



PROVINCE OF THE EASTERN CAPE
IPHONDO LEMPUMA KOLONI
PROVINSIE OOS-KAAP

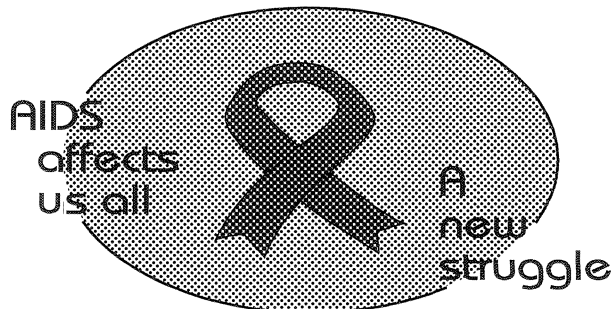
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No. 3399
(Extraordinary)

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GENERAL NOTICE

No. 35

DEPARTMENT OF ECONOMIC DEVELOPMENT, ENVIRONMENTAL AFFAIRS AND TOURISM

PUBLICATION OF DRAFT WHITE PAPER ON CONSUMER PROTECTION IN THE EASTERN CAPE FOR PUBLIC COMMENT

I, **Sakhumzi Somyo**, Member of the Executive Council responsible for Economic Development, Environmental Affairs and Tourism in the Province of the Eastern Cape, hereby publish for public comment, the draft White Paper on Consumer Protection in the Eastern Cape.

Any person who wishes comment on the draft White Paper, is invited to do so within one month of the date of this notice. Comments received after the closing date will not be considered. All comments are to be submitted in writing to:

Head of Department, Economic Development, Environmental Affairs and Tourism

Private Bag X0054

Bhisho

5601

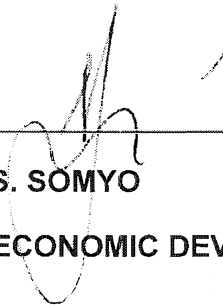
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HON. S. SOMYO
MEC: ECONOMIC DEVELOPMENT, ENVIRONMENTAL AFFAIRS AND TOURISM

WHITE PAPER

ON

CONSUMER PROTECTION IN THE

EASTERN CAPE

EXECUTIVE SUMMARY

Consumer protection is a functional area listed in Schedule 4 to the Constitution of the Republic of South Africa, 1996. This means that both the national and provincial legislatures have concurrent jurisdiction to legislate in respect of consumer protection.

Currently there are two general statutes which regulate consumer protection in the Province of the Eastern Cape. These are the (national) Consumer Protection Act 68 of 2008 (CPA) and the (provincial) Consumer Affairs (Unfair Business Practices) Act 5 of 1998 (Eastern Cape). These two statutes both aim to protect consumers but follow substantially different approaches. The CPA is much more comprehensive in the substantive rights it provides. These rights are generally directly enforceable by the consumer. The provincial Consumer Affairs Act provides a more indirect manner for consumer protection inasmuch as it does not provide directly enforceable consumer rights. The approach of the Consumer Affairs Act is rather to have a particular business practice declared unlawful if it is found to be unfair. In addition, different mechanisms and options for enforcing the provisions of these respective Acts exist. It is important to note that the CPA has repealed the national Consumer Affairs (Unfair Business Practices) Act 71 of 1988. The Consumer Affairs (Unfair Business Practices) Act (Eastern Cape), 1998 is based on this national Act which has now been repealed.

There is currently then a mismatch or “gap” between the protection provided to consumers at national level and at provincial level. The current provincial legislation is not able to give effect to the rights, protection and redress consumers have in terms of the CPA. The practical effect of this is to deny the consumers of the Province of the Eastern Cape access to justice and protection against the infringement of their consumer rights. The CPA has “overtaken” the provincial Consumer Affairs Act making it necessary to re-align provincial and national legislation. It is implicit in the provisions of the CPA that it anticipates the provinces to enact provincial consumer protection and some (not all) provinces have already done so.

Besides the imperatives contained in the CPA itself for the promulgation of new consumer protection legislation in the provinces, the Constitution specifically requires of all spheres of government and all organs of state within each sphere to co-operate with one another in mutual trust and good faith by co-ordinating their actions and legislation.

There is therefore a clear need for the province to align its consumer protection legislation with the national legislation so as to provide their residents with efficient and effective mechanisms to ensure the protection and enforcement of consumer rights within the Province of the Eastern Cape.

The extensive changes required to align provincial consumer protection legislation with the national Act is indicated. The extent of these changes leads to the inevitable conclusion that the current provincial legislation (Consumer Affairs (Unfair Business Practices) Act (Eastern Cape), 1998) should be replaced by a new Consumer Protection Act (Eastern Cape). This new legislation must recognise the consumer rights provided by the CPA and must establish the relevant structures, in alignment with national structures, so as to give effect to these rights. This will entail the establishment of a provincial consumer protection authority (to be known as the Office of the Consumer Protector) and a provincial consumer tribunal with powers and functions aligned with the National Consumer Commission and the National Consumer Tribunal respectively, and to provide for matters incidental thereto.

