

## AN INTRODUCTION TO THE CONSUMER PROTECTION ACT

1. The Consumer Protection Act 2008 (“the Act”) comes into operation incrementally.
2. For the most part, the business provisions of the Act take effect eighteen months from the 29<sup>th</sup> April 2009, which is the date on which the Act was signed by the President.
3. The effective date of the business provisions can be deferred for an additional six months on notice on the grounds that additional time is required for adequate preparation of the administrative systems necessary to ensure the efficient and effective implementation of these provisions. Those parts of the Act dealing with interpretation, purpose and application, and establishment of national consumer protection institutions as well as provision-making for regulations come into effect twelve months from 29 April 2009.

### **4. EXCLUSIONS TO THE ACT**

4.1 The Act does not apply:

4.1.1 to transactions where the State is the Consumer;

4.1.2 where the value of the transaction exceeds the threshold value and goods or services are supplied to a person in the supply chain in the ordinary course of business for resale; or

4.1.3 where the transaction falls within an exemption granted by the Minister on application by a regulatory authority.

4.2 There is no escape from the application of the Act in respect of Sections 60 and 61.

### **5. RELEVANT DEFINITIONS**

5.1 Consumer - A “*consumer*” is very broadly defined and, in respect of particular goods or services, means *inter alia*

“(a) *a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;*

(b) *a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business unless the transaction is subject to the exemptions under the Act referred to above;*

- (c) *if the context so requires or permits, the user of those particular goods or services or a recipient or beneficiary of the particular services irrespective of whether they were a party to a transaction concerning the supply of the particular goods and services; and*
- (d) *a franchisee in terms of a franchise agreement, as contemplated by section 5(6) of the Act.”*

- 5.2 Promote - “*Promote*” means *inter alia* to advertise or offer to supply any goods or services in the ordinary course of business to all or part of the public for consideration.
- 5.3 Supply - “*Supply*” when used as a verb in relation to goods, includes the selling and sale by instalment in the ordinary course of business and, in respect of services, means to sell the services or to perform or cause them to be performed or provided or to grant access to any premises or facility in the ordinary course of business for consideration. A “*supplier*” is a person who markets any goods or services. “*Market*” ,in turn, when used as a verb means to promote or supply any goods or services.
- 5.4 Retailer - A “*retailer*” with respect to any particular goods is a person “*who, in the ordinary course of business, supplies those goods to a consumer.*”

## **6. APPLICATION OF THE ACT**

- 6.1 The Act applies to every transaction in the Republic and to the promotion of any goods or services or supply of any goods or services in the Republic unless exempted.
- 6.2 A “*transaction*” means:
- “(a) *in respect of a person acting in the ordinary course of business –*
  - (i) *an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or*
    - (ii) *the supply by that person of any goods to or at the direction of a consumer for consideration; or*
    - (iii) *the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or*
  - (b) *an interaction contemplated in section 5(6), irrespective whether it falls within paragraph (a);”*

6.3 “Goods” as defined includes “...*(b) any tangible object ... (d) a legal interest in land or any other immovable property other than an interest that falls within the definition of “service” in this section; and (e) gas, water and electricity, ...*”

6.4 “Service” includes, but is not limited to *inter alia*:

*“(a) any work or undertaking performed by one person for the direct or indirect benefit of another; ...*

*(c) any banking services or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service –*

*i) constitutes advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act 2002 (Act No 37 of 2002); or*

*ii) (is regulated in terms of the Insurance Acts) ...*

*(e) the provision of –*

*iii) any accommodation or sustenance;*

*iv) any entertainment or similar intangible product or access to any such entertainment or intangible product;*

*v) access to any electronic communication infrastructure;*

*vi) access, or of a right of access, to an event or to any premises, activity or facility; or*

*vii) access to or use of any premises or other property in terms of a rental.*

*(f) a right of occupancy of, or power or privilege over or in connection with any land or other immovable property, other than in terms of a rental; and*

*(g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e);*

*irrespective of whether the person promoting, offering or providing the services participates in, supervises, or engages directly or indirectly in the service.”*

6.5 Having regard to the broad definition of both “*goods*” and “*service*”, the property industry in its broadest terms will fall within the provisions of the Act.

