

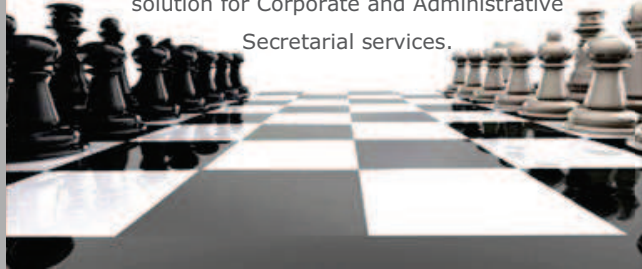


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.:Consumer Protection Act

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FUNDAMENTAL CONSUMER PROTECTION RIGHTS UNDER THE CONSUMER PROTECTION ACT NO. 68 OF 2008 ("THE ACT")



1. Introduction

The Act will come into effect on 24 October 2010 and will have far reaching consequences on the South African economic landscape and consumers in general.

The purposes of the Act are, amongst others, to protect consumers from exploitation and unfair marketplace practices, to promote and advance the social and economic welfare of consumers, to empower consumers and to develop a culture of consumer responsibility.

The purpose of this document is to summarise the Fundamental Consumer Rights and is not intended to constitute a comprehensive explanation of the Act nor legal advice.

2. Application of the Act



The Act will apply to all transactions concluded in the ordinary course of business of a supplier, “occurring” within South Africa, for the supply to the consumer, or at the direction of the consumer, of goods or services in return for a consideration.

The Act will also apply to goods and services which are “promoted” within South Africa to the extent to which such goods and services are reasonably capable of being subject to any transaction as mentioned above.

3. Goods and Services



The Act casts a very wide net in respect of the goods and services which are subject to its provisions.

3.1 Goods are defined as any tangible goods “marketed” for human consumption, tangible objects including any medium on which anything may be written or recorded, any intangible product as well as the license to use same, a legal interest in land and gas, water and electricity.

3.2 Services are defined as any work or undertaking for the direct or indirect

benefit of another, the provision of education, information, advice or consultation (excluding advice which is subject to the Financial Advisory and Intermediary Services Act), banking services and related services including the assumption of risk on behalf of another (excluding advice which is subject to the Financial Advisory and Intermediary Services Act or the Short and Long Term Insurance Acts), the transportation of goods and people, the provision of a right of occupancy of any land regardless of whether or not such can be classified as a lease agreement, rights of franchise and, the provision of accommodation, entertainment or similar intangible product, electronic communication infrastructure, a right of access to any event, premises (regardless of whether such can be classified as a lease agreement), activity or facilities.

4. Exempt Transactions



The following transactions are amongst those exempt from the Act:

- 4.1 Where the consumer (with whom the transaction is concluded) is a juristic person and its annual turnover or asset value at the time of the conclusion of the transaction exceeds an amount published by the Minister responsible for consumer protection matters (the Minister has not yet determined the threshold). It is important to note that this exemption will not apply to Franchise offers or agreements;
- 4.2 Transactions which are subject to the National Credit Act No. 34 of 2005; and

4.3 Services supplied in terms of an employment contract.

5. Right of equality in the Consumer market



No consumer can be treated differently from another consumer, unless there are grounds for reasonable differential treatment.

6. Consumer's right to privacy



The Consumer has the right to (free of charge) discontinue, pre-emptively block or refuse any direct marketing communication.

7. Consumer's right of choice



7.1 Suppliers are prohibited from bundling goods/services unless the convenience of bundling goods/services outweighs the limitation of the Consumer's rights,

or where those goods/services are also sold separately and at individual prices.

- 7.2 The Act prescribes a number of requirements in relation to fixed term agreements concluded between a supplier and a natural person.

Example: the Consumer will be able to cancel the agreement on 20 (twenty) business days notice in writing.

- 7.3 Repair, maintenance or service contracts generally require an estimate of costs (free of charge), which complies with the prescribed requirements.

- 7.4 The consumer has a right of cooling off and can cancel the contract within 5 (five) business days of the date upon which the transaction was concluded or the goods were delivered, whichever date is later.

