

# **ANTI CORRUPTION ACT**

## **ACT**

**To regulate matters incidental to the establishment by the Constitution of the Republic of South Africa, 1996, of an anti-corruption unit; and to provide for matters connected therewith.**

## **PREAMBLE**

The people of South Africa recognise

That apartheid and other discriminatory laws and practices of the past lent itself to the abuse of governmental power and corrupt activities of public officials

That parliamentary sovereignty during the apartheid era resulted in an inadequate separation of powers of State and a lack of accountability of the State to the people of South Africa

That corruption continues to stifle the development of the constitutional democracy of South Africa, both in the public and the private sphere

The establishment of a state institution that shall investigate and prevent corruption, in compliance with the Republic's international obligations upon ratification of the *United Nations Convention on Corruption* adopted by the General Assembly 31 October 2003

The Anti Corruption Unit shall enforce the Prevention and Combating of Corrupt Activities Act 12 of 2004

The Anti Corruption Unit is based on the founding values of prevention, deterrence and education

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## CHAPTER 1

### 1. Definitions

“**Constitution**” means the Constitution of the Republic of South Africa, 1996;

“**Corruption**” means corruption defined in section 1 of the Prevention and Combating of Corrupt Activities Act 12 of 2004;

“**Member**” shall mean any person acting in the employ of the Anti Corruption Unit;

“**National Assembly**” shall mean the National Assembly of the Parliament of the Republic of South Africa;

“**National Director**” shall mean the National Director of the Anti Corruption Unit established in terms of this Act;

“**Unit**” means the Anti Corruption Unit established in terms of this Act;

The definitions relating to Corruption as set out in Section 1 of the Prevention and Combating of Corrupt Activities Act, 2003 (Act 12 of 2004), as amended from time to time, shall apply and the Interpretation Section of that Act shall be applicable in the interpretation of this Act.

### 2. Purpose

- (1) The Anti-Corruption Unit shall receive complaints of and investigate instances of corruption.
- (2) The Unit shall also serve to prevent future corruption and educate the inhabitants of South Africa of the effects of corruption.
- (3) The Unit shall have sole jurisdiction over the crime of corruption and related offences.

### **3. Structure and Composition of the ACU**

There is a single Anti Corruption Unit in the Republic, empowered in terms of section 182A of the Constitution and consisting of:

- (a) A National Director of the Anti Corruption Unit, who is the head of the Unit
- (b) Nine Directors who are subservient to the National Director and who shall be posted in each province

### **4. Corruption Prevention Department**

- (1) There is hereby established a Corruption Prevention Department that is situated within the Anti-Corruption Unit.
- (2) The main objectives of this department are: to identify opportunities for corruption in existing legislation, proposed legislation and policies and practices.
- (3) The Department shall make recommendations to Parliament as to how to combat and remedy these opportunities for corruption.
- (4) The Director may issue any policy guidelines that help the Department achieve its stated objectives.
- (5) The Department shall also monitor any tenders that are awarded by the state to ensure they comply with the principles of fairness, equity and transparency.

### **5. Investigative Department**

- (1) There is hereby established an Investigative Department that is situated within the Anti-Corruption Unit.

- (2) The main objectives of this Department are: to combat and investigate instances and reports of corruption within the public and private sphere.
- (3) In the event that the Department chooses not to investigate a report of corruption it must provide satisfactory reasons that are to be made freely available to the public through the media and internet based sources, depending on which is the most effective in the current social climate.
- (4) The Director may issue any policy guidelines that help the Department achieve its stated objectives.

## **6. Social Engagement Department**

- (1) There is hereby established an Investigative Department that is situated within the Anti-Corruption Unit.
- (2) The main objectives of this department are: to educate all sectors of the population on what corruption is, the effects of corruption on the country and its citizens, the role of the Anti Corruption Unit and what members of society can do to combat corruption in South Africa.
- (3) The Director may issue any policy guidelines that help the Department achieve its stated objectives.