## **7. CONTRACTS**

7.1 Part G of Chapter 2 deals with the right to fair, just and reasonable terms and conditions.

7.2 In terms of Section 50 the Minister may prescribe categories of consumer agreements that are required to be in writing.

7.2.1 Where, however, a consumer agreement is in writing whether required by the Act or voluntarily, then:

7.2.1.1 that agreement applies irrespective whether or not the consumer signs the agreement;

7.2.1.2 the supplier must provide the consumer with a free copy or free electronic access to a copy of the agreement;

7.2.1.3 the agreement must satisfy the conditions of Section 22; and

7.2.1.4 it must set out an itemised break-down of the consumer’s financial obligations under such agreement.

7.3 Section 22 deals with the right to information in plain and understandable language.

7.4 The document must be in its prescribed form, if any, for that particular document or, if no form is prescribed, in plain language.

7.5 In determining whether the document is in plain language, it is in plain language if:

7.5.1 it is reasonable to conclude that an ordinary consumer of a class of persons for whom the document is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the document without undue effort, having regard to:

7.5.1.1 the context, comprehensiveness and consistency of the document;

7.5.1.2 the organisation, form and style of the document;

7.5.1.3 the vocabulary, usage and sentence construction of the document;

7.5.1.4 the use of any illustrations, examples, headings or other aids to reading and understanding.

- 7.5.2 The National Consumer Commission may publish guidelines for methods of assessing whether a document satisfies the above requirements.
- 7.6 Accordingly, your members will probably need to look to revising their contracts to comply with the plain and understandable language provisions.
- 7.7 A supplier must not offer to supply, supply or enter into any agreement to supply any goods or services-
- 7.7.1 at a price that is manifestly unfair, unreasonable or unjust; or
- 7.7.2 on terms that are unfair, unreasonable or unjust;
- nor can a consumer be required to waive any rights, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust or impose any such terms as a condition of entering into a transaction (See Section 48(1)).
- 7.8 Section 48(2) sets out a non-limiting test of when a transaction or a term or condition is unfair, unreasonable or unjust which includes-
- 7.8.1 the test referred to in Section 48(1) above;
- 7.8.2 where the terms of the transaction or agreement are so adverse to the consumer as to be inequitable; or
- 7.8.3 if the transaction agreement was subject to Section 49(1) notice and-
- 7.8.3.1 the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
- 7.8.3.2 the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner which satisfies the requirements of Section 49.
- 7.9 The Court is also empowered in terms of Section 52 to ensure fair and just conduct, terms and conditions. The concept of what is unfair, unreasonable or unjust, is on the face of it very broad. A Court in providing Section 52 relief would consider, *inter alia*, the parties to the transaction, their relationship and relative capacity, education, experience, sophistication and bargaining position, the conduct of the supplier and consumer, whether there was any opportunity for negotiation between the parties and if so the extent thereof, the extent to which there is Section 22 compliance, whether the consumer knew or ought reasonably to have known of the existence and extent of any

particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust having regard to trade custom and previous dealings, and the amount for which and the circumstances under which the consumer could have acquired identical or equivalent goods or services from a different supplier.

- 7.10 To an extent those considerations list public policy considerations which would apply at common law but the list is more comprehensive and is not definitive.
- 7.11 The Court can *inter alia* declare that the transaction or agreement is in whole or in part unconscionable, unjust, unreasonable or unfair. It may make any further order it considers just, including an order to restore money or property to the consumer, to compensate the consumer for losses or expenses and requiring the supplier to cease any practice or alter any practice, form or document as required to avoid a repetition of the supplier's conduct.
- 7.12 To the extent that it is alleged that the agreement is void, the Court may also make an order that the provision or notice is void or sever any part of the relevant agreement, provision or notice or alter it to the extent required to render it lawful or declare the entire agreement, provision or notice void as from the date it purportedly took effect or declare the provision to have no force or effect with respect to the transaction or make any further order it considers just and reasonable in the circumstances.

