

FAIR TRADING ACT

Date of commencement: 5th November, 2001.

An Act to provide for a standard code of trading conduct and to prohibit certain conduct and practices in trade and matters incidental thereto.

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PART I
PRELIMINARY

Short title

1. This Act may be cited as the Fair Trading Act, 2001, and shall come into force on 5th November, 2001.

Interpretation

2. (1) In this Act, unless the context otherwise requires —

“acquire”, —

- (a) in relation to goods, includes obtain by way of gift, purchase, or exchange, and also includes take on lease, hire, or hire purchase of goods;
- (b) in relation to services, includes acceptance of services; and
- (c) in relation to interest in land, includes obtain by way of gift, purchase, exchange, lease or licence of land,

and “acquisition” has a corresponding meaning;

“advertisement” means any form of communication made to the public or a certain section of the public for the purpose of promoting the supply of goods or services or the sale or granting of an interest in land, and “advertise” has a corresponding meaning;

“business” means any undertaking —

- (a) that is carried on whether or not for gain or reward; and
- (b) in the course of which —
 - (i) goods or services are acquired or supplied; or
 - (ii) any interest in land is acquired or disposed of, whether free of charge or not;

“Court” means the High Court of Swaziland;

“credit instrument” means any verbal or written agreement, acknowledging an obligation to pay a sum or sums of money on demand or at any future time or times;

“document” means a document in any form whether or not signed or initialled or otherwise authenticated by its maker, and includes —

- (a) any writing on any material;
- (b) any information recorded or stored by means of any tape recorder, computer, or other device, and any material subsequently derived from information so recorded or stored;
- (c) any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means whatsoever;
- (d) any book, map, plan, graph or drawing; or
- (e) any photograph, film, negative, tape, or other device in one or more visual images which are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced;

“goods” has its ordinary meaning and shall also include —

- (a) animals, including fish;
- (b) minerals, trees, and crops, whether on, under, or attached to land or not; and
- (c) electricity;

“local authority” has the same meaning as defined in the Urban Government Act, 1969;

“Minister” means the Minister responsible for Commerce or Enterprise;

“Ministry” means the Ministry responsible for Commerce or Enterprise;

“person” includes a local authority, and any association of persons whether incorporated or not;

“place” includes any premises, building, aircraft, ship, carriage, vehicle, box or receptacle;

“price” includes valuable consideration in any form, whether direct or indirect, and includes any consideration that in effect relates to the acquisition or supply of goods or services or the acquisition or disposition of any interest in land, although ostensibly relating to any other matter or thing;

“services” includes any rights, including rights in real or personal property, benefits or facilities that are provided or are to be provided, granted, or conferred, or conferred under —

- (a) a contract for, or in relation to —
 - (i) the performance of work, including work of a professional nature, whether with or without the supply of goods;

- (ii) the provision of, or the use or enjoyment of facilities for accommodation, parking, amusement, or the care of persons, animals or things, entertainment, instruction, recreation; or
- (iii) the conferring of rights or benefits for which remuneration is payable in the form of a royalty, tribute, levy, or similar exaction;
- (b) a contract of insurance, including life assurance, and life reinsurance;
- (c) a contract between a bank and a customer of the bank;
- (d) any contract for, or in relation to, the lending of money or granting of credit, or the making of arrangements for the lending of money or granting of credit, or the buying or discounting of a credit instrument, or the acceptance of deposits but does not include rights or benefits in the form of the supply of goods or the performance of work under a contract of service;

“supply” —

- (a) in relation to goods, includes supply or re-supply of goods by way of gift, sale, exchange, lease, hire, or hire purchase; and
- (b) in relation to services, includes to provide a grant or confer of services,

and “supply” as a noun, “supplied”, and “supplier” have corresponding meanings; and

“trade” means any trade, business, industry, profession, occupation, activity of commerce or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.

(2) In this Act, a reference to engaging in conduct shall be read as a reference to doing or refusing to do an act, and includes —

- (a) omitting to do an act; or
- (b) making it known that an act will or will not be done.

Application outside Swaziland

3. (1) This Act extends to any person resident or carrying on business in Swaziland, who is engaged in conduct outside Swaziland, to the extent that such conduct relates to the supply of goods or services, or the granting of interests in land, within Swaziland.

(2) The provisions of this Act shall be in addition to the Regulation of Advertisement Act, No. 62 of 1953, and where the two Acts are inconsistent, the provisions of this Act shall take precedence.