## **7. Independence of the Anti-Corruption Unit**

The Anti Corruption Unit:

- (1) Is independent and subject only to the Constitution and the law; and
- (2) Must be impartial and perform its functions without fear, favour or prejudice

(3) Required to submit reports four times a year to Parliament.

## CHAPTER 2

### 8. Appointment of members

(1) The current chapter 9 institutions as well as the Ministers of Justice and Constitutional Development, Safety and Security, Finance, and Department of Trade and Industry must recommend a person or persons for the appointment as director and/or vice director of the ACU

(a) Before making such recommendations member of the public must be called to nominate anyone they so wish. Due regard must be had to these nominations.

(b) The call for nominations must be made by means that the majority of the citizens of the Republic shall hear.

(2) Recommendations shall be made *bona fide* on the basis of the person's qualifications and soundness of character

(3) Recommendations shall be submitted to Parliament

(4) The President must appoint the recommended person provided that person received a supporting vote of at least 75% from the National Assembly

(a) The President must appoint the recommended person within 14 days of receiving the recommendation from Parliament.

(b) If the President fails to appoint such person within the 14 days that person shall be deemed to have been appointed in terms of subsection

(4) above.

## **9. Requisite qualification of members**

- (1) Must be a South African citizen.
- (2) The National Director and the Provincial Directors must have obtained a tertiary degree, or the equivalent thereof.
- (3) Is a fit and proper person.
- (4) Has experience of no less than 10 years in any of the following fields of expertise:
  - (a) Law
  - (b) Ethics and good governance
  - (c) Public and private administration
  - (d) Fraud and crime investigation and intelligence
  - (e) Forensics and white collar crime
  - (f) Accounting, audit and financial matters
- (5) Has not been convicted of a criminal offence.
- (6) Is not an unrehabilitated insolvent
- (7) Is not affiliated, or holds a position, with a political body.
- (8) Has not been dismissed from a position in a public office, or a public or private company for non-compliance with the Constitution, the Companies Act or any other law relating to ethics and governance.

## **10. Oath of Office**

- (1) Upon appointment, the National Director and the Provincial Directors, must affirm an oath of office, in which he or she avows to:



- (a) Uphold and adhere to the Constitution, the principles of the rule of law and all other laws of the Republic
- (b) To discharge her or his duties truthfully and in good faith without fear, favour or bias

### **11. Term of Office**

The Directors shall serve a non-consecutive term of five years.

### **12. Remuneration**

(1) The National Director, the Provincial Directors, the investigators and the staff shall receive remuneration determined by the Anti Corruption Unit provided that:

(a) The National Director receives a salary that is equivalent to the salary received by a High Court judge.

(b) The Provincial Directors receive a salary that is no less than 75% of the monetary value of the salary received by a High Court judge.

(2) The National Director must submit the remuneration rates of the staff of the Unit to the National Assembly for approval.

### **13. Conditions of Service**

(1) Any person appointed to the Anti-Corruption Unit shall cease any current affiliation with any public office upon appointment to the Unit

- (2) New and existing members of the Unit shall voluntarily waive their rights to vote for, and be associated with, any political party for the duration of their service in the Unit.
- (3) Upon the commencement of service, the National Director and the Provincial Directors shall sign a written employment contract which shall contain terms and conditions of employment determined by the Anti-Corruption Unit itself, including specific, measurable performance standards to be attained.
- (4) Members must disclose any personal, financial, or any other interest relating to or incidental of any investigation of a corrupt activity or corrupt activities.

#### **14. Employment security of members**

- (1) No member shall be dismissed for any reason other than a dismissal for
  - (a) gross misconduct
  - (b) serious incapacity
  - (c) operational requirements
- (2) Dismissals shall be regulated by the Labour Relations Act 66 of 1995

#### **15. Vacancy of Office**

- (1) Should the Director lose or vacate office the President shall appoint a fit and proper person with the necessary qualifications and experience to hold office until such a time that Parliament agrees on a new Director.
- (2) Such person shall only hold office for the remainder of the time that the previous Director was eligible to hold office.

