



BERMUDA

CONSUMER PROTECTION ACT 1999

1999 : 45

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SCHEDULE SECTION 23
PROHIBITION ORDERS, PROHIBITION NOTICES AND NOTICES TO WARN

WHEREAS it is expedient to establish the Consumer Affairs Board and to make provision for the protection of consumers in respect of unfair business practices and the safety of consumer goods:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:—

PART I
PRELIMINARY

Citation

- 1 This Act may be cited as the Consumer Protection Act 1999.

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Definitions

2 In this Act—

“the Board” means the Consumer Affairs Board established under section 3;

“consumer” means a person to whom goods or services are or may be supplied but does not include a person who receives the goods or services in the course of a business carried on by him;

“consumer goods” means any goods which are ordinarily intended for private use or consumption except—

- (i) water;
- (ii) food;
- (iii) controlled drugs as defined in the Misuse of Drugs Act 1972;
- (v) tobacco or tobacco products;
- (vi) pharmaceutical or medicinal products available without prescription;

“consumer representation” means a representation, statement, offer, request or proposal—

- (i) made respecting, or with a view to the supplying of, goods or services, or both, to a consumer; or
- (ii) made for the purpose of, or with a view to receiving, consideration for goods or services, or both, supplied or purporting to have been supplied to a consumer;

“court” means in Part III the Supreme Court, but elsewhere means a court of summary jurisdiction;

“Executive Officer” means the person appointed under section 6;

“goods” means chattels personal or any right or interest therein other than choses in action and money, including chattels that become fixtures, but not including securities as defined in the Investment Business Act 1998;

“inspector” means a person appointed under section 27;

“the Minister” means the Minister for the time being responsible for consumer affairs;

“notice to warn” means a notice under section 23(1)(c);

“prescribed” means prescribed by regulations;

“prohibition notice” means a notice under section 23(1)(b);

“prohibition order” means an order under section 23(1)(a);

“safe”, in relation to any consumer goods, means such that there is no risk, or no risk apart from one reduced to a minimum, that any of the following will

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(whether immediately or after a definite or indefinite period) cause the death of, or any personal injury to, any person whatsoever, that is to say—

- (i) the goods;
- (ii) the keeping, use or consumption of the goods;
- (iii) the assembly of any of the goods which are, or are to be, supplied unassembled;
- (iv) any emission or leakage from the goods or, as a result of the keeping, use or consumption of the goods, from anything else; or
- (v) reliance on accuracy of any measurement, calculation or other reading made by or by means of the goods;

“safety provision” means the general safety requirement in section 20 or any provision of safety regulations, a prohibition order, a prohibition notice or a suspension notice;

“safety regulations” means regulations made under section 22;

“unfair business practice” means an unfair business practice set out in section 11.

PART II

ADMINISTRATION

Establishment of the Board

3 (1) There is established a body to be called “the Consumer Affairs Board” which shall perform the functions assigned to the Board by this Act and by any other statutory provision.

(2) The Board shall consist of not more than twelve persons appearing to the Minister to have training, knowledge or experience, relevant to consumer affairs.

(3) The Minister shall appoint the members of the Board for such term not exceeding three years as may be specified in their respective instruments of appointment, and shall appoint from among them a Chairman and Deputy Chairman.

(4) In the absence of the Chairman, the Deputy Chairman shall act as Chairman and, in the absence of both the Chairman and the Deputy Chairman, the members present at a meeting of the Board shall elect one of them to preside at that meeting.

(5) At a meeting of the Board, seven members shall form a quorum.

(6) Subject to this Act, the Board shall determine their own procedure.

(7) The expenses of the Board shall be met out of funds appropriated by the Legislature.

Functions of the Board

4 The functions of the Board are—

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- (a) to ensure and protect the rights of consumers and, in particular to review and keep under review business practices, to regulate product safety, to ensure the provision of adequate information to the consumer and to monitor the timeliness of repairs and other services;
- (b) to advise the Minister on any consumer protection matter referred to the Board by the Minister or which, of their own initiative, the Board consider appropriate;
- (c) to conduct research on consumer matters, and to educate the public by the production and distribution of information on the rights of consumers and better business practices;
- (d) to use their good offices in an informal manner to conciliate and settle consumer complaints or grievances and to maintain a database of complaints and grievances;
- (e) to encourage businesses to adhere to better business practices;
- (f) to advise on the issue of orders or notices relating to safety or unfair business practices;
- (g) to keep under review the working of this Act and, where so required by the Minister or, as the Board of their own initiative consider appropriate, submit to the Minister proposals for amending it.

Minister may give policy directions

5 The Minister, after consultation with the Board, may give such general directions as to the policy to be followed by the Board in the performance of their functions as appear to the Minister to be necessary in the public interest; and the Board shall give effect to any such directions.

Executive Officer

- 6
- (1) There shall be appointed a public officer to be Executive Officer to the Board.
 - (2) The Board may delegate any of their functions to the Executive Officer.
 - (3) The Executive Officer shall act as secretary to the Board, shall be responsible for the day to day management of the affairs of the Board and, subject to the policy directions of the Board or of the Minister under section 5, shall be responsible for carrying out the functions of the Board.
 - (4) The Executive Officer shall—
 - (a) receive, act on and attempt to settle, complaints respecting unfair business practices;
 - (b) maintain available for public inspection a record of—
 - (i) assurances of voluntary compliance entered into under Part III;

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- (ii) orders to cease engaging in unfair business practices issued under Part III.

