

No. 28 of 1993.

***Fairness of Transactions Act 1993.***

Certified on: / /20 .



INDEPENDENT STATE OF PAPUA NEW GUINEA.



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*Fairness of Transactions Act 1993.*

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INDEPENDENT STATE OF PAPUA NEW GUINEA.



AN ACT

entitled

*Fairness of Transactions Act 1993,*

Being an Act relating to the effect of certain transactions, to ensure that they operate fairly without causing undue harm to, or imposing too great a burden on, any person, and in such a way that no person suffers unduly because he is economically weaker than, or is otherwise disadvantaged in relation to, another person,

MADE by the National Parliament to come into operation in accordance with a notice published in the National Gazette by the Head of State, acting with, and in accordance with, the advice of the Minister.

**PART I. – PRELIMINARY.**

**1. PURPOSE OF ACT.**

The purposes of this Act are to—

- (a) ensure the overall fairness of any transaction which—
  - (i) is entered into between parties in circumstances where one party is for reasons of economic or other advantage predominant and the other is not able to exercise a free choice; or
  - (ii) for one reason or another, without attaching any evil design or bad faith, appears to be manifestly unfair or not to be genuinely mutual; and
- (b) allow for the re-opening and review of any transaction irrespective of fault and validity, enforceability or effect of any agreement; and
- (c) ensure the fair distribution and adjustment of rights, benefits, duties, advantages and disadvantages arising out of a transaction.

## 2. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS.

(1) For the purposes of Section 41 of the *Organic Law on Provincial Governments and Local-level Governments*, it is declared that this law relates to a matter of national importance.

(2) This Act, to the extent that it regulates or restricts a right or freedom referred to Subdivision III.3.C of the *Constitution*, namely—

- (a) the right to freedom of employment conferred by Section 48 of the *Constitution*; and
- (b) the right to privacy conferred by Section 49 of the *Constitution*; and
- (c) the right to protection from unjust deprivation of property conferred by Section 53 of the *Constitution*,

is a law that is made for the purpose of giving effect to the public interest in public welfare.

## 3. INTERPRETATION.

(1) In this Act, unless it appears otherwise in the context—

“**Court**” means the Supreme Court or National Court, as the case may be, or a tribunal set up for the purpose or an Arbitration Tribunal agreed upon between the parties to a transaction;

“**government body**” means—

- (a) the National Government; or
- (b) a Provincial Government; or
- (c) an arm, department, agency or instrumentality of the National Government or a Provincial Government; or
- (d) a body set up by statute or administrative act for governmental or official purposes;

“**party**” in respect of a transaction means a party to the transaction and includes a person who—

- (a) derives or derived or is entitled to or was intended to derive any right or benefit from the transaction; or
- (b) suffers, or has suffered or may suffer any disadvantage or loss from the transaction; or
- (c) has undertaken or may undertake any duty as a result of the transaction;

“**person**” includes a company, corporation, or a group of persons whether incorporated or not;

**“transaction”** means any contract, promise, agreement, dealing or undertaking of an economic or commercial nature whether supported by consideration or not entered into between parties, and includes—

- (a) an informal, complete or incomplete transaction; and
- (b) a transaction governed by customary law,

but does not include—

- (c) a transaction that is renegotiated and its terms are substantially altered after three years of the date of the original transaction; and
- (d) gifts, whether of a reciprocal nature or otherwise; and
- (e) a transaction which is primarily of a non-economic kind (including a transaction relating to marriage, divorce, engagement to marry and custody of children), except to the extent that its economic or commercial aspects or consequences can properly be treated separately from its non-economic or non-commercial aspects and consequences; and
- (f) a transaction between a government body and a non-citizen or a foreign State or between a government body and a foreign enterprise within the meaning of the *Investment Promotion Act 1992*, so far as it does not involve a Papua New Guinean person, company or joint-venture.

(2) This act applies to all transactions entered into either within or outside Papua New Guinea where at least one party is a Papua New Guinean citizen, resident or registered in Papua New Guinea.

**PART II. – FAIRNESS, BASIC PRINCIPLES, ETC.**

**4. FAIRNESS.**

(1) For the purposes of this Act, the concept of fairness relates to the principle of the just and equitable distribution to and among parties to a transaction of the rights, privileges, advantages, benefits and duties, obligations and disadvantages of the transaction in proportion and relative to a party's standing in or contribution to the transaction, and according to business principles and practices appertaining to the particular transaction in question and the provisions of this Act shall be read liberally and applied accordingly.

(2) In accordance with the general tenor and purposes of this Act as stated in Section 1 and Subsection (1) of this section, but without departing drastically from the rule of law of right to contract, in determining the fairness or otherwise of a transaction, the circumstances of the parties existing before, at and after the entering into of the transaction shall be taken into account.



**PART III. – REVIEW OF TRANSACTION.**

**5. REVIEW OF TRANSACTIONS, GROUNDS, ETC.**

(1) A transaction to which this Act applies may be reviewed by a court on the application of any party, if the Court is satisfied that the transaction was not genuinely mutual or was manifestly unfair to a party.