- 7.5 The consumer has a right to cancel any advance booking, reservation or order.

- 7.6 Any goods which are displayed by a supplier are displayed at the risk of the supplier.

- 7.7 The consumer has the right to choose and/or examine the goods.

- 7.8 There are a number of implied provisions regarding costs, place, time and date of delivery.

- 7.9 Goods/services delivered on the wrong date or in the wrong quantity may be

forfeited to the consumer at the supplier's expense and the consumer has a right to return goods.

7.10 Unsolicited goods will be forfeited to the consumer at the supplier's expense.

8. Right to disclosure and information



- 8.1 All information to consumers must be in plain and understandable language. The Act lays down tests to determine compliance.
- 8.2 All goods displayed must have a price displayed in accordance with the requirements stipulated by the Act.
- 8.3 Product labeling and trade descriptions must not mislead consumers. The Minister can prescribe rules governing categories of goods which must have such labeling/description and/or what information is to be contained therein.
- 8.4 There must be a notice on any reconditioned, rebuilt or remade goods stating that such goods are reconditioned, rebuilt or remade.
- 8.5 Suppliers must provide consumers with a written record (in compliance with the Act) of each transaction concluded with a consumer.

8.6 The Act prescribes rules for disclosure by intermediaries.

9. Right to fair and responsible marketing



- 9.1 Suppliers must be careful not to engage in marketing which is likely to mislead consumers.
- 9.2 Negative option marketing and misleading bait marketing are prohibited.
- 9.3 Suppliers must inform consumers of their right to cancel the contract during the cooling off period.
- 9.4 Catalogue marketing detracts from the right of consumers to inspect goods and therefore must be accompanied and must include the information prescribed in the Act.
- 9.5 The Act places restrictions on, and enacts rules relating to, trade coupons and similar promotions as well as customer loyalty programs and promotional competitions.
- 9.6 Advertising in relation to alternative work schemes must be accompanied by

cautionary wording and must comply with the requirements of the Act.

- 9.7 The Act prohibits referral selling (i.e. the giving of a rebate/commission for the names of other consumers).
- 9.8 The Act codifies the rules of the common law relating to the conclusion of a contract for the supply of goods/services to persons lacking the capacity to act (i.e. to conclude the contract).

10. Right to fair and honest dealing



- 10.1 The Act prohibits unconscionable conduct toward consumers (e.g. duress, coercion, or taking advantage of a mental disability) and prohibits false, misleading or deceptive representations.
- 10.2 The Act also lays down guidelines for determining whether a representation is false, misleading or deceptive.
- 10.3 Fraudulent schemes and offers as well as pyramid and related schemes are defined and prohibited.
- 10.4 It is an implied provision of every contract which is subject to the Act that:

- a. The supplier has the right to sell;
 - b. The supplier has the right to enter into the transaction;
 - c. The supplier is liable for any charge or encumbrance pertaining to the goods in favour of any third party (with certain exceptions);
 - d. The consumer will have quiet possession of the goods.
- 10.5 Auctions, their rules, and the manner in which they are conducted are subject to the Act (e.g. bids may be retracted before the fall of the hammer).
- 10.6 The Act prescribes rules in relation to the deferral, waiver and substitution of goods (e.g. where goods are substituted from the date of delivery the transaction applies to the substituted goods, not the goods originally described).
- 10.7 A supplier cannot accept consideration for any goods/services if the supplier has no reasonable basis to assert an intention to supply those goods/services.
- 10.8 If the supplier cannot uphold a commitment the supplier must refund any consideration plus interest and must (in certain circumstances) compensate the consumer for any costs directly incidental to the supplier's breach.



