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GENERAL NOTICE ALGEMENE KENNISGEWING

NOTICE 841 OF 1998

DEPARTMENT OF TRADE AND INDUSTRY

COMPETITION: BILL AND EXPLANATORY MEMORANDUM

The above mentioned bill and explanatory memorandum is hereby published for comment.

Interested persons are invited to furnish written comment and representations before or on **14 August 1998** to—

The Director-General
Department of Trade and Industry
Private Bag X84
Pretoria
0001

For attention:
Alistair Ruiters
Tel: (012) 310-9576
Fax: (012) 322-8489
(012) 320-8527

KENNISGEWING 841 VAN 1998

DEPARTEMENT VAN HANDEL EN NYWERHEID

MEDEDIGING: WETSONTWERP EN VERKLARENDE MEMORANDUM

Bogenoemde wetsontwerp en verklarende memorandum word hiermee vir kommentaar gepubliseer.

Belanghebbende persone word versoek om voor of op **14 Augustus 1998** hul skriftelike kommentaar en vertoë aangaande beide dokumente te verskaf aan—

Die Direkteur-generaal
Departement van Handel en Nywerheid
Privaatsak X84
Pretoria
0001

Vir aandag:
Alistair Ruiters
Tel: (012) 310-9576
Fax: (012) 322-8489
(012) 320-8527

DEPARTMENT OF TRADE AND INDUSTRY

COMPETITION BILL, 1998

MAY 1998

COMPETITION BILL, 1998

To provide for the establishment of the Competition Commission responsible for the investigation, control and adjudication of restrictive practices, abuse of dominant position and mergers and for the establishment of a Competition Appeal Court and for matters connected therewith.

PREAMBLE

The people of South Africa recognise :

That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, weak enforcement of anti-competitive trade practices, and unjust restrictions on full and free participation in the economy.

That the economy must be open to greater ownership by a greater number of South Africans.

That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.

That an efficient, competitive economic environment will benefit all South Africans: workers, owners and consumers alike.

Therefore -

to provide all South Africans equal opportunity to participate fairly in the national economy;

to achieve a more effective and efficient economy in South Africa;

to provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;

to create an environment for South Africans to compete effectively in international markets;

to restrain particular trade practices which undermine a competitive economy;

to regulate the transfer of economic ownership in keeping with the public interest;

to establish independent professional structures to monitor economic competition; and

to give effect to the international law obligations of the Republic.

Be it enacted by the Parliament of the Republic of South Africa as follows :

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CHAPTER 1

PURPOSE, APPLICATION AND INTERPRETATION

1. Purpose of the Act

The purpose of *this Act* is to promote and maintain competition in South Africa in order to -

- (a) promote the efficiency, adaptability, and development of the economy;
- (b) provide consumers with competitive prices and product choices;
- (c) promote employment and advance the social and economic welfare of South Africans;
- (d) expand opportunities for South African participation in world markets while at the same time recognising the role of foreign competition in South Africa;
- (e) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy;
- (f) promote a greater spread of ownership, in particular to increase the ownership stakes of members of historically disadvantaged communities.

2. Application of this Act

This Act applies to all economic activity within, or having an effect within, the Republic except -

- (a) collective bargaining within the meaning of section 23 of the *Constitution* and the Labour Relations Act, 1995 (Act No 66 of 1995);
- (b) a collective agreement, as defined in section 213 of that Act;
- (c) the rules of a professional association to the extent that they are exempted in terms of Schedule 1;
- (d) transactions by affiliated members of a co-operative society incorporated in terms of the Co-operatives Act, 1981 (Act No 91 of 1981); or
- (e) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.

3. Interpretation

- (1) *This Act* must be interpreted -

- (a) in a manner that is consistent with the *Constitution* and gives effect to the purposes set out in section 1; and
 - (b) in compliance with the international law obligations of the Republic.
- (2) Any person interpreting or applying *this Act* may consider applicable foreign and international law.

CHAPTER 2

PROHIBITED PRACTICES

PART A - RESTRICTIVE PRACTICES

4. Restrictive Horizontal Practices Prohibited

- (1) An *agreement* between *firms*, or a decision by an association of *firms*, or a concerted practice engaged in by a *firm* or by an association of *firms* is prohibited if -
- (a) it is between parties in a *horizontal relationship* and it has the effect of substantially preventing, or lessening, competition in a *market*, unless a party to the *agreement* can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or
 - (b) it involves any of the following *restrictive horizontal practices* :
 - (i) Directly or indirectly fixing a purchase or selling price or any other trading condition.
 - (ii) Establishing production quotas or otherwise restricting production.
 - (iii) Restricting technical innovation or development.
 - (iv) Avoiding or restricting investment.
 - (v) Dividing markets by allocating customers, suppliers, territories, or specific types of *good or service*.
 - (vi) Collusive tendering.
- (2) For the purposes of subsection (1), an *agreement* to engage in an action referred to in subsection (1) is presumed to exist between two or more *firms* if -
- (a) any one of them owns a substantial shareholding, *interest* or similar right in the other, or they have at least one director in common; and
 - (b) any combination of them is involved in such an action,
- unless the *firms* concerned, or the directors as the case may be, can establish the absence of an *agreement*.
- (3) For the purposes of subsection (2), "director" means -
- (a) a director of a company as defined in the Companies Act, 1973 (Act No 61 of 1973);

- (b) a member of a close corporation, as defined in the Close Corporations Act, 1984 (Act No 69 of 1984);
 - (c) a trustee of a trust ; or
 - (d) a person holding an equivalent position in a *firm*.
- (4) The provisions of subsection (2) do not apply to a company and its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973 (Act No 61 of 1973).

5. Restrictive vertical practices prohibited

- (1) An *agreement* is prohibited if it is between parties in a *vertical relationship* and it has the effect of substantially preventing, or lessening, competition in a *market*, unless a party to the *agreement* can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect.
- (2) The practice of resale price maintenance is prohibited.

PART B - ABUSE OF A DOMINANT POSITION

6. Restricted application of this Part

Each year, the *Minister* by notice in the *Gazette* must determine a threshold of annual turnover, either in general or in relation to specific industries, below which this part does not apply to a *firm*.

7. Dominant firms

A *firm* is dominant in a *market* if it is the leading *firm* in that *market*, and -

- (a) it has at least 35% of that *market*, unless it can demonstrate that it does not have *market power*; or
- (b) it has less than 35% of that *market*, but has *market power*.

8. Abuse of dominance prohibited

A dominant *firm* must not -

- (a) limit output, production or technological development to the detriment of consumers;
- (b) charge an excessive price to the detriment of consumers;
- (c) refuse to give a competitor access to an essential facility when it is economically feasible to do so;
- (d) engage in any act, other than an act listed under paragraph (e), that impedes or prevents a competitor's entry into, or expansion in, the *market*, if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or
- (e) engage in an exclusionary act listed in this paragraph, unless the *firm* can show technological, efficiency or other pro-competitive gain that outweigh the anti-competitive effects of that action. The exclusionary acts are -
 - (i) requiring or inducing a supplier or customer to not deal with a competitor;
 - (ii) refusing to supply a scarce good to a competitor when supplying that good is economically feasible;
 - (iii) selling a *good or service* on condition that the buyer purchase a separate *good or service*, or forcing a buyer to accept a condition unrelated to the object of a contract;
 - (iv) selling a *good or service* below its marginal or average variable cost;

- (v) buying-up a scarce supply of intermediate goods required by a competitor.

9. Price discrimination by a dominant firm prohibited

- (1) An action by a dominant *firm*, as the seller of a *good or service*, that is likely to have the effect of substantially lessening competition is prohibited price discrimination, if -

- (a) it relates to the sale of a *good or service* of like grade and quality to different purchasers; and
- (b) it involves discriminating between those purchasers in terms of -
 - (i) the price charged for the *good or service*;
 - (ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of the *good or service*;
 - (iii) the provision of services in respect of the *good or service*; or
 - (iv) payment for services provided in respect of the *good or service*.

- (2) Despite subsection (1), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (b) of that subsection, is not prohibited price discrimination if the dominant *firm* establishes that the differential treatment -

- (a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale or delivery resulting from the differing places to which, methods by which, or quantities in which, a *good or service* is supplied to different purchasers;
- (b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or
- (c) is in response to changing conditions affecting the *market* for the *goods or services* concerned, including -
 - (i) any action in response to the actual or imminent deterioration of perishable goods;
 - (ii) any action in response to the obsolescence of seasonal goods;
 - (iii) a sale pursuant to a liquidation or sequestration procedure; or
 - (iv) a sale in good faith in discontinuance of business in the goods or services concerned.

PART C - EXEMPTIONS

10. Exemption

- (1) A *firm* may apply to the Competition Tribunal to exempt an *agreement*, or category of *agreements* from the application of this chapter.
- (2) Upon receiving an application in terms of subsection (1), the Competition Tribunal may grant a conditional or unconditional exemption for a specified term of not more than 5 years, if the *agreement*, or category of *agreement* concerned -
 - (a) does not impose on the *firms* concerned any restriction that is not required to attain an objective mentioned in paragraph (b); and
 - (b) contributes to any of the following objectives -
 - (i) promotion of exports;
 - (ii) promotion of the ability of *small businesses* or *firms* controlled or owned by *historically disadvantaged persons* to become competitive;
 - (iii) change in productive capacity necessary to stop decline in an industry.
- (3) The Competition Tribunal may revoke an exemption granted in terms of subsection (2) if -
 - (a) a condition for the exemption is not fulfilled;
 - (b) the rationale for granting the exemption no longer exists; or
 - (c) the exemption was granted on the basis of false, or incorrect information.
- (4) Before granting an exemption in terms of subsection (2), or revoking an exemption in terms of subsection (3), the Competition Tribunal must -
 - (a) give notice in the *Gazette* of the application for an exemption, or of its intention to revoke that exemption; and
 - (b) allow interested parties 30 days from the date of that notice to make representations as to why the exemption should not be granted or revoked.
- (5) The Competition Tribunal must give notice in the *Gazette* of any exemption granted or revoked in terms of this section.

CHAPTER 3 MERGER CONTROL

11. Restricted application of this Chapter

Each year, the *Minister* by notice in the *Gazette* must determine a threshold of annual turnover below which this chapter does not apply to a merger.

12. Merger defined

- (1) For the purpose of this chapter, "merger" means the direct or indirect acquisition or establishment of control by one or more persons over all significant interests in the whole or part of the *firm* of a competitor, supplier, customer or other person, whether that control is achieved as a result of -
 - (a) purchase or lease of the *shares*, *interest*, or assets of the competitor, supplier, customer or other person;
 - (b) amalgamation or combination with them; or
 - (c) any other means.
- (2) A person controls a *firm* if that person -
 - (a) beneficially owns more than one half of the issued share capital of the *firm*;
 - (b) is in a position to vote, or control directly or through any controlled entity of that person the voting of more than one half of the maximum number of votes that may be cast at a general meeting of the *firm*;
 - (c) is able to appoint or to veto the appointment of a majority of the directors of the *firm*;
 - (d) is a holding company where the *firm* is a subsidiary of that person as contemplated in section 1(3)(a) of the Companies Act 1973, (Act No 61 of 1973);
 - (e) in the case of a *firm* that is a trust, has the ability to control the majority of the votes of the trustees, or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust;
 - (f) in the case of a close corporation, owns the majority of members' *interest*, or controls directly, or has the right to control the majority of members' votes in the close corporation; or
 - (g) has the ability to materially influence the policy of the *firm*.

