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CONTENTS • INHOUD

| No. | Page No. Gazette No. |
|--|---------------------------------|
| GENERAL NOTICES | |
| Trade and Industry, Department of | |
| <i>General Notices</i> | |
| 1758 Consumer Affairs (Unfair Business Practices) Act (71/1988): Consumer Affairs Committee: Report on the result of an investigation: Report No. 111..... | 3 26700 |
| 1759 do.: do.: Unfair business practice | 17 26700 |

GENERAL NOTICES

NOTICE 1758 OF 2004

DEPARTMENT OF TRADE AND INDUSTRY CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988

I, Mandisi Mpahlwa, MP, Minister of Trade and Industry, do hereby, in terms of section 10(3) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), publish the report of the Consumer Affairs Committee on the result of an investigation made by the Committee pursuant to General Notice 4083 of 2002 as published in Government Gazette No.21665 dated 20 October 2000, as set out in the Schedule.



M B M MPAHLWA

MINISTER OF TRADE AND INDUSTRY

SCHEDULE

CONSUMER AFFAIRS COMMITTEE

REPORT IN TERMS OF SECTION 10(1) OF THE CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988 (ACT No. 71 OF 1988)

Report No111

INERTIA SELLING

1. The Consumer Affairs Committee

The Consumer Affairs Committee (the Committee) administers the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988 (the Act). It is a statutory committee in the Department of Trade and Industry that reports to the Minister of Trade and Industry (the Minister). The purpose of the Act is to provide for the prohibition or control of certain business practices.

An "unfair business practice" is defined in the Act as any business practice which, directly or indirectly, has or is likely to have the effect of harming the relations between businesses and consumers, unreasonably prejudicing any consumer, deceiving any consumer or unfairly affecting any consumer.

The Committee has wide investigative powers. In broad terms the Committee is empowered to undertake investigations into:

- (a) the business practices of individuals and businesses that could be involved in unfair business practices⁽¹⁾

and

- (b) any business practice in general which is commonly applied for the purposes of or in connection with the creation or maintenance of unfair business practices.⁽²⁾

A 4(1)(c) investigation enables the Committee to make a preliminary investigation in order to ascertain whether there is an unfair business practice in existence or whether there is a possibility that an unfair business practice may come into existence in the future. Notice of a 4(1)(c) investigation is not published in the *Government Gazette* but

(1) In terms of sections 4(1)(c) and 8(1)(a). These are commonly referred to as 4(1) (c) and 8 (1) (a) investigations.

(2) In terms of section 8 (1) (b). This is commonly referred to as an 8(1) (b) investigation

if the Committee is of the view that there is evidence of an unfair business practice and it decides to investigate the matter further, ⁽³⁾ notice of the section 8 investigation is published in the *Government Gazette*. The purpose of a 4(1)(c) investigation is to enable the Committee to make a more informed decision as to whether there is a need for a formal investigation. The Minister is not empowered to make any decisions on the strength of a 4(1)(c) investigation but he may do so following a section 8 investigation.

Should the Committee, after the conclusion of a section 8 investigation, resolve that an unfair business practice exists, or may come into existence, it recommends corrective action to the Minister to ensure the discontinuance of the unfair business practice.⁽⁴⁾ The Minister may, on the recommendation of the Committee, by notice in the *Government Gazette*, make regulations.⁽⁵⁾ Orders of the Minister are published in the *Government Gazette*. A contravention of an order by the Minister is a criminal offence, punishable by a fine of R200 000 or five years imprisonment or both the fine and the imprisonment.

2. The Definition of Inertia selling

Inertia selling is a concept which, for the purposes of this report, encompasses two different marketing techniques - "negative option marketing" and "unsolicited marketing".⁽⁶⁾

(3) This is a formal investigation in terms of section 8(1)(a)

(4) The powers of the Minister are set out in s 12

(5) See s 16

(6) These marketing techniques must be distinguished from the practice of automatically renewing contracts. The contract may state that the term of the contract will continue for another period unless either party gives notice, usually in writing, that the contract is to be terminated. There may also be a similar clause relating to price increases. For example, the parties agree, in the initial contract, that certain price increases during the course of the contract will automatically take effect.