**8. DISCLAIMER CLAUSES AND INDEMNITIES**

- 8.1 Section 49 provides that any notice or term of an agreement that purports to:
  - 8.1.1 limit in any way the risk or liability of a supplier or any person;
  - 8.1.2 constitute an assumption of risk or liability by the consumer;
  - 8.1.3 impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
  - 8.1.4 is an acknowledgement of any fact by the consumer must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections 3 to 5.
  - 8.1.5 Those provisions must also comply with the plain language requirements of Section 22. The fact, nature and effect of the provision or notice must be drawn to the attention of the consumer in a conspicuous manner and form that is likely to attract the attention of an ordinary alert consumer; having regard to the

circumstances and before the earlier of the time at which the transaction is entered into, the consumer begins to engage in the activity or gains access to the facility or is required or expected to offer consideration.

8.2 The consumer must be given adequate opportunity in the circumstances to receive and comprehend the provision or notice.

8.3 Where the provision or notice concerns an activity or facility that is subject to any risk event of an unusual character or nature-

8.3.1 the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or

8.3.2 could result in serious injury or death;

the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of the subsections and the consumer must have consented to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.

8.4 In other words those sections limit and circumscribe the circumstances in which *inter alia* the use of disclaimer and indemnity terms and notices may be used. It does not prohibit their use entirely except where there is an attempt to exclude liability or obtain an indemnity for gross negligence or constitute an assumption of risk in that regard.

8.5 To the extent that any of your contracts make use of disclaimers or indemnities they would need to be revised. Likewise where disclaimer or indemnity notices are used at any of your members premises the contents would need to be considered and as well as the manner of display and appropriate protocols drawn up to ensure that notice to the consumer is achieved. Many premises, such as shopping malls do make use of disclaimer notices. Notices and protocols will need to be amended to comply with Section 49. In the hospitality industry various excursions, activities or facilities subject to any risk of an unusual character or nature of a risk which the consumer could not reasonably be aware of or which could result in serious injury or death would need disclaimer notices compliant with the express requirements of Section 49(2).

8.6 The provisions of Section 49 regarding disclaimers and indemnities are largely procedural and formal. One must not lose sight of the fact that disclaimers and

indemnities must be appropriately worded having regard to the particular risks sought to be excluded. The Courts, as a general principle, interpret disclaimers and indemnities narrowly. If you require a general view on the substance of disclaimers and indemnities and the case law dealing with successful and unsuccessful applications of disclaimers please let us know.

## **9. NON-CIRCUMVENTION**

9.1 A contract may also not be subject to any term or condition if the general purpose or effect is to defeat the purpose or policies of the Act, mislead or deceive the consumer or subject the consumer to fraudulent conduct, or it directly or indirectly purports to:

9.1.1 waive or deprive a consumer of a right in terms of the Act;

9.1.2 avoid a supplier's obligation or duty in terms of the Act;

9.1.3 set aside or override the effect of any provision of the Act; or

authorise the supplier to do anything unlawful in terms of the Act or fail to do anything that is required in terms of the Act (see Section 51).

9.2 The agreement or the particular section thereof is void to the extent that it contravenes Section 51.

## **10. MARKETING**

10.1 Part A of Chapter 2 also provides protection against, *inter alia*, discriminatory marketing (Section 8).

10.2 Part B of Chapter 2 provides for the consumer's right to privacy including:

10.2.1 the right to restrict unwanted direct marketing; and

10.2.2 the regulation of time for contacting consumers.