13. Notification of merger required

- (1) The parties to a merger must notify the Competition Tribunal of that merger no more than 7 days after the earlier of -
 - (a) the conclusion of their merger *agreement*;
 - (b) the public announcement of a merger bid; or
 - (c) the acquisition by one of them of a controlling *interest* in another.
- (2) The parties to a merger must not implement that merger until they have received a clearance notification from the Competition Tribunal in terms of section 15(1)(a) or an approval in terms of section 16(2)(a).

14. Prohibition of mergers

- (1) The Competition Tribunal must prohibit a proposed merger, if the Tribunal has determined that it is likely to substantially prevent or lessen competition.
- (2) When determining whether or not a merger or proposed merger is likely to substantially prevent or lessen competition, the Tribunal must assess the strength of competition in the relevant *market*, and the probability that the *firms* in the *market* after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that *market*, including -
 - (a) the actual and potential level of import competition in the *market*;
 - (b) the ease of entry into the *market*, including tariff and regulatory barriers;
 - (c) the level, trends of concentration, and history of collusion, in the *market*;
 - (d) the degree of countervailing power in the *market*;
 - (e) the likelihood that the acquisition would result in the merged *firm* having *market power*;
 - (f) the dynamic characteristics of the *market*, including growth, innovation, and product differentiation;
 - (g) the nature and extent of vertical integration in the *market*;
 - (h) whether the business, or part of the business, of a party to the merger or proposed merger has failed or is likely to fail; and
 - (i) whether the merger will result in the removal of an effective competitor.

15. Initial consideration

- (1) Within 30 days after receiving notice of a merger, the Competition Tribunal must decide either -
 - (a) to approve the merger by issuing a clearance certificate, in which case the Tribunal must publish a notice of that certificate in the *Gazette* ;
 - (b) issue a certificate to initiate a merger inquiry in terms of section 16, in which case the Tribunal must publish a notice of that certificate in the *Gazette* ; or
 - (c) extend by up to 2 months the period in which it has to consider the proposed merger, and in that case, issue an extension certificate to any party that notified it of the merger.
- (2) If, upon the expiry of the 30 day period provided for in subsection (1), the Competition Tribunal has not issued any of the certificates referred to in that subsection, the Tribunal will be deemed to have approved the merger, subject to section 16(3).

16. Merger inquiry proceedings

- (1) If the Competition Tribunal initiates a merger inquiry, it must consider that merger in accordance with the merger inquiry rules.
- (2) Upon completion of a merger inquiry, the Competition Tribunal -
 - (a) may -
 - (i) approve the merger;
 - (ii) approve the merger subject to conditions; or
 - (iii) prohibit implementation of the merger; and
 - (b) must publish a notice of its decision in the *Gazette* .
- (3) The Competition Tribunal may revoke a decision to approve or conditionally approve a merger if -
 - (a) the decision was based on incorrect information for which a party to the merger is responsible;
 - (b) the approval was obtained by deceit; or
 - (c) a *firm* concerned has breached an obligation attached to the decision.

- (4) Despite the time limits set out in section 15, if, in terms of subsection (3), the Competition Tribunal revokes a decision to approve a merger, the Tribunal may prohibit that merger even though any of those time limits may have elapsed.

17. Merger inquiry rules

The Competition Tribunal may make rules for merger inquiry proceedings including -

- (a) forms;
- (b) time periods;
- (c) information required;
- (d) additional definitions;
- (e) filing fees; and
- (f) access to *confidential information*.

18. Review power of the Minister

- (1) Within 30 days after notice of a decision by the Competition Tribunal in terms of section 15 or 16, an interested party, by application in the *prescribed* form, may request the *Minister* to review that decision, on any of the following public interest grounds -

- (a) The effect that the merger will have on -
 - (i) a particular industrial sector or region;
 - (ii) employment; or
 - (iii) the ability of *small businesses*, or *firms* controlled or owned by *historically disadvantaged persons* to become competitive.
- (b) The ability of national industries to compete in international markets.

- (2) Within 1 month after receiving an application in terms of subsection (1), the *Minister*, by notice in the *Gazette*, must -

- (a) give notice of the request for a review; and
- (b) invite interested parties to make submissions to the *Minister* in regard to the factors referred to in subsection (1) within the time period stipulated in that notice.

- (3) Within 4 months after the date that a request is made, the *Minister* by notice in the *Gazette* must either -
 - (a) overturn the decision of the Competition Tribunal;
 - (b) amend that decision by ordering restrictions or including conditions; or
 - (c) confirm that decision.
- (4) The *Minister* must give written reasons for any decision made in terms of subsection (3) and make those reasons available for public inspection.
- (5) The *Minister* may make rules for review proceedings in terms of this section, and the provisions of section 17, read with the changes required by the context, will apply to those rules.

CHAPTER 4

COMPETITION COMMISSION AND COURT

PART A - THE COMPETITION COMMISSION

19. Establishment of Competition Commission

- (1) To give effect to the purposes and provisions of *this Act*, there is established a single juristic body titled the Competition Commission, comprising -
 - (a) The Commission Management Board, which is the governing body of the Competition Commission, as described in Part B of this Chapter;
 - (b) The Competition Inspectorate, as described in Part C of this Chapter; and
 - (c) The Competition Tribunal, as described in Part D of this Chapter.
- (2) The Competition Commission, and each of its constituent entities listed in subsection (1), is responsible, and has the authority, to exercise and perform the powers, functions and duties conferred and imposed upon it by *this Act* or by, or in terms of, any other law.
- (3) The Competition Tribunal and the Competition Inspectorate have jurisdiction throughout the Republic.

20. Independence of Competition Commission

- (1) The Competition Commission is independent and subject only to the *Constitution* and the law.
- (2) The Commission, the persons appointed to each of its constituent entities, and its staff -
 - (a) must serve the public impartially, carrying out their powers and duties in good faith and without fear, favour, bias, or prejudice;
 - (b) must not engage in any activity that may undermine the integrity of the Commission;
 - (c) must not participate in any investigation, inquiry, or decision concerning a matter in respect of which they have a direct financial *interest* or any similar personal *interest*;
 - (d) must not make private use of, or profit from, any *confidential information* gained as a result of performing their official functions within the Commission;

- (e) must not divulge any such information to any third party, except as required as part of their official functions within the Commission.
- (3) Apart from their respective responsibilities within the Competition Management Board, The Competition Tribunal and the Competition Inspectorate must each treat the other as if it were an independent body.
- (4) Each *organ of state* must do everything reasonable to assist the Commission to protect its independence and impartiality, and to effectively carry out its powers and duties.

PART B - THE COMMISSION MANAGEMENT BOARD

21. Function and composition of Management Board

- (1) The Commission Management Board is the governing body of the Competition Commission, and consists of -
 - (a) the Commissioner, as presiding member of the Board, and the Deputy Commissioner of the Competition Inspectorate;
 - (b) the Chairperson, and Deputy Chairperson of the Competition Tribunal; and
 - (c) a person appointed by the *Minister* from among the officials responsible for competition policy in the Department of Trade and Industry.
- (2) The Commission Management Board is responsible for the general administration of the Competition Commission and for carrying out any functions assigned to it in terms of *this Act*.

22. Meeting procedures

- (1) The Commission Management Board may meet at any time, and at any place in the Republic, determined by the Commissioner.
- (2) A quorum for a meeting of the Commission Management Board is three of its members.
- (3) Each member present at a meeting has one vote on any question.
- (4) A majority vote is sufficient to decide a question. If a vote is tied, the presiding member may cast an extra vote to decide the question.
- (5) Subject to this section, the Commission Management Board may decide its own rules of procedure, but must keep minutes of its proceedings.

23. Committees

- (1) The Commission Management Board may establish any number of committees, for any purpose and for any period.
- (2) When it establishes a committee, the Management Board -
 - (a) must appoint at least one member of the Management Board to serve on the committee;
 - (b) may appoint any number of other persons to serve for a specific period, and may extend the term, or withdraw the appointment, of a person at any time;

- (c) may delegate to the committee any of the Management Board's powers and duties; and
 - (d) may decide what procedures the committee must follow.
- (3) When its work is done, a committee must report to the Management Board.

24. Staff and facilities of the Competition Commission

- (1) The Commissioner -
- (a) after consulting the Management Board, may appoint staff, or contract with other persons, to assist in carrying out the functions of the Commission; and
 - (b) in consultation with the Management Board, may determine the remuneration, allowances, benefits, and other terms and conditions of appointment of each member of the staff.
- (2) The Commission must -
- (a) structure its operations in such a way that the functions of its constituent entities are kept independent from one another; and
 - (b) manage its staff and contractors in such a way that potential conflicts of interest arising out of its several functions are avoided.

25. Finances of Competition Commission

- (1) The Competition Commission will be financed and provided with working capital from -
- (a) any money that the *Minister*, in consultation with the Minister of Finance, allocates to the Commission from public funds at the commencement of *this Act*;
 - (b) any money that is appropriated by Parliament for the Commission;
 - (c) fees payable to the Commission in terms of *this Act*; and
 - (d) income derived by the Commission from its investment and deposit of surplus moneys in terms of subsection (6).
- (2) The financial year of the Commission is the period from 1 April in any year to 31 March in the following year, except the first financial year of the Commission, which begins on the date of coming into operation of *this Act*, and ends on 31 March in the following year.

- (3) Each year, at a time determined by the *Minister*, the Commission Management Board must submit to the *Minister* a statement of the Commission's estimated income and expenditure, and requested appropriation from Parliament in respect of the next ensuing financial year.
- (4) The Commission Management Board must open and maintain an account in the name of the Commission with a registered bank, or other registered financial institution, in the Republic, and -
 - (a) any money received by the Commission must be deposited to that account; and
 - (b) every payment on behalf of the Commission must be made from that account.
- (5) Cheques drawn on the account of the Commission must be signed on its behalf by two persons authorized for that purpose by resolution of the Management Board.
- (6) The Commission Management Board may invest or deposit money of the Commission that is not immediately required for contingencies or to meet current expenditures -
 - (a) on call or short-term fixed deposit with any registered bank or financial institution in the Republic; or
 - (b) in an investment account with the Corporation for Public Deposits.
- (7) The Commissioner -
 - (a) is the accounting officer of the Commission for purposes of the Exchequer Act, 1975 (Act No 66 of 1975); and
 - (b) is accountable for all money that the Commission receives or pays, and must keep the accounting records required by that Act.
- (8) As soon as reasonably practicable after the end of each financial year, the Commissioner must prepare financial statements in conformity with established accounting practice, principles and procedures, comprising -
 - (a) a statement reflecting, with suitable and sufficient particulars, the income and expenditure of the Commission during the preceding financial year; and
 - (b) a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year.