2.1. Negative Option Marketing

Negative option marketing is a marketing strategy where marketers make available new products or services to existing customers, by for example post or e-mail and, should the consumers not expressly reject the proposals, the marketers assume that the proposals are acceptable. If customers fail to communicate with the marketers, the marketers debit their accounts. In these circumstances the marketers are able to do this because these are already existing customers and so the marketers have their account details. This is best described by way of example:

A broker sends his existing client base an offer to purchase a new "family funeral policy" at R100 per month. He informs them that if they do not respond to the offer, their accounts will be debited from a certain date. He is therefore putting the responsibility on them to tell him if they do not wish to purchase this policy. If they fail to do this, often because they are not even aware of the offer, it is assumed that they have agreed to purchase the policy.

Most of the complaints which the Committee has dealt with concern this form of inertia selling.

2.2 Unsolicited Marketing

Unsolicited marketing is the practice of sending unsolicited merchandise to consumers "out of the blue." There is no contractual relationship between the parties and marketers simply hope that consumers will keep the items and forward their payments. Marketers obtain the addresses of consumers from suppliers of address lists or telephone directories. This marketing technique must be distinguished from the practice of sending free samples through the post. Marketers who send out free samples intend the recipients to become the owners of the samples. With unsolicited marketing marketers do not intend the recipients to become owners until they have paid for the goods. If they do not pay, they may be threatened with collection, told that their credit record will be affected or that legal action will be taken against them.

3. Complaints Received

From time to time the Committee receives complaints from consumers who have been subjected to inertia selling. These complaints have been resolved on an *ad hoc* basis and in all cases the sellers have agreed to discontinue the practice. The Committee has therefore been able to stop the campaigns that have been brought to its attention.

During January 2000 a leading retail chain marketed a particular benefit to their existing clients making use of negative option marketing. Some of their clients complained to the Committee, which then initiated discussions with the business in order to resolve the matter.

The benefit which was offered was an insurance policy that covered the outstanding balance in the case of death and retrenchment. Counsel for the business argued that the product justified the marketing method and that without negative option marketing there would be no product. The agreement with the insurer stipulated a minimum number of policy holders and the master policy could only be implemented once this number was reached. Negative option marketing was the only option available to ensure that the minimum number was attained. Counsel argued that the policy would benefit the clients in case of death and retrenchment and that this route was therefore in the public interest. The Committee, however, did not accept this argument.

The matter was resolved after the business agreed to negotiate with the Committee.⁽⁷⁾ The end result was that the business agreed not use negative option marketing to sell its product but that consumers would be informed of the benefits of taking out the policy and could elect for themselves whether they wished to purchase it.

4. General Investigation and the Publication of the Notice

The Committee resolved to undertake a general investigation in terms of section 8(1)(b)

(7) The Committee may, in terms of section 9, negotiate with any person with a view to making an arrangement which will ensure the discontinuance of a unfair business practice

into inertia selling because it appeared that more and more businesses were attempting to use the technique and it was no longer feasible to deal with the matter on a case by case basis.⁽⁸⁾ Notice of the investigation was published in the *Government Gazette*.⁽⁹⁾

This read as follows:

In terms of the provisions of section 8(4) of the Consumer Affairs (Unfair Business Practices) Act, No. 71 of 1988 (the Act), notice is herewith given that the Consumer Affairs Committee intends undertaking an investigation in terms of section 8(1)(b) of the said Act into the supply of goods and services, defined as commodities in the Act, to consumers without their unequivocal authorization. This practice is known as inertia selling or negative option marketing."