Executive summary

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1 FOREWORD, ABBREVIATIONS AND GLOSSARY

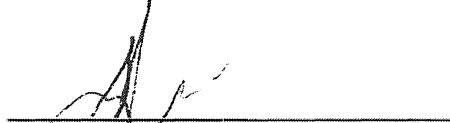
1.1 Foreword by the Member of the Executive Council for Economic Development, Environmental Affairs and Tourism

Inherent in the Constitution of the Republic of South Africa are the rights to Consumer protection inherently forms a necessary part of every citizen's socio-economic rights as expressed through the Constitution. To this effect, the values of dignity, equality and freedom must underlie and inform any consumer protection policy and legislation. Consumer Protection is a functional area listed in Schedule 4 to the Constitution of the Republic of South Africa, 1996. Since 1994, the South African government has committed itself to a national policy of consumer protection for the people of South Africa. With the commencement of the Consumer Protection Act (Act No. 68 of 2008) in 2011 provision is made for comprehensive rights to consumers thus creating and promoting an economic environment that supports and strengthens a culture of consumer rights and responsibilities whilst promoting a fair, efficient and transparent market place for consumers and business.

Currently there are two general statutes which regulate consumer protection in the Eastern Cape Province, namely the Consumer Protection Act (CPA) and the Consumer Affairs (Unfair Business Practices) Act (Eastern Cape), 1998. These two statutes both aim to protect consumers but follow substantially different approaches. Critically, the current provincial legislation is not able to provide the protection and enforcement of the rights provided for by the CPA, except through the national mechanisms. This practically denies the consumers of the Province of the Eastern Cape access to justice and protection against the infringement of their consumer rights. The effective realisation of consumer rights in the Eastern Cape is therefore inhibited. In this sense the CPA has "overtaken" the provincial Consumer Affairs Act making it necessary to re-align provincial and national legislation. It is, therefore, necessary to promulgate provincial legislation to create a legal framework to give effect to consumer rights provided in the CPA.

This White Paper is intended to inform this legislation for consumer protection in the province. It is a culmination of research and discussions over a period to ensure optimum protection for consumers in the Province. Consumer Protection is needed in the province to ensure the necessary alignment with national legislation so as to provide our residents with efficient and effective mechanisms to ensure the protection and enforcement of consumer rights within the Province of the Eastern Cape, in line with the Constitution. The need to put in place a policy for consumer protection in the Province will contribute

to the creation of a fair, competitive and equitable economic environment for all. I therefore invite stakeholders to consider this policy and to forward comments to us.



Hon. Somyo

MEC for Economic Development, Environmental Affairs and Tourism

Province of the Eastern Cape

1.2 List of Abbreviations / Acronyms

'CAFCOM'	means Consumer Affairs Committee
'CPA'	means the Consumer Protection Act 68 of 2008
'MEC'	means the Member of the Executive Council of the Province of the Eastern Cape responsible for Economic Development, Environmental Affairs and Tourism
'NCA'	means the National Credit Act 34 of 2005
'NCC'	means the National Consumer Commission
'NCT'	means the National Consumer Tribunal
'PAIA'	means the Promotion of Access to Information Act 2 of 2000
'PAJA'	means the Promotion of Administrative Justice Act 3 of 2000
'UNCTAD'	United Nations Conference on Trade and Development

1.3 Glossary of Terms

'CPA'	means the Consumer Protection Act 68 of 2008;
'Consumer Affairs Act'	means the Consumer Affairs (Unfair Business Practices) Act 71 of 1988;
'Consumer Court'	means a Consumer Tribunal that has been established in terms of provincial consumer legislation;
'Consumer Tribunal'	means a 'consumer court' as provided in the CPA;
'Department'	means the Department of Economic Development, Environmental Affairs and Tourism of the Province of the Eastern Cape;
'NDP'	means the National Development Plan
'Province'	means the Province of the Eastern Cape;
'Provincial Act'	means the proposed Eastern Cape Consumer Protection Act.

2 BACKGROUND AND LEGISLATIVE CONTEXT

2.1 Background

In the Draft Green Paper on the Consumer Policy Framework it was noted that consumer protection law in South Africa was, 'fragmented, out-dated and predicated on principles that are not applicable in a democratic and developing society. South Africa has numerous pieces of legislation, which are either merely incidental to consumer protection or are scattered in numerous statutes and policies. In order to give consumers certainty in their interaction in the market place, it is therefore necessary to develop a simple, comprehensive and accessible consumer law. It should serve as a single reference to consumers and to business, outline the fundamental rules of conduct and grant consumers basic rights'.¹

In 1996 at 'The Africa Conference on Consumer Protection', an international meeting that brought together African government officials, consumer leaders and experts from African countries on consumer protection issues which took place in Harare, Zimbabwe, the Conference stressed that African countries should strive to enact and enforce consumer protection policies and legislation on the basis of the United Nations Guidelines on Consumer Protection, in order to protect their citizens as consumers.² The Guidelines, adopted by the United Nations General Assembly in 1985, and subsequently update, represent internationally accepted principles on what constitutes a fair and reasonable standard of consumer protection. While important progress has been made over the last 10 years in promoting the United Nations Guidelines in Africa, many countries still do not have fully developed or operational legislative frameworks or institutional capacity for consumer protection.