- (9) The Auditor-General must audit the Commission's financial records each year.

26. Annual report

- (1) Each year, as soon as reasonably practicable after the end of the Commission's financial year, the Commissioner must prepare and submit to the *Minister* an annual report, including -
- (a) the audited financial statements prepared in terms of section 25(8);
 - (b) the auditor's report, prepared in terms of section 25(9); and
 - (c) any other information that the *Minister* determines, by notice in the Gazette.
- (2) The *Minister* must table in the National Assembly each annual report submitted in terms of subsection (1) -
- (a) within 14 days after receiving that report from the Commission, if Parliament is in session at that time; or
 - (b) within 14 days after the commencement of the next session of Parliament.

27. Liability

- (1) The State Liability Act, 1957 (Act No 20 of 1957) (with the changes required by context) applies to Competition Commission; but a reference in that Act to "the Minister of the Department concerned" should be interpreted as referring to the Commissioner.
- (2) No Tribunal member, Competition Appeal Court member, Commissioner, committee member, staff person, or contractor is liable for any report, finding, point of view, or recommendation that is given in good faith and is submitted to Parliament or made known under the *Constitution or this Act*.

PART C - THE COMPETITION INSPECTORATE

28. Functions of Competition Inspectorate

- (1) The Competition Inspectorate is responsible to -
 - (a) implement measures to increase *market* transparency;
 - (b) implement measures to develop public awareness of the provisions of *this Act*;
 - (c) investigate and evaluate -
 - (i) alleged contraventions of Chapter 2;
 - (ii) applications for exemptions in terms of Chapter 2, referred to it by the Competition Tribunal;
 - (iii) mergers referred to it by the Competition Tribunal; or
 - (iv) any other matter referred to it by the Competition Tribunal.
 - (d) negotiate and conclude consent orders; and
 - (e) refer matters to the Competition Tribunal, and appear before the Tribunal, as required by *this Act*.
- (2) In addition to the functions listed in subsection (1), the Competition Inspectorate may -
 - (a) report to the *Minister* on any matter relating to the application of *this Act*; and
 - (b) perform any other function assigned to it in terms of this, or any other Act.

29. Appointment of Commissioner

- (1) The *Minister* must appoint a person with suitable qualifications and appropriate experience, to be the Competition Commissioner.
- (2) The Competition Commissioner is the Chief Executive Officer of the Commission, and must -
 - (a) perform the functions that are conferred on the Commissioner by or in terms of *this Act*, or any other law;
 - (b) manage and direct the activities of the Inspectorate; and
 - (c) supervise the Commission's staff.

- (3) The *Minister* in consultation with the Minister of Finance, must determine the Commissioner's remuneration, allowances, benefits, and other terms and conditions of employment.

30. Appointment of Deputy Commissioner

- (1) The *Minister* must appoint a person to be Deputy Commissioner to -
 - (a) assist the Commissioner in carrying out the functions of the Inspectorate; and
 - (b) to act as Commissioner whenever -
 - (i) the Commissioner is absent from the Republic or from duty or for any reason is temporarily unable to perform the functions of Commissioner; or
 - (ii) the office of Commissioner is vacant.

31. Appointment of Inspectors

- (1) The Commissioner may appoint any person in the service of the Commission or any other suitable person as an Inspector.
- (2) The *Minister* in consultation with the Minister of Finance may determine the remuneration paid to a person who is appointed in terms of subsection (1), but is not in the full-time service of the Commission.
- (3) An Inspector must be provided with a certificate of appointment signed by the Commissioner stating that the person has been appointed as an Inspector in terms of *this Act*.
- (4) When an Inspector performs any function in terms of Chapter 5 they must have a certificate of appointment in their possession and show it at the request of any person affected.

PART D - THE COMPETITION TRIBUNAL

32. Functions of Competition Tribunal

- (1) Upon a matter being referred to it in terms of *this Act*, the Competition Tribunal may -
 - (a) grant exemptions from relevant provisions of *this Act*;
 - (b) authorise or prohibit a merger;
 - (c) adjudicate in relation to any conduct prohibited in terms of Chapter 2 or 3, by determining whether prohibited conduct has occurred, and if so, impose a remedy provided for in Chapter 6; and
 - (d) grant orders for costs as provided for in *this Act*.

33. Composition of Competition Tribunal

- (1) The Tribunal consists of a Chairperson and other members appointed by the President on the recommendation of the *Minister*.
- (2) The President must -
 - (a) appoint the first Chairperson and other members of the Tribunal upon the effective date of *this Act*; and
 - (b) appoint a person to fill any vacancy on the Tribunal as it arises.

34. Qualifications of Tribunal members

- (1) The Chairperson and other members of the Competition Tribunal, when viewed collectively, must represent a broad cross-section of the population of the Republic; and each of them -
 - (a) must be a citizen of South Africa, who is ordinarily resident in South Africa;
 - (b) must have experience and expertise relevant to the functions contemplated in section 32;
 - (c) must be committed to the objects and principles enunciated in section 1.
- (2) A person may not be a member of the Tribunal if that person -
 - (a) at the relevant time -
 - (i) holds an office of profit under the State; or

- (ii) is an office-bearer or employee of any party, movement, organisation, or body of a partisan political nature;
- (b) is an unrehabilitated insolvent;
- (c) is subject to an order of a competent court holding that person to be mentally unfit or disordered;
- (d) is serving a sentence of imprisonment without the option of a fine;
- (e) after the commencement of *this Act*, has been convicted of an offence and sentenced to imprisonment without the option of a fine.

35. Term of office

- (1) Subject to subsection (2), the Chairperson and each other member of the Competition Tribunal, may serve for a term of 5 years.
- (2) The President may appoint a former member of the Tribunal, or re-appoint a person whose term is expiring, but no person may be appointed to the Tribunal for more than two consecutive terms.
- (3) The Chairperson, by giving at least 1 month's written notice to the *Minister*, may -
 - (a) resign from the Tribunal; or
 - (b) resign as Chairperson, but remain as a member of the Tribunal.
- (4) A member of the Tribunal other than the Chairperson may resign by giving at least 1 month's written notice to the *Minister*.
- (5) The President, on the recommendation of the *Minister* -
 - (a) must remove the Chairperson or any other member of the Tribunal from office if at any time during that person's term of office they fall within any of the grounds of disqualification set out in section 34(2); and
 - (b) other than as provided in subsection (a), may remove the Chairperson or a member of the Tribunal from office only for -
 - (i) serious misconduct;
 - (ii) permanent incapacity; or
 - (iii) engaging in any activity that may undermine the integrity of the Tribunal.

36. Deputy Chairperson

- (1) The President, on the recommendation of the *Minister*, must appoint a member of the Tribunal to be Deputy Chairperson and to act as Chairperson whenever -
 - (a) the office of Chairperson is vacant; or
 - (b) the Chairperson is absent from the Republic or from duty, or for any other reason is temporarily unable to function as Chairperson.

37. Remuneration and benefits of Tribunal members

- (1) The *Minister*, in consultation with the Minister of Finance, may determine the salary, allowances, and benefits of the Chairperson, Deputy Chairperson and each other member of the Competition Tribunal.
- (2) During the term of office of a member of the Tribunal, the *Minister* may not reduce a member's salary, allowances or benefits.
- (3) The *Minister* may determine any other conditions of appointment not provided for in this section.

38. Competition Tribunal proceedings

- (1) The Chairperson is responsible to manage the caseload of the Competition Tribunal, and must assign each matter referred to the Tribunal to a panel composed of any three members of the Tribunal.
- (2) When assigning a matter in terms of subsection (1), the Chairperson must designate which member of the panel is to preside over the panel's proceedings.
- (3) If, because of illness, death, or withdrawal from an inquiry in terms of section 39, a member of the panel cannot complete the proceedings in a matter assigned to that panel, the Chairperson must either -
 - (a) direct that the inquiry proceed before any remaining member of the panel; or
 - (b) terminate the inquiry before that panel and direct a newly constituted panel, which may include any member of the original panel, to conduct a new inquiry.
- (4) The decision of a panel on any matter referred to it must be in writing and include reasons for that decision.

- (5) A unanimous decision of a panel is the decision of the Competition Tribunal, but if the decision of a panel is not unanimous, the majority decision is the decision of the Tribunal.
- (6) The Competition Tribunal, by notice in the *Gazette*, may establish rules for its proceedings, in addition to any rules required in terms of *this Act*.

39. Disclosure of interests

If, during any proceeding, it appears to a member of the Competition Tribunal that a matter concerns a financial or other *interest* of that member of the type referred to in section 20(2)(c), the member must -

- (a) immediately and fully disclose the fact and nature of that *interest* to the Chairperson and to the presiding member at that inquiry; and
- (b) withdraw from any further involvement in that inquiry.

40. Acting after expiry of term

If, upon the expiry of the term of a member of the Competition Tribunal, that member is still considering a matter before the Tribunal, that member may continue to act as a member in respect of that matter only. If a member's term on the Competition Tribunal expires, and that member is still considering a matter before the Tribunal, that member may continue to act in respect of the matter only.

PART E - THE COMPETITION APPEAL COURT

41. Status and function of Competition Appeal Court

- (1) The Competition Appeal Court may consider any appeal from, or review of, a decision of the Competition Tribunal.
- (2) The Competition Appeal Court has the power to confirm, amend or set aside the judgment or order that is the subject of an appeal from, or review of, a decision of the Competition Tribunal, and to give any judgment or make any order that the circumstances may require.
- (3) The Competition Appeal Court -
 - (a) is a court as contemplated in section 166(e) of the *Constitution* with a status similar to that of a High Court;
 - (b) has jurisdiction throughout the Republic; and
 - (c) is a court of record.

42. Composition of Competition Appeal Court

The Competition Appeal Court consists of the following members appointed by the President -

- (a) a judge of the High Court, as Judge-President of the Court; and
- (b) other members, each of whom must -
 - (i) be a citizen of South Africa, who is ordinarily resident in South Africa;
 - (ii) have experience and expertise relevant to the functions contemplated in section 32; and
 - (iii) be committed to the objects and principles enunciated in section 1.

43. Business of the Competition Appeal Court

- (1) The Judge President of the Competition Appeal Court -
 - (a) is responsible to supervise and direct the work of the Court;
 - (b) must preside at proceedings of the Court; and
 - (c) by notice in the *Gazette*, may establish rules for its proceedings.
- (2) A matter before the Competition Appeal Court must be heard by three members of the Court, one of whom must be the Judge-President.

