



EASTERN CAPE PROVINCIAL LEGISLATURE

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Date: 23 June 2008

**PORTFOLIO COMMITTEE ON ECONOMIC AFFAIRS, ENVIRONMENT AND
TOURISM**

Negotiating mandate on the Consumer Protection Bill [B19-2008]

1. *Terms of reference*

The Consumer Protection Bill [B19-2008] hereinafter referred to as the Bill, was referred to the Portfolio Committee on Economic Affairs, Environment and Tourism by the NCOP Business Committee for consideration.

2. *Consideration of the Bill*

The Portfolio Committee was briefed on the content and effect of the Bill by the Permanent Delegate.

3. *Negotiating mandate of the Committee*

3.1 EXEMPTIONS (S5)

1. Public entities and law firms acting on behalf of public entities not to be exempt;



2. Consideration of exemptions to be subject to public hearings with affected consumers and applicant(s).

3.2 RIGHT OF EQUALITY IN CONSUMER MARKET (S8)

1. To include a prohibition on public entities from refusing or failing to provide services to specific areas.

3.3 CONSUMER'S RIGHT TO PRIVACY (S11)

1. To include regulation of times, dates, etc. when debt collectors contact consumers.

3.4 CONSUMER'S RIGHT TO CHOOSE (S13)

1. To include consumer's right not to pay for pre-loaded advertising material on airtime bundles.

3.5 PYRAMID & RELATED SCHEMES (S43)

1. To specifically exclude legitimate alternatives to existing formal financial markets, such as stokvels, community savings or banking schemes (such as Indian Gramman Bank).

3.6 AUCTIONS (S45)

1. The reserve price must at least cover full cost of settlement of outstanding debt;
2. Where the owner or auctioneer is given right to participate in auction, bondholders must be excluded from securing a bid below the market value of property to be auctioned, such that they enjoy

unfair advantage against debtor from the benefit of making a profit against a fair sale on the open market.

3.7 OVER-SELLING & OVER-BOOKING (S47)

1. S47(1) to be deleted;
2. Public entities to be included, especially SAA.

3.8 WRITTEN CONSUMER AGREEMENTS (S50)

1. Consumers must be given choice with regard to personal information being forwarded to any other parties with whom the consumer does not make direct contact;
2. Consumers must be given an option to insure against unforeseen circumstances such as death, disability, unemployment, etc;
3. Failure by seller to make delivery on specified date to enable consumer to secure change in date of commencement of payment of payment of installments;
4. Bondholders must be obliged to disclose defects, poor workmanship, valuation results, etc, to consumer, prior to fixing insured value of property;
5. Consumers must be given choice with regard to paying for the costs of advertising by seller;
6. Sellers must be prohibited from transferring debt from deceased, disabled or unemployed debtor to other members of the family of the original debtor;
7. Bondholders and furniture stores to be prohibited from repossessing or auctioning property below 25% of the original purchase price;

8. In the event of the death of one of the parties to a joint estate, the surviving spouse should not be required to pay a fresh transfer fee to retain ownership of fixed property;
9. In the event of the death of a debtor, the agreement should be treated as "frozen" until the winding up of the deceased estate and must not continue to attract interest charges on the outstanding balance;
10. Where a supplier removes old apparatus or goods in order to install new apparatus in its place, the supplier must pay compensation to the consumer if such apparatus or goods may be re-used or re-sold;
11. Special dispensation for pensioners or indigent persons must be clearly outlined to enable such consumers to avail themselves of such special dispensation;
12. Public and/or essential services must be insured against damage caused to consumers due to failure of such services, eg damage to appliances by power surges following power cuts;
13. In addition to understandable and simple language, agreements must be available in the language of choice of a consumer, as well as compulsory explanation of the terms of an agreement for the benefit of illiterate consumers.

3.9 ESTABLISHMENT OF NATIONAL CONSUMER COMMISSION (S85)

1. This section should also include the establishment of Provincial Commissions, with offices located in each District Municipality, at least, in order to improve consumer access to services envisaged.