PART II

MISLEADING AND DECEPTIVE CONDUCT, FALSE REPRESENTATIONS
AND UNFAIR PRACTICES

Misleading or deceptive conduct generally

4. A person shall not, in trade, engage in any conduct that is misleading or deceptive or is likely to mislead or deceive.

Misleading conduct in relation to goods or services

5. A person shall not, in trade or services, engage in any conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods and services.

Misleading conduct in relation to employment

6. A person shall not in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in any conduct that is misleading or deceptive or is likely to mislead or deceive as to the availability, nature, terms or conditions or any other matter relating to that employment.

False representations in respect of goods or services

7. A person shall not in trade in connection with the supply or possible supply of goods or services, or with the promotion by any means of the supply or use of goods or services —

- (a) falsely represent that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use;
- (b) falsely represent that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill;
- (c) falsely represent that a particular person has agreed to acquire goods or services;
- (d) falsely represent that goods are new, or that they are reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time;
- (e) falsely represent that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits;
- (f) falsely represent that a person has any sponsorship approval, endorsement, or affiliation;
- (g) make a false or misleading representation with respect to the price of any goods or services;
- (h) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy; or
- (i) make a false or misleading representation concerning the place of origin of goods.

False representations in respect of land

8. (1) A person shall not in trade in connection with the sale or grant or possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land —

- (a) falsely represent that a person has any sponsorship, approval, endorsement, or affiliation; or
- (b) make a false or misleading representation concerning the nature of interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put, or the existence or availability of facilities association with the land.

(2) A person shall not use physical force, harassment, or coercion in connection with the sale or grant or possible sale or grant of an interest in land, or the payment for an interest in land.

(3) In this section “interest”, in relation to land, means a legal or equitable estate or interest in the land, and includes —

- (a) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, in a company that owns the land or building; or
- (b) a right, power or privilege over, or in connection with the land.

Limited application of sections 4 to 8 to news media

9. Sections 4 to 8 shall not apply to the publication of any information or matter in a newspaper or broadcasting service, not being —

- (a) an advertisement; or
- (b) information or matter relating to the supply or promotion of goods or services or the sale or grant or promotion of an interest in land by —
 - (i) the newspaper publisher or broadcasting service or a body corporate connected thereto; or
 - (ii) any person who is a party to any contract, arrangement, or understanding with that publisher or service relating to the content, nature or tenor of the information or matter.

Certain conduct in relation to trade marks prohibited

10. (1) A person shall not, in trade, —

- (a) forge any trade mark; or
- (b) falsely apply to any goods any trade mark or mark so nearly resembling a trade mark as to be likely to mislead or deceive.

(2) A person shall not sell or expose or have in the person’s possession for sale or for the purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied or to which any trade mark, or mark so nearly resembling a trade mark as to be calculated to deceive, is falsely applied.

(3) For the purposes of this section a person shall be deemed to forge a trade mark if that person —

- (a) without the consent of the proprietor of the trade mark, makes that trade mark or a mark so nearly resembling that trade mark as to be likely to mislead or deceive; or
- (b) falsifies any trade mark, whether by alteration, effacement or otherwise.

(4) For the purposes of this section, “trade mark” means any trade mark as defined in the Trade Marks Act, 1981, or any successor thereto, and includes any mark which is used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of the mark by virtue of manufacture, selection, certification, dealing with, or offering for supply.

(5) It shall be a defence to any charge under subsection (2) if the defendant proves that —

- (a) she or he, having taken all reasonable precautions against contravening the provisions of the subsection, had at the time of committing the alleged offence no reason to suspect the genuineness of the trade mark or trade description; and
- (b) she or he, on demand made by or on behalf of the complainant, gave all the information known to her or him regarding the persons from whom she or he obtained such goods or things.

Offering gifts and prizes

11. A person shall not —

- (a) in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services; or
- (b) in connection with the sale or grant or the possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land,

offer gifts, prizes, or other free items with the intention of not providing them as offered.

Trading stamp schemes prohibited

12. (1) A person shall not in trade supply or arrange for the supply of any trading stamp, either directly or indirectly, to any manufacturer, packer, importer, distributor, or seller of goods or supplier of services.

(2) In this section “trading stamp” means any coupon, stamp, token, cover, package, document or thing —

- (a) that is supplied or intended to be supplied in connection with the sale of goods or services or for the purpose of promoting the sale of goods or services;
- (b) that is redeemable by a person who is not the manufacturer, packer, importer, distributor, or seller of goods or supplier of services in connection with which it is supplied; and
- (c) that entitled the holder on redemption to money, goods or services or qualifies the holder on redemption to receive money, goods or services.