Staff

7 There may be appointed such other public officers as the Minister considers necessary to enable the Board to carry out their functions.

Board and staff to maintain secrecy

8 The members of the Board, the Executive Officer and every person acting under the direction of the Board, shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions, and shall not communicate any such matter to any person except for the purpose of carrying out their functions under this Act.

Liability of Board and staff

9 No action, suit, prosecution or other proceeding shall lie against the members of the Board or any public officer acting on behalf of the Board in respect of any act done in good faith in execution or intended execution of any function under this Act.

Annual report

10 (1) Without limiting the duty of the Board to report at any time on any matter referred to the Board by the Minister, the Board shall, not later than six months after the end of each year, furnish to the Minister a report on the activities of the Board in that year.

(2) The Minister shall lay a copy of every such report before both Houses of the Legislature as soon as practicable after the date on which it is furnished to him.

PART III

UNFAIR BUSINESS PRACTICES

Unfair business practices

11 (1) For the purposes of this Part the following shall be deemed to be unfair business practices—

- (a) a false, misleading or deceptive consumer representation including—
 - (i) a representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or quantities they do not have;
 - (ii) a representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection he does not have;
 - (iii) a representation that the goods are of a particular standard, quality, grade, style or model, if they are not;

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- (iv) a representation that the goods are new, or unused, if they are not or are reconditioned or reclaimed, provided that the reasonable use of goods to enable the seller to service, prepare, test and deliver the goods for the purpose of sale shall not be deemed to make the goods used for the purposes of this subparagraph;
- (v) a representation that the goods have been used to an extent that is materially different from the fact;
- (vi) a representation that the goods or services are available for a reason that does not exist;
- (vii) a representation that the goods or services have been supplied in accordance with a previous representation, if they have not;
- (viii) a representation that the goods or services or any part thereof are available to the consumer when the person making the representation knows or ought to know they will not be supplied or that he will be unable to supply the demand for the goods or services that can reasonably be expected;
- (ix) a representation that a service, part, replacement or repair is needed, if it is not;
- (x) a representation that a specific price advantage exists, if it does not;
- (xi) a representation that misrepresents the authority of a salesman, representative, employee or agent to negotiate the final terms of the proposed transaction;
- (xii) a representation that the proposed transaction involves or does not involve rights, remedies or obligations if the representation is false or misleading;
- (xiii) a representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive;
- (xiv) a representation that misrepresents the purpose or intent of any solicitation of, or any communication with, a consumer;
- (xv) a representation that disparages the goods or services of another by the false or misleading representation of material facts relating to those goods or services;
- (xvi) a representation that a repair or service has been done or a part has been replaced, if it has not;
- (xvii) a representation that because of some defect in the consumer's home, the health or safety of the consumer or his family is endangered if the particular goods or services are not purchased, if the defect does not exist or if the goods or services would not remove the danger;

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- (xviii) a representation that goods or services are offered at a discounted or sale price unless they have been offered at the full or undiscounted price for a period of at least 28 days preceding the sale;
 - (xix) a representation that is false or misleading with respect to the reason why goods or services are offered at a discounted or sale price;
 - (xx) a representation that goods are made in Bermuda, if they are not;
 - (xxi) a representation that goods or services supplied by him are or are of a kind supplied to or approved by Her Majesty or any member of the Royal Family, if they are not;
 - (xxii) such other representations as may be prescribed;
- (b) an unconscionable consumer representation made in respect of a particular transaction and, in determining whether or not a consumer representation is unconscionable, there may be taken into account that the person making the representation or his employer or principal knows or ought to know—
- (i) that the consumer is not reasonably able to protect his interests because of his physical infirmity, mental disorder or impairment, age, illiteracy, inability to understand the language of an agreement or similar factors;
 - (ii) that the price to be charged will grossly exceed the estimated or quoted price, or that the price grossly exceeds the price at which similar goods or services are readily available to like consumers;
 - (iii) that the consumer is unable to receive a substantial benefit from the subject-matter of the consumer representation;
 - (iv) that there is no reasonable probability of payment of the obligation in full by the consumer;
 - (v) that the proposed transaction is excessively one-sided in favour of someone other than the consumer;
 - (vi) that the terms or conditions of the proposed transaction are so adverse to the consumer as to be inequitable;
 - (vii) that he is making a misleading statement of opinion on which the consumer is likely to rely to his detriment;
 - (viii) that he is subjecting the consumer to undue pressure to enter into the transaction;
 - (ix) that the transaction is part of a pyramid or multi-layer marketing scheme and that fact has not been disclosed to the consumer; and
- (c) an unconscionable act in respect of a particular transaction and, in determining whether or not an act is unconscionable, there may be taken into account that the person is—

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- (i) engaging in abusive language, or verbal or physical threats directed towards the consumer;
- (ii) withholding from the consumer material information, or providing material information in terms which cannot be understood by the consumer; and in particular, where the person knows or ought to know that the consumer is not reasonably able to protect his interests because of his physical infirmity, mental disorder or impairment, age, illiteracy, or inability to understand the language or similar factors;
- (iii) supplying and charging the consumer for consumer goods and services which were not part of the transaction without first obtaining the agreement of the consumer;
- (iv) failing to make a full refund (or an appropriate refund) within 30 days from the date the consumer requested a refund, in circumstances where the person failed to supply or substantially supply goods or services under the terms and conditions of the transaction;
- (v) placing a lien on property belonging to the consumer for the purpose of inducing the consumer to pay for the unauthorized supply of goods or services, either at the time the goods or services are supplied or at a later date.