11. Right to fair, just and reasonable terms and conditions

- 11.1 The principles of fairness, justness and reasonableness apply to:
- a. the prices of goods/services,
 - b. The marketing of goods/services,
 - c. conduct during negotiations,
 - d. agreements which are subject to the Act,
 - e. the administration of agreements,
 - f. any waiver of rights,
 - g. any assumption of obligations.
- 11.2 The Act lays down tests to determine the fairness, justness and reasonableness of any provision in an agreement.
- 11.3 Written notice (in plain language) to the consumer is required for certain terms and conditions in a contract (e.g. any provision which limits the risk of the supplier or passes any risk onto the consumer). The Act stipulates rules in respect of the aforesaid notice.
- 11.4 The Minister may prescribe categories of contracts which are required to be in writing.
- 11.5 If a contract is in writing the consumer need not sign it for it to be effective, the consumer is entitled to a free copy and the agreement must set out an itemised breakdown of the consumer's financial obligations in terms of the agreement.
- 11.6 The Act also lays down certain transactions, agreements, terms and conditions which are prohibited and which are therefore void to the extent of their

inconsistency with the Act (e.g. any provision which defeats the objects of the Act).

- 11.7 Courts are literally given the power to amend contracts which are subject to the provisions of the Act so that they comply.

12. Right to fair value, good quality and safety



- 12.1 This right entails that consumers are entitled to:
- a. timely performance and completion of services;
 - b. timely notice of unavoidable delays;
 - c. goods free from defects;
 - d. the return of the consumers property in as good a condition as when received by the supplier;
 - e. the standard of service and quality of goods which the market is generally entitled to expect.
- 12.2 Failure by the supplier to comply entitles the consumer to demand that defects be remedied, or that the supplier refund a reasonable portion of the price paid (having regard to the extent of the failure).
- 12.3 Consumers have a right to receive goods that:

- a. Are reasonably suitable for the purposes for which they are generally intended;
- b. Are of good quality, in good working order and are free from defects;
- c. Will be useable and durable for a reasonable duration of time;
- d. Comply with the Standards Act of South Africa or any other standards prescribed by public regulation.

12.4 Producers, importers, distributors and retailers each warrant that the goods comply with the requirements laid out above. Consumers can return any goods which do not comply within a period of 6 months.

12.5 The Act lays down a number of tests to determine compliance with these obligations.

12.6 Service providers warrant new or reconditioned parts installed during any repair/maintenance work (including the labour) for a period of three months.

12.7 Suppliers must specifically draw consumers' attention to the fact, nature and potential effect of any risks of an unusual nature, which the consumer could not reasonably foresee and any risk that can cause serious injury or death.

12.8 Any hazardous materials must contain adequate instruction for the safe handling of those materials.

12.9 If any national legislation prohibits the disposal/deposit of any goods into a common waste collection system then any person who supplies goods of that kind in the ordinary course of business must, without charge, accept the return of those goods (irrespective of whether or not that person supplied the goods to the particular consumer). This obligation applies down the supply chain.

- 12.10 The National Consumer Commission (“NCC”) is tasked with promoting the development, adoption and application of industry-wide codes of good practice.
- 12.11 If the NCC has reasonable grounds to believe that any goods may be unsafe or that there is a potential risk to the public from continued use/existence of the goods, and the producer or importer of those goods has not complied with the codes mentioned above the NCC may require an investigation by the producer, or may carry out a recall program.
- 12.12 The Act brings about an extensive change to the existing law by providing consumers, who are harmed by unsafe goods, product failure or defects/hazards in any goods, or a failure by the supplier to display warnings on any goods, with a right to sue the producer, importer, distributor or retailer of those goods. These persons in the supply chain are jointly and severally liable and they are liable as such regardless of whether they are negligent or not. The Act lays down a number of defenses which may be raised in relation to such a claim by the consumer.

13. Conclusion



As is evident from the range of rights which consumers are afforded in terms of the Act, the Act will have far reaching consequences on all businesses interacting with “consumers”. Businesses would be well advised to consult with professionals to bring their businesses in line with Act. Not only will this protect the business from the broad enforcement provisions of the Act but compliance may be used as a marketing tool in that consumers develop a level of trust in businesses which seek to protect their interests.

The Act provides for, amongst other non-compliance provisions, imprisonment of up to 10 years and administrative fines of up to R1, 000, 000.00.



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