3.10 APPOINTMENT OF INSPECTORS (S88(1))

1. On page 61, s88(1), The appointment of any suitable person as an inspector at the discretion of the Commissioner must include suitably "qualified"

3.11 RIGHT OF APPEAL

1. The Legislation should state clearly the rights of the respondent to appeal on the Tribunal's decision.

3.12 VIEWS & REPORTS TO MINISTER (S91)

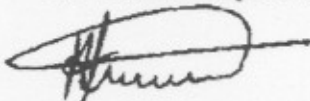
report must be amended to provide for the Minister and/or MEC to

3.13 CONSUMER'S RIGHT TO BE CHARGED FOR NORMAL ACTIVITIES OF PUBLIC ENTITIES IN ADDITION TO ANNUAL FEES, LICENSE FEES, etc

1. This new clause must specifically exclude the payment of a premium on ordinary applicable costs of telephone or cell phone calls to the public broadcaster when consumers participate in talk shows.

4. RESOLUTION OF THE COMMITTEE

The Committee further resolved that Hon. N Hoosain represent the Province of the Eastern Cape in a meeting to consider the negotiating mandates.



N. KIVIET

SPEAKER: EASTERN CAPE PROVINCIAL LEGISLATURE



**FINAL MANDATE OF THE WESTERN CAPE ON THE CONSUMER
PROTECTION BILL [B19-2008] (NCOP)**

Final mandate of the Western Cape Provincial Parliament on the *Consumer Protection Bill [B19-2008] (NCOP)*, as resolved by the House on 24 June 2008.

The Western Cape Provincial Parliament having considered the subject of the *Consumer Protection Bill [B19-2008] (NCOP)* referred to the Provincial Parliament in terms of the rules of the National Council of Provinces (NCOP), begs to report that it confers on the Western Cape's delegation in the NCOP the authority to support the Bill with the following concerns and recommendations:

**Concerns raised by the Provincial Department of Economic
Development & Tourism**

The general explanatory note as contained on page 1 of the Bill as well as section 121(2) (g) of the Bill provide that the Businesses Act, 1991 (Act No. 71 of 1991) is to be repealed in terms of the provisions of the Bill. The proposed repeal of the Businesses Act is deemed problematic by the province for a number of reasons. We shall deal with these reasons individually and identify the challenges posed by the proposed repeal.

1 (a) Businesses Act, 1991 (Act 71 of 1991)

The then President of the Republic of South Africa, Nelson Mandela, on 2 March 1995 officially assigned the Administration of the Businesses Act to the provinces. A copy of the proclamation is attached hereto as Annexure A. By virtue of the assignment, the administration of the Act became the responsibility and mandate of each province to fulfill. It is also our view that the process of assignment of the legislation for all intents and purposes resulted in the assigned legislation assuming the mantle of Provincial legislation. As such all aspects relating to the Act would now be assumed by the province. This would in our view include the authority to effect amendments to the Act or repeal sections of the Act or the whole of the Act. It is therefore our view that the Businesses Act, by virtue of its assignment to the province in 1995, cannot be repealed by the National



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Department as the Act is deemed to be provincial legislation. It is therefore our view that the decision and action of repealing the Businesses Act should be executed by the province via its legislative and constitutional mandate. This decision will however depend on whether or not the provincial department determines that such repeal is desirable, as will be seen from the additional comment below. The provincial department is at this stage not in favour of such repeal.

1 (b) Provisions of the Businesses Act

The Businesses Act regulates a number of relevant and important matters connected to the mandate performed by the provincial department. For example, section 2 of the Act as well as the Regulations promulgated under the Act regulate the important matter of business licence applications. In terms of the provisions of the Businesses Act, municipalities currently perform the function of assessing and adjudicating certain prescribed business licence applications from potential business owners. These business licences include restaurant, pub and nightclub applications. The Businesses Act currently dictates that an application for certain types of businesses must be submitted to the relevant municipality who considers such an application in light of a number of factors. If an application is approved, the municipality advises the provincial department thereof and the applicant is entitled to operate the specific business. The Provincial Minister responsible for Economic Development is however authorised in terms of section 3 of the Act and the accompanying Regulations to act as the appeal authority in matters where an application is refused.