4.1 Public Response

In January 2001 copies of the Notice were sent to all retailers listed on the Johannesburg Stock Exchange (JSE) and other interested parties. The vice chairperson of the Committee issued a press release and most of the major newspapers carried articles about inertia selling. The Committee received comment from consumers, the Direct Marketing Association of South Africa (DMA), some of the members of the DMA and the Advertising Standards Authority of South Africa (ASA). All comments were in favour of the Committee's intention to investigate inertia selling and it is clear that this practice is frowned upon by both consumers and business alike.

(8) The Committee had been informed that a number of other businesses were following the matter with interest and that should no action be taken against the business concerned, they intended to develop similar products and use similar marketing techniques. Although the Act contains a secrecy clause and there were no public discussions concerning the particular business involved, many consumers had complained to the press and there were a number of articles on the subject. At the same time pressure by the press was brought to bear on some other businesses which were adopting similar marketing techniques and these businesses found that it was in their interests to change their business practices

(9) Notice 4083 in *Government Gazette* 21665 20 October 2000

5. The Law

In terms of the common law of contract the general rule is that a recipient of unrequested goods or services is not obligated to pay for them unless she or he consented to having the goods or services supplied. To use the words of Watermeyer CJ 'quiescence is not necessarily acquiescence and one party cannot without the consent of the other, impose upon another such a condition to that effect.'⁽¹⁰⁾ Generally speaking therefore, silence does not mean consent.

As far as legislation is concerned, the recent Electronic Communications and Transactions Act⁽¹¹⁾ states that no agreement is concluded where a consumer has failed to respond to an unsolicited communication.⁽¹²⁾ In addition, any person who sends unsolicited commercial communications to consumers must provide consumers with the option of cancelling his or her subscription to the mailing list of that person and must supply the consumer with the particulars of the source from which that person obtained the consumers' personal particulars.⁽¹³⁾ From this it is clear that, when it comes to electronic transactions, inertia selling is a practice which has been outlawed by Parliament.

In addition, there are certain consumer codes which provide guidelines on inertia selling.⁽¹⁴⁾ These guidelines are contained in the ASA's *Code for Advertising Practice*, and the Direct Marketing Association's *Code of Practice*. The Committee also regards transgressions of the codes as unfair business practices.

(10) *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 422

(11) Act No 25 of 2002

(12) Section 46 (2)

(13) Section 46 (1)

(14) The Committee as well as a number of industries have developed consumer codes which provide guidance regarding acceptable business practices. These codes make an important contribution to self-regulation and are often a starting point for the Committee when it analyses a potentially unfair business practice. For a full discussion of the role of consumer codes see Report No 15 *Government Gazette* No 13899 18 May 1992

5.1 ASA's Code of Advertising Practice

The ASA is an independent body set up and funded by the marketing communication industry to ensure that its system of self-regulation works in the public interest. The *Code of Advertising Practice* (the *Code*) is the guiding document of the ASA. The *Code* is based upon the *International Code of Advertising Practice*, prepared by the International Chamber of Commerce. This is internationally accepted as the basis for domestic systems of self-regulation.⁽¹⁵⁾ The *Code* was drawn up by the ASA with the participation of those involved in the marketing communication industry and is amended from time to time to meet the changing needs of both the industry and of society.

The purpose of the *Code* is twofold - to protect consumers, and to ensure professionalism among advertisers.⁽¹⁶⁾ The *Code* lays down criteria for professional conduct, while at the same time informing the public of the self-imposed limitations accepted by those using or working in advertising. It forms the basis for arbitration where there is a conflict within the industry, or between advertisers and the general public.⁽¹⁷⁾

The *Code* is designed to complement, rather than replace, legislation that exists to protect consumers from dishonest and fraudulent trading practices.⁽¹⁸⁾ As far as inertia selling is concerned, it states as follows:

"Advertisements will not be accepted from those who supply goods without express authority from the receiver of the communication".⁽¹⁹⁾

The ASA can order the withdrawal of an advertisement in its current format, direct the

(15) See generally the Preface to the *Code*

(16) Preface clause 12

(17) As above

(18) Preface clause 13

(19) Section 1V clause 3

advertiser to submit the proposed amendment, the original advertisement and the relevant ASA ruling to the ASA Advisory Service for pre-publication advice, subject the respondent to pre-publication advice in respect of future advertisements, require members of the ASA to withhold advertising space from the respondent and ensure adverse publicity including the publication of the names of the defaulters.