(2) For the purpose of this section—

“estimate” means a representation, whether written or oral, indicating the likely price that will be charged in respect of consumer goods or services;

“quote” means a written and signed representation setting out the actual price that will be charged in respect of consumer goods or services.

[Section 11 amended by 2011 : 15 s. 2 effective 3 June 2011]

Unfair business practices prohibited

12 (1) No person shall engage in an unfair business practice.

(2) A person who makes, under section 11, a consumer representation or performs any act shall be deemed to be engaging in an unfair business practice.

(3) Every person who engages in an unfair business practice is guilty of an offence and is liable on summary conviction to a fine of \$10,000 or imprisonment for 6 months.

(4) Where a person is found guilty of engaging in an unfair business practice the court may, in addition to imposing a penalty under subsection (3), make an order for the payment of compensation for the loss suffered by the consumer.

(5) Notwithstanding subsection (3), a person shall not be charged with an offence of unfair business practice under this section where such person—

- (a) agrees to attempts made by the Executive Officer to effectively settle a complaint of unfair business practice as provided in section 6(4)(a);

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- (b) complies with an order issued by the Executive Officer for the person to cease engaging in an unfair business practice as provided in section 14; or
- (c) complies with a written assurance of voluntary compliance under section 17.

[Section 12 subsection (2) repealed and replaced, and subsections (4) and (5) inserted by 2011 : 15 s. 3 effective 3 June 2011]

Remedies

13 (1) Where a person induces a consumer to enter into an agreement, whether written, oral or implied, by an unfair business practice, the consumer may, subject to subsection (2), rescind the agreement and is entitled to any remedy that is available at law, including damages.

(2) Where rescission is not possible because—

- (a) restitution is no longer possible; or
- (b) rescission would deprive a third party of a right in the subject-matter of the agreement that he has acquired in good faith and for value,

the consumer is entitled to recover the amount by which the amount paid under the agreement exceeds the fair value of the goods or services received under the agreement or damages, or both.

(3) Where the unfair business practice that induced the consumer to enter into the agreement comes within paragraph 11(b) or (c), the court may award exemplary or punitive damages.

(4) Subject to subsection (5), each person who engages in an unfair business practice referred to in subsection (1) is liable jointly and severally with the person who entered into the agreement with the consumer for any amount that the consumer is entitled to under subsections (1), (2) and (3).

(5) Subsection (4) does not apply to a person who, on behalf of another person, prints, publishes (including publication by electronic media), distributes, broadcasts or telecasts a representation or an advertisement that he accepts in good faith for printing, publishing, distributing, broadcasting or telecasting in the ordinary course of his business.

(6) The liability of an assignee of an agreement under subsection (1) or any right to payment thereunder is limited to the amount paid to the assignee under the agreement.

(7) A consumer may, within six months after the agreement referred to in subsection (1) is entered into, claim a remedy conferred by subsection (1) by giving notice of the claim in writing to the person who induced the consumer to enter into the agreement.

(8) A notice under subsection (7) may be delivered personally or sent by registered mail addressed to the person to whom delivery is required to be made, and delivery by registered mail shall be deemed to have been made at the time of mailing.

(9) This section applies notwithstanding any agreement or waiver to the contrary.

[Section 13 amended by 2011 : 15 s. 4 effective 3 June 2011]

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Order to cease unfair business practice

14 (1) Where the Executive Officer believes on reasonable and probable grounds that any person is engaging or has engaged in an unfair business practice, the Executive Officer may order such person to cease the unfair business practice specified in the order.

(2) Where the Executive Officer proposes to make an order under subsection (1), he shall serve notice of his proposal on each person to be named in the order together with written reasons therefor.

(3) A notice under subsection (2) shall inform each person to be named in the order that he is entitled to a hearing by the Minister if he mails or delivers within fifteen days after a notice under subsection (2) is served on him notice in writing requiring a hearing to the Executive Officer and the Minister and he may so require such a hearing.

(4) Where a person upon whom a notice is served under subsection (2) does not require a hearing by the Minister in accordance with subsection (3), the Executive Officer may carry out the proposal stated in the notice.

(5) Where a person requires a hearing by the Minister in accordance with subsection (3), the Minister shall appoint a time for and hold the hearing and may by order direct the Executive Officer to carry out his proposal or to refrain from carrying out his proposal and to take such action as the Minister considers the Executive Officer ought to take in accordance with this Act.

(6) The Minister may attach such terms and conditions to his order as he considers appropriate to give effect to the purpose of this Act.

(7) The Executive Officer and the person who has required the hearing and such other persons as the Minister may specify are parties to proceedings before the Minister.

Order for immediate compliance

15 (1) Notwithstanding section 14, the Executive Officer may make an order under section 14(1) to take effect immediately where, in his opinion, to do so is necessary for the protection of the public and, subject to subsections (3) and (4), the order takes effect immediately.

(2) Where the Executive Officer makes an order under subsection (1), he shall serve each person named in the order with a copy of the order together with written reasons therefor and a notice containing the information required to be in a notice referred to in section 14(2) and (3).