The meeting urged the African countries to enact and implement policies which take into consideration everyday changes arising from the new globalized and liberalized world economy.³ Global integration has brought benefits, spurring sustained growth. However, integration over two decades has also allowed threats in the financial, technological and social systems to spread much more rapidly across the globe.⁴ The meeting identified a number of areas for special attention: health, safety, access

¹ Draft Green Paper on the Consumer Policy Framework GG 26774 GN 1957 of 2004 p6.

² Organized by the Consumers International in partnership with the United Nations Department for Policy Coordination and Sustainable Development, with funding from the European Union and hosted by the Government of Zimbabwe; Press Release ENV/DEV/366.

³ *Ibid*

⁴ National Development Plan 11 November 2011 p50 (hereinafter NDP).

to goods and services, measures for redress and areas requiring future action, such as the extension of the United Nations Guidelines for consumer protection to include, for example, the areas of financial services and consumer representation.

South Africa has considered the role and development of Consumer Protection, including reference to the UN guidelines on Consumer Protection in a national context.⁵ This is evidenced in the National Development Plan (NDP) where, as part of social protection, one of the actions is to *'focus on competition, access, efficiency and costs of transport, food, telecommunications and other goods and services to lower the cost of living, especially for poor households'*.⁶ Inherent in competition, access and efficiency is ensuring the protection of consumer rights which will assist in achieving the abovementioned aims by setting minimum standards to regulate the marketing and provision of goods and services. The efficiency of provision of goods and services, and the quality thereof, must necessarily be enhanced.

In addition, the Africa Conference also discussed issues related to equitable distribution of services to consumers, strategies for protecting consumers' needs and interests, and the promotion of education and public awareness to enable individuals to become critical consumers. The NDP encapsulates this sentiment when it states;

'The country must write a different story in the years ahead. In this new story, every citizen is concerned about the wellbeing of all other citizens, and the development of South Africa means the development of each and every one of us who lives here. We must build on our social solidarity, which, through history and heritage has demonstrated our aspiration to create a caring South African society. In this new story, our nation's energies are focused both on attacking poverty and on expanding a robust, entrepreneurial and innovative economy. Over the next two decades and beyond, communities will need the resources and capabilities to become their own engines of development, and government must support this. We have to ensure that poor people have the environment, services and skills to improve their lives. At the same time, government must create the conditions and environment for higher levels of public and private investment to create jobs and ensure rising incomes'.⁷

A common theme emerging in the debate on the way forward is the need for a more nuanced balance between the roles of governments, the private sector and the market to achieve dynamic economic growth. Credible and sustainable national

⁵ 2003.

⁶ NDP p37

⁷ NDP p4.

policies should be based on the specific situation of each country, taking the global context into account.⁸ It is therefore of great importance what South Africa does to create or modify linkages, regulate and incentivise behaviour and adopt policies on global issues.⁹ A priority in this must be to ensure alignment within the region and globally (but also within the national borders) of policies and regulations which ensure consumer protection in the market place. It is recognised that trade is affected by the consumer protection policies which a country adopts and businesses and individuals will be more willing to trade with a country if they have extensive and effective consumer protection in place. This ensures compliance for businesses with regulations regarding investments within their country and encourages individuals to participate in economic activity within South Africa, safe in the knowledge that their consumer rights are protected.

To this end the NDP is the guiding policy in the re-structuring of South Africa, both economically and socially. The Plan recognises South Africa's strengths in the financial, telecommunications and retail sectors and indicates the need to develop and promote these strengths both locally and within the region.¹⁰ Inherent in this development will be the need to create an environment of protection for consumers to ensure equality in access to all goods and services, protection against exploitation by economically more experienced businesses and improved education on consumers as to their rights in terms of legislation.

In the development of any policy, and ultimately legislation, the Constitution of the Republic of South Africa will always be the guide for such development.¹¹ As stated:

'The Republic of South Africa is one, sovereign, democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms'.¹²

2.2 Legislative context

⁸ NDP p55

⁹ NDP p73

¹⁰ 72.

¹¹ Act 108 of 1996

¹² Section 1.

