

A SUMMARY OF THE CONSUMER PROTECTION ACT 68 OF 2008

1. INTRODUCTION

Consumers have rights, and they will have those rights set out in statutory form for them from 24th October this year when the Consumer Protection Act will come into force with an entire set of regulations attached.

Provisions of the Act have been released so that businesses will have time to adjust their trading practices to comply. Although the Regulations are still in the making, the time for looking at consumer rights and what to do about them is now.

The Act clearly spells out the rights of consumers and the responsibilities of suppliers of goods or services. By codifying the common law in relation to consumer rights, South Africa is not only following in the footsteps of many first-world countries, but also aligning itself with United Nations and European Community guidelines on consumer protection.

2. BACKGROUND

The Act focuses on consumer protection by aiming to "*promote a fair, accessible and sustainable marketplace for consumer products and services and, for that purpose, to establish national norms and standards relating to consumer protection*". It is the result of the Department of Trade and Industry's (DTI) intention to "*create and promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities*". (Explanatory Memorandum on the Objects of the Consumer Protection Bill 2008 p80).

3. CONSUMER PROTECTION IN THE SOUTH AFRICAN CONTEXT

Consumer protection is important in every market, particularly in the South African context. The more vulnerable consumers, the more protection is required. The Act acknowledges the reality of many South African consumers: high levels of poverty, illiteracy and other forms of social and economic inequality; living in remote or low-density population areas; being minors, seniors or other similarly vulnerable consumers; having a limited ability to read and comprehend advertisements, agreements, instructions, warnings, etc. as a result of low literacy levels, vision impairment or language impediments. (Preamble of the Act) The Act refers to the need to "*fulfill the rights of historically disadvantaged persons and to promote their full participation as consumers*".

4. THE ACT

4.1 Purpose and policy

The purpose of the Act is "*to promote and advance the social and economic welfare of consumers in South Africa.*" (Section 3(1)).

The Act aims to achieve this objective through, *inter alia*, establishing a legal framework for maintaining a fair, accessible and efficient marketplace for consumers; reducing the disadvantages experienced in accessing goods or services by vulnerable consumers; protecting consumers from unfair trade practices; encouraging responsible consumer behaviour; promoting consumer empowerment and providing an efficient system of redress for consumers.

4.2 Structure

The Act consists of seven chapters and 122 sections:

- Chapter 1 deals with the interpretation, purpose and application of the Act.
- Chapter 2 identifies and elaborates on specific consumer rights
- Chapter 3 of the Act deals with the consumers' voice
- Chapter 4 deals with business names and industry codes of conduct
- Chapter 5 deals with national consumer protection institutions
- Chapter 6 deals with the enforcement of the Act

- Chapter 7 deals with certain general provisions, i.e. the regulations required in terms of the Act.

The Act also includes two schedules:

- Schedule 1 explains the extent to which the Act amends existing law in the form of the National Credit Act, 2005 and the Lotteries Act, 1997.
- Schedule 2 contains the transitional provisions.

4.3 Consumer rights

Chapter 2 of the Act introduces a formal set of consumer rights into law by referring to eight specific consumer rights, namely the right to:

- Equality in the consumer market
- Privacy
- Choose
- Disclosure and information
- Fair and responsible marketing
- Fair and honest dealing
- Fair, just and reasonable terms and conditions
- Fair value, good quality and safety.

4.4 Application

The Act covers both goods and services delivered or rendered "*in the ordinary course of business*".

It applies to transactions (occurring within the Republic) between suppliers and consumers with regard to

- goods and services unless specifically exempted
- the promotion of goods and services
- goods and services themselves
- goods which form the subject of an exempted transaction.

Goods and services are to take on an entirely new meaning under the Act, and businesses (such as retailers of goods (i.e. consumables, furniture, clothing, literature, music etc); casinos; motor manufacturers; second-hand car dealers; marketing and advertising agencies; the print media industry; airlines; estate agencies; the tourism and hospitality industry; franchisors and franchisees; service providers in, for example, the healthcare, beauty and hair-care, education, banking and financial services, transportation, funeral and telecommunications sectors, as well as providers of professional services (i.e. medical practitioners, attorneys and accountants)) will soon have to undertake a complete review of their standard agreements and day-to-day operational processes to ensure compliance with the Act.

