthatswana)	Consumer Affairs Amendment Act, 1986
Act No 17 of 1988 (Bophuthatswana)	Consumer Affairs Amendment Act, 1988
Act No 28 of 1991 (Bophuthatswana)	Consumer Affairs Amendment Act, 1991