(2) Without limiting the generality of Subsection (1), unless the Court is satisfied that the transaction was entered into on an equal footing in all material respects, a transaction shall be deemed not to be genuinely mutual or manifestly unfair if a party to the transaction complaining unfairness shows–

- (a) that he did not understand the transaction and no genuine effort was made to explain its terms to him prior to entering into the transaction; or
- (b) that the other party was in such a predominant position (whether economically, socially, personally or otherwise), that an ordinary person with the background of the complainant was not likely to exercise a true freedom of choice in relation to the transaction; or
- (c) that the other party had or should have had at the time of entering into the transaction or immediately thereafter information affecting the fairness of the transaction which was not disclosed to the complainant; or
- (d) that he was mistaken in or had miscalculated the likely consequences of the transaction and the mistake or miscalculation was to such an extent adverse to his interests that he could not reasonably be held responsible for such consequences.

**6. EXCLUSION TRANSACTIONS.**

Nothing in this Act shall be taken to permit a party to take advantage of any law by virtue of which a transaction or a part of it may be illegal, void or voidable as being contrary to public policy.

**PART IV. – MEDIATION AND ADJUDICATION.**

**7. MEDIATION.**

(1) In all proceedings under this Act, a Court shall in the first instance, attempt to arrive at an amicable settlement that conforms with the primary object of this Act and only after a mediated order has failed the Court may proceed to exercise its jurisdiction under Section 8.

(2) The Court may adjourn any proceedings for such time as it thinks fit if it is of the opinion that the parties are likely to reach a settlement.

(3) If the court consists of more members than one, one of the members may exercise the mediatory jurisdiction of the Court under Subsection (1).

(4) If a mediated settlement in accordance with Subsection (1) is arrived at, the Court shall include it in an order, which shall be enforceable in that Court or another Court of competent jurisdiction.

**8. JUDICIAL ORDERS.**

(1) If in the opinion of the Court, an attempt at a mediated settlement of any proceedings in accordance with Section 7 has failed or, in the case of an adjournment under Section 7(2), there is no real likelihood of such settlement being arrived at within a reasonable time, the Court shall proceed to review the matter and make such order between the parties as it thinks conforms with Section 4.

(2) Where a party has entered into a transaction in good faith and in reliance on the terms and conditions of the transaction has substantially altered his position and the Court, having regard to all possible implications in respect of the parties and any other persons, is of the opinion that it would be unjust or inequitable to grant relief by way of an order under Subsection (1), it may refuse to grant, wholly or in part, any relief applied for under this Act.

**PART V. – PROCEDURAL.**

**9. JOINING OTHER TRANSACTIONS OR PERSONS.**

(1) Where in any proceedings under this Act it appears to the Court that in the interests of justice and for the purpose of attaining the objects of this Act it is desirable that—

(a) some other transaction should be dealt with within the same proceedings or in association with, or at the same time as the first proceedings; or

(b) a person who is not a party to the proceedings should be made a party,

the Court may order that the other transaction be so dealt with, or that the person be so joined, as the case may be.

(2) The Court may adjourn any proceedings in order to allow for the implementation of an order under Subsection (1).

**10. REPRESENTATION IN PROCEEDINGS.**

Any party to proceedings under this Act—

(a) may appear in such proceedings either personally or by a representative; or

(b) may be represented in such proceedings by a legal practitioner.

**11. LIMITATION OF PROCEEDINGS.**

(1) Any proceedings under this Act shall, subject to Subsection (2), be commenced soon after the party aggrieved by the transaction to which they relate suffers the disadvantage or becomes aware of the matters which amount to or constitute the unfairness, as the case may be, but no action shall lie later than three years after the date of the transaction.

(2) A transaction that has already been dealt with under this Act may be further reviewed if the Court is satisfied that there exist new circumstances or consequences not apparent or anticipated in the earlier proceeding, but in any case no later than six years after the date of the transaction to which they relate.

**PART VI. – MISCELLANEOUS.**

**12. CONTRACTING OUT.**

In any transaction, any provision, agreement or arrangement made the purpose, intention or effect of which is to avoid or exclude the application of this Act is to that extent void and of no effect.

**13. EFFECT ON OTHER LAWS.**

(1) In any proceedings commenced in any Court under any other law but relating to a transaction to which this Act applies, the Court shall apply the provisions of this Act.

(2) Notwithstanding any provision of any law relating to transactions of economic kind which would otherwise be subject to this Act, the provisions of this Act apply and have retrospective application.

**14. REGULATIONS.**

The Head of State, acting on advice, may make regulations, not inconsistent with this Act, prescribing all matters that by this Act are required or permitted to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

**15. REPEAL.**

The *Transactions with Natives Act 1958* and the *Transactions with Natives Act 1963* are repealed.

Office of Legislative Counsel, PNG