- (3) A decision of the Competition Appeal Court must be in writing and include reasons for that decision.
 - (4) The decision of a majority of the members of the Competition Appeal Court shall be the decision of the court.
 - (5) Despite subsection (4), any matter of law arising for decision by the Competition Appeal Court, and any question as to whether a matter for decision is a matter of fact or a matter of law, shall be decided upon by the Judge-President only.
44. **Tribunal provisions applicable and conditions of appointment of the Judge-President**
- (1) Subject to subsection (2), sections 33(2), 34, 35, 37, 39 and 40, each read with the changes required by context, apply to the Competition Appeal Court.
 - (2) Sections 34, 35 and 37 do not apply to the Judge-President of the Competition Appeal Court.
 - (3) The Judge-President must be appointed for a fixed term determined by the President at the time of appointment.
 - (4) The Judge-President may resign by giving written notice to the President.
 - (5) The Judge-President holds office until -
 - (i) the Judge-President's term of office in the Competition Appeal Court ends;
 - (ii) the Judge-President's resignation takes effect;
 - (iii) the Judge-President is removed from office;
 - (iv) the Judge-President ceases to be a judge of the High Court; or
 - (v) the Judge-President dies.
 - (6) Neither the tenure of office, nor the remuneration and terms and conditions of appointment applicable to a judge of the High Court in terms of the Judges Remuneration and Conditions of Employment Act, 1989 (Act No 88 of 1989), is affected by that judge's appointment and concurrent tenure of office as Judge-President.
 - (7) The Judge-President -

- (a) may be removed from office of Judge-President only if that person has been first removed from the office of a judge of the High Court; and
- (b) upon having been removed as a judge of the High Court, must be removed from office as a Judge-President of the Competition Appeal Court.

CHAPTER 5

COMPETITION TRIBUNAL PROCEDURES

45. Filing a complaint

- (1) A complaint against a *prohibited practice* by a *firm* may be initiated by -
 - (a) a *regulatory authority*; or
 - (b) a person prejudiced by that practice and having a substantial legal interest in obtaining relief from the *prohibited practice*.
- (2) A person entitled to initiate a complaint may file the complaint with the Competition Inspectorate in the *prescribed* manner.

46. Investigation by the Inspectorate

- (1) The Commissioner must direct an Inspector to investigate a complaint as quickly as practicable.
- (2) At any time during an investigation, the Commissioner may designate one or more persons to assist the Inspector conducting the investigation.
- (3) A person questioned by an Inspector conducting an investigation must answer each question truthfully and to the best of their ability; but no person is compelled to answer any question if the answer may be self-incriminating.

47. Search warrants

- (1) A Judge, Regional Magistrate or Magistrate, who has jurisdiction in the area in which the *premises* are situated may issue a warrant to enter and search *premises* if, from information on oath, there are reasonable grounds to believe that anything connected with an investigation is either -
 - (a) on or in those *premises*; or
 - (b) in the possession of or under the control of a person who is on or in those *premises*.
- (2) A warrant to enter and search may be issued at any time and must specifically -
 - (a) identify the *premises* that may be entered and searched; and
 - (b) authorise an Inspector or a police officer to enter and search the *premises* and to do anything listed in section 48(4).
- (3) A warrant to enter and search is valid until one of the following events occurs -

- (a) it is executed;
 - (b) it is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;
 - (c) the purpose for issuing it has lapsed; or
 - (d) 1 month has passed since the date it was issued.
- (4) A warrant to enter and search may only be carried out during the day, unless the Judge, Regional Magistrate or Magistrate who issued it states in writing that it may be carried out at night at a reasonable time in the circumstances.

48. Search under warrant

- (1) A person authorised by warrant issued in terms of section 47 may enter and search *premises* named in that warrant.
- (2) Before beginning to enter and search, the person who carries out a warrant must either -
 - (a) if the owner, or person in control, of the *premises* to be searched is present -
 - (i) identify themselves and explain their authority to that person, and
 - (ii) hand a copy of the warrant to that person or to the person named in it; or
 - (b) if none of those persons is present, attach a copy of the warrant to the *premises* in a prominent and visible place.
- (3) A person who enters and searches any *premises* under this section must conduct themselves with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security, and privacy.
- (4) A person who carries out a warrant to enter and search *premises* may do any of the following things -
 - (a) search the *premises* identified in the warrant;
 - (b) examine any article or document that is on or in the *premises*;
 - (c) request information about any article or document from the owner of or person in control of the *premises*, or from any person who has control of the article or document, or from any other person who may have the information;

- (d) take extracts from or make copies of any book or document that is on or in the *premises*; and
 - (e) attach and, if necessary, remove from the *premises* for examination and safekeeping anything that bears on the investigation.
- (5) A person who carries out a warrant under this section must, before questioning anyone in terms of subsection (4)(c) -
- (a) advise them of their right to be assisted at the time by an advocate or attorney; and
 - (b) allow them to exercise that right.
- (6) A person who removes anything from *premises* being searched must -
- (a) issue a receipt for it to the owner of or person in control of the *premises*; and
 - (b) return it as soon as practicable after achieving the purpose for which it was removed.
- (7) During a search, a person may refuse to permit the inspection or removal of an article or document on the grounds that it contains privileged information. In that case, the person conducting the search may ask the registrar of the High Court that has jurisdiction to attach and remove the article or document for safe custody until that court determines whether the information is privileged.

49. Search without a warrant

- (1) A person referred to in section 47(2)(b) who does not have a warrant may enter and search *premises* other than a *private dwelling*, to attach and remove an article or document.
- (2) Before beginning to enter and search in terms of this section, the person conducting the search must identify themselves and explain their authority to a person with authority to grant them permission to enter and search the *premises* and they must either -
 - (a) get permission from that person to enter and search the *premises*, and to attach and remove any article or document; or
 - (b) believe on reasonable grounds that a warrant would be issued under section 47 if applied for, and that the delay needed to obtain a warrant would defeat the object of the search.
- (3) An entry and search without a warrant must be carried out during the day, unless doing it at night is justifiable and necessary.

50. Use of force

- (1) A person who is entitled to enter and search *premises* under either section 48 or 49 may overcome any resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window of the *premises*.
- (2) Before using force, the person carrying out an entry and search must audibly demand admission and must announce their purpose, unless they reasonably believe that doing so may induce someone to destroy or dispose of an article or document that is the object of the search.
- (3) The Commission may compensate anyone who suffers damage because of a forced entry during a search when no one responsible for the *premises* was present.

51. Disposition of Complaint

- (1) After completing its investigation, the Competition Inspectorate must either -
 - (a) refer the matter to the Competition Tribunal, if it determines that a *prohibited practice* has been established; or
 - (b) in any other case, issue a notice of non-referral to the complainant in the *prescribed* form.

52. Referral to the Competition Tribunal

- (1) If the Inspectorate issues a notice of non-referral in response to a complaint, the complainant concerned may refer the matter directly to the Competition Tribunal.
- (2) A referral to the Competition Tribunal, whether by the Inspectorate in terms of section 51(1)(a), or by a complainant in terms of subsection (1), must be in the *prescribed* form.
- (3) The Chairperson of the Tribunal must publish a notice of each referral made to the Tribunal in the *Gazette*, including in that notice -
 - (a) the name of the *firm* whose conduct is the subject of the inquiry; and
 - (b) the nature of the conduct that is the subject of the inquiry.

53. Hearings before the Competition Tribunal

- (1) The Tribunal must conduct an inquiry into every matter referred to it.
- (2) The Tribunal member presiding at an inquiry must conduct it in public and -

- (a) in an inquisitorial manner;
 - (b) as expeditiously and informally as possible;
 - (c) in accordance with the principles of natural justice; and
 - (d) must record the evidence given at the inquiry.
- (3) Despite subsection (2) the Tribunal member presiding at an inquiry may exclude members of the public or specific persons or categories of persons from attending the proceedings -
- (a) if evidence to be presented is *confidential information* to the extent that it cannot otherwise be protected;
 - (b) if the proper conduct of the inquiry requires it; or
 - (c) for any other reason which would be justifiable in a High Court.
- (4) At the conclusion of an inquiry, the Tribunal must make any order permitted in terms of Chapter 6, and issue written reasons for its decision.
- (5) The Competition Tribunal must provide the participants and other members of the public reasonable access to the record of each inquiry, subject to any ruling to protect *confidential information* made in terms of subsection (3)(a).

54. Right to participate in inquiry

The persons listed in this section may participate in an inquiry and, either personally or through a representative, may put questions to witnesses and inspect any books, documents or items presented at the inquiry. The persons entitled to participate are -

- (a) the Commissioner, or any person appointed by the Commissioner;
- (b) the complainant;
- (c) The *firm* whose conduct forms the basis of the inquiry; and
- (d) any other person who has a material interest in the inquiry, unless, in the opinion of the presiding member of the Tribunal, that interest is adequately represented by another participant.

55. Powers of member presiding at inquiry

The member presiding at an inquiry may -

- (a) direct or summon any person to appear at any specified time and place;
- (b) question any person under oath or affirmation;
- (c) order any person -
 - (i) to produce any book, document or item necessary for the purposes of the inquiry; or
 - (ii) to perform any other act in relation to *this Act*; and
 - (iii) give directions prohibiting or restricting the publication of any evidence given to the Tribunal.

56. Rules of procedure

- (1) The Competition Tribunal, by notice in the *Gazette*, may make rules to regulate the procedure at inquiries.
- (2) Subject to the Tribunal's rules of procedure, the Tribunal member presiding at an inquiry may determine any matter of procedure for that inquiry, with due regard to the circumstances of the case, and the requirements of section 53(2).

57. Witnesses

- (1) Every person giving evidence at an inquiry must answer any relevant question.
- (2) The law regarding a witness's privilege in a criminal case in a court of law applies equally to a person who provides information during an inquiry.
- (3) The Tribunal may order a person to answer any question, or to produce any article or document, even if it is self-incriminating to do so.
- (4) If incriminating information is obtained directly or indirectly under this section, the information may not be admitted in any court of law or before any body as evidence in any criminal proceedings against that person, except on a charge of perjury or on a charge contemplated under section 73 of *this Act* or under Section 319(3) of the Criminal Procedure Act, 1955 (Act No 56 of 1955).

58. Costs

- (1) Subject to subsection (2), each party participating in an inquiry must bear its own costs.
- (2) If the Tribunal has not made a finding against the *respondent*, the Tribunal member presiding at an inquiry may award costs to the

respondent, and against a complainant who referred the complaint in terms of section 52(1).

59. Appeals

- (1) Subject to the rules of the Competition Appeal Court, a participant in an inquiry mentioned in section 54 (a), (b) or (c), may -
 - (a) appeal against any decision of the Competition Tribunal, other than a decision in terms of section 63(3), to the Competition Appeal Court; or
 - (b) apply to the Competition Appeal Court to review a decision of the Competition Tribunal.
- (2) Subject to the *Constitution*, the Competition Appeal Court has exclusive and final jurisdiction over any matter that may be appealed to it, or reviewed by it.
- (3) The Competition Appeal Court may make an order for the payment of costs, against any party in the hearing, or against any person who represented a party in the hearing, according to the requirements of the law and fairness.
- (4) A judgment of the Competition Appeal Court is binding on the Competition Tribunal.