(3) Where a person named in the order requires a hearing by the Minister in accordance with the notice under subsection (2), the Minister shall appoint a time for and hold the hearing and may confirm or set aside the order or exercise such other powers as may be exercised in a proceeding under section 14.

(4) Where a hearing by the Minister is required, the order expires fifteen days after the giving of the notice requiring the hearing but, where the hearing is commenced before the expiration of the order, the Minister may extend the time of expiration until the hearing is concluded.

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(5) The Executive Officer and the person who has required the hearing and such other persons having a direct interest in the order as the Minister may specify are parties to proceedings before the Minister under this section.

(6) An order of the Minister under this section or section 14 takes effect immediately but the Minister may grant a stay if notice of an appeal under section 16 is served on him.

Appeal from decision of Minister

16 (1) Any party to proceedings before the Minister may appeal from his decision or order to the Supreme Court in accordance with the rules of court.

(2) Where any party appeals from a decision of the Minister, the Minister shall forthwith file in the court the record of the proceedings before him in which the decision was made, which, together with the transcript of the evidence if it is not part of the record, shall constitute the record in the appeal.

(3) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Minister, and for such purpose the court may substitute its opinion for that of the Minister, or the court may refer the matter back to the Minister for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

Assurance of voluntary compliance

17 (1) Any person against whom the Executive Officer proposes to make an order to comply with section 12 may enter into a written assurance of voluntary compliance in such form as may be approved by the Minister undertaking to not engage in the specified unfair business practices after the date thereof.

(2) Where an assurance of voluntary compliance is accepted by the Executive Officer, the assurance has and shall be given for all purposes of this Act the force and effect of an order made by the Executive Officer.

(3) An assurance of voluntary compliance may include such undertakings as are acceptable to the Executive Officer and the Executive Officer may receive a bond and collateral therefor as security for the reimbursement of consumers and for investigation and other costs in such amount as is satisfactory to the Executive Officer.

Investigations by order of Minister

18 The Minister may by order appoint a person to make an investigation into any matter to which this Part applies as may be specified in the Minister's order and the person appointed shall report the result of his investigation to the Minister and, for the purposes of this investigation, the person making it has the powers of a commissioner under the Commissions of Inquiry Act 1935, which Act applies to such investigation as if it were an inquiry under that Act.

Offences

19 Every person who—

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- (a) furnishes false information in an investigation under this Part;
- (b) obstructs a person making an investigation under this Part;
- (c) fails to comply with an order made under this Part or an assurance of voluntary compliance,

is guilty of an offence and is liable on summary conviction to a fine of \$10,000 or imprisonment for 6 months.

PART IV CONSUMER SAFETY

General safety requirement

20 For the purposes of this Part consumer goods fail to comply with the general safety requirement if they are not reasonably safe having regard to all the circumstances including—

- (a) the manner in which, and purposes for which the goods are marketed, the use of any trade mark in relation to the goods and any instructions or warnings which are given with respect to the keeping, use or consumption of the goods; and
- (b) any standards of safety published by the manufacturer or other authority in the place of origin either for goods of a description that applies to the goods in question or for matters relating to goods of that description.

Offence

21 A person is guilty of an offence if he—

- (a) supplies any consumer goods which fail to comply with the general safety requirement, the safety standards applicable in the place of origin of the goods, or any prescribed standard;
- (b) offers or agrees to supply any such goods; or
- (c) exposes or possesses such goods for supply,

and is liable on summary conviction to a fine of \$10,000 or imprisonment for 6 months.

Safety regulations

22 (1) The Minister may make regulations (“safety regulations”) containing such provision as he considers appropriate for the purpose of securing that consumer goods are safe and that appropriate information is, and inappropriate information is not, provided in relation to consumer goods and in particular—

- (a) with respect to the composition or contents, design, construction, finish or packing of consumer goods or with respect to other matters relating to consumer goods;

- (b) for requiring consumer goods to conform to a particular standard or to be approved or of a kind approved by a particular person and for requiring information to be given, and determining the manner in which it is to be given, for the purpose of indicating that the consumer goods conform to that standard or are so approved or of such a kind;
 - (c) with respect to standards for consumer goods (which may be standards set out in the regulations or standards or parts of standards of which particulars have been published by any person in Bermuda or elsewhere) and with respect to the approval by the Minister of standards or parts of standards of which particulars have been so published;
 - (d) with respect to the giving, refusal, alteration and cancellation of approvals for consumer goods or kinds of consumer goods, with respect to the conditions and alteration of the conditions, which may be attached to and the fees which may be charged for approvals and with respect to appeals against refusals, alterations and cancellations of such approvals and against the conditions and alteration of conditions of such approvals;
 - (e) with respect to the testing or inspection of consumer goods, for determining the manner in which any person by whom any test or inspection required by the regulations is to be carried out and for determining the standards to be applied in carrying out such a test or inspection;
 - (f) with respect to the ways of dealing with consumer goods of which some or all do not satisfy a test prescribed by the regulations or a standard connected with a procedure so prescribed;
 - (g) for requiring a warning or instructions or other information relating to consumer goods to be marked on or to accompany the goods or to be given in some other manner in connection with the goods, and for securing that inappropriate information is not given in respect of goods either by means of misleading trade marks or otherwise;
 - (h) for prohibiting persons from supplying, or from offering to supply, agreeing to supply, exposing for supply or possessing for supply consumer goods which the Minister considers are not safe and consumer goods in respect of which requirements of the regulations are not satisfied;
 - (i) for prohibiting persons from supplying, or from offering to supply, agreeing to supply, exposing for supply or possessing for supply, goods which are designed to be used as component parts of other goods and which would if so used cause the other goods to contravene requirements of the regulations.
- (2) Safety regulations may—
- (a) make different provisions for different circumstances or provision relating only to specified circumstances;
 - (b) provide for exemptions from any provision of the regulations;