South Africa's Constitution is a social contract. A fundamental principle of this contract can be found in Chapter 2 of the Constitution, which declares that, 'everyone is equal before the law and has the right to equal protection and benefit from the law' and 'that the country may pass laws that protect or advance people disadvantaged by unfair discrimination'. Furthermore, the contract imposes on the State certain obligations to ensure the protection of the dignity of all its people also through the realisation of socio-economic rights, including consumer protection. Many clauses in the Bill of Rights (Chapter 2 of the Constitution) are styled, 'Everyone has the right to...' followed by 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights'. It is important that the government, as custodians and managers of the State's obligations, addresses these obligations.

Since 1994 the South African government has committed itself to a national policy of consumer protection for the people of South Africa, both in an economic and social sphere and in line with the objectives in the NDP. This commitment has already culminated in the introduction of a significant number of statutes containing provisions providing consumer protection. This has included the promulgation of the Short and Long Term Insurance Acts;¹³ Financial Advisory and Intermediary Services Act,¹⁴ and, of particular relevance for current purposes, the National Credit Act¹⁵ to regulate the credit industry, the Consumer Protection Act¹⁶ to regulate the relationship between business and consumers in the market-place and recently the promulgation of the Protection of Personal Information Act¹⁷ providing measures for the protection of the personal information of consumers in an increasingly technologically advanced world.

The Consumer Protection Act¹⁸ came into general effect on 1 April 2011. The Act provides comprehensive rights to consumers and it provides for the mechanisms to enforce these rights. *The Act is applicable to the whole of South Africa.* In South Africa, consumer protection is a shared competence between national and provincial government. It is listed in Schedule 4 of the Constitution as a functional area in respect of which both the national legislature (Parliament) and the provincial legislatures have concurrent power. This means that both spheres are responsible to ensure effective enforcement and redress for consumers. The effect of this is that,

¹³ Acts 53 of 1998 and 52 of 1998 respectively.

¹⁴ 37 of 2002.

¹⁵ 34 of 2005.

¹⁶ 68 of 2008.

¹⁷ 4 of 2013.

¹⁸ Hereinafter referred to as the CPA or the Act.

while national government may, and has, enacted legislation, provinces may and should also enact their own legislation with regard to consumer protection.

Providing for and giving effect to consumer rights is a governmental obligation but it is not something that happens in isolation. It must still occur within the ambit of the law. The protection and enforcement of consumer rights is significantly influenced also by other laws, particularly for current purposes legislation such as the Promotion of Access to Information Act¹⁹ (PAIA) and Promotion of Administrative Justice Act²⁰ (PAJA). Both these Acts impose obligations on public bodies, including government, and private legal persons with regard to the availability of information to protect and enforce rights, as well as to mechanisms and procedural requirements when enforcing their rights. Bodies responsible for upholding consumer rights must be equipped and must function in a manner that is consistent with the duties set out in PAIA and PAJA.

Prior to the CPA coming into effect a number of different Acts provided *ad hoc* consumer protection. However, general consumer protection was provided by the Consumer Affairs (Unfair Business Practices) Act.²¹ The Consumer Affairs Act provided for the investigation, prohibition and control of unfair business practices in the interest of the protection of consumers. The Consumer Affairs Act can be described as an enabling Act rather than a prescriptive one and the Act itself did not prohibit anything nor did it provide consumers with any enforceable rights *per se*. The Consumer Affairs Act created a statutory body, CAFCOM, whose functions included investigations into alleged unfair business practices. If found that a business practice was unfair, a recommendation could be made to the relevant Minister who could then declare the practice to be unlawful and provide directions as to the discontinuance or prevention of such practice. The Consumer Affairs Act has now been repealed by the CPA.

In line with the Consumer Affairs Act the Province of the Eastern Cape passed the Consumer Affairs (Unfair Business Practices) Act (Eastern Cape), 1998.²² This legislation is essentially a provincial version of the Consumer Affairs Act. The provincial Consumer Affairs Act provides for an Office of the Consumer Protector which office can investigate allegations of unfair business practices. A matter can then be referred to a tribunal for determination. The provincial Consumer Affairs Act

¹⁹ 2 of 2000.

²⁰ 3 of 2000.

²¹ 71 of 1998.

²² 5 of 1998.

is currently in force as the repeal by the CPA was of the national Consumer Affairs Act only.

3 PROBLEM STATEMENT

Currently there are two general statutes which regulate consumer protection in the Province, namely the CPA and the Consumer Affairs (Unfair Business Practices) Act (Eastern Cape), 1998. These two statutes both aim to protect consumers but follow substantially different approaches. The CPA is much more comprehensive in the substantive rights it provides and which rights are generally directly enforceable. The provincial Consumer Affairs Act provides a more indirect manner for consumer protection inasmuch as it does not provide directly enforceable consumer rights. The approach is rather to have a particular business practice declared unlawful if it is found to be unfair. In addition, different mechanisms exist for enforcing the provisions of these Acts.²³

Critically, the current provincial legislation is not able to provide the protection and enforcement of the rights provided for by the CPA, except through the national mechanisms. The practical effect of this is to deny the consumers of the Province of the Eastern Cape access to justice and protection against the infringement of their consumer rights. This is a critical requirement of PAJA and thus the effective realisation of consumer rights in the Eastern Cape is therefore inhibited by mis-aligned consumer protection legislation. The CPA has “overtaken” the provincial Consumer Affairs Act making it necessary to re-align provincial and national legislation.