CHAPTER 6 REMEDIES AND ENFORCEMENT

60. Interim relief

- (1) At any time, whether or not an inquiry has commenced into an alleged *prohibited practice*, a person mentioned in section 45(1) may apply to the Competition Tribunal for an interim order in respect of that alleged practice, and the Tribunal may grant such an order if -
 - (a) there is evidence that a *prohibited practice* has occurred;
 - (b) an interim order is reasonably necessary to -
 - (i) prevent serious, irreparable damage to that person; or
 - (ii) to prevent the objects of *this Act* being frustrated;
 - (c) the *respondent* has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and
 - (d) the balance of convenience favours the granting of the order.
- (2) An interim order in terms of this section must not extend beyond the earlier of -
 - (a) the conclusion of an inquiry into the alleged *prohibited practice*; or
 - (b) the date that is 6 months after the date of issue of the interim order.
- (3) If an interim order has been granted, and an inquiry into that matter has not been concluded within 6 months after the date of that order, the Tribunal, on good cause shown, may extend the interim order for a further period not exceeding 6 months.

61. Orders of the Tribunal

- (1) In addition to its other powers in terms of *this Act*, the Competition Tribunal may -
 - (a) make an appropriate order in relation to a *prohibited practice*, including -
 - (i) an order interdicting any *prohibited practice*;
 - (ii) ordering a party to modify an *agreement* or decision;

- (iii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to eliminate the continuance of a *prohibited practice*;
 - (iv) ordering divestiture, subject to the terms of section 63;
 - (v) imposing an administrative fine, subject to the terms of section 62 with or without the addition of any other order in terms of this section;
 - (vi) declaring conduct of a *firm* to be a *prohibited practice* in terms of *this Act*, for the purposes of section 66;
 - (vii) declaring the whole or any part of an *agreement* to be void;
 - (viii) ordering access to an essential facility on terms reasonably required;
- (b) confirm a consent *agreement* in terms of section 64 as an order of the Tribunal; or
 - (c) condone any non-compliance of its rules and procedures on good cause shown.
- (2) At any time, the Tribunal may stay an inquiry for a reasonable period of time, if there is reason to believe that the inquiry relates to an act that might qualify for exemption in terms of section 10.
- (3) Despite any other provision of *this Act*, if the Tribunal stays an inquiry in terms of subsection (2), the *respondent* may apply for an exemption within the time period allowed by the Tribunal.

62. Administrative fines

- (1) The Tribunal may impose an administrative penalty only -
- (a) for a *prohibited practice* prohibited in terms of sections 4(1)(b), 5(2) or 8(a), (b), (c), and (e);
 - (b) for a *prohibited practice* in terms of sections 4(1)(a), 5(1), 8(d) or 9(1), if the conduct is substantially a repeat by the same *firm* of conduct previously found by the Tribunal to be a *prohibited practice*; or
 - (c) if the parties to a merger have -
 - (i) failed to give notice of the merger as required in terms of section 13;

- (ii) proceeded to implement the merger in contravention of a decision by the Tribunal to prohibit that merger;
 - (iii) proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Tribunal in terms of section 16; or
 - (iv) proceeded to implement the merger without the approval of the Tribunal.
- (2) An administrative fine imposed in terms of subsection (1) may not exceed 10% of the *firm's* annual turnover in the Republic and exports from the Republic during the preceding financial year.
- (3) When determining an appropriate fine, the Tribunal must consider the following factors in relation to the contravention -
 - (a) the nature, duration, gravity, and extent;
 - (b) any loss or damage suffered as a result;
 - (c) the behaviour of the *respondent*;
 - (d) the *market* circumstances in which it took place;
 - (e) the level of profit derived;
 - (f) the degree to which the *respondent* has co-operated with the Competition Commission; and
 - (g) whether the *respondent* has previously been found in contravention of the Act.
- (4) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the *Constitution*.

63. Divestiture

- (1) If a merger occurs in contravention of Chapter 3, the Tribunal may -
 - (a) order a party to the merger to sell any shares, interests, or other assets it has acquired pursuant to the merger; or
 - (b) declare void any *agreement* to which the merger was subject.
- (2) The Tribunal, in addition to or in lieu of making an order under section 60, may make an order directing any *firm*, or any other person to sell any shares, *interest* or assets of the *firm* if -
 - (a) the *firm* has contravened section 8; and

- (b) the *prohibited practice* -
 - (i) cannot adequately be remedied in terms of another provision of *this Act*; or
 - (ii) is substantially a repeat by that *firm* of conduct previously found by the Tribunal to be a *prohibited practice*.
- (3) An order made by the Tribunal in terms of subsection (2) is of no force or effect unless confirmed by the Competition Appeal Court.
- (4) An order in terms of subsection (1) or (2) may set a time for compliance, and any other terms that the Tribunal considers appropriate, having regard to the commercial interests of the party concerned.

64. Consent orders

- (1) If a complaint of a *prohibited practice* has been investigated by the Competition Inspectorate, and the Inspectorate and the *respondent* agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that *agreement* as a consent order in terms of section 61.
- (2) A consent order does not preclude a complainant applying for -
 - (a) a declaration in terms of section 61(a)(vi); or
 - (b) an award of civil damages in terms of section 66.

65. Status and enforcement of Tribunal orders

- (1) Any decision, judgment or order of the Tribunal or Competition Appeal Court may be served, executed, and enforced as if it were an order of the High Court.
- (2) The Competition Commission may institute proceedings in the High Court on its own behalf for recovery of an administrative penalty imposed by the Tribunal.
- (3) A proceeding under subsection (2) may not be initiated more than 3 years after the imposition of the administrative penalty.

66. Civil actions

- (1) Except where *this Act* provides otherwise, the Competition Tribunal and the Competition Appeal Court share exclusive jurisdiction in respect of all matters in terms of *this Act*, but only a *civil court* may award damages to a plaintiff in terms of this section.
- (2) A person who has suffered loss or damage as a result of a *prohibited practice* may commence an action to recover the loss or damage in a

civil court against a person whom the Competition Tribunal has determined committed the *prohibited practice*.

- (3) A *civil court* may not award damages under this section unless the plaintiff, when instituting proceedings, has filed with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge-President of the Competition Appeal Court in the *prescribed* form, certifying -
 - (a) that the conduct constituting the basis for the action has been found to be a *prohibited practice* in terms of the Act;
 - (b) stating the date of the Tribunal's or the Competition Appeal Court's finding; and
 - (c) setting out the section in terms of which the Tribunal or the Competition Appeal Court made its finding.
- (4) A certificate issued in terms of subsection (3) is conclusive proof of its contents.
- (5) An appeal or application for review against an order imposed by the Tribunal in terms of section 61, suspends any right under subsection (2) to commence an action with respect to the same matter.
- (6) A person's right to claim damages in terms of *this Act* comes into existence on -
 - (a) the date that the Tribunal made an order in terms of *this Act*; or
 - (b) in the case of an appeal, on the date that the appeal process concludes.
- (7) If, in any action in a *civil court*, a party raises an issue concerning conduct that is prohibited in terms of *this Act*, that court must not consider that issue on its merits, and -
 - (a) if the issue raised is one in respect of which the Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or
 - (b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that -
 - (i) the issue has not been raised in a frivolous or vexatious manner; and
 - (ii) the resolution of that issue is required to determine the final outcome of the action.

67. Variation of an order

- (1) The Tribunal, or the Competition Appeal Court, acting of its own accord or on application, may vary or rescind a decision, judgment, or order -
 - (a) erroneously sought or granted in the absence of a party affected by that judgment;
 - (b) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or
 - (c) granted as a result of a mistake common to all of the parties to the proceeding.

68. Limitations of bringing an action

- (1) A complaint in respect of a *prohibited practice* may not be initiated more than 3 years after the practice has ceased.
- (2) A complaint may not be initiated against any *firm* that is, or has been, a *respondent* in proceedings under another section of the Act relating substantially to the same conduct.

69. Standard of proof

In any proceedings in terms of *this Act*, the standard of proof is on a balance of probabilities.

CHAPTER 7 OFFENCES

70. Breach of confidence

- (1) A person commits an offence who discloses any *confidential information* concerning the affairs of any other person or *firm* obtained in carrying out any function in terms of *this Act*.
- (2) Subsection (1) does not apply to information disclosed -
 - (a) for the purpose of the proper administration or enforcement of *this Act*;
 - (b) for the purpose of the administration of justice; or
 - (c) at the request of an inspector or Tribunal member entitled to receive the information.

71. Hindering administration of this Act

A person commits an offence who hinders, opposes, obstructs or unduly influences any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by *this Act*.

72. Failure to attend when summoned

- (1) A person commits an offence who, having been directed or summoned to attend an inquiry -
 - (a) without sufficient cause fails -
 - (i) to appear at the time and place specified; or
 - (ii) to remain in attendance until excused; or
 - (b) attends as required, but -
 - (i) fails to produce a book, document or other item which that person has been ordered to produce, and which is in their possession or under their control; or
 - (ii) refuses to be sworn in or to make an affirmation.

73. Failure to answer fully or truthfully

A person commits an offence who, having been sworn in or having made an affirmation -

- (a) subject to section 57, fails to answer any question fully and to the best of their ability; or

- (b) gives false evidence, knowing or believing it to be false.

74. Failure to comply with this Act

- (1) A person commits an offence who contravenes, or fails to comply with an order of the Competition Tribunal or the Competition Appeal Court.
- (2) A person commits an offence who -
 - (a) does anything calculated to improperly influence the Tribunal concerning any matter connected with an investigation;
 - (b) anticipates any findings of the Tribunal concerning an investigation in a way that is calculated to influence the Tribunal's proceedings or findings;
 - (c) does anything in connection with an investigation that would have been contempt of court if the proceedings had occurred in a court of law;
 - (d) knowingly provides false information to the Competition Commission;
 - (e) defames the Competition Tribunal or the Competition Appeal Court, or a member of either, in their respective official capacities;
 - (f) willfully interrupts the proceedings or misbehaves in the place where an inquiry is being conducted;
 - (g) acts contrary to a warrant to enter and search;
 - (h) without authority -
 - (i) enters or searches *premises*, or
 - (ii) attaches or removes an article or document.

75. Penalties

- (1) Any person convicted of any offence in terms of *this Act*, is liable -
 - (a) in the case of a contravention of section 74(1), to a fine not exceeding R500 000,00 or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or
 - (b) in any other case, to a fine not exceeding R2 000,00 or to imprisonment for a period not exceeding 6 months, or to both a fine and imprisonment.

76. Magistrate's Court has jurisdiction to impose penalties

Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in *this Act*.

77. Serving documents

(1) Unless otherwise provided in *this Act*, a notice, order or other document which, in terms of *this Act*, must be served on or given to a person, will have been properly served or given when it has been either -

- (a) delivered to that person;
- (b) sent by registered post to that person's last known address; or
- (c) published in the *Gazette*.