10.3 Part C of Chapter 2 deals with the consumer's right to choose including the consumer's right to select suppliers.

10.4 Section 13 provides that a supplier must not require as a condition of offering to supply any goods or services or as a condition of entering into a transaction or agreement, that the consumer must:

10.4.1 purchase any other particular goods or services from a supplier;

- 10.4.2 enter into an additional agreement or transaction with the same supplier or designated third party; or
- 10.4.3 agree to purchase any particular goods or services from a designated third party, unless it can be shown that the convenience to the consumer in having those goods or services bundled outweighs the limitation of the consumer's right to choose or results in economic benefit for consumers.
- 10.5 Provision is also made for:
  - 10.5.1 the expiry and renewal of fixed term agreements,
  - 10.5.2 the pre-authorisation of repair or maintenance services,
  - 10.5.3 the consumer's right to a cooling off period after direct marketing; and
  - 10.5.4 the consumer's right to cancel advanced reservations, bookings or orders.
- 10.6 Part E of Chapter 2 deals with the right to fair and responsible marketing and deals with:
  - 10.6.1 general standards for marketing of goods or services;
  - 10.6.2 bait marketing;
  - 10.6.3 negative option marketing;
  - 10.6.4 direct marketing to consumers at home;
  - 10.6.5 catalogue marketing;
  - 10.6.6 trade coupons and similar promotions;
  - 10.6.7 customer loyalty programmes;
  - 10.6.8 promotional competitions;
  - 10.6.9 alternative work schemes; and
  - 10.6.10 referral selling.

## **11. ADVANCE ORDERS**

- 11.1 Section 17 allows for termination of an advance order subject to certain reasonable penalties which are determined by the circumstances of the cancellation.

## **12. FRANCHISEES**

- 12.1 According to the Act the Franchise Agreement means:

*“an agreement between the parties being the franchisor and franchisee, respectively:*

- (a) in which, for consideration paid or to be paid by the franchisee to the franchisor, the franchisor grants to the franchisee the right to carry on business within all or a specific part of the Republic under a system or marketing plan substantially determined or controlled by the franchisor or an associate of the franchisor;*
- (b) under which the operation of the business of the franchisee will be substantially or materially associated with advertising schemes or programmes or one or more trade marks, commercial symbols or logos or any similar marketing, branding, labelling or devices, or any combination of such schemes, programmes or devices, that are conducted, owned, used or licensed by the franchisor or an associate of the franchisor; and*
- (c) that governs the business relationship between the franchisor and the franchisee, including the relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisor or an associate of the franchisor.”*

- 12.2 Certain elements of the Franchise Agreement constitute transactions between supplier and consumer within the meaning of the Act and as per Section 5(6), the definition of “*consumer*” includes a franchisee in terms of an agreement to the extent contemplated by Section 5(6)(b) to (e).
- 12.3 Section 7 deals with requirements for a Franchise Agreement. The devil of the Franchise Agreements lies in the authority of the Minister to prescribe information to be set out in Franchise Agreements.
- 12.4 Franchise Agreements must comply with the plain language requirements of Section 22 and provide the franchisee with the opportunity to cancel the agreement, on notice, within ten business days after signing without penalty.
- 12.5 Accordingly members who operate franchises, whether as a franchisor or franchisee should have regard to the franchise provisions and obligations and bear in mind that a franchisee (as a customer) will generally be entitled to the Section 48 protections in respect of unfair, unreasonable or unjust contract terms and the Section 51 prohibitions in respect of prohibited transactions, agreements, terms and conditions.

**13. IDENTIFICATION**

13.1 In terms of Section 28, whenever a person, *inter alia*, performs any services for a consumer at the premises or delivers any goods or installs any goods for a consumer at the consumer's premises that person must:

13.1.1 visibly wear or display a badge or similar identification device that satisfies any prescribed standards; or

13.1.2 provide suitable identification upon request by the consumer.

**14. RIGHT TO FAIR VALUE, GOOD QUALITY & SAFETY**

14.1 Part H of Chapter 2 deals with the consumer's right to fair value, good quality and safety. This section deals with specific definitions of "*defect*", "*failure*", "*hazard*" and "*unsafe*".