Should the respondent ignore a reasonable request for cooperation, the ASA will issue an Ad-Alert to its members who are requested not to accept any further advertisements from the offending member.⁽²⁰⁾

Reports indicate that the ASA regularly deals with the problem of inertia selling. In one case the ASA reported that customers had to advise a company by telephone if they did not wish to take up an offer which would have cost them an additional R2.00 per month.⁽²¹⁾ A complainant to the ASA pointed out that if the company had 200 000 customers and only 5% made the phone call to reject the offer, an additional R380 000 per month would be generated by the advertiser without the authority to do so. The ASA has stated that it regards inertia selling as an unacceptable practice and that it will not hesitate to take firm action when businesses contravene the *Code* in this manner.⁽²²⁾

5.2 The DMA's *Code of Practice*

The DMA is a voluntary organization that represents, promotes, and serves a range of direct marketing organizations, from call centres and TV infomercial marketers, to print, electronic commerce and mail order organizations.

Adherence to the DMA's *Code of Practice* is a prerequisite for membership. The relevant section of the code reads as follows:

(20) Its members are representative of the marketing and communications industry and include, amongst others, the Association of Advertising Agencies, the Printing Industries Federation of South Africa, the National Association of Broadcasters and the Outdoor Advertising Association of South Africa

(21) *Rulings and Reasons* No 1 April 1994

(22) *Rulings and Reasons* No 10 August 1997

Offers which require a person to return a notice that he does not wish to receive further goods or services shall not be made, except when the conditions are made clear in an initial offer which is accepted by the purchaser by way of a confirmed order.⁽²³⁾

and

Goods and/or services shall not be despatched or provided to a potential buyer unless an order has been received or the consignment is clearly shown to be 'free' and the recipient expressly informed of his unqualified right to treat it as an unconditional gift.⁽²⁴⁾

Members that contravene this code will be investigated by the DMA Standards Committee, which has the authority to censure, suspend, or expel members from the DMA.

5.3 Foreign practices

Some countries have legislated against this practice. In Britain for example, consumers who receive unsolicited goods are made the unconditional owners of them after expiration of six months if the business has not reclaimed the goods.⁽²⁵⁾ This period is shortened to 30 days if the business fails to collect the goods after being notified that they are unsolicited. Unless a business has reasonable cause to believe that it has a right to payment for these goods, it is a criminal offence to demand payment, to threaten any legal proceedings or to invoke any collection procedure such as placing the name of the consumer on a list of defaulters. Similar provisions are also found in Australian legislation.⁽²⁶⁾ In the United States, several cases have been brought before

(23) Section 5.1 of the DMA 's Code of Practice

(24) Section 5.2 of the DMA's Code of Practice

(25) Unsolicited Goods and Services Act of 1971 and 1975

(26) See, for example, the Trade Practices Act 1974 ss 64 and 65 and the Unsolicited Goods and Services Act 1974 (New South Wales)

the courts, where companies either unbundled products or introduced new products using inertia selling. Most companies were prosecuted and the practice of charging a consumer for any service that the consumer has not affirmatively asked for by name, outlawed.⁽²⁷⁾ Other jurisdictions such as the European Union, Canada and New Zealand also have legislation curbing the use of negative option marketing and limiting consumers' obligations when they receive unsolicited merchandise.⁽²⁸⁾