As indicated, consumer protection is a functional area in respect of which both the national and provincial legislatures have concurrent legislative authority. The significance of this is that both the national legislature (Parliament) and the respective provincial legislatures have the power to make legislation in respect of consumer protection – Parliament for the country as a whole and a provincial legislature for a specific province. This does not mean that a legislative authority can pass legislation in respect of Schedule 4 matter as it wishes. Where a situation arises of a conflict between legislation of Parliament and legislation of a province in respect of a Schedule 4 functional area because the afore-mentioned constitutional imperatives were not adhered to, then the Constitution provides in s146 for the rules

²³ See Table1 In Annexure 1

to govern the situation. Essentially the section 146 provides that national legislation will prevail over provincial legislation if certain factors or circumstances are present. So, for instance, will national legislation prevail in the case of a conflict if the national legislation deals with a matter that, to be dealt with effectively, requires uniformity by establishing norms and standards, frameworks, or national policy. Section 41(1)(c) and (h)(iv) of the Constitution specifically requires of all spheres of government and all organs of state within each sphere to provide effective, transparent, accountable and coherent government for the Republic as a whole, and to *co-operate with one another in mutual trust and good faith by coordinating their actions and legislation with one another*. The constitutional imperative of creating harmonisation between different levels of legislation must be respected and adhered to. The CPA also makes comprehensive provision in Chapter 5 Part A (sections 83 and 84) for the co-operative exercise of concurrent jurisdiction between national and provincial authorities in line with the constitutional imperative on co-operative government and also the Intergovernmental Relations Framework Act 13 of 2005.

Furthermore is it clear that the CPA envisages that the various provinces will promulgate consumer protection legislation which will create the provincial consumer protection authorities as well as establish a provincial consumer 'court' or, more appropriate to its actual role, a provincial consumer tribunal.²⁴ This clearly indicates the understanding that Provinces will establish such authorities to ensure execution of these functions.²⁵

National developments in consumer protection policy have resulted in a shift to impose a responsibility on the Province relating to the operation of its business and

²⁴ A clear example is to be found in section 84 of the CPA which provides as follows:

84. A provincial consumer protection authority has jurisdiction within its province to—
- (a) issue compliance notices in terms of this Act on behalf of the Commission to any person carrying on business exclusively within that province;
 - (b) facilitate the mediation or conciliation of a dispute arising in terms of this Act between or among persons resident, or carrying on business exclusively within that province;
 - (c) refer a dispute contemplated in paragraph (b) to the provincial consumer court within that province, if there is one; and
 - (d) request the Commission to initiate a complaint in respect of any apparent prohibited conduct or offence in terms of this Act arising within that province.

²⁵ Two provinces have adopted consumer protection legislation to align itself with the CPA, namely the Provinces of the Northern Cape (Northern Cape Consumer Protection Act 1 of 2012) and the Province of KwaZulu-Natal (KwaZulu-Natal Consumer Protection Act 4 of 2013). Two other provinces, Limpopo and Northwest Province have published draft legislation for public comment).

operating models relevant to consumer protection. The additional need to comply with legislative imperatives will require additional resources at all levels.

The focus of consumer protection operations will not only require effective complaints handling and assistance where a consumer alleges an infringement of a right in terms of the CPA. It is also critical to empower consumers and suppliers by facilitating education and awareness the rights and obligations of both consumers and suppliers (business), thereby promoting responsible behaviour by consumers and suppliers to the greater benefit of all.

4 VALUES AND PRINCIPLES

4.1 Values

The NDP states that a united people and a more cohesive society are not only national objectives; they are also means to eradicating poverty and inequality. The strategy to enhance social cohesion is based on three themes:

- Reducing poverty and inequality by broadening opportunity through economic inclusion, education and skills, and specific redress measures.
- Promoting mutual respect, inclusiveness and cohesion by acting on the constitutional imperative that South Africa belongs to all who live in it, and that all are equal before the law.
- Deepening the national appreciation of the responsibilities and obligations that citizens have towards one another'.²⁶

Consumer protection inherently forms a necessary part of every citizen's socio-economic rights as expressed through the Constitution. To this effect, the values of dignity, equality and freedom must underlie and inform any consumer protection policy and legislation. Taking into account the interests and needs of consumers in the Eastern Cape, particularly those in rural areas, and recognizing that consumers often face imbalances in economic terms, educational levels and bargaining power; and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the right to promote just, equitable and sustainable

²⁶ 25

economic and social development and environmental protection, the values envisaged by this consumer protection policy are the following:

- The dignity of each person generally and specifically in the context of participating in the market as a consumer and also as a supplier;
- The equal and fair treatment of consumers and suppliers;
- The access to a free, fair and competitive market;
- The access to justice through an effective and efficient system of redress;
- The promotion of accountable, open and transparent, and responsible behaviour of supplier and consumers, and
- Good governance in regulating consumer protection matters.