14.2 Section 54 deals with the consumer's rights to demand quality service and 55 with the consumer's rights to safe, good quality goods. In the latter instance every consumer, in general terms, has the right to receive goods that:

14.2.1 are reasonably suitable for the purposes for which they are generally intended;

14.2.2 are of good quality, in good working order and free of any defects;

14.2.3 will be usable and durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the supplier; and

14.2.4 comply with any applicable standard of the Standards Act, 1993 or any other public regulation.

14.3 If a consumer has also specifically informed a supplier of the particular purpose for which the consumer wishes to acquire any goods or the use to which a consumer intends to apply those goods and the supplier:

14.3.1 ordinarily offers to supply such goods; or

14.3.2 acts in a manner consistent with being knowledgeable about the use of those goods;

the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.

- 14.4 Tests are set out for determining whether particular goods satisfy those requirements including the manner and the purpose for which the goods were marketed. It is irrelevant whether a product failure or defect was latent or patent or whether it could have been detected by the consumer before taking delivery of the goods.
- 14.5 However, a product failure or defect may not be inferred in respect of particular goods solely on the grounds that better goods have subsequently become available from the same or any other producer or supplier.
- 14.6 Those provisions do not apply to a transaction if the consumer:
- 14.6.1 has been expressly informed that the particular goods were offered in a specific condition; and
- 14.6.2 has expressly agreed to accept the goods in that condition or knowingly acted in a manner consistent with accepting the goods in that condition. Accordingly, for example, if goods were sold *voetstoots* that needs to be expressly recorded and the consumer informed and the condition agreed to by the consumer.
- 14.7 Section 58 requires warnings to be given concerning the fact and nature of risks where any activity or facility is subject to:
- 14.7.1 a risk of an unusual character or nature;
- 14.7.2 a risk of which a consumer could not reasonably be expected to be aware or which an ordinarily alert consumer could not reasonably be expected to contemplate in the circumstances; or
- 14.7.3 a risk that could result in serious injury or death.
- 14.8 In those circumstances the fact, nature and potential effect of the risk must be specifically drawn to the attention of consumers in a form and manner which meets the requirements of Section 49.
- 14.9 Similar warnings are required in respect of a person who packages hazardous goods for supply to consumers except to the extent that an appropriate notice has already been applied in terms of any other public regulation.
- 14.10 Where a person installs any hazardous goods as contemplated or supplies them in conjunction with services, again the warning documentation must be provided.

## **15. PRODUCT LIABILITY**

- 15.1 Section 60 deals with safety monitoring and recall. It allows the National Consumer Commission to monitor consumer complaints in respect of product failures, defects or hazards and the return of those goods, to monitor personal injury, illness or damages which arise therefrom, to conduct investigations into the nature, cause and extent or degree of the risks, to notify consumers of the nature, causes, extent of the risks and the goods and if the goods are unsafe to recall those goods for repair, replacement or refund. The Commission may require a producer to carry out those investigations as well and to carry out a recall programme.
- 15.2 Section 61 imposes a no-fault regime for liability for damage caused by goods. Services as defined are not affected by the provision.
- 15.3 The current common law position will accordingly be altered. As the law currently stands, negligent causation of damages has to be established.
- 15.4 Under section 61, harm as a result of the defective goods will have to be proved and then a causal link with the harm, as defined, to establish liability. It is not necessary to prove that the harm resulted from any negligence on the part of the producer, importer, distributor or retailer.
- 15.5 The onus remains on the plaintiff to prove harm as defined, caused wholly or partly as a consequence of:
- 15.5.1 supplying any unsafe goods;
  - 15.5.2 a product failure, defect or hazard in any goods; or
  - 15.5.3 inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,
- all of which are defined in the Act.
- 15.6 The difficulty which the consumer or ultimate user has in establishing negligent manufacture of the product has always been a complaint of consumers in establishing producers' product liability because the consumer is not privy to the manufacturing and quality control process. That hurdle will fall away.
- 15.7 Suppliers who have an increased risk of exposure would have to look at changing production methods and improving quality control. Suppliers will also need to have appropriate product liability insurance in place. Increased exposure to product liability is likely to lead to a rise in insurance premiums.