4.5 Definitions contained in the Act

The following definitions, contained in section 1 of the Act, are of particular importance:

- Advertisement
- Consumer
- Goods
- Market
- Promote
- Services
- Supply
- Supplier

- Supply chain
- Transaction.

The Act does not apply to the following transactions: (*section 5(2)*)

- when goods or services are promoted or supplied to the State
- when the consumer is a juristic person whose asset value or annual turnover equals/exceeds the threshold value determined by the Minister
- a credit agreement under the National Credit Act, 2005
- services to be supplied under an employment contract giving effect to a collective bargaining agreement; or
- a collective agreement as set out in the Labour Relations Act, 1995.

Apart from the aforesaid exclusions, it is possible for a regulatory authority to apply to the relevant Minister for industry-wide exemption from one or more provisions of the Act on the grounds that those provisions overlap or duplicate an existing regulatory scheme. (*Section 5(3); (4)*)

4.6 Examples of far-reaching provisions

Marketing (*sections 5(3) & (4)*)

The Act prohibits discriminatory marketing (i.e. excluding persons from accessing any goods or services or targeting particular communities for exclusive supply of goods or services). It also deals extensively with general marketing standards; bait marketing; negative option marketing; direct marketing; catalogue marketing; trade coupons and similar promotions; customer loyalty programmes; alternative work schemes and referral selling.

The consumer's choice (*sections 13-21*)

The Act deals with the consumer's right to select suppliers; the expiry and renewal of fixed-term agreements; pre-authorisation of repair or maintenance services; providing consumers with estimates; the right to choose or examine goods; the right to return goods and so-called unsolicited goods.

A cooling-off period following direct marketing (*section 16*)

Consumers are afforded a period of five business days to rescind notify the supplier in writing or another recorded manner and form.

Cancellation of advance reservations, bookings or orders (*section 17*)

Consumers are allowed, subject to a reasonable cancellation charge, to cancel advance reservations, bookings and orders. However, no cancellation charge may be imposed if a consumer is unable to honour the booking because of death or hospitalisation.

Disclosure and information (*section 22-28*)

Consumers are entitled to information in plain and understandable language. This is defined with reference to what "*an ordinary consumer... with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand...without undue effort*". (*Section 22 (2)*) The Act also requires the display of the price of goods or services; product labelling and trade descriptions in certain circumstances; disclosure of reconditioned or grey market goods; written sales records and proper identification of deliverers and installers of goods.

Fair and honest dealing with consumers (*sections 40-46*)

The Act deals extensively with so-called unconscionable conduct; false or misleading representations; fraudulent schemes and offers; pyramid schemes and auctions.

Over-booking and over-selling (*section 47*)

A supplier must not accept payment or consideration for goods/services if the supplier has no reasonable basis to assert an intention to supply such goods/services or intends to supply goods/services that are materially different from those in respect of which payment was accepted. In instances where a supplier is unable to honour a commitment towards the consumer, the

consumer will be entitled to a refund of any amount paid to the supplier, as well as to consequential damages sustained by the consumer. It will, however, constitute a defence if the supplier procures another person to supply comparable goods or services to the consumer (for example, gets another airline to provide a seat at the same price) and the consumer unreasonably refuses such offer.

Consumer agreements (sections 48-52)

Some of the most controversial provisions of the Act, which are likely to turn the way business is done completely on its head, relate to contracts, i.e. unfair, unreasonable or unjust contract terms are not allowed; notice to the consumer is required for certain contractual terms, such as when the supplier intends to limit his liability; written consumer agreements are required in certain instances, and the Act prescribes the content of these agreements. The Act also provides for so-called prohibited transactions, agreements, terms or conditions.

Fair value, good quality and safety (sections 53-60)

The Act deals with the right to demand quality service; the right to safe, good quality goods; implied warranties of quality; warranties on repaired goods and warnings concerning the fact and nature of risks pertaining to activities or facilities.

How will this impact on the "voetstoots" clause contained in your sale agreements? More on this later.