4.2 Principles

The entire consumer protection imperative in a South African context is underpinned by a number of principles. These are set out in the Long Title, Preamble and section 3 of the CPA and this provincial consumer protection policy must be guided by these principles which include:

- a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection;
- to provide for improved standards of consumer information;
- to prohibit unfair marketing and business practices;
- to promote responsible consumer behaviour; and
- to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements.

As the NDP states:

'The country must write a different story in the years ahead. In this new story, every citizen is concerned about the wellbeing of all other citizens, and the development of South Africa means the development of each and every one of us who lives here. We must build on our social solidarity, which, through history and heritage has demonstrated our aspiration to create a caring South African society'.²⁷

²⁷ p50.

5 AIMS AND APPROACH

5.1 Aims

The aims of any provincial consumer protection policy must of ideally (and also of necessity) coincide with the aims spelled out in the Preamble of the CPA. These are to:

- Promote and protect the economic interest of consumers in the province;
- Improve access to, and the quality of, information that is necessary so that consumers in the province are able to make informed choices according to their individual wishes and needs;
- Protect consumers from hazards to their well-being and safety;
- Develop effective means of redress for consumers in the province;
- Promote and provide for consumer education, including education concerning the social and economic effects of consumer choices;
- Promote consumer participation in decision-making processes concerning the marketplace and the interest of consumers;
- Facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests; and
- Promote consumer participation in decision-making processes concerning the marketplace and the interests of consumers.

In view of the fact that the CPA already makes provision for these, there is no need to specifically make provision for each of these aims in provincial policy or legislation, save to recognise and endorse them.

However it is necessary to ensure that provincial policy and legislation is aligned to that of national policy and legislation. It is, therefore, necessary to promulgate provincial legislation to create a legal framework for the establishment of consumer protection bodies for the enforcement of the consumer rights contained in the CPA.

5.2 Approach

The approach in achieving the abovementioned aims is to make provision by way of legislation for the:

- establishment of a Provincial Consumer Protection Authority in the Province with the functions and jurisdiction necessary for the implementation of consumer rights as provided for in the CPA; and
- establishment of a Provincial Consumer Tribunal (Court) with the necessary powers to provide effective enforcement and redress for consumers in the Province.

6 POLICY CONTEXT

The CPA provides consumers in South Africa with comprehensive substantive consumer rights and mechanisms to enforce these rights. Although consumers have these rights as provided by the CPA, currently the enforcement thereof can only happen at a national level. Practically it means that the consumer must approach the National Consumer Commission with a complaint. This is patently not to the benefit of the consumers, particularly the more vulnerable consumer.

The CPA never intended for the enforcement to be centralised at a national level. The practical difficulties with such an approach would most certainly defeat the objects of the consumer protection imperative. Decentralising the enforcement of consumer protection is clearly envisaged by the CPA when the Act anticipates the establishment of provincial consumer authorities (see sections 1, 71(2)(b)(i), 72(1)(b), 83, 84 and 120(2)(c) of the CPA) and provincial consumer courts (see sections 1, 69(c)(ii), 70(1)(d), 72(1)(b), 73(2)(a), 73(3), 73(4), 73(5) and 73(6) of the CPA). The CPA also in section 94(a) authorises the NCC to identify national and provincial legislation that affects the welfare of consumers and is inconsistent with the purposes of the Act, and in consultation with the relevant authorities, develop proposals for the reform of such legislation.

It is clear that provincial legislation is foreseen to ensure that provincial consumer protection authorities are able to do this in alignment with the national Act and in support of national consumer protection bodies, so as to ensure that every consumer in South Africa enjoys the same protection.

Inextricably linked to this is consumer education and awareness. Consumer education is critical to ensure that consumers and suppliers are aware of their rights respectively, as well as their duties in terms of applicable consumer protection legislation. Only through the education of consumers will it be possible to empower

consumers to be able to be responsible consumers and to have the necessary knowledge to enforce their rights.

7 POLICY CONTENT

7.1 Alignment with national legislation (CPA)

This policy document points out that a particular problem exists within the current legislative and regulatory framework for consumer protection for the Province of the Eastern Cape. This came about due to the fact that there are two different statutes regulating this functional area namely the Eastern Cape Consumer Affairs (Unfair Business Practices) Act 5 of 1998 and the national Consumer protection Act 68 of 2008. These respective pieces of legislation have different mandates and, consequently, different approaches to the protection of consumers. This is illustrated by the fact that the CPA has repealed the Consumer Affairs (Unfair Business Practices) Act 71 of 1988, the latter being the Act on which the Eastern Cape Consumer Affairs (Unfair Business Practices) Act 5 of 1998 is based. The provincial Act is therefore fundamentally different from the national Act.