- 15.8 The supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods is also regarded as a supplier of those goods.
- 15.9 The appliance repair person or building maintenance person who supplies or installs a component which is defective also has a no-fault liability exposure. This will create a specific area of exposure in the property industry. In most cases it is likely that the installer or repairer could escape liability by way of the proviso referred to in paragraph 15.10 below. That does not mean, however, that such persons will not be faced with the nuisance and inconvenience of having to deal with such claims. Consideration needs to be given to whether maintenance contracts can be made subject to disclaimers or indemnities in the context of the Section 61 product liability provisions and the non-circumvention provisions of Section 51. The market for product liability insurance will certainly expand significantly.
- 15.10 There are limited exclusions to liability which benefit distributors or retailers, not producers or importers. The most significant exclusion to liability being where it is unreasonable to expect a distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard having regard to that person's role in marketing the goods to the consumer and the state of scientific and technical knowledge at the time the goods were under the control of that person.
- 15.11 A limiting provision is the definition of "*harm*" for which a person may be held liable. Harm is death, injury or illness of any natural person or loss of or physical damage to any property and economic harm which results from that physical harm. Accordingly, there is no liability for pure economic loss, for example, where a defect in the product is discovered resulting in a product recall and loss to supplier of profit from the sale of that product. Likewise where a product defect is discovered which does not result in any physical damage or injury but in loss of the use of the product, or the goods of which the product is a component, for the user and economic loss for the user, the no-fault provisions of the section would not avail the claimant. The common law of contract or delict would still apply.
- 15.12 While this section provides for apportionment of liability between joint wrongdoers, there is no provision for reduction in damages due to contributory negligence of the consumer or user.

**16. ENFORCEMENT**

- 16.1 Chapter 3 deals with protection of consumer rights and consumers' voices and provides for the consumer's right to be heard and obtain redress, enforcement of rights by consumers by way of alternative dispute resolution, the National Consumer Commission and National Consumer Tribunal and the powers of the Court to enforce consumers' rights.
- 16.2 Provision is also made for civil society's support of consumer rights and, in particular, the support for consumer protection groups, and the ability of a creditor consumer protection group to initiate action.
- 16.3 Chapter 4 deals with business names and industry codes of conduct and requirements in respect of identification of a supplier, registration of business names and the criteria for business names. You may wish to put in place the necessary documentation to seek appropriate registration and protection of business names.
- 16.4 Part B of Chapter 4 also provides for prescribing of industry codes of conduct. See Section 82 in that regard. The proposed industry code may be recommended to the Minister after, *inter alia*, publishing the proposed code for public comment, considering submissions and consulting with the relevant members of the industry and accredited consumer protection groups.
- 16.5 That code can, *inter alia*, provide for a scheme for alternative dispute resolution. It is recommended that you consider the potential impact of industry codes and provisions of the section in detail and consider whether, having regard to the practical operation of your industry, any representations need to be made in that regard.
- 16.6 Chapter 6 deals with enforcement of the Act and gives enforcement functions to the National Consumer Commission enabling the Commission to, *inter alia*, issue compliance notices. Powers are given in respect of support of investigations including mechanisms of summons and authority to enter and search under a warrant.
- 16.7 Part C of Chapter 6 deals with offences and penalties. A person convicted of an offence under the Act is subject to a fine or imprisonment for a period not exceeding 12 years or both the fine and imprisonment. The tribunal may also impose administrative fines in certain circumstances as provided by the Act which may not exceed the greater of 10% of the respondent's annual turn over during the preceding financial year and R1 million.

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