78. Proof of facts

(1) In any criminal proceedings in terms of *this Act* -

- (a) if it is alleged that a person at a *firm* is or was an employee that person must be presumed to be an employee at that *firm*, unless the contrary is proved;
- (b) if it is proved that a false statement, entry, record or information appears in or on a book, document, plan, drawing or computer storage medium, the person who kept that item must be presumed to have made the statement, entry, record or information, until the contrary is proved.

(2) A statement, entry, record or information in or on any book, document, plan, drawing or computer storage medium is admissible in evidence as an admission of the facts in or on it by the person who made, entered, recorded or stored it unless it is proved that person did not make, enter, record or store it within the scope of their functions.

CHAPTER 8 GENERAL PROVISIONS

79. Regulations

- (1) The *Minister* may make regulations as required to give effect to the purposes of *this Act*.

80. Guidelines

- (1) The Competition Tribunal may prepare guidelines to indicate the Tribunal's policy approach to any matter within its jurisdiction in terms of *this Act*.
- (2) A guideline prepared in terms of subsection (1) -
 - (a) must be published in the *Gazette*; but
 - (b) is not binding on the Tribunal in the exercise of its discretion or the interpretation of *this Act*.

81. Official seal

The President, by Proclamation in the *Gazette*, may prescribe an official seal for each of the Competition Tribunal and the Competition Appeal Court.

82. Act binds the State

This Act binds the State.

83. Information exchange with foreign agencies

The President may assign to the Competition Commission any duty of the Republic, in terms of an international *agreement* relating to the objects of *this Act*, to exchange information with a similar foreign agency.

84. Definitions

In *this Act* -

- (a) '**agreement**' includes a contract, arrangement or understanding, whether or not legally enforceable;
- (b) '**civil court**' means a High Court or Magistrates Court, as referred to in sections 166(c) and (d) of the *Constitution*;
- (c) '**confidential information**' means trade, business or industrial information belonging to a *firm* which has a particular economic value, and which is not generally available to or known by others;

- (d) **'Constitution'** means the *Constitution* of the Republic of South Africa, 1996 (Act No 108 of 1996);
- (e) **'firm'** includes a person, partnership or a trust;
- (f) **'good or service'**, when used with respect to a particular *good or service*, includes any other *good or service* that is reasonably capable of being substituted for it, taking into account ordinary commercial practice and geographical, technical and temporal constraints;
- (g) **'historically disadvantaged persons'** has the meaning set out in the National Empowerment Fund Act, 199# (Act ## of 199#);
- (h) **'horizontal relationship'** means a relationship between competitors;
- (i) **'interest'** means a member's *interest* as defined in the Close Corporations Act, 1984 (Act No 69 of 1984);
- (j) **'market'** means the trade within the Republic of any *good or service*;
- (k) **'market power'** means the power of a *firm* to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers, or suppliers;
- (l) **'Minister'** means the Minister of Trade and Industry;
- (m) **'organ of state'** includes any statutory body or functionary;
- (n) **'premises'** includes land, or any building, structure, vehicle, ship, boat, vessel, aircraft, or container;
- (o) **'prescribed'** means *prescribed* from time to time by regulations in terms of section 79;
- (p) **'private dwelling'** means any part of any structure that is occupied as a residence, or any part of any structure or outdoor living area which is accessory to and used wholly for the purposes of residence;
- (q) **'prohibited practice'** means a practice prohibited in terms of Chapter 2;
- (r) **'regulatory authority'** means an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of industry;
- (s) **'respondent'** means a *firm* against whom a complaint of a *prohibited practice* has been brought in terms of *this Act*;

- (t) **'restrictive horizontal practice'** means any practice listed in section 4;
- (u) **'restrictive vertical practice'** means any practice listed in section 8;
- (v) **'small business'** has the meaning set out in the National Small Business Development Act, 1996 (Act No 102 of 1996);
- (w) **'this Act'** includes the Regulations and Schedules;
- (x) **'vertical relationship'** means the relationship between a *firm* and its suppliers, its customers, or both.

85. **Repeal of laws and transitional arrangements**

- (1) Subject to sub-section (2), the laws specified in Schedule 2, and all proclamations, regulations or notices promulgated or published in terms of those laws are repealed.
- (2) An exemption granted in terms of Section 14(5) of the Maintenance and Promotion of Competition Act, 1979 (Act No 86 of 1979) is deemed to have been granted in terms of section 10 of *this Act* and shall be valid for a period of 6 months from the date on which *this Act* comes into operation.

86. **Title and commencement of this Act**

- (1) *This Act* is called the Competition Act and comes into operation on a date fixed by the President by proclamation in the *Gazette*.
- (2) The President may set different dates for different provisions of *this Act* to come into operation.
- (3) Unless the context otherwise indicates, a reference in a section of the Act to a time when the Act comes into operation must be construed as a reference to the time when that section comes into operation.

SCHEDULE 1

EXEMPTION OF PROFESSIONAL RULES IN TERMS OF SECTION 2(c)

PART A

1. A *professional association* may apply in the *prescribed* manner to the Competition Tribunal to have all or part of its *rules*, exempted from the provisions of Part A of Chapter 2 of the Act, provided the *rules* do not contain any restriction that has the effect of substantially preventing, or lessening, competition in a *market* not reasonably required to maintain professional standards, or the ordinary function of the profession.
2. Upon receiving an application in terms of item 1, the Competition Tribunal may exempt the *rules* concerned if it has -
 - (a) given notice in the *Gazette* of the application;
 - (b) allowed interested parties 30 days from the date of that notice to make representations concerning the application; and
 - (c) consulted the *responsible Minister*.
3. At any time the Tribunal in the *prescribed* manner may revoke an exemption granted under item 2 on good cause shown, provided it has -
 - (a) given notice in the *Gazette* of its intention to revoke the exemption;
 - (b) allowed interested parties 30 days from the date of that notice to make representations concerning the exemption; and
 - (c) consulted the *responsible Minister*.
4. A *professional rule* is exempt, or its exemption revoked, only as of the date notice of exemption or revocation, as the case may be, is published in the *Gazette*.
5. The Competition Commission must maintain for public inspection a record of all *professional rules* that have received exemption, or for which exemption has been revoked.
6. For the purpose of this Schedule -

'professional association' means an association referred to in Part B of this Schedule;

'professional rules' means rules regulating a *professional association* that are binding on its members;

'rules' includes regulations, codes of practice and statements of principle;

'responsible Minister' means a Minister, or member of Executive Council of a Province, responsible for the regulation of a *professional association*.

PART B

The Governing Bodies of the following *professional associations* registered in terms of the following Acts are *professional associations* for the purposes of this Act :

Accountants and Auditors

Public Accountants and Auditors Act, 1991 (Act No 80 of 1991).

Architects

Architects Act, 1970 (Act No 35 of 1970).

Engineering

Engineering Profession of South Africa Act, 1990 (Act No 114 of 1990)

Estate Agents

Estate Agents Act, 1976 (Act No. 112 of 1976)

Attorneys

Attorneys Act, 1979 (Act No. 53 of 1979)

Admission of Advocates Act, 1964 (Act No. 74 of 1964)

National sciences

National Scientific Professions Act, 1993 (Act No.106 of 1993)

Quantity Surveyors

Quantity Surveyors Act, 1970 (Act No. 36 of 1970)

Surveyors

Professional and Technical Surveyors Act, 1984 (Act No. 40 of 1984)

Town and Regional Planners

Town and Regional Planners Act, 1984 (Act No. 19 of 1984)

Valuers

Valuers Act, 1982 (Act No. 23 of 1982)

Medical

Medical, Dental and Supplementary Health Service Professions Act, 1974
(Act No. 56 of 1974)

Nursing Act, 1978 (Act No. 50 of 1978)

Dental Technicians Act, 1979 (Act No. 19 of 1979)

Pharmacy Act, 1974 (Act No. 53 of 1974)

Veterinary and Para-veterinary Professional Act, 1982 (Act No. 19 of 1982)

Chiropractors Homeopaths and Allied Health Service Professions Act, 1982
(Act No. 63 of 1982)

Miscellaneous

Any other *professional associations* to whom the provisions of this Schedule have been declared applicable by the Minister by notice in the *Gazette*.

SCHEDULE 2**LAWS REPEALED BY SECTION 85**

NO AND YEAR OF LAW	SHORT TITLE	EXTENT OF REPEAL
Act 96 of 1979	Maintenance and Promotion of Competition Act 1979	The whole
Act 58 of 1980	Maintenance and Promotion of Competition Amendment Act 1980	The whole
Act 62 of 1983	Maintenance and Promotion of Competition Amendment Act 1983	The whole
Act 12 of 1985	Maintenance and Promotion of Competition Amendment Act 1985	The whole
Act 5 of 1986	Maintenance and Promotion of Competition Amendment Act, 1986	The whole
Act 96 of 1987	Maintenance and Promotion of Competition Amendment Act, 1987	The whole
Act 88 of 1990	Maintenance and Promotion of Competition Amendment Act, 1990	The whole

DEPARTMENT OF TRADE AND INDUSTRY

EXPLANATORY MEMORANDUM TO COMPETITION BILL, 1998

MAY 1998

EXPLANATORY MEMORANDUM : COMPETITION BILL 1998

1. INTRODUCTION – BACKGROUND AND MOTIVATION FOR POLICY REVIEW

On 27 November 1997 the Department of Trade and Industry published Proposed Guidelines for Competition Policy in a document entitled a FRAMEWORK FOR COMPETITION, COMPETITIVENESS AND DEVELOPMENT (The Guidelines). This document sets out the fundamental principles which would underpin competition policy. It proposed that a law be introduced to prohibit anti-competitive practices and, in the case of dominant firms, abuse of their dominant position, as well as to regulate mergers and acquisitions with respect to their likely impact upon competition.

Competition policy and its associated legislation and institutions are concerned with promoting and maintaining high levels of competition. In particular, competition policy is concerned with the potentially negative impact on competition of concentrated structures of economic power and the conduct that may emanate from these structures.

It is generally acknowledged that the South African economy is characterised by unusually high levels of product market concentration. This domination of key product markets - a phenomenon popularly referred to as 'monopolisation' - may be, and frequently is, abused to the detriment of consumers, potential and actual competitors, small firms and new entrants to the market, and even the public authority. Indeed excessive levels of market concentration are a potential threat to the functioning of the market economy itself. Furthermore, many South African markets not subject to monopolisation - that is, to domination by a single firm - are nonetheless dominated by two or three extremely large firms. This latter market structure lends itself to collusive - as opposed to competitive - inter-firm relations again to the potential detriment of the functioning of the market economy and those interests identified above.

Not only are South African market structures highly concentrated, ownership and control of the economy is also unusually centralised. This phenomenon is manifest in unusually high levels of vertical integration - ownership by a single shareholder or groups of shareholders of a producer as well as its key suppliers and customers. These ownership

structures are particularly threatening to the interests of small enterprise and new market entrants. Moreover, ownership concentration does not only take the form of common ownership along a vertical production and marketing chain. It is also manifest in ubiquitous cross shareholding and common board membership ('interlocking directorships') between competitors, again a situation that lends itself to abusive and collusive anti-competitive conduct.