## CHAPTER 3: Powers and Functions

### 16. Power to Investigate Report

- (1) Any report or allegation of corruption may be made orally or in writing to a member of the Unit. If made orally the report must be reduced to writing and signed by the person reporting it after every person involved is assured that the person making the report understands what has been reduced to writing.
- (2) If an Investigator of the Unit believes that an offence has taken place based on the report, that Investigator shall institute investigative proceedings in line with this Act and the Criminal Procedure Act.
- (3) If the Investigator refuses to investigate any report that Investigator shall send the report to a member of the Unit not below the rank of Deputy Director for review. This person may then decide to endorse the decision or overturn it, in which case an investigation shall then take place.
- (4) If the person that is not below the rank of Deputy Director agrees with the decision not to investigate that person shall issue sufficient and good reasons for not investigating. These reasons shall be made freely available to the public.
- (5) No member of the Unit is precluded from investigating a suspected instance of corruption that comes to their attention in an informal way or through their own initiative.

## **17. Search and Seizure**

- (1) The Unit shall not search any premises or seize anyone's possessions without a court order in accordance with the Criminal Procedure Act.
- (2) Nothing in this Act should be viewed so as to preclude the Unit from working in close conjunction with the Asset Forfeiture Unit.

## **18. Power to Demand Documents**

- (1) The Unit has the power to request from any government officials any records, reports or communications that are reasonably suspected to be linked to any instances of corruption.
- (2) If the person fails to provide such records, reports or communications the Unit may approach the High Court for an order compelling the person to disclose such information.
- (3) Further failure to provide such information will be an offence and the person shall be liable for a fine of not more than R500 000 or a prison sentence not exceeding 5 years.
- (4) The Unit may make an *ex parte* application *in camera* to the High Court for an order to preserve any evidence that any person is reasonably suspected to be in possession of that the Unit intends to use in subsequent criminal proceedings.

## **19. Prosecution**

- (1) Results of a completed investigation shall be sent to the National Prosecuting Authority for prosecution.
- (2) No member of the Unit is entitled to prosecute any offences without the permission of the National Prosecuting Authority.
- (3) If the National Prosecuting Authority declines to prosecute any suspected offence it shall provide to the Unit sufficient and good reasons.
- (4) If the Unit is unsatisfied with the reasons given by the National Prosecuting Authority it may institute a prosecution in its own capacity.

## **20. Arrest**

- (1) The Unit shall have the power to arrest and detain persons suspected of committing an offence in terms of this Act.
- (2) No person shall be arrested before the Unit attains a court order.

## **21. Liability of Members**

- (1) No member of the Unit shall be held liable for his or her actions unless that Member acted:
  - (a) In bad faith; or
  - (b) With gross negligence
- (2) If the Member has acted in terms of section 1(a) or 1(b) above then section 27 of this Act shall apply.

## **CHAPTER 4: General Provisions**

### **22. Protection of Whistleblowers**

- (1) Any person or institution may approach the Anti Corruption Unit with information relating to *bona fide* suspicions of corrupt activities

- (2) The identity of such person or institution shall be withheld during the investigation and the potential subsequent prosecution proceedings
- (3) If the suspected corrupt activity or activities is proven to be true, and said person or institution is implicated in the corrupt activity or activities, such person or institution shall receive full immunity in respect of any subsequent criminal or civil proceeding, subject to subsection (4)
- (4) Any person or institution who informs the ACU of suspected corrupt activity or activities, and who is implicated in said activity, shall receive immunity only if:
  - (a) The person or institution involved in the corrupt activity is the first implicated person or institution to approach the ACU
  - (b) The person or institution involved in the suspected corrupt activity or activities provides full disclosure and co-operation in exchange for immunity in any potential subsequent criminal proceeding or civil proceeding.