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- (c) create offences and provide that a person who commits an offence against the regulations is liable on summary conviction to a fine of \$5,000 or imprisonment for 6 months;
- (d) contain such incidental and supplemental provisions as the Minister considers appropriate.

(3) Safety regulations made under this section are subject to the negative resolution procedure.

Orders and notices to prohibit supply of goods or give warning of danger from goods

23 (1) The Minister may—

- (a) make orders (“prohibition orders”) prohibiting persons from supplying, or from offering to supply, agreeing to supply, exposing for supply or possessing for supply—
 - (i) any consumer goods which the Minister considers are not safe and which are described in the orders; and
 - (ii) any consumer goods which are designed to be used as component parts of other consumer goods and which would if so used cause the other consumer goods to be consumer goods described in the orders in pursuance of sub-paragraph (i);
- (b) serve on any person a notice (“prohibition notice”) prohibiting the person, except with the consent of the Minister and in accordance with the conditions, if any, on which the consent is given from supplying, or from offering to supply, agreeing to supply, exposing for supply or possessing for supply, any consumer goods which the Minister considers are not safe and which are described in the notice;
- (c) serve on any person a notice (“notice to warn”) requiring the person to publish, in a form and manner and on occasions specified in the notice and at his own expense, a warning about any consumer goods so specified which the Minister considers are not safe and which the person supplies or has supplied.

(2) Part I of the Schedule shall have effect with respect to prohibition orders, Part II of the Schedule shall have effect with respect to prohibition notices and Part III of the Schedule shall have effect with respect to notices to warn; and section 22(2) shall apply to prohibition orders as it applies to safety regulations.

(3) A person who contravenes a prohibition order, a prohibition notice or a notice to warn is liable on summary conviction to a fine of \$10,000 or to imprisonment for 6 months.

Suspension notices

24 (1) Where the Minister has reasonable grounds for suspecting that any safety provision has been contravened in relation to any consumer goods, he may serve a notice (“a suspension notice”) prohibiting the person on whom it is served, for such period ending

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not more than 6 months after the date of the notice as is specified therein, from supplying the goods, offering to supply them, agreeing to supply them or exposing them for supply without the consent of the Minister.

- (2) A suspension notice shall—
- (a) describe the consumer goods in a manner sufficient to identify them;
 - (b) set out the grounds on which the Minister suspects that a safety provision has been contravened in relation to the consumer goods; and
 - (c) state that the person on whom the notice is served may apply under section 25 for an order setting aside the notice.

(3) A consent of the Minister under subsection (1) may impose such conditions on the doing of anything for which the consent is required as the Minister considers appropriate.

(4) Any person who contravenes a suspension notice is guilty of an offence and is liable on summary conviction to a fine of \$10,000 or to imprisonment for 6 months.

Application to set aside suspension notice

25 (1) Any person having an interest in any consumer goods in respect of which a suspension notice is in force may apply to a magistrate for an order setting aside the notice.

(2) On an application under subsection (1) the magistrate shall make an order setting aside the suspension notice only if he is satisfied that there has been no contravention of any safety provision in relation to the consumer goods.

Power to obtain information

26 (1) If the Minister considers that, for the purpose of deciding whether to make, vary or revoke safety regulations or a prohibition order or to serve, vary or revoke a prohibition notice or to serve or revoke a notice to warn, he requires information which another person is likely to be able to furnish, the Minister may serve on the other person a notice requiring the person—

- (a) to furnish to the Minister within a period specified in the notice, such information as is so specified;
 - (b) to produce such documents as are specified in the notice at a time and place so specified and to permit a person appointed by the Minister for the purpose to take copies of the documents at that time and place.
- (2) A person is guilty of an offence if he—
- (a) fails, without reasonable cause, to comply with a notice served on him under subsection (1); or
 - (b) in purporting to comply with a requirement which by virtue of subsection (1)(a) is contained in a notice served on him under that subsection, furnishes information which he knows is false in a material particular or recklessly furnishes information which is false in a material particular.

- (3) A person guilty of an offence under subsection (2)—
- (a) in the case of an offence under paragraph (a) of that subsection, is liable on summary conviction to a fine of \$10,000 or to imprisonment for 6 months; and
 - (b) in the case of an offence under paragraph (b) of that subsection, is liable on summary conviction to a fine of \$15,000 or to imprisonment for 12 months.
- (4) No information obtained by virtue of this section shall be disclosed except—
- (a) for the purpose of any criminal proceedings or any investigation with a view to such proceedings;
 - (b) for the purpose of facilitating the performance by the Executive Officer of his functions under Part III or for the purpose of any proceedings under Part III;
 - (c) for the purpose of enabling the Minister to decide whether to make, vary or revoke safety regulations or a prohibition order or whether to serve, vary or revoke a prohibition notice or to serve or revoke a notice to warn; or
 - (d) in a prohibition notice, a notice to warn or a warning published as required by a notice to warn or in a warning about goods which is published by the Minister;

but the prohibition on disclosure imposed by this subsection does not apply to publicised information.