Government's commitment to an urgent and comprehensive review of competition policy is underpinned by these factors. It is concerned at the threat that the industrial structure poses to the efficiency and adaptability of the economy through the exploitation and outright exclusion of key participants and potential participants. These fundamental concerns have, in the recent past, been strengthened by the need to forestall the potential threat that the restructuring of state-owned enterprises poses to competition. Moreover, the global reduction in barriers to international trade has placed competition policy high on the agenda of the multilateral trade initiatives and institutions and it surfaces with increasing regularity in bilateral engagements with some of our most important trading partners.

This important area is still governed by the Maintenance and Promotion of Competition Act No 96 of 1979. This statute established the Competition Board, the principal institution responsible for administering the Act. It is commonly accepted that the existing legislation is not equal to its important tasks. In general, the Act narrowly delimits the Board's areas of concern – major potentially anti-competitive practices (for example, vertical mergers) do not even fall within the ambit of the Act. The Board's decisions are subject to ministerial override generating uncertainty, political lobbying and scant respect for the Board. The Board has no punitive powers and must rely upon the criminal justice system to prosecute and punish transgressions. It is inadequately resourced. These shortcomings are particularly crippling in an area where the implementing authority relies upon the willingness of the weak to report transgressions committed by powerful suppliers, customers or competitors – there is little incentive for a small firm or group of consumers to risk retributive action by a powerful interest where there are strong grounds for expecting little support from a virtually powerless authority.

Against this background the core elements of Government's approach to competition policy, an approach enshrined in the accompanying Bill, may be summarised as follows:

- The overriding objective of competition policy and its associated instruments is the promotion of competition in order to underpin economic efficiency and adaptability, international competitiveness, the market access of SMMEs, diversification of ownership in favour of members of historically disadvantaged communities, and the creation of new employment opportunities.
- Procedures and remedies to be provided for in the proposed legislation will be triggered by a combination of structural and behavioural factors. In specified instances, behaviour, regardless of the size or structure of the offending firm, will trigger remedies under the act. For example a single firm or combination of firms may transgress the competition law by engaging in a defined 'restrictive practice'. In other instances remedies will be triggered by a combination of structure and behaviour. For example, a 'dominant' firm may commit practices that constitute an 'abuse' of its dominant position. In key instances – mergers and acquisitions for example – contemplated structural change will attract the attention of the competition authorities.
- Infringement of competition legislation will not be subject to criminal sanction, the only exceptions being in respect of breaches of confidence, hindering administration of the Act and failures to attend when summoned and to answer truthfully to the commission. Insofar as competition matters are concerned, an independent authority comprising an investigative (a 'competition inspectorate') and an adjudicative (a 'competition tribunal') division will administer the Act. The competition tribunal will have the authority to issue compliance orders and interdicts, to levy fines and to impose structural remedies. The latter set of remedies will include the right to prohibit a merger and, in specified circumstances, to order divestiture. Presumptions in the Act will discourage cross-shareholdings and directorship interlocks. Injured parties will have the right to claim civil damages, the quantum of which will be determined by the

civil courts.

The new legislation will provide for a right of appeal from the decisions of the competition tribunal to a specially constituted judicial authority, the Competition Appeal Court. The Competition Tribunal and the Competition Appeal Court will have – with a few specified exceptions – sole jurisdiction over competition matters. The one exception relates to the civil courts' responsibility for calculating the quantum of damages; the other relates to the question of ministerial override. In general, the decisions of the competition authorities will not – in contrast with the current situation – be subject to ministerial override. However, in one area – mergers and acquisitions – interested parties may appeal to the Minister on specified public interest grounds. The tribunal will not adjudicate on public interest grounds. In providing for limited public interest considerations in the legislation South Africa is in keeping with international precedent. The competition laws of most countries share certain common objectives, principally to maintain healthy rivalry among firms in markets for goods and services. However, as the World Trade Organisation notes in its 1998 report most countries link the goal of maintaining inter-firm rivalry with broader economic and social objectives including the protection of consumers from the undue exercise of market power, the promotion of trade, the promotion of democratic values such as economic pluralism and the dispersion of socio-economic power and the protection of the public interest including consideration leading to industrial competitiveness and employment and the promotion of small and medium sized business.

The draft Bill in which these broad principles are enshrined will comprise eight chapters. These are, firstly, a chapter dealing with the purpose, application and interpretation of the proposed Statute. Second, the chapter dealing with prohibited practices, in particular vertical and horizontal restrictive practices and abuse of a dominant position. The third chapter deals with merger control. Chapter 4 deals with the Competition Commission and Court covering matters related to the establishment of the Commission and its independence, the management of the Commission, the investigative (the 'competition

inspectorate) and adjudicative (the 'competition tribunal') branches of the Commission, and the proposed Competition Appeal Court. Chapter 5 deals with procedural matters. Chapter 6 is concerned with remedies and enforcement. Chapter 7 deals with specified criminal offences under the proposed Act and the final chapter details some *pro forma* general provisions.

The remainder of this memorandum summarises the key provisions contained in each of these chapters.

2. CHAPTER 1

This chapter sets out the objectives of the Bill. It provides that the purpose of the Bill is the promotion and maintenance of competition to facilitate the realisation of a number of specified economic and social objectives. These are economic efficiency and adaptability, competitive prices and product choices, the maximisation of employment opportunities, entry into world markets, ease of access by SMMEs to the economy, and a greater spread of ownership, principally in order to increase the ownership stake of historically disadvantaged persons. The Bill specifically provides that the Bill be interpreted with reference to these objectives.

Chapter 1 also provides that the Bill applies to all economic activity with the exception of collective bargaining agreements, the rules of specified professional associations, the transactions of co-operative societies, and concerted practices and actions designed to achieve a non-commercial, socio-economic objective. Note prior to placing a professional society in the exempted schedule, its rules would be subject to scrutiny by the competition authority.

3. CHAPTER 2

This chapter deals with the prohibitions against restrictive horizontal and vertical practices and the abuse of a dominant position.

Clause 4 provides for the prohibition of restrictive horizontal practices. Specified agreements between firms are prohibited outright. These include price-fixing agreements, collusive tendering and market-sharing agreements. There is also a general provision that stipulates that any other horizontal agreement that prevents or lessens competition is prohibited unless a party to the agreement can prove efficiency gains that outweigh the negative impact on competition. The existence of a horizontal agreement is frequently difficult to establish and this clause also provides that where a horizontal restrictive practice is alleged, an agreement will be rebuttably presumed to exist if the firms in question share a common director or one firm owns a substantial share in the other.

Clause 5 deals with restrictive vertical practices. The practice of resale price maintenance is prohibited outright. Beyond this specific prohibition, all agreements between firms in a vertical relationship – for example supplier-producer or producer-customer – that lessen competition are prohibited unless a party to the agreement can prove efficiency gains that outweigh the negative impact on competition.

Clauses 6-9 deal with abuse of a dominant position. The Bill stipulates that a firm that enjoys a market share in excess of 35% is considered dominant unless it can establish that it does not enjoy market power, that is, that it does not have the power to control prices, exclude competition or to behave independently of its competitors, customers or suppliers. A firm with a market share of less than 35% may, on the other hand, be considered dominant, if it can be shown that it does indeed possess market power.

In common with the approach to restrictive practices, there is an outright prohibition on specified practices when undertaken by a dominant firm. Other specified practices by a dominant firm are prohibited unless the firm can establish the existence of

countervailing technological or efficiency gains.

A firm may apply to exempt an agreement from provisions of chapter two. Clause 10(2) sets out the circumstances where an exemption can be granted for a maximum of five years. In line with the general objectives of the bill, a firm or group of firms may apply for an exemption if it can show that the contemplated agreement will contribute to the promotion of exports or to promoting the ability of small firms or firms owned by historically disadvantaged persons to become competitive. An agreement may also be exempted if it is intended to arrest decline in an industry.

4. CHAPTER 3

This chapter deals with the control of mergers and acquisitions which constitutes an important form of structural remedy in the bill. This chapter should be read in the light of the guidelines' assessment of the weaknesses in existing legislation. In particular, the guidelines drew attention to the absence of compulsory pre-notification of mergers or acquisitions, to the failure to consider vertical and conglomerate mergers and acquisitions and to the absence of adequate mechanisms for the unscrambling of such transactions.

Clause 14 sets out the circumstances in which it is mandatory for the Competition Tribunal to prevent a merger or a proposed merger. In order to do so the Tribunal must determine that the merger or proposed merger is likely to substantially lessen competition. In making this determination the Tribunal must have regard to the strength of competition in the relevant market and to the probability, after the merger, of the firms in the market behaving competitively or co-operatively. The Bill specifies a number of factors which must be considered in making this determination.

Clause 18 stipulates that an interested party can request the Minister to review the decision of the Tribunal on a number of specified public interest grounds. These are the effect of a merger on a particular industrial sector or region, employment, the ability of small firms or firm controlled or owned by historically disadvantaged persons to become

competitive and the ability of national industries to compete in international markets. It should be noted that this definition of public interest is drawn from the objectives of the bill as set out in Clause 1. Clause 18 (3) prescribes a limit of four months within which the Minister must act. The Minister may exercise three options, namely to overturn, confirm or amend the order of the Tribunal.

5. CHAPTER 4

Chapter four provides for the establishment of a Commission and the Appeal Court. Clause 19 makes clear that there is one body with three component arms: a Management Board, responsible for the general administration of the commission, an Inspectorate (the investigative arm) and a Tribunal (the adjudicative arm).

Clause 20 entrenches the commission as an independent body. The requirements imposed on all personnel are the same as are prescribed within the Constitution.

Part B of this chapter grants the Management Board the authority to manage the commission in an independent manner. Clause 25 is a detailed provision in respect of the financing of the commission. Thus Clause 25 (3) requires the Board to submit a statement to the Minister of its estimated income and expenditure and the requested appropriation from Parliament.

Clause 28 sets out the function of the inspectorate. Although part of the one-body Commission for administrative purposes the inspectorate exists as a separate body for the purposes, *inter alia*, of investigation and appearance before the Tribunal as well as other functions set out in the Clause 28.

Clause 32 sets out the functions of the Tribunal, these being to grant exemptions, to authorise or prohibit a merger, to adjudicate in relation to any of the prohibited practices specified in the Bill and to impose remedies, and to grant orders for costs.

Clause 33 sets out the composition of the Tribunal. The appointments are to be made by the President on the recommendation of the Minister. Clause 35 provides for the circumstances under which a person may be removed from the Tribunal. Outside of these limited conditions a member has independence of tenure for a maximum of two consecutive terms of five years each.

Part E deals with the Competition Appeal Court. It has the power to consider an appeal from the Tribunal or to review a decision thereof. It will have the status of a High Court and will be presided over by a judge of the High Court and two assessors who have specialist experience of competition law and policy.