Bait advertising

13. (1) A person shall not in trade advertise for supply at a specified price goods or services which that person —

- (a) does not intend to offer for supply; or
- (b) does not have reasonable grounds for believing can be supplied by that person at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the person carries on business and the nature of the advertisement.

(2) Any person who advertises goods or services for supply at a specified price shall offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the person carries on business and the nature of the advertisement.

Referral selling

14. (1) A person shall not, subject to subsection (2), induce another person to acquire goods or services by representing that the person acquiring the goods or services will, after the contract for the acquisition of the goods or services is made, receive a rebate, Commission, or other benefit in return for giving that person the names of prospective customers or otherwise assisting that person to supply goods or services to other users or consumers, if receipt of the rebate, commission, or other benefit is contingent on an event occurring after such contract is made.

(2) Subsection (1) shall not apply to the acquisition of goods for re-supply.

Demanding or accepting payment without intending to supply as ordered

15. (1) A person shall not demand or accept payment or other consideration for goods or services, if at the time of the demand or acceptance, that person —

- (a) does not intend to supply the goods or services;
- (b) intends to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is demanded or accepted; or
- (c) does not have reasonable grounds to believe that that person will be able to supply the goods or services within any specified period, or if no period is specified, within a reasonable time.

Misleading representations about certain business activities

16. (1) A person shall not make a representation that is false or misleading in a material aspect by particulars concerning the profitability or risk or any other material aspect of any business activity that that person represents as one that may be, or may be to a substantial extent, carried on at or from a person's place of residence.

(2) A person who invites, whether by advertisement or otherwise, persons to engage or participate or to offer or apply to engage or participate, in a business activity requiring —

- (a) the performance by the persons concerned of work; or

- (b) the investment of money by the persons concerned and the performance by them of work associated with the investment,

shall not make, with respect to the profitability or risk or any other material aspect of the business activity, a representation that is false or misleading in a material particular.

Harassment and coercion

17. A person shall not use physical force or harassment or coercion in connection with the supply or possible supply of goods or services or the payment for goods or services.

Pyramid selling schemes

- 18. (1) A person shall not promote or operate a pyramid selling scheme.
- (2) For the purposes of this section, the term “pyramid selling scheme” includes —
 - (a) a scheme —
 - (i) that provides for the supply of goods or services or both for reward; and
 - (ii) that, to many participants in the scheme, constitutes primarily an opportunity to sell an investment opportunity rather than an opportunity to supply goods or service; and
 - (iii) that is or is likely to be unfair to many of the participants in the scheme in that —
 - (aa) the financial rewards of many of those participants are dependent on the recruitment of additional participants, whether or not at successively lower levels; and
 - (bb) the number of additional participants in the scheme that must be recruited to produce reasonable financial rewards to participants in the scheme is not attainable or is not likely to be attainable by many of the participants to the scheme; or
 - (b) a scheme of the type commonly known as a chain letter scheme, whether or not it provides for the supply of goods or services or both that is likely to be unfair to many of the participants in the scheme, in that —
 - (i) the financial rewards of many of those participants are dependent on the recruitment of additional participants; and
 - (ii) the number of additional participants in the scheme that must be recruited to produce reasonable financial rewards to participants in the scheme is not attainable or is not likely to be attainable by many of the participants in the scheme.

Import of goods bearing false trade description or false trade mark prohibited

- 19. (1) No goods to which —
 - (a) a false trade description is applied; or
 - (b) there is falsely applied any trade mark, or mark so nearly resembling a trade mark as to be likely to mislead or deceive,

shall be imported into Swaziland and shall be deemed to be included among goods prohibited from import under section 113 of the Customs, Fiscal, Excise and Sales Duties Act, 1971, and the provisions of that Act shall apply to such goods in so far as it is applicable.

(2) In this section “false trade description” means any representation which, if made in connection with the supply or possible supply of goods or with the promotion by any means of the supply or use of goods, would constitute a contravention of paragraphs (a), (d) or (i) of section 7.

(3) For the purpose of subsection (1) a false trade description or trade mark or mark shall be deemed to be applied to goods if —

- (a) it is woven in, impressed on, worked into, or annexed or affixed to the goods in any manner; or
- (b) it is applied to a covering, label, reel, or thing in or with which the goods are supplied.