### **23. Performance Reports**

- (1) A quarterly report shall be submitted to Parliament for review.
  - (a) This report shall contain the outcome of all investigations and reports of corruption.
  - (b) Parliament shall then publish its findings for public scrutiny.

### **24. Code of Conduct**

- (1) Every member of the Unit shall sign a Code of Conduct before commencing official duties.

## **CHAPTER 5: Administrative Provisions**

### **25. Collaboration with other institutions and Organs of State**

(1) Nothing in this Act shall prevent the Unit from working closely with other institutions, non-governmental bodies or Organs of /State, including:

- (a) South African Police Service
- (b) Public Protector
- (c) Auditor General
- (d) Financial Intelligence Centre

### **26. Financing of the Anti Corruption Unit**

- (1) The annual budget for the Unit shall be determined by Parliament based on a 75% vote on the budget tabled by the Unit itself.
- (2) The annual budget of the Unit shall be no less than 0.01% of the GDP of South Africa.
- (3) The Unit shall be entitled to keep any monies it receives from fines levied from successful prosecutions.
- (4) The Unit may keep any donations, gifts or other dispositions for the purpose of carrying out its duties. Such dispositions are to be declared to Parliament within 1 month of the receipt thereof and Parliament must approve the receipt of the donation, gift or other disposition.
- (a) Approval will be met by a majority vote of the National Assembly.

## **27. Complaints Against the Anti-Corruption Unit**

- (1) It shall be the Public Protector's role to hear any complaints made against the conduct of the Unit.
- (2) Complaints may be made regarding the conduct of any of the Unit's staff whilst carrying out their duties on behalf of the Unit.
- (3) The Public Protector shall appoint a person to investigate the relevant member's actions.
  - (a) This person shall have no less than 10 years experience in dealing with investigations
  - (b) This person must not be connected to or affiliated with any political party or hold any office in Government.

## **28. Appointment of Administrator**

- (1) The Director, after consultation with all the Vice Directors, shall appoint a suitably qualified and fit person as the Administrator.
- (2) A person shall qualify as an administrator if that person has obtained a degree at a university recognised by the Republic, but not necessarily a university within South Africa.
- (3) Due regard must be had to the person's area of expertise and experience in his/her field.
- (4) The Director must be satisfied that the person is fit and proper, as well as qualified and experienced enough to carry out the functions and responsibilities of an Administrator.



- (5) Any person who has a criminal record shall be ineligible for appointment as an Administrator.

## **29. Removal from Office of the Administrator**

- (1) The Administrator may only be removed from office on one or more of the following grounds:

- (a) Incapacity;
- (b) Gross misconduct; or
- (c) Violating any law of the Republic

- (2) The employment relationship shall be governed by the Labour Relations Act 66 of 1995

## **30. Duties of the Administrator**

- (1) The Administrator shall be responsible for the day to day functioning of the Unit.
- (2) The Administrator shall carry out any orders necessary for the efficient and effective fulfilment of the Unit's duties.
- (3) The Unit itself shall regulate all other matters connected with or incidental to the office of the Administrator.<sup>1</sup>

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<sup>1</sup> We are indebted to IFAISA and its carefully drafted Anti Corruption Commission Bill. Our approach is to improve on this Bill rather than change it completely. As such we find ourselves in agreement with the general administrative provisions. We have therefore included only the substantive provisions that affect the independence and accountability of the Unit.

## SCHEDULE 1

### Code of Ethics and Conduct<sup>2</sup>

The Code of Ethics and Conduct prescribes the **minimum** standards of behaviour for Commissioners and Staff of the Commission and shall be demonstrated by such individuals and shall serve as a guide when making decisions and taking actions.

The Code of Ethics and Conduct serves to ensure public confidence in the integrity of the ACU and all employees shall respect and adhere to its provisions.