6. Consideration

Inertia selling forces particular products on consumers, discourages comparative shopping and produces sales of unwanted goods. Consumers are often deceived into believing (incorrectly) that they are bound to pay for the goods or service.⁽²⁹⁾ Even if consumers are not deceived, they may be inconvenienced by the fact that they now have to take positive steps in order to ensure that they do not end up paying for something they did not request in the first place. In many instances consumers are not even aware of the new charges particularly when the charges are relatively small. This is particularly problematic in South Africa where many consumers do not understand the language in which the marketing material is printed. It is the Committee's experience that the languages most commonly used are English and Afrikaans. It is also the Committee's experience that many consumers who can read, do not read the material and regard it as 'junk mail'. There is also the problem of consumer apathy where, because of the small amounts involved, consumers cannot be bothered to go through the inconvenience of notifying the business concerned.

In some cases, businesses have attempted to justify the practice by arguing that the service is one which is beneficial but in order to provide this beneficial product at a low cost it is necessary to achieve a critical mass. This critical mass will only be achieved by inertia selling as many consumers will not respond to the advertising even when it

(27) Negative Option Marketing: Discussion Paper Office of Consumer Affairs Canada

(28) Negative Option Marketing: Discussion Paper Office of Consumer Affairs Canada

(29) See generally S Barnes and M Blakeney *Advertising Regulation* (1982) 292

is clear that it is in their interests to do so. The Committee is of the view that this does not justify taking away consumer choice and that consumers may only be charged for a product or service when they have made a conscious and informed decision to purchase that product or service.

7. Conclusion

All available information indicates that inertia selling is an unfair business practice as defined in section 1. The Committee is of the view that inertia selling is an unacceptable marketing method which cannot be justified in the public interest and should be prohibited by the Minister for the following reasons:

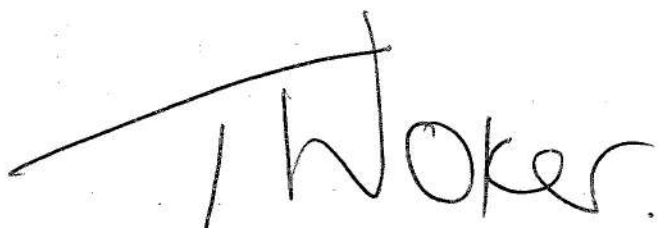
- (a) inertia selling is unfair because some customers may not receive, read or understand the marketing material, notification, brochure or letter and may acquire a product or service without even being aware thereof; and
- (b) Inertia selling imposes a positive obligation on consumers who, should they fail to take positive steps, will be charged. It is unfair to expect a consumer who does not wish to enter into a transaction to take active steps to prevent the transaction from going through.

8. Recommendation

It is accordingly recommended that the Minister, in terms of section 12(6) of the Act, declares unlawful any practice whereby

goods and services, defined as commodities in the Act, are supplied, offered or in any other way presented to consumers without their unequivocal authorization, a practice known as inertia selling.

It is further recommended that this report be published in the Government Gazette for comment. In terms of section 12(6)(c) of the Act the Minister may, on the recommendation of the Committee, in a particular case in writing grant exemption from a prohibition promulgated in terms of section 12(6)(a) of the Act.

A handwritten signature in black ink, appearing to read 'T A Woker', with a long horizontal stroke extending to the left.

PROFESSOR T A WOKER

VICE-CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE

20/5/2004

NOTICE 1759 OF 2004**DEPARTMENT OF TRADE AND INDUSTRY
CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988**

I, Mandisi Mpahlwa, MP, Minister of Trade and Industry, in terms of section 12(6)(a)(iii) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No 71 of 1988), hereby give notice that I intend publishing the following notice in the Government Gazette. Interested parties are hereby invited to comment on the proposed notice. These comments must be directed to the address which appears at the end of the proposed notice within a month from date of publication.

