CONSUMER PROTECTION ACT
June 2010
CHAPTER 1

South Africa’s new Consumer Protection Act (No. 68 of 2008) has been passed by Parliament and signed into law by the President on 24 April 2009. To date no Regulations implementing the Act are available. The Act will become effective in two phases. In phase one the provisions dealing with the establishment of new consumer protection bodies and those giving the Minister of Trade and Industry authority to make regulations came into effect on 24 April 2010. All other regulations will come into effect on 24 October 2010 and hopefully we will then also see the Regulations. The Act with its far-reaching provisions regarding the marketing of goods and services applies to most transactions involving the supply of goods and services (unless specifically exempt) between suppliers and consumers and also involve franchise arrangements.

The Act does not apply to any transaction:
• in terms of which goods or services are promoted or supplied to the State;
• in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold to be determined by the Minister;
• that constitutes a credit agreement under the National Credit Act (the goods or services are still subject to that);
• pertaining to services to be supplied under an employment contract;
• giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act.

A consumer in respect of any particular goods or services means:
• a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
• a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of the Act;
• a recipient or beneficiary of those particular goods and services; and
• a franchisee in terms of a franchise agreement.

A supplier means a person who promotes or supplies any goods or services.

Promote means:
• advertise, display or offer to supply any goods or services in the ordinary course of business to all or part of the public for consideration;
• make any representation in the ordinary course of business that could be reasonably inferred as expressing a willingness to supply any goods or services for consideration;
• engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.

Supply means:
• in relation to goods includes sell, rent, exchange, or hire in the ordinary course of business for consideration
• in relation to services, to sell the services, or to perform or cause them to be performed or provided or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.

A transaction means:
• in respect of a person acting in the ordinary course of business;
  o an agreement for the supply of any goods or services in exchange for consideration;
  o the supply of goods to a consumer or at the direction of a consumer for consideration; or
  o the performance of any services to or at the direction of a consumer for consideration;
• the supply of goods or services in the ordinary course of business by a club or other voluntary collectivity to its members, whether for fair value consideration or not;
• franchise-related transactions.
PART A - Right to equality in consumer market

Chapter 2 of the Act deals with fundamental consumer rights and will be discussed under subheadings below.

- **Right of equality**

  The right to equality prohibits a supplier to directly or indirectly treat any person differently than any other, in a manner that constitutes unfair discrimination. This protects the consumer against discriminatory marketing with regards to the following:
  - exclusion from, exclusive rights to or preferential treatment of the supply of goods and services based on one or more grounds of discrimination; and
  - differential pricing models and target marketing whereby any person or group of people will be treated differently or be either included or excluded based on pre-determined criteria.

  This also includes unfair discrimination when a supplier:
  - assesses the ability of a consumer to pay or meet the obligations of a proposed transaction;
  - considers whether to enter into a transaction or not;
  - determines any aspect of cost, packaging, delivery of goods or service delivery.

  This might, for example, impact on financial institutions whereby certain packages are only available for clients above a certain income or insurers offering different contracts based on age or gender. There is, however, reasonable grounds for differential treatment which includes differential treatment based on age and gender under certain circumstances in cases where the specific needs of a particular group of consumers are addressed.

PART B - Consumer’s right to unwanted direct marketing

- **Right to restrict unwanted direct marketing**

  The Act strives to protect the consumer’s privacy which includes the consumer’s right to restrict unwanted direct marketing by mail or electronic communication including requests for donations. The consumer can now refuse or block direct marketing. The Minister can even prescribe prohibited periods (days, dates, times of day) for direct marketing at their homes, for example after 18h00, public holidays etc.

  Consumers can also elect to register a pre-emptive block either generally or for specific purposes against any communication for the purpose of direct marketing.
CHAPTER 2 (cont)

- A supplier may not
  - require or induce a consumer to enter into a supplementary agreement
  - require a consumer to supply any document other than for information purposes

- Powers of court to ensure fair and just conduct, terms and conditions

  The court may make an order of ratification to the benefit of the consumer taking into account various issues contemplated in subsection 2 of section 52 in any proceeding concerning a transaction or agreement between a consumer and a supplier.

Part H - Right to fair value, good quality and safety

- Consumer’s right to demand quality service

  When the supplier undertakes to perform any service for or on behalf of a customer, the consumer has a right to:
  - timely performance and completion of services, and timely notice of unavoidable delays;
  - performance of services in a manner and quality that a consumer would be entitled to expect;
  - use, delivery and installation of goods which are free of defects and of a quality that persons are generally expected to expect;
  - return of property or control of property in as good a condition as when the consumer made the property available to the supplier.

  Consumer’s right to safe, good quality goods

  This section does not apply to goods bought at an auction. The consumer has a right to receive goods that:
  - are reasonably suitable for the purposes for which they are generally intended;
  - are of good quality, in good working order and free of any defects;
  - will be usable and durable for a reasonable period of time having regards to the use to which they would normally be put and to all surrounding circumstances of their supply; and

  This also applies to situations where a consumer specifies the intended use and the supplier offers to supply such goods, but does not apply if the consumer has been expressly informed that particular goods were offered in a specific condition or has expressly agreed to accept goods in that condition.