PART III ENFORCEMENT AND REMEDIES

Jurisdiction of Courts

20. (1) Magistrates’ Courts shall hear and determine —
- (a) proceedings for offences under section 21; and
 - (b) applications for orders under section 24 where the amount or value claimed or awarded does not exceed E50,000.
- (2) The Court shall hear and determine —
- (a) appeals from proceedings in a Magistrate’s Court for offences under section 21;
 - (b) applications for injunctions under section 22; and
 - (c) application for orders under sections 23 and 24.

Offences and Penalties for contravention of Part II

21. (1) A person who contravenes any of the provisions of Part II commits an offence and is liable on conviction to a fine not exceeding E100,000 or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.

(2) Proceedings under this section may be commenced at any time within 3 years after the matter giving rise to the contravention arose or came to light.

Injunctions for contravention of Part II

22. (1) The Court may, on the application of any person, grant an injunction, including an interim injunction, restraining a person from engaging in any conduct which constitutes —
- (a) a contravention or an attempt to contravene any provision of Part II;
 - (b) aiding, abetting, or assisting any other person to contravene such a provision;
 - (c) inducing, or attempting to induce, any other person, whether by threats, promises or otherwise, to contravene such a provision;

- (d) being in any way directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or
 - (e) conspiring with any other person to contravene such a provision.
- (2) If it appears to the Court —
- (i) that any person has engaged or is likely to engage in any conduct referred to in subsection (1); or
 - (ii) that it is otherwise desirable to issue an injunction, whether or not it appears to the Court that the person intends to continue or repeat the conduct and whether or not there is damage or imminent danger of damage to any other person,

the Court may grant an injunction or interim injunction as requested.

(3) The Court may at any time rescind or vary an injunction or interim injunction granted under this section.

Order to disclose information or publish advertisement

23. The Court may, on the application of the Minister, if the Court is satisfied that a person has engaged in conduct constituting a contravention of any of the provisions of Part II, make —

- (a) an order requiring that person, or any other person involved in the contravention, to disclose, at that person's own expense, to the public, or to a particular person or class of persons, in such manner as is specified in the order, any information that is in the possession of the person to whom the order is directed or to which that person has access; or
- (b) an order requiring that person, or any other person involved in the contravention, to publish, at that person's own expense, in such manner and at such times as are specified in the order, corrective statements the terms of which are specified in, or are to be determined in accordance with, the order.

Other orders

24. (1) If, in any proceedings under this Act, or on the application of any person, the Court finds that a person, whether that person is or is not a party to the proceedings, has suffered, or is likely to suffer, loss or damage by any conduct of any other person described in section 22, the Court may make an order —

- (a) declaring the whole or any part of a contract made between the person who suffered or is likely to suffer the loss or damage and the person who engaged in the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void *ab initio* or from any other time;
- (b) varying such a contract or arrangement, with effect from any date;
- (c) directing the person who engaged in the conduct to refund money or return property to the person who suffered the loss or damage;
- (d) directing the person who engaged in the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;

- (e) directing the person who engaged in the conduct to repair, or provide parts for, goods that had been supplied by that person to the person who suffered, or is likely to suffer, the loss or damage; or
- (f) directing the person who engaged in the conduct to supply specified services to the person who suffered, or is likely to suffer, the loss or damage.

(2) An application under subsection (1) may be made at any time within 3 years from the time when the matter giving rise to the application occurred or came to light.

(3) Subject to section 20(1)(b), a Magistrate's Court may hear and determine applications for orders under subsection (1).

Defences

25. (1) Subject to this section, it is a defence to a prosecution for contravening section 21 if the defendant proves —

- (a) that the contravention was due to a reasonable mistake;
- (b) that the contravention was due to reasonable reliance on information supplied by another person; or
- (c) that —
 - (i) the contravention was due to the act or default of another person, or to an oversight or to some other cause beyond the defendant's control; and
 - (ii) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

(2) For the purposes of subsection (1)(b) and (c) the term "another person" does not include —

- (a) a servant or agent of the defendant; or
- (b) where the defendant is a body corporate, a director, servant or agent of the defendant.

(3) A defendant is not, without the leave of the Court, and subject to such order as to costs as the Court may deem fit, entitled to rely on the defence provided for by subsection (1)(b) or (1)(c)(i) unless the defendant has, not later than 7 days before the date on which the hearing of the proceedings commences, served on the person contemplated in section 25(1)(b) a notice in writing identifying that person.