**NOTICE IN TERMS OF SECTION 12(6) OF THE
CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988**

I, Mandisi Mpahlwa, Minister of Trade and Industry, by virtue of the powers vested in me by section 12(6) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No 71 of 1988), and after having considered a report by the Consumer Affairs Committee in relation to an investigation of which notice was given in Notice 4083 of 2002 published in Government Gazette No 21665 dated 20 October 2000, which report was published in Notice 1758 in Government Gazette No. 26700 of 18 August 2004, and being of the opinion that an unfair business practice exists which is not in the public interest, promulgate the notice in the Schedule.

SCHEDULE

In this notice, unless the context indicates otherwise -

1. "Unfair business practice" means the business practice whereby goods and services, defined as commodities in section 1 of the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988, are supplied, offered or in any other way presented to consumers without their unequivocal authorization, a practice known as inertia selling.
2. The unfair business practice is hereby declared unlawful and persons are hereby directed to:
 - (a) refrain from applying the unfair business practice;
 - (b) refrain at any time from applying the unfair business practice.
3. On the recommendation of the Consumer Affairs Committee I may, in a

particular case, in terms of section 12(6)(c) of the Act, grant exemption from a condition or requirement contemplated in this notice to such extent and for such period and subject to such conditions as may be specified in the exception. Such applications for exemption must be directed to:

The Secretary
Consumer Affairs Committee
Private Bag X84
PRETORIA
0001

[For attention: Mr E Mohamed, (F) 012-394-2542]