The provincial department and the Minister therefore have an important role to play in the process of awarding business licences.

We have noted that the Bill is silent on the issue of business licence applications in the form as regulated by the Businesses Act. The Bill does in clauses 79-81 cover the issue of business name registration but this does not in our view cover the **business licensing issues** dealt with in the Businesses Act. It is therefore our view that if the Businesses Act is repealed in totality it will lead to a vacuum in the law as far as the licensing of specific businesses is concerned, and more importantly, negatively affect the appeal authority position that the provincial Minister currently enjoys. This could lead to an unfortunate situation as the processing of business licence applications could be delayed for a considerable time until new legislation (provincial or local government) is adopted.

1 (c) Section 6A of the Businesses Act

The above-mentioned subsection of the Businesses Act regulates the very important issue of informal trading conducted by hawkers, pedlars and traders.

This provision provides that a municipality may, **WITH THE APPROVAL OF THE PROVINCIAL MINISTER**, make by-laws regarding the following matters:

- (i) the supervision and control of the carrying on of the business of street vendor, pedlar or hawker;
- (ii) the restriction of the carrying on of such business -
 - (aa) in a garden or park to which the public has a right of access;
 - (bb) on a verge as defined in section 1 of the Road Traffic Act, 1989 (Act 29 of 1989), contiguous to-
 - (A) a building belonging to, or occupied solely by, the State or the municipality concerned;
 - (B) a church or other place of worship;
 - (C) a building declared to be a national monument under the National Monuments Act, 1969 (Act 28 of 1969);

[Subpara (bb) amended by sec 5 of Act 11 of 2002 with effect from 28 February 2003.]

- (cc) in an area declared or to be declared under subsection (2) (a) ;
- (iii) the prohibition of the carrying on of such business -
 - (dd) in a garden or park as contemplated in subparagraph (ii) (aa) ;
 - (bb) on a verge so defined as contemplated in subparagraph (ii) (bb) ;
 - (cc) in an area declared or to be declared under subsection (2) (a) ;
 - dd. at a place where –
 - (A) it causes an obstruction in front of a fire hydrant or an entrance to or exit from a building;
 - (B) it causes an obstruction to vehicular traffic; or

- (C) it substantially obstructs pedestrians in their use of a sidewalk as defined in section 1 of the Road Traffic Act, 1989;
- (ee) on a verge so defined contiguous to a building in which business is being carried on by any person who sells goods of the same nature as or of a similar nature to goods being sold by the street vendor, pedler or hawker concerned, without the consent of that person;
- (ff) on that half of a public road contiguous to a building used for residential purposes, if the owner or person in control or any occupier of the building objects thereto.

Section 6A of the Act is therefore an extremely important provision as all by-laws promulgated by a municipality and which relate to the abovementioned issues MUST be approved by the Provincial Minister. This provision can therefore ensure that by-laws that are promulgated are in line with the strategic objectives of the provincial government. This will be of particular relevance as most informal trading by-laws are important to the development of the informal economy which is a strategic imperative of the provincial department.

In addition, section 6A(2)(a) provides that a municipality has the authority to declare any place in its jurisdiction to be an area in which the carrying on of the business of street vendor, pedler or hawker may be restricted or prohibited.

Section 6A(2)(i) and (j) furthermore provide that if a municipality wishes to exercise its authority as prescribed in section 6A(2)(a) then the following obligations are placed on such a municipality:

The Provincial Minister must be provided with the following information:

A copy of the advert/notice published by the municipality advising of its intention to restrict or prohibit informal trading, a copy of the plan, copies of objections received and the municipalities comments on the objections.