This situation impacts negatively on the ability of residents of the Province of the Eastern Cape to enjoy fully the consumer rights they have in terms of the CPA. This situation is untenable and should be rectified.

7.2 Structure

In rectifying the misalignment between national and provincial legislation in the functional area of consumer protection the specific aspects detailed below need to be addressed.

7.2.1 Realisation and protection of consumer rights

Under this heading consideration should be given to the title, objectives and application of new legislation so as to ensure alignment with the purposes and ambit of application of the CPA.

Importantly, who may initiate a complaint and enforce consumer rights under provincial legislation at least must be the same as provided for by the CPA.

7.2.2 Establishment of a provincial consumer protection authority

It is recognised that there is currently in existence an Office for the Investigation of Unfair Business Practices which has been established in terms of the Eastern Cape Consumer Affairs (Unfair Business Practices) Act. This Office needs to be replaced with an Office of the Consumer Protector with powers and functions aligned to that of the NCC.

A provincial consumer authority must be established. This authority will be responsible to the relevant MEC. The authority will be headed by a Consumer Protector appointed by the MEC, who will also appointment the necessary staff required for the proper functioning of this authority.

Transitional arrangements need to be provided for to ensure that all acts performed by the Office for the Investigation of Unfair Business Practices remains of legal force and effect and that no rights vested are compromised because of the change in office.

7.2.3 Powers and functions of the provincial consumer protection authority

The Consumer Protector will have the following functions and powers and which must be aligned to that of the NCC:

- Managing the Consumer Protection Authority
- Development and implementation of consumer education and awareness strategies
- Appointment of investigators and inspectors
- Receiving and lodging consumer complaints
- Managing the investigation of complaints
- Institution of proceedings after completion of investigation
- Referral of matters to the consumer tribunal
- Registration of adverse notations
- Liaison and negotiating agreements with other consumer protection authorities
- Reporting to the MEC.

7.2.4 Establishment of a provincial consumer tribunal

It is recognised that there is in terms of the current provincial legislation provision made for the establishment of tribunals. There must be established a provincial consumer tribunal and provision needs to be made for the composition thereof and the appointment of members in line with that of the National Consumer Tribunal (NCT) established in terms of the NCA.

The members of the tribunal and administrative support staff are to be appointed by the MEC.

7.3.5 Powers and functions of the provincial consumer tribunal

The current legislation providing the tribunal(s) with its powers and functions is not aligned with the CPA. The powers of the (current) tribunal is significantly different to that of the NCT because of the different enforcement provisions of the respective Acts. This aspect needs to be remedied. The powers and functions of the consumer tribunal need to be described and such powers and functions must be aligned to that of the NCT.

7.3.6 Transitional arrangements

As indicated, transitional arrangements need to be provided for so as to ensure that vested rights are not compromised and that acts performed in terms of the current provincial legislation remains of legal force and effect.

7.3.7 Matters incidental

Matters incidental to the afore-going need to be provided for, particularly authority needs to be provided for the making of regulations.

8 IMPLEMENTATION STRATEGIES

The currently applicable Provincial consumer protection legislation is not aligned with the recent National consumer protection legislation. Although both the CPA and the Consumer Affairs (Unfair Business Practices) Act (Eastern Cape), 1998 provide for consumer protection, the objects and the manner of enforcing consumer protection differ fundamentally. To provide for the new legislative and regulatory

framework of consumer protection and in order to give effect to the greater protection provided to consumers in terms of the CPA, it is necessary that new legislation be drafted. Potentially two solutions are available for creating the new legislation.

The first solution is to amend the current Consumer Affairs (Unfair Business Practices) Act (Eastern Cape), 1998. There is a fundamentally different approach to consumer protection followed by the CPA which provides for consumer rights and a contravention of the Act entails a rights-based investigation. The current provincial consumer protection legislation does not contain consumer rights at all but has a broad definition of an unfair business practice against which business behaviour is weighed. This fundamental change resulted in the National Consumer Affairs (Unfair Business Practices) Act being repealed by the CPA. To facilitate the change in approach between the CPA and the current Provincial legislation it will be necessary to make extensive amendments to the Provincial legislation to create a desirable legislative and regulatory framework.

The second solution is to repeal the current Provincial legislation and to draft and promulgate a new Consumer Protection Bill to replace the repealed legislation. This solution will result in an alignment between the Provincial Bill and the CPA and it will ensure that the Provincial enforcement mechanisms and processes are compatible with the National structures. In addition, the introduction of new legislation will create legal certainty as both National and Provincial policy and legislation will be aligned.