(5) A person who discloses information in contravention of subsection (4) is liable on summary conviction to a fine of \$10,000 or to imprisonment for 6 months.

PART V ENFORCEMENT

Inspectors

27 The Minister may designate the Executive Officer and other persons to be inspectors for the purpose of enforcement of this Act and the regulations and shall furnish every such person with a certificate of his designation signed by the Minister and the person so designated.

Power to make test purchases, etc.

28 Any inspector may, for the purposes of enforcement of this Act or the regulations, make test purchases of goods or otherwise ascertain whether the safety provisions or any other provisions of this Act or the regulations or of an order under this Act are being complied with.

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Power to enter premises and to seize goods, etc.

29 (1) An inspector who has reasonable cause to believe that an offence under this Act or the regulations has been committed, may at all reasonable times and on production, if required, of his credentials enter any premises other than premises or parts of premises used exclusively as a dwelling house and while there may—

- (a) inspect any goods found;
- (b) require any person carrying on a business on the premises or employed in or connected with the business to produce books or documents relating to the business and to permit the inspector to take copies of or any entry in such books or documents;
- (c) examine any procedure (including any arrangements for carrying out a test connected with the production of goods);
- (d) seize and detain goods for testing;
- (e) seize and detain goods or documents which he believes may be required as evidence in proceedings under this Act;
- (f) for the purpose of exercising his powers to seize goods under this section and to the extent that it is reasonably necessary in order to ensure compliance with any provision referred to in section 28, require any person having authority to do so to break open any container, and if the person does not comply, the inspector may do so himself.

(2) An inspector who seizes goods or documents in exercise of his powers under subsection (1) shall, in a written statement specifying the nature and amount of items seized, inform the person from whom they are seized.

(3) For the purpose of proceedings taken or transactions made under this Act, the written statement of an inspector given under subsection (2) has effect as a receipt for the goods or documents seized.

(4) A magistrate who is satisfied by sworn information in writing that there are reasonable grounds to believe that—

- (a) goods, books or documents which an inspector has power to inspect are on any premises and that their inspection is likely to disclose evidence of the commission of an offence under this Act or the regulations; or
- (b) an offence under this Act or the regulations has been, is being, or is about to be committed on any premises;

and that—

- (c) admission to the premises has been or is likely to be refused and that notice of intention to apply for a warrant under this subsection has been given to the occupier; or
- (d) an application for admission or the giving of the notice mentioned in paragraph (c) would defeat the object of the entry or that the premises are

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unoccupied or that the occupier is temporarily absent and it might defeat the object of the entry to await his return,

may by warrant under his hand, which shall continue in force for a period of one month, authorise any inspector to enter the premises, if need be by force.

(5) An inspector who enters premises by virtue of this section may take with him such other persons and equipment as appears necessary to him, and on leaving premises which he enters by virtue of a warrant under subsection (4), where either the premises are unoccupied or the occupier is temporarily absent, he shall affix a notice in a conspicuous place stating that the premises were entered for the purpose of this section, and as far as practicable shall leave the premises as effectively secured against trespassers as he found them.

Offences connected to exercise of powers under section 29

30 A person who—

- (a) wilfully obstructs an inspector acting in the exercise of any power conferred on him by or under section 29;
- (b) wilfully fails to comply with any requirement properly made to him by an inspector under section 29;
- (c) without reasonable cause fails to give an inspector acting under section 29, such assistance or information as he may reasonably require of the person for the performance of the inspector's functions under this Part;
- (d) in giving information as mentioned in paragraph (c) makes a statement which he knows to be false;
- (e) not being an inspector purports to act as an inspector under this Act;
- (f) discloses to another person, where the disclosure is not made in the performance of his duty—
 - (i) information with respect to a manufacturing process or trade secret obtained by him in premises which he has entered by virtue of section 29; or
 - (ii) information otherwise obtained by him under this Act;

is guilty of an offence and is liable on summary conviction to a fine of \$10,000 or imprisonment for 6 months.

Notice of test

31 (1) Where goods seized or purchased by an inspector in pursuance of this Part are submitted to a test, the inspector shall—

- (a) if the goods were seized, inform the person from whom they were seized of the result of the test;

- (b) if the goods were purchased and the test leads to proceedings for an offence under this Act, inform the person from whom the goods were purchased of the result of the test;

and where as a result of the test proceedings for an offence are instituted against a person, the inspector shall allow the person to have the goods tested independently if it is reasonably practicable to do so.

(2) The Minister may by order provide for the testing of goods seized or purchased by an inspector in pursuance of this Act and in particular may in those orders provide that the test be carried out at the Ministry's expense in a manner, by a person, and at a laboratory or testing facility specified in the order.

Compensation

32 (1) Where in the exercise of his powers under section 29 an inspector seizes and detains any goods, and the owner suffers loss by reason of the goods being seized or by reason that, during the detention, the goods are lost or damaged or deteriorate, unless the owner is convicted of an offence under this Act committed in relation to the goods, the owner is entitled to compensation for the loss so suffered.