The Provincial Minister thereafter has 60 days within which to assess the submission and after consultation with the municipality to either amend or revoke the declaration.

The above provisions are also extremely important as it enables the Provincial Minister to assess proposed restrictions or prohibitions and if necessary amend or revoke them. This will be of particular relevance as most informal trading by-laws are important to the

development of the informal economy which is a strategic imperative of the department.

On our assessment, the Bill is however silent on all aspects relating to the abovementioned issues and as previously stated, the law may have a vacuum if the Businesses Act is repealed in totality. We are aware that the argument may be advanced that the issue of informal trading may be regulated at local government level via the provisions of the Municipal Systems Act and as such, the repeal of the Businesses Act will not have any effect on the issue of informal trading within provinces. The provincial department has a fundamental issue with this argument as we maintain that the provisions of the Businesses Act authorise the provincial government to play an active role in the area of informal trading. It must also be noted that the Informal Sector is one of the priority areas for the Provincial Minister and the department. As such, the issue of the regulation of the Informal Sector is an important element of the department's mandate. The Businesses Act therefore provides the provincial department with the legislative mandate to exercise some authority in the domain of informal trading and business licences and as such the department is eager to maintain that authority.

The proposed repeal of the Businesses Act is therefore questioned on the basis of the 3 main issues identified above. It is noted that the Bill in section 7 of schedule 2 under the title of "continued operation of repealed laws' provides that for a period of 3 years after the general effective date, the Commission may exercise any power in terms of such repealed law to **investigate any breach of that law**. This section does in our view not address our concern as it relates to the **investigation of breaches of the law** and does not cover the issue of administration of the Act as identified above.

Recommendation

The proposed repeal is therefore questioned and we propose that the aspect of the repeal be reconsidered. The provincial department will also engage in further discussions with our counterparts at the DTI and determine if common ground can be reached on this issue.

2. Genetically Modified Organisms: Various Submissions (Oral and Written)

A total of 14 written submissions and one oral presentation on the issue of genetically modified organisms served before the standing committee. The common issue raised by all commentators related to the removal of a clause in a previous version of the Bill that related to the issue of genetically modified ingredients and components. All of the submissions received requested the reinstatement of the previous clause which related

information that was necessary for consumers to make informed decisions regarding goods purchased and goods which could have an impact on their health. In addition, it was motivated that the provision of the information mooted could protect consumers from hazards to their well being and safety.

The DTI was of the view that the Bill should not address technical specifications such as the ingredients and contents of products. It was also stated that the issue of genetically modified organisms was an issue that was adequately dealt with in the Genetically Modified Organisms Act, 1997 (Act No. 15 of 1997), and as such the need for formal protection in the Bill was not required. It was also stated that the GMO Act was administered by the Department of Agriculture and that possible amendments to the legislation could be considered.

Recommendation

The Provincial Department is of the view that due consideration must be given by the DTI to the inclusion of the previous clause 29(1)(a) which provided that producers must display on or in association with that packaging or those goods, a notice in the prescribed manner and form that discloses the presence, nature and extent of any genetically modified ingredients or components of those goods. The recommendation is based on the acknowledgement of the rights of consumers to be adequately informed about issues that will lead them to making informed decisions about whether or not to purchase a specific product. It is acknowledged that the GMO Act regulates the area of genetically modified organisms but it is however recommended that the Consumer Protection Bill concretise a consumer's right to be informed about the existence of genetically modified organisms in products.

Sun International

The Sun International group raised the following 2 issues:

Clause 26: Sales records

The recommendation was made that clause 26 be amended so as to exclude casino gaming transactions from this particular provision. The motivation behind the request was that the nature of the business conducted by Sun International was of such a nature that compliance with the provision would be onerous on them.

Clause 36: Promotional Competitions

Sun International requested that casinos be excluded from the provisions of clause 36.