6. CHAPTER 5

Chapter 5 sets out the procedures for filing a complaint before the Tribunal. CL 45 provides that, apart from a regulatory authority, a person prejudiced by a prohibited practice and who has a substantial legal interest in obtaining relief can submit a complaint.

The provision relating to search warrants contained in Clause 47 - 49 follows a similar provision in the Income Tax Act.

The thrust of this chapter is to encourage public participation of interested parties (Clause 54) in respect of persons who have material interest in the inquiry. In addition Clause 53 (5) provides that all participants and members of the public should have reasonable access to the record of an inquiry subject to the protection of confidential information.

Clause 59 provides for a right of appeal to the Competition Appeal Court; the Court will also have the power of review of the Tribunal's decision. Clause 59(2) gives the Competition Appeal Court exclusive and final jurisdiction in these matters.

Clause 58 provides a deterrent to parties initiating insubstantial complaints in that an award of costs can be made against a complainant who pursues a complaint to the Tribunal after the inspectorate has refused to proceed and has issued a notice of non referral.

7. CHAPTER 6

Chapter six provides for the remedies under the Bill. In terms of Clause 60 - 61, the Tribunal will have power to issue interim and final interdicts. It will also have the power to impose administrative fines for breaches, the maximum fine being 10% of the breaching firms annual turnover in the Republic (Clause 62). Clause 63 creates a power of divestiture in the case of a prohibited merger. Apart from compelling a sale of any shares or interest, the Tribunal can declare void any agreement which the merger has been subjected. This divestiture power affords the tribunal a significant power to remedy structural defects as prohibited in Chapter three. Clause 63 (2) also creates a power of divestiture in the event that this is needed to prevent persistent abuse of dominance. A divestiture order must be confirmed by the Competition Appeal Court in order to be effective.

In general this Chapter makes clear that only the Tribunal and Competition Appeal Court have the power to adjudicate over the contents of the Bill. Thus if civil action is initiated by a party in a civil court, the latter cannot consider an issue which falls within the scope of this bill. It must either apply the determination of the Tribunal if that has occurred or, if the court is satisfied that the issue is not frivolous or vexatious (and is required to determine the case) it has to refer this aspect of overall dispute to the Tribunal. Civil courts do however retain jurisdiction to award damages for anti-competitive actions and the bill gives them this power exclusively.

8. CHAPTER 7

Chapter seven provides for the offences under the Act. These relate only to non-compliance in respect of the powers of the various bodies and officials under the bill. The bill has sought to deal with the substantial breaches of the prohibited practices without recourse to the criminal law.

9. CHAPTER 8

Chapter eight contains the general provisions of the act. Included in this chapter is a section that provides for the Tribunal to issue guidelines to indicate the Tribunal's policy approach on any matter within its jurisdiction. Although the guidelines are non-binding they will give clarity to the public on the Tribunal's approach to the interpretation of the Act.

10. SCHEDULES

A. PROFESSIONAL ASSOCIATIONS

The first schedule deals with the manner in which professional associations' rules are exempted from the provisions of the Competition Bill. The schedule in brief provides that a professional association can apply to the Tribunal to have its rules exempted from the provisions of the Competition Bill. The Tribunal may make a decision on the exemption only after consultation with the relevant line Ministries.

If the Competition Tribunal does not exempt a professional rule, this does not affect the validity of such a rule. It merely means that such a rule is not excluded from the provisions of the Competition Act.

The Minister is given the power to extend the list of professions to whom the right to apply for an exemption applies.

B. TRANSITIONAL MEASURES

The second schedule to the Act provides for certain transitional measures, namely:

- That professional rules will be deemed to be exempt in terms of this Act for a period of one year after the date of commencement of the Act. The purpose of this is to allow professions the time to apply to have their rules exempt;
- Exemptions granted under the existing Maintenance and Promotion of Competition Act will be deemed to be in force for a period of six months after the date commencement of the Act. The purpose of this is to allow parties in favour of whom such exemptions have been granted to apply once again to the Competition Tribunal for an exemption (on the assumption that such an exemption is still available to them under the new Act) within a reasonable time period so as not to prejudice their existing rights. Where exemptions are not competent under the new Act, these rights will elapse after a period of six months.

11. WAY FORWARD

Publish Bill	22 May 1998
Workshops and bi-lateral meetings	During 12 week publication period
Closing date for comments	14 August 1998
Table in Parliament	September 1998

12. CONTACT PERSON:

Alistair Ruiters

Chief Director: Business Regulation and Consumer Services

Private Bag X84

Pretoria

0001

Tel No: 012-310 9576

Fax No: 012-322 8489

012-320 8527

E-mail: alistair@dti.pwv.gov.za

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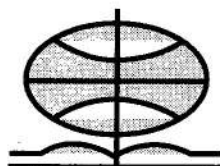
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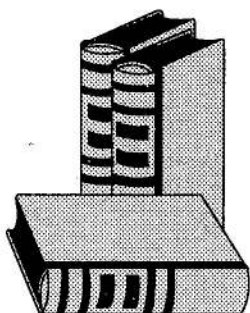
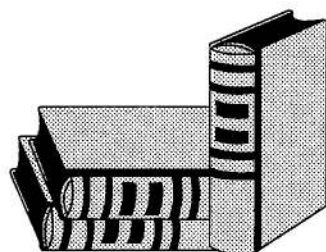
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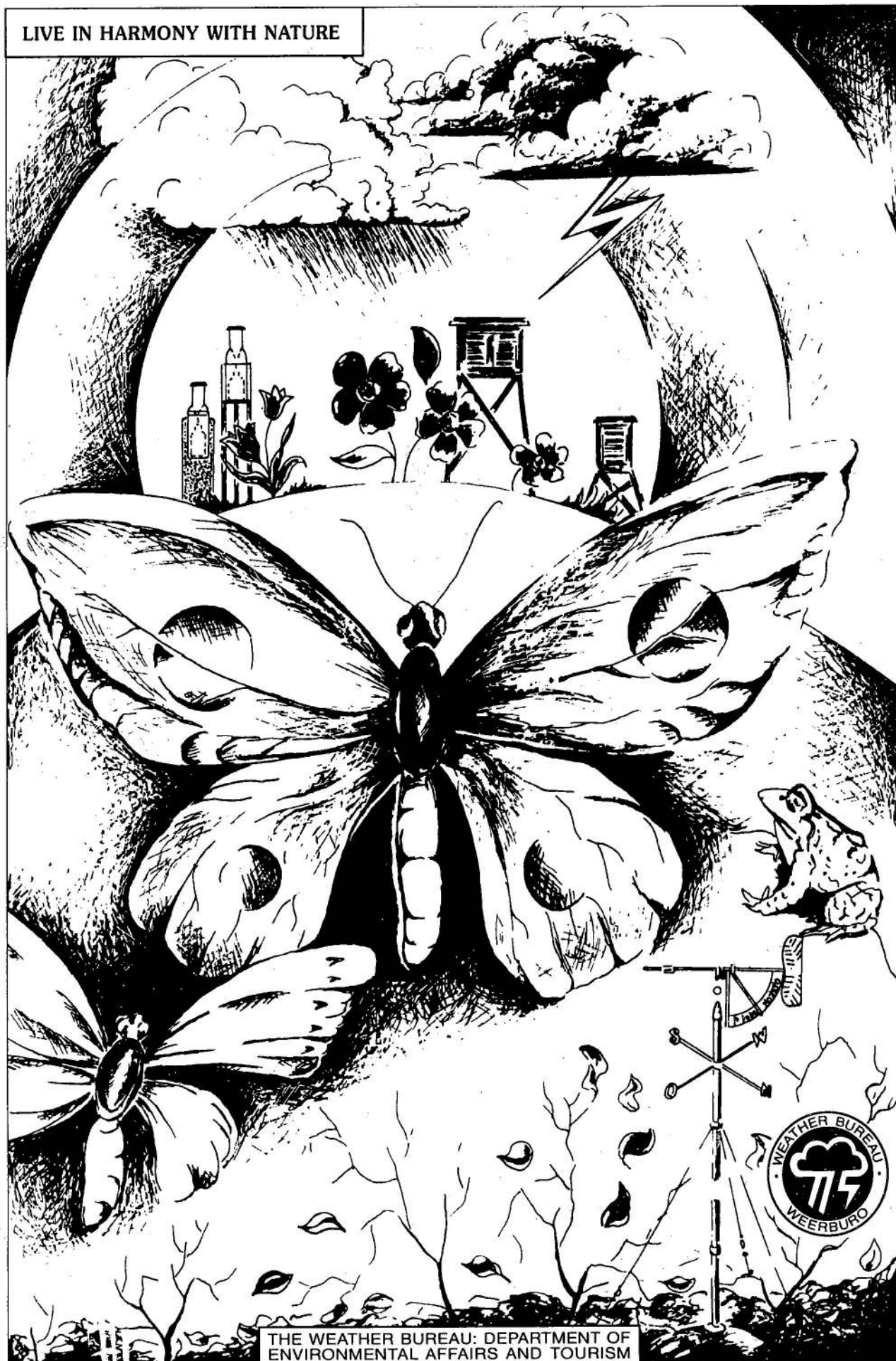
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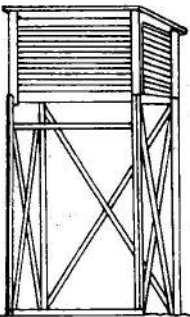
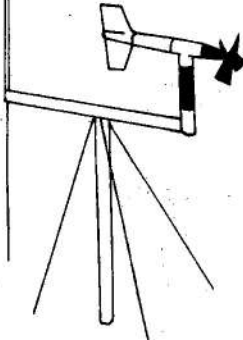
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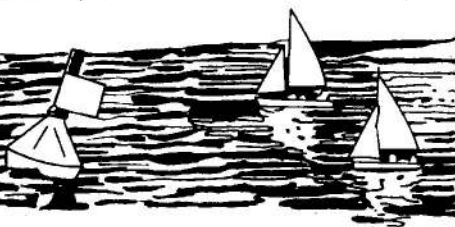
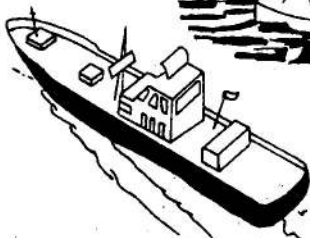
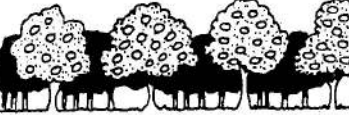
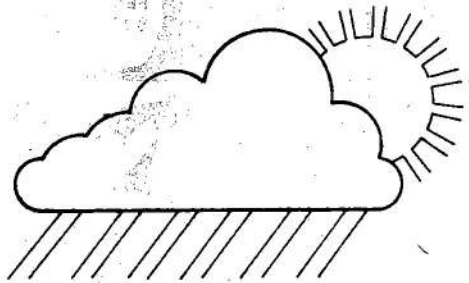


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