(2) Any disputed question as to the right to or the amount of any compensation payable under this section shall on the written application of the owner or of the Attorney-General be determined as follows—

- (a) if the amount of the compensation claimed does not exceed \$10,000, by a magistrate; or
- (b) if the amount of the compensation claimed exceeds \$10,000 by a judge of the Supreme Court,

in like manner as if the magistrate or the judge were a single arbitrator appointed pursuant to the provisions of the Arbitration Act 1986, and the provisions of that Act shall apply accordingly.

PART VI MISCELLANEOUS

Defence of mistake, accident, etc.

33 (1) In any proceedings for an offence under this Act it shall, subject to subsection (2), be a defence for the person charged to prove—

- (a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and
- (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

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(2) If in any case the defence provided by subsection (1) involves the allegation that the commission of the offence was due to the act or default of another person or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless, he has served on the prosecutor a notice in writing giving such information identifying or assisting in the identification of that other person as was then in his possession.

Offences by corporations

34 Where an offence under this Act which is committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, he, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Regulations

35 (1) The Minister may make regulations generally for any matter the Minister considers necessary to give effect to this Act and, in particular—

- (a) respecting the marking and display of prices on goods;
- (b) regulating the date stamping of food products and the sale at discounted prices of out of date food products.

(2) Regulations under subsection (1) may create offences and provide that a person who commits an offence against the regulations is liable on summary conviction to a fine of \$5,000.

(3) Regulations made under this section are subject to the negative resolution procedure.

Commencement

36 This Act or any provision thereof comes into operation on such day as the Minister may appoint by notice published in the Gazette.

PROHIBITION ORDERS, PROHIBITION NOTICES AND NOTICES TO WARN

PART I
PROHIBITION ORDERS

1. If the Minister proposes to make a prohibition order (“an order”), then, subject to paragraph 5, he shall before he makes the order—

- (a) publish, in such manner as he thinks fit a notice stating—
 - (i) that he proposes to make the order and, in such terms as he thinks fit, the proposed effect of the order; and
 - (ii) that any person may make representations in writing to the Minister about the proposed order before a date specified in the notice (which must be after the expiration of the period of twenty-eight days beginning with the date of the first publication of the notice); and
- (b) consider any such representations made within that period.

2. The effect of an order must not be more restrictive, but may be less restrictive, than the proposed effect of it as stated in the notice.

3. Without prejudice to the power to make a further order and subject to paragraph 4, an order shall cease to have effect at the expiration of a period specified in the order which must not be longer than twelve months beginning with the date on which the order comes into force.

4. An order may revoke a previous order or may vary it otherwise than by providing for it to be in force after expiration of twelve months beginning with the date of the coming into force of the previous order.

5. Paragraphs 1 and 2 shall not apply to an order if the order contains a statement that in the opinion of the Minister the risk of danger connected with the consumer goods to which the order relates is such that the order must be made without delay.

PART II
PROHIBITION NOTICES

Preliminary

6. In this Part—

“notice” means a prohibition notice;

“notification” means a notification in writing;

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“the trader” in relation to a proposed notice or an actual notice means the person on whom the proposed notice is proposed to be served or on whom the actual notice has been served.

7. A notice must specify the date on which it comes into force.

General Procedure

8. If the Minister proposes to serve a notice in respect of any consumer goods, then, subject to paragraph 14, he shall before he serves the notice serve on the trader a notification—

- (a) stating that the Minister proposes to serve on him a notice in respect of the consumer goods; and
- (b) specifying the consumer goods in a manner sufficient to identify them and stating that, for the reasons set out in the notification, the Minister considers that the goods are not safe; and
- (c) stating that the trader may make representations, in writing or both in writing and orally, for the purpose of satisfying the Minister that the consumer goods are safe but that if the trader intends to make such representations he must, before the expiration of the period of fourteen days beginning with the day when the notification is served on him, inform the Minister of his intention indicating whether the representations are to be in writing only or both in writing and oral.

9. Subject to paragraph 14, the Minister shall not serve a notice on the trader in respect of any consumer goods before the expiration of the period of fourteen days beginning with the day on which the Minister served on him a notification in pursuance of paragraph 8 relating to the goods; and if within that period the trader informs the Minister as mentioned in paragraph 8(c), then—

- (a) the Minister shall not serve a notice on the trader in consequence of the notification before the expiration of the period of twenty-eight days beginning with the day aforesaid; and
- (b) if during that period the trader makes to the Minister such written representations as are mentioned in paragraph 8(c) the Minister shall not serve a notice on the trader in consequence of the notification before the Minister has considered the report of a person appointed in pursuance of paragraph 10 in consequence of the representations.

10. Where, in consequence of the service on the trader of a notification in pursuance of paragraph 8, the trader informs the Minister as mentioned in paragraph 8(c) within the period so mentioned and makes to the Minister within that period or the fourteen days beginning with the end of that period such written representations as are so mentioned, the Minister shall—

- (a) appoint a person to consider the written representations; and

- (b) if the trader informed the Minister in pursuance of paragraph 8(c) that the representations would be both written and oral, inform the trader of the place and time (which must not be before the expiration of the fourteen days and of seven days beginning with the day when the information is given to the trader) at which the oral representations may be made to the person appointed;

and the trader or his representative may at that place and time make to the person appointed oral representations for the purpose of satisfying the Minister that the consumer goods in question are safe and may call and examine witnesses in connection with the representations.