The DTI indicated that it was not in support of specifically excluding the casino industry from the provisions of clause 26. The DTI was of the view that clause 26(4) provides for goods or services to be excluded from the provisions stipulated and as such provision had been made for organisations such as Sun International to obtain exemption after following due process. The DTI was also not in favour of the exclusion of the casino industry from the operations of clause 36.

Recommendation

The view of DTI with regards to this submission is supported by the provincial department and we recommend that the proposed amendments by Sun International not be incorporated into the Bill.

South African Federation of Soft Drink Manufacturers

The Federation expressed reservation about the weighting in favour of consumers as far as the interpretation of forms, contracts or other documents is concerned. It was the opinion of the Federation that the Bill provided extensive protection to consumers in the aforementioned matters and at the detriment to business.

The DTI was of the view that in the majority of transactions consumers were at a distinct disadvantage from a bargaining perspective. The Bill was predominantly aimed at providing vulnerable consumers with enhanced protection and as such the Bill had merit in advantaging consumers.

Reservation was also expressed about the provisions of section 7(2) of the Bill. The Federation was of the view that the right of a franchisee to cancel a franchise agreement within 10 business days of signing such an agreement was problematic. It was proposed that the Bill be amended to include a provision which prescribed that intellectual property and other materials that were provided after the signature of the agreement should be returned after cancellation. It was also stated that the right to a "cooling off" period in franchise agreements was not advisable.

The DTI advanced the view that the cooling off period as prescribed in clause 7(2) was valid and was also a measure that finds international application. It was however conceded that consideration to expanding the clause to provide for the return of intellectual property and other material that may have been advanced to a party that subsequently cancels an agreement should be given.

The Federation noted a concern regarding the provisions of clause 14 of the Bill. The view was expressed that this clause would have a negative effect on franchisee agreements and it was proposed that the clause be amended.

The DTI advised that clause 14 does not apply to franchise agreements and as such the comments were irrelevant.

The Federation mooted for the definition of the term "defect" in the definitions section in the Bill. It was advanced that such a definition was necessary especially with regards to the provisions relating to a consumers right to safe, good quality goods.

The DTI noted that a definition for the term "defect" was in fact contained in clause 53(1)(a).

The Federation expressed reservations about the statutory recognition of the issue of "strict liability" as provided for in the Bill. It was contended that the Bill amended the common law position regarding liability as now a consumer merely had to show that they suffered damages as a result of defective or unsafe products. The Bill therefore removes the need to prove negligence. The Federation contended that as a compromise the Tribunal should adjudicate issues of liability.

The DTI contended that parliament was authorised to amend the common law by way of promulgating legislation on a specific issue and the recognition of strict liability via the Bill was lawful.

Recommendation

The provincial department is in agreement with the views expressed by the DTI on the issues raised by the Federation. It is therefore recommended that the only provision that could be amended is clause 7(2) of the Bill. We agree that the issue of the return of intellectual property and other material after the cancellation of a franchise agreement be considered for inclusion in the Bill.



**SE BYNEVELDT
SPEAKER
24 JUNE 2008**

ANNEXURE A:

Database: Government Gazettes

Gazette No: 16302

Notice No: 18

Gazette: GOV

Date: 19950309

Text:

PROCLAMATION by the President of the Republic of South Africa No. 18, 1995

ASSIGNMENT OF THE BUSINESSES ACT, 1991 (ACT No. 71 OF 1991), TO THE PROVINCIAL GOVERNMENTS IN TERMS OF SECTION 235 (8) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

Under section 235 (8) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), I hereby assign the administration of the Businesses Act, 1991 (Act No. 71 of 1991), to competent authorities within the jurisdiction of each of the provincial governments provided for in Schedule 1 of the said Constitution, designated by the Premier of each province.

Given under my Hand and the Seal of the Republic of South Africa at Cape Town this Second day of March, One thousand Nine hundred and Ninety-five.

N. R. MANDELA,
President.

By Order of the President-in-Cabinet:

T. A. MANUEL,
Minister of the Cabinet.