In addition the transitional arrangements will provide for the continued operation of the existing Provincial consumer protection authority, known as the Office of the Consumer Protector, in its role of mediation, conciliation, consumer awareness and education as well as any matters incidental to the implementation of the CPA in the Province.

9 PREFERRED SOLUTION

The preferred solution is to repeal the existing Provincial Act, namely the Consumer Affairs (Unfair Business Practices) Act (Eastern Cape), 1998 and to promulgate new consumer protection legislation in the form of a Consumer Protection Bill (Eastern Cape) which will be aligned with both National consumer protection policy and legislation.

10 CONSULTATION

The list of parties and/or institutions that were involved in discussions and made inputs on this White Paper is attached here to as Annexure A.

11 LONG TERM OUTCOMES AND CONCLUSION

11.1 Long Term Outcomes

The establishment of

- a Provincial Consumer Protection Authority with the necessary powers to progressively realise the consumer rights set out in the CPA for the people of the Province of the Eastern Cape, thereby facilitating the socio-economic objectives of the Provincial Government;
- a programme of consumer education and awareness to enable consumers to make informed choices and understand the social and economic effects of their choices;
- a programme of education and awareness to assist suppliers in becoming compliant with legislative requirements in respect of consumer rights, thereby developing an increasingly fair consumer market within the Province;
- a Provincial Consumer Tribunal for the enforcement of the Provincial legislation; and
- accessible, time and cost-effective mechanisms for redress and enforcement of consumer rights which will advance the socio-economic interests of the consumers of the Eastern Cape.


10.2 Conclusion

The policy imperatives contained in this White Paper requires the establishment and empowerment of a Provincial Consumer Protection Authority and a Provincial Consumer Tribunal to ensure that the Authority and the Tribunal can facilitate and enforce the consumer rights contained in the CPA for the people of the Province.

In order to achieve the aims of this policy the old consumer protection legislation, the Consumer Affairs (Unfair Business Practices) Act (Eastern Cape), 1998 must be repealed as it is not aligned to the new National policy and legislation and new provincial legislation is required in the form of a Provincial Consumer Protection Act.

12 APPROVAL OF WHITE PAPER

The White Paper is therefore approved by the Member of the Executive Council for the Eastern Cape Department of Economic Development, Environmental Affairs and Tourism.



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Honourable Sakhumzi Somyo

MEC for Economic Development, Environment Affairs and Tourism

IMPORTANT

Information

from Government Printing Works

Dear Valued Customers,

Government Printing Works has implemented rules for completing and submitting the electronic Adobe Forms when you, the customer, submits your notice request.

Please take note of these guidelines when completing your form.

GPW Business Rules

1. No hand written notices will be accepted for processing, this includes Adobe forms which have been completed by hand.
2. Notices can only be submitted in Adobe electronic form format to the email submission address submit.egazette@gpw.gov.za. This means that any notice submissions not on an Adobe electronic form that are submitted to this mailbox will be **rejected**. National or Provincial gazette notices, where the Z95 or Z95Prov must be an Adobe form but the notice content (body) will be an attachment.
3. Notices brought into GPW by "walk-in" customers on electronic media can only be submitted in Adobe electronic form format. This means that any notice submissions not on an Adobe electronic form that are submitted by the customer on electronic media will be **rejected**. National or Provincial gazette notices, where the Z95 or Z95Prov must be an Adobe form but the notice content (body) will be an attachment.
4. All customers who walk in to GPW that wish to submit a notice that is not on an electronic Adobe form will be routed to the Contact Centre where the customer will be taken through the completion of the form by a GPW representative. Where a customer walks into GPW with a stack of hard copy notices delivered by a messenger on behalf of a newspaper the messenger must be referred back to the sender as the submission does not adhere to the submission rules.
5. All notice submissions that do not comply with point 2 will be charged full price for the notice submission.
6. The current cut-off of all Gazette's remains unchanged for all channels. (Refer to the GPW website for submission deadlines – www.gpwonline.co.za)
7. Incorrectly completed forms and notices submitted in the wrong format will be rejected to the customer to be corrected and resubmitted. Assistance will be available through the Contact Centre should help be required when completing the forms. (012-748 6200 or email info.egazette@gpw.gov.za)
8. All re-submissions by customers will be subject to the above cut-off times.
9. All submissions and re-submissions that miss the cut-off will be rejected to the customer to be submitted with a new publication date.
10. Information on forms will be taken as the primary source of the notice to be published. Any instructions that are on the email body or covering letter that contradicts the notice form content will be ignored.

You are therefore advised that effective from **Monday, 18 May 2015** should you not comply with our new rules of engagement, all notice requests will be rejected by our new system.

Furthermore, the fax number **012- 748 6030** will also be **discontinued** from this date and customers will only be able to submit notice requests through the email address submit.egazette@gpw.gov.za.



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