11. The person appointed in pursuance of paragraph 10 to consider written representations with respect to any goods shall, after considering the representations, any oral representations made in pursuance of that paragraph with respect to the goods and any statements made by witnesses in connection with the oral representations, make a report (including recommendations) to the Minister about the representations and the proposed notice.

12. If at any time after the Minister has served a notification on the trader in pursuance of paragraph 8 the Minister decides not to serve a notice on him in consequence of the notification, the Minister shall inform him of the decision; and after the Minister informs him of the decision the notification and anything done in consequence of it in pursuance of the preceding paragraphs shall be disregarded for the purposes of those paragraphs.

13. Where a notification is served on the trader in respect of any consumer goods in pursuance of paragraph 8, a notice served on him in consequence of the notification may relate to some only of those goods.

Special Procedure

14. Paragraphs 8 to 13 do not apply to a notice which contains a statement that the Minister considers that the risk of danger connected with the consumer goods to which the notice relates is such that the notice must come into force without delay; and references to a notice in paragraphs 15 to 18 are to a notice containing such a statement.

15. A notice in respect of any consumer goods must—

- (a) state that, for the reasons set out in the notice, the Minister considers that the goods are not safe; and
- (b) state that the trader may, at such time as the trader thinks fit, make representations in writing to the Minister for the purpose of satisfying him that the consumer goods are safe.

16. If representations in writing about a notice are made by the trader to the Minister, the Minister shall consider the representations and either revoke the notice and inform the trader that he has revoked it or—

- (a) appoint a person to consider the representations; and
- (b) serve on the trader a notification stating that he may make to the person appointed oral representations for the purpose mentioned in paragraph 15 and specifying the place and time (which, except with the agreement of the trader, must not be before the date of service of the notification) at which the oral representations may be made,

and the trader or his representative may at that place and time make to the person appointed oral representations and may call and examine witnesses in connection with the representations.

17. The person appointed in pursuance of paragraph 16 to consider written representations with respect to any consumer goods shall, after considering the representations, any oral representations made in pursuance of that paragraph with respect to the goods and any statements made by witnesses in connection with the oral representations, make a report including recommendations to the Minister about the representations and the notice in question.

18. Where the Minister has appointed a person in pursuance of paragraph 16 to consider any representations relating to a notice then, without prejudice to the operation of paragraphs 19 and 20, paragraphs 16 and 17 shall not apply to any subsequent representations in writing about the notice.

Other Representations

19. If at any time the trader on whom a notice has been served makes representations in writing to the Minister for the purpose of satisfying him that the consumer goods to which the notice relates are safe and, by virtue of paragraph 18, paragraph 16 does not apply to the representations, the Minister shall consider the representations and serve on the trader, before the expiration of one month beginning with the day when the Minister receives the representations, a notification stating—

- (a) that the Minister will revoke the notice or vary it or declines to do so; or
- (b) that the Minister has appointed a person to consider the representations and that the trader may make to the person appointed, at a place specified in the notification and a time so specified (which, except with the agreement of the trader, must not be before the expiration of the period of twenty-one days beginning with the date of service of the notification), oral representations for the purpose,

and the trader or his representative may at that place and time make to the person appointed oral representations and may call and examine witnesses in connection with the representations.

20. The person appointed in pursuance of paragraph 19 to consider written representations with respect to any consumer goods shall, after considering the

representations, any oral representations made in pursuance of that paragraph with respect to the goods and any statements made by witnesses in connection with the oral representations, make a report including recommendations to the Minister about the representations and the notice in question.

Miscellaneous

21. The Minister may revoke or vary a notice by serving on the trader a notification stating that the notice is revoked or, as the case may be, is varied as specified in the notification; but the Minister shall not have power to vary a notice so as to make the effect of the notice more restrictive for the trader.

22. The Minister shall consider any report made to him in pursuance of paragraph 17 or 20 and, after considering the report, inform the trader of his decision with respect to the notice in question.

PART III
NOTICES TO WARN

23. If the Minister proposes to serve on a person a notice to warn in respect of any consumer goods, the Minister shall, before he serves the notice, serve on the person a notification in writing—

- (a) containing a draft of the notice and stating that the Minister proposes to serve on the person such a notice in the form of the draft;
- (b) stating that, for the reasons set out in the notification, the Minister considers that the consumer goods specified in the draft are not safe; and
- (c) stating that the person may make representations, in writing or both in writing and orally, for the purpose of satisfying the Minister that the consumer goods are safe but that if the person intends to make such representations he must, before the expiration of the period of fourteen days beginning with the day when the notification is served on him, inform the Minister of his intentions indicating whether the representations are to be in writing only or both in writing and oral.

24. Paragraphs 9 to 13 and 21 shall with the necessary modifications have effect in relation to a notice to warn as they have effect in relation to a prohibition notice but as if—

- (a) the reference to paragraph 14 in paragraph 9 were omitted;
- (b) for the references to paragraph 8 in paragraphs 9, 10, 12 and 13 there were substituted references to paragraph 23;
- (c) in paragraph 13 for the words from “relate” onwards there were substituted the words “be less onerous than the draft of the notice contained in the notification”; and
- (d) in paragraph 21 the words “or vary” and the words from “or, as” onwards were omitted.

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[Assent Date: 22 December 1999]

[Operative Date: 1 October 2000]

[Amended by:

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