(4) It is a defence to a prosecution for an offence for the contravention of section 21, or to any other proceedings under this Part, in relation to a contravention of a provision of this Act committed by the publication of an advertisement, if the defendant proves —

- (a) that the defendant's business is publishing or arranging for the publication of advertisements; and
- (b) that the defendant received the advertisement, or the information contained in the advertisement, as the case may be, in the ordinary course of that business and did not know and had no reason to suspect that the publication of the advertisement or the publication of the advertisement containing that information, as the case may be, would constitute a contravention of the provision.

Conduct by servants or agents

26. (1) Where, in proceedings under this Act in respect of a contravention by a person of any provisions of this Act, it is necessary to establish the state of mind of that person, it is sufficient to show that a servant or agent of the person, including a director in the case of a body corporate, acting within the scope of that person's actual or apparent authority, had that state of mind.

(2) Any conduct engaged in on behalf of a person —

- (a) by a servant or agent of the person, including a director in the case of a body corporate, acting within the scope of that person's actual or apparent authority; or
- (b) by any other person at the direction or with the consent or agreement, whether express or implied, of a servant or agent of the person, including a director in the case of a body corporate, given within the scope of the actual or apparent authority of the servant or agent,

shall be deemed, for the purposes of this Act, to have been engaged by the first-mentioned person.

PART IV
GENERAL

Power to search

27. (1) The Minister may authorise an officer of the Ministry to search any place named in the warrant for the purpose of ascertaining whether a person mentioned in the warrant has engaged in or is engaging in conduct that constitutes or may constitute a contravention of this Act.

(2) A Magistrate who is satisfied, on application made on oath by an officer of the Ministry authorised under subsection (1), that there are reasonable grounds to believe that it is necessary for the purpose of ascertaining whether or not a person mentioned in the warrant has engaged in or is engaging in any conduct that constitutes or may constitute a contravention of this Act, may authorise a warrant to search the place mentioned in the warrant.

(3) A warrant issued under subsections (1) or (2) authorises the officer named in it —

- (a) to enter and search the place specified in the warrant on one occasion only within 30 days of the date of issue at a reasonable time;
- (b) to use such assistance (including that of the Police) as is reasonable, in the circumstances;
- (c) the use such force for gaining entry of any property and for breaking open any article or thing as is reasonable in the circumstances;
- (d) where necessary, to take copies of documents, or extracts from documents, that the person executing the warrant believes on reasonable grounds may be relevant in the case; and
- (e) where necessary, to require a person to reproduce, or assist any person executing the warrant to reproduce, in usable form, information recorded or stored in a document.

(4) Where, as a result of the information obtained from the search, the officer has reason to believe that there has been a contravention of this Act or any other law, the officer may report to, and may request the Director of Public Prosecutions to institute criminal proceedings against, any person involved in the contravention, and the Director of Public Prosecutions shall judiciously act upon the matter.

(5) Any person who resists, obstructs, or unreasonably delays any officer authorised to search the place mentioned in the warrant, is guilty of an offence and liable on conviction to a fine not exceeding E10,000 or to imprisonment for a period not exceeding 5 years or to both the fine and imprisonment.

(6) Nothing contained in this section shall be construed as derogating from the powers to enter, search and seize conferred on police officers by the Criminal Procedure and Evidence Act or any other laws.

Repeal of laws

28. (1) Subject to the provisions of subsection (2), the laws specified in the Schedule are hereby repealed.

(2) Any regulation, rule, notice, approval, authority, return, certificate, document, direction or appointment made, issued, given or granted, and any other act done under any provision of any law repealed by this Act shall, subject to the provisions of subsections (3), be deemed to have been made, issued, given, granted or done under the corresponding provisions of this Act.

(3) Notwithstanding the repeal of any law under subsection (1), criminal proceedings which have under such law at the date of commencement of this Act been commenced in any court or magistrate's court, and in which evidence has at such date been led in respect of the relevant charge, shall, if such proceedings have at that date not been concluded, be continued and concluded under such law as if it had not been repealed.

Power to make Regulations

29. (1) The Minister may, by notice in the Gazette —

(a) amend any schedule to this Act;

(b) make regulations —

(i) prescribing any forms to be used in this Act;

(ii) amending the fines provided for in this Act;

(iii) prescribing any thing under this Act which is to be prescribed and generally for the better carrying out of the objects and purposes of this Act or to give force or effect to its provisions or for its better administration.

SCHEDULE

Merchandise Marks Act, 1937 (No. 24 of 1937)