M B M MPAHLWA

MINISTER OF TRADE AND INDUSTRY

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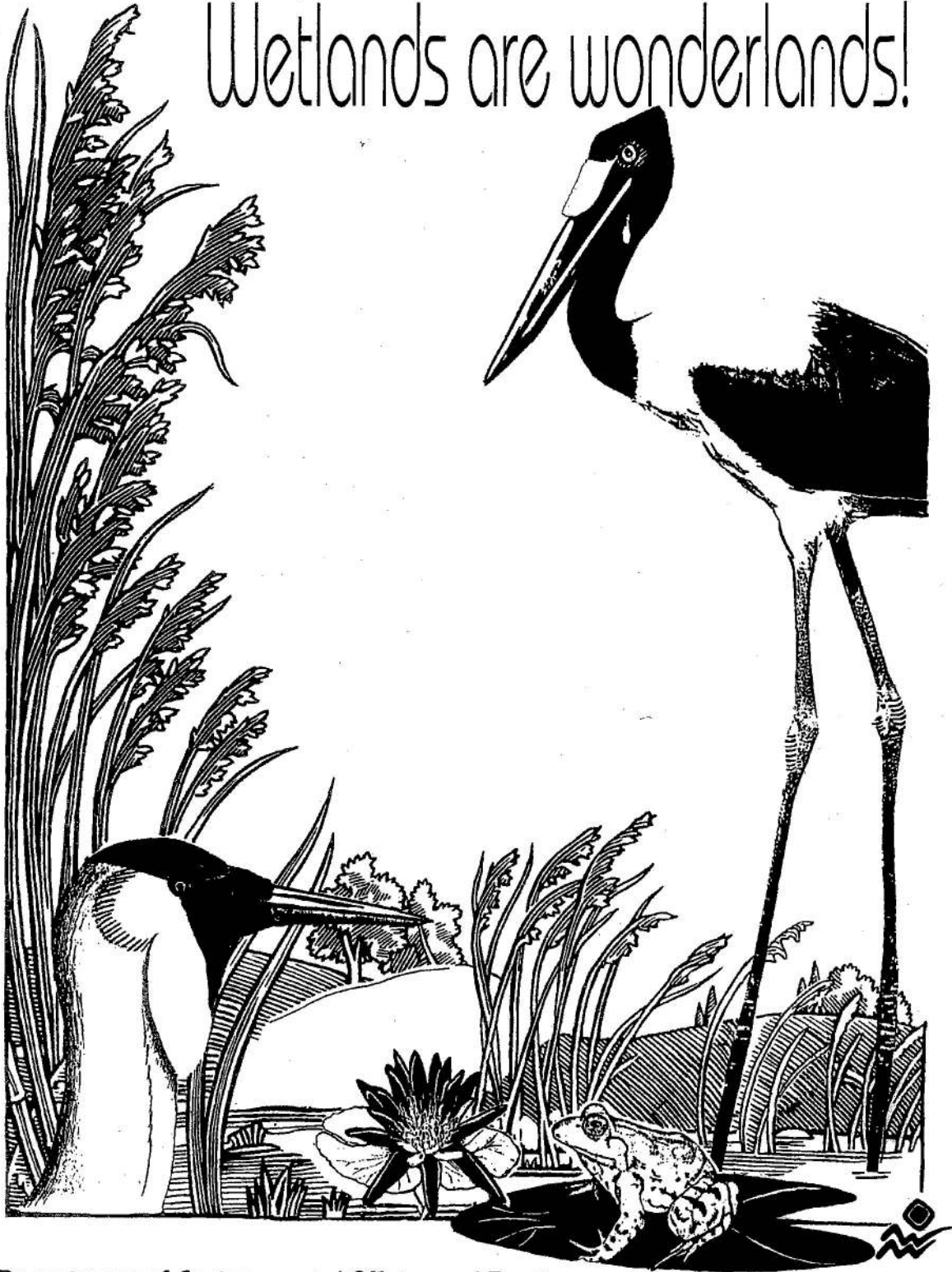
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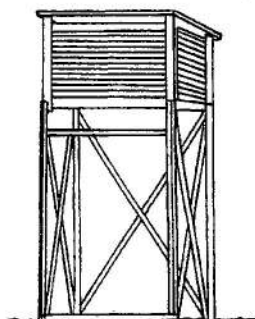
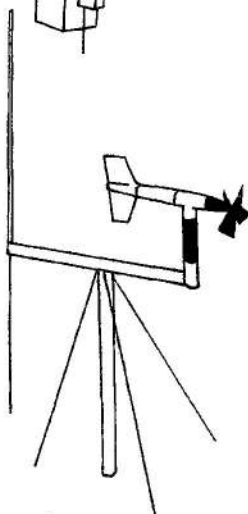
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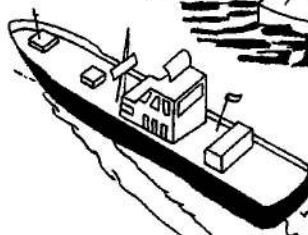
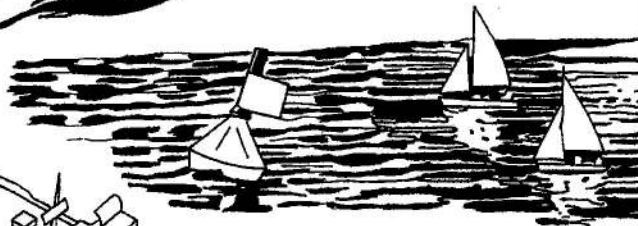
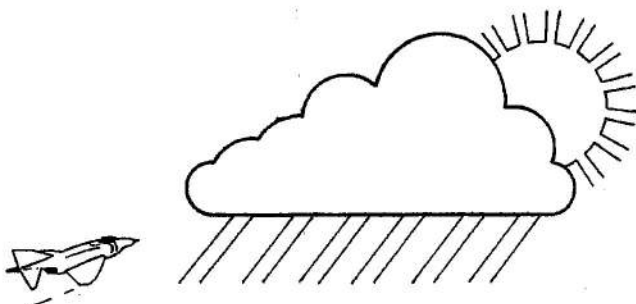


Department of Environmental Affairs and Tourism

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