#### 1. General Rules

(1) All employees of the ACU accept personal responsibility for compliance with the Code of Ethics and Conduct. In particular employees must:

- (a) Behave in a manner consistent with the Code of Ethics and Conduct
- (b) Perform duties with honesty, care, diligence, professionalism, impartiality and integrity
- (c) Strive for the highest ethical standards to sustain the trust and confidence of the public they serve, not just the minimum to meet legal or procedural requirements
- (d) Take time to read and understand the Code of Ethics and Conduct and the implications of non-compliance
- (e) Participate in periodic compulsory courses in ethical conduct as directed by management or the secretariat

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<sup>2</sup> Many of the provisions below were borrowed from Schedule 2 to the Ifaisa Anti-Corruption Commission Bill 2012/03/26 available at: [http://www.ifaisa.org/current\\_affairs/Ifaisa\\_Anti-Corruption\\_Commission\\_Bill\\_2012.pdf](http://www.ifaisa.org/current_affairs/Ifaisa_Anti-Corruption_Commission_Bill_2012.pdf) and The World Customs Organisation Model Code of Ethics and Conduct available at: <http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Model%20Code%20of%20Ethics%20and%20Conduct.pdf>

- (f) Observe all relevant acts, laws, regulations, determinations and lawful directions that relate to the performance of official duties and avoid any action creating even the appearance that they are violating any acts, laws, regulations, determinations or directions
- (g) Put forth honest effort in the performance of their duties in compliance with all laws, policies, statutes, regulations and in accordance with the Code of Ethics and Conduct
- (h) Behave at all times in a manner that enhances the reputation of the ACU
- (i) Support and encourage others to comply with the Code of Ethics and Conduct
- (j) Report any behaviour that is inconsistent with the Code of Ethics and Conduct
- (k) Not knowingly make unauthorised commitments or promises of any kind purporting to bind the ACU

## 2. Impartiality And Independence Of Commissioners And Staff

(1) Every Commissioner and staff member of the Commission shall impartially and independently perform their functions in good faith and without fear, favour or prejudice, and without influence from:

- (a) the Government;
- (b) any public officer;
- (c) any political party;
- (d) any candidate participating in an election; or
- (e) any other person or authority.

## 3. Independence From Political Or Public Office

(1) The Commissioners and staff of the Commission shall not, during tenure of office, be eligible for:

(a) appointment or nomination to a political office; or

(b) appointment to another public office.

(2) The Commissioners and staff of the Commission:

(a) by their membership, association, statement, conduct or in any other manner place in jeopardy the perceived independence of the Commission, or in any other manner harm the credibility, impartiality, independence or integrity of the Commission;

(b) make private use of or profit from any confidential information gained as a result of being a Commissioner; or

(c) divulge any information to any third party, save in the course of official duty.

#### 4. Disclosure Of Conflicting Interests

(1) If a Commissioner or a staff member or a Person Connected to them has a direct or indirect interest in any contract, proposed contract or other matter in a private capacity (whether personally or via any corporate entity or trust) before the Commission and is present at any meeting of the Commission at which the contract, proposed contract or other matter is the subject of consideration, the Commissioner or staff member shall, at the meeting and as soon as practicable after the commencement thereof, disclose the fact and shall not take part in the consideration or discussion of, or vote on, any questions with respect to the contract or other matter or be counted in the quorum of the meeting during consideration of the matter.

(2) A Commissioner or staff member whose personal interest conflicts with their official duties shall:

(a) in writing, declare the personal interests to their supervisor or other appropriate person or body and comply with any directions given to avoid the conflict; and

(b) refrain from participating in any deliberations with respect to the matter.

(3) No Commissioner or staff member of the Commission shall transact business with the Commission directly or indirectly.