Liability for damage caused by goods (section 61)

The imposition of strict liability for damage caused by goods is one of the most controversial provisions contained in the Act. It provides that the producer or importer, distributor or retailer of any goods is liable for any harm caused wholly or partly as a consequence of the following: *"supplying any unsafe goods; a product failure, defect or hazard in any goods; or inadequate instructions or warnings provided to a consumer pertaining to any hazard arising from or associated with the use of any goods - irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer..."*. (Section 61(2)) It is interesting to note that, even if a transaction is exempt from the Act, the strict liability provision applies to the goods themselves.

Franchise agreements (sections 7; 13; 17; 19; 33; 34; 38; 47 & 48)

The Act contains various provisions in relation to franchise agreements, i.e. the agreement has to be in writing, include prescribed information and comply with the plain and understandable language requirement. The Minister is authorised to prescribe information to be set out in franchise agreements.

Business names (sections 79-81)

The Act proposes a significant change in the current registration scheme by making the registration of business names mandatory. The Act intends to repeal the Business Names Act, 1991 and determines that a person must not carry on business, advertise, promote, offer to supply or supply goods or services or enter into an agreement with a consumer in any name other than the person's full name, as per identification book for natural persons and registered name for juristic persons, or a registered business name. The rationale for requiring business names to be registered is to enable the consumer to know the legal identity of the party he/she is dealing with. When engaging in any of the aforesaid activities, a person is furthermore required to include certain information on all trade catalogues, circulars, letters, orders, sales records and statements of account. It appears as if the criteria for business names as set out in the Act, corresponds with the provisions of the new Companies Act 71 of 2008 in this regard.

Class actions (section 4)

The Act allows class actions in the form of accredited consumer protection groups, which groups may act to protect the interests of a consumer individually or of consumers collectively. It determines that any of the following may approach a court, the Consumer Tribunal or the National

Consumer Commission on the basis that a consumer's rights in terms of the Act have been infringed:

- a person acting on his/her own behalf
- a person acting on behalf of someone else who cannot act in his/her own name
- a person acting as a member of, or in the interest of, a group or class of affected persons
- a person acting in the public interest
- an association acting in the interest of its members.

Promotional competitions (section 36)

The Act will repeal section 54 of the Lotteries Act and introduces a new definition of 'promotional competition'. If a competition satisfies the requirements set out in the Act and the prize offered exceeds a prescribed threshold, the competition will qualify as a promotional competition and will be regulated by the Act. The purpose of this threshold is to exclude competitions linked to low-value prizes from the ambit of the Act. The Act contains a number of requirements with regard to promotional competitions (i.e. making the rules of the competition available at no cost etc.) and promoters of these competitions will have to ensure that they comply with the Act.

5. VOETSOOTS- ANYTHING NEW??

The Act has been hailed as the end of the voetstoets clause in sale agreements as we know it. The Regulations have not been published yet, and when they are, we will have a better understanding as to how the Act will be implemented. But we do not need the Regulations to determine the fate of the voetstoets clause.

Section 55 of the Act sets out the Consumer's rights to safe, good quality goods.

Section 55(2) reads as follows:

"Except to the extent contemplated in subsection (6), every consumer has 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 free of any defects;
- (c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and all the surrounding circumstances of their supply; and...."

But what does subsection (6) provide? What is the exception?

Section 55(6) reads as follows:

"Subsection (2)(a) and (b) do not apply to a transaction if the consumer-

- (a) has been expressly informed that particular goods were offered in a specific condition; and
- (b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition."

..and that is exactly what your Purchaser does when he signs a sale agreement that contains a "voetstoets clause"- he acknowledges that:

- he has been informed that the property is sold in the condition that he sees it,
- he is acquainted with the property's nature, extent and condition; and
- accepts the property as is

Section 55(3) gives the consumer the right to expect that the goods sold are reasonably suitable for any purpose the consumer has indicated the goods to be used for, if the supplier

- "ordinarily offers to supply such goods" and
- "acts in a manner consistent with being knowledgeable about the use of those goods".

Unless the Seller is a developer, he cannot be said to "ordinarily offer to supply such goods" so section 55(3) will be of no application.

What changes may your sale agreement require? At this stage, and unless the Regulations say otherwise...NONE.