#### 5. Professionalism

(1) The Commissioners and staff of the Commission shall:

(a) perform their duties in a manner that maintains public confidence in the Commission;

(b) treat the public and colleagues with courtesy and respect;

(c) discharge all their duties in a professional, timeous and efficient manner and in line with the rule of law; and

(d) respect the rights and freedom of all persons that he or she may interact with.

#### 6. Improper Enrichment

(1) The Commissioners and staff of the Commission shall not:

(a) use their office or organisation to improperly enrich themselves or others;

(b) accept or request gifts, favours or benefits to include but not limited to gifts, hospitality, offers of free travel, concessions or discounts from any person or organisation

who may have a commercial interest with the Commission or any other interest that may be affected by the normal business of the Commission; or

(c) give preferential treatment to any individual or organisation; and

(d) use information that is acquired during the course of their duties or connected to their duties for their benefit or for the benefit of others.

7. Integrity in Private Affairs.

(1) The Commissioners and staff of the Commission shall conduct their private affairs in a manner that maintains public confidence in the integrity of their office and the Commission as a whole and shall:

(a) not evade paying taxes;

(b) not neglect their financial obligations;

(c) submit an annual declaration of their income, assets, interests and liabilities, and that of any person connected to them as defined, to the Secretary of the Commission;

(d) not engage in political activity that may compromise or be seen to compromise the neutrality of their office, or the Commission; and

(e) not preside over or play a central role in the organisation of a fundraising activity.

8. 7) Sexual Harassment

(1) The Commissioners and staff of the Commission shall not sexually harass a member of the public or a colleague. Sexual harassment includes:

(a) making a request or exerting pressure for sexual activity or favours;

(b) making intentional or careless physical contact that is sexual in nature; or

(c) making gestures, jokes or comments, including innuendoes regarding another person's sexuality.

#### 9. Nepotism

The Commissioner or staff member shall not practice favouritism on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth or otherwise in performance of their duties.

#### 10. Privileged Information And Security Of Interests Of The State

The Commissioners and staff of the Commission shall safeguard privileged information that comes into his or her possession and protect it from improper or inadvertent disclosure.

#### 11. Internally Initiated Allegations

(1) If any member of staff believe they are being instructed by a superior or colleague to act in a way which is illegal, improper, unethical, or is in any way in breach of the Code of Ethics and Conduct in the course of their official duties, they have a responsibility to report the matter to a member of the senior management.

(a) Staff members must be specifically advised of and afforded appropriate official protections for such actions. In this regard, information exchange mechanisms should be free of undue influence;

- (b) Effective steps must be taken to thoroughly investigate all such claims; and
  - (c) To ensure fairness, no one connected to or working with the person against whom the allegation is levied should take part in the investigation.
- (2) Behaviour inconsistent with the Code of Ethics and Conduct should not be considered acceptable and should be addressed in a timely manner. This could result in disciplinary action.
- (3) Regular challenge meetings will be held wherein any member of staff may challenge any decision taken by the ACU or its staff in an open forum without fear, favour or prejudice. Senior officials or the relevant members of staff will then have a chance to respond to and/or address such challenges. This provision envisages an internal environment of open dialogue in order to address any concerns of any member of staff.

## 12. Application Of Other Codes Of Ethics

This Code is in addition to the provisions of any other code of ethics that may apply to the Commissioners and staff of the Commission, and where there is a conflict between such code of ethics and this Act the provisions of this Act shall prevail. Ifaisa Anti-

Corruption Commission Bill 2012/03/26 Breach Of Code

Any breach of this Code by a Commissioner or a staff member of the Commission shall be treated as misconduct.

## 13. Disciplinary Code



- (1) The Secretary shall issue a Disciplinary Code for the Commission providing for the discipline of its staff.
- (2) The Disciplinary Code may provide for investigations and for the determination, including by a hearing, of matters that may be in dispute.
- (3) The Disciplinary Code may provide for penalties up to and including dismissal and may include provisions for the recovery of costs arising from loss of or damage to property of the Commission.