- Implied warranty of quality

  There is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements with regards to the consumer’s right to safe and good quality goods except to the extent that the goods were altered contrary to the instructions or after leaving the control of the producer or importer, distributor or retailer. In the case of malfunction the consumer may within 6 months after delivery return goods to be repaired, replaced or for a refund.

- Warranty on repaired goods

  If repaired, the goods or components have a 3 months guarantee. Any warranty is concurrent with any other deemed, implied or expressed warranty, but is void if the goods were misused or abused and does not apply to normal wear and tear.
CHAPTER 2 (cont)

Part C - Consumer’s right to choose

• Consumer’s right to select suppliers

The consumer also now has the right to choose or select its suppliers. The Act prohibits a supplier from bundling certain goods or services into a single transaction as a condition of entering into an agreement or transaction. This has a specific impact on franchise relationships where the franchisee can no longer be forced to buy its products from or through the franchisor unless the goods are reasonably related to the branded products or services – like for example Brazilian coffee with a very specific taste etc.

• Expiry and renewal of fixed term contracts

The Act now allows consumers to cancel any fixed term contract on any date earlier than the agreed expiry date on giving 20 days notice and against payment of a reasonable cancellation penalty. This will have a big impact on the cell phone industry as well as health clubs. On expiry of these kinds of contracts the agreement can no longer automatically continue for another say two year period as is currently the practice and will now only continue on a month-to-month basis unless cancelled.

• Pre-authorisation of repair or maintenance services

This section only applies to a transaction above the threshold to be prescribed by the Minister and where has, or takes, possession, of property for repair or installation purposes or for providing a repair estimate. In these cases a supplier may not charge the consumer for any service unless a cost estimate was pre-approved by the consumer. This will not apply in cases where the consumer declined the offer of an estimate in writing or where costs to specified maximum are pre-authorised. It is important to note that the supplier may not charge the consumer for the estimate even if certain diagnostic work, disassembly or re-assembly is required.
CHAPTER 2 (cont)

- Consumer's right to cooling-off period after direct marketing

The consumer has the right to a 5 business day cooling-off period after direct marketing (7 normal days for transactions governed by the Electronic Communications and Transactions Act). Transactions resulting from direct marketing can now be cancelled without giving a reason or incurring a penalty on condition it is done in writing within the prescribed time period. The supplier must return any payment received within 15 business days of receiving notice of the rescission where no goods have been delivered, or where goods were delivered, receiving the goods from the consumer.

- Consumer's right to cancel advance reservation, booking or order

This section does not apply to a franchise agreement or in respect of special-order goods. In all other cases a consumer has the right to cancel any advance booking, reservation or order for any goods or services to be supplied. The supplier may require payment of a reasonable deposit in advance and impose a reasonable cancellation charge. Reasonability is based on the nature of the goods or services, the length of notice, the ability of the supplier to find an alternative consumer and the general practice of the industry. No cancellation fee may be charged if the cancellation is caused by the death or hospitalization of the consumer.

- Consumer's right to choose or examine goods

Despite any notice to the contrary the consumer is not responsible for any loss or damage to any goods displayed by a supplier unless the loss or damage results from action by the consumer amounting to gross negligence or reckless, malicious behavior. This refers to the 'if you break it, consider it sold' notices. Consumer’s rights with respect to delivery of goods or supply of service

This section does not apply to the supply of goods or service in terms of a franchise agreement or to transactions governed by the Electronic Communications and Transactions Act. The supplier is responsible for delivering the goods or service on an agreed date, time and place and for bearing the costs in relation to that as well unless the parties to the transaction opt to specifically contract out of it. If there is no agreement with respect to the date and time of delivery the supplier must not require acceptance at an unreasonable time. Goods to be delivered remain at the supplier’s risk until the consumer accepts delivery. The consumer has the right to examine the goods on delivery and the right to either accept or reject them.

- Unsolicited goods or services

The consumer does not have to pay any supplier for unsolicited goods or services or for the delivery thereof and has the right to recover such amount with interest if paid. The supplier has the right to recover goods delivered within 20 days after the date of informing the consumer that the goods were delivered in error. The person in possession of the unsolicited goods may retain the goods or return them at the risk and expense of the supplier and or deliverer. If a person lawfully retains solicited goods, ownership of those goods might pass unconditionally to that person under certain conditions.
CHAPTER 2 (cont)

Part D - Right to disclosure and information

- Right to information in plain and understandable language

The consumer has the right to receive notices, documents and or other visual representation in plain language which an ordinary customer with average literacy skills and minimal experience as a customer of the relevant goods or services, can be expected to understand without undue effort.

- Disclosure of price of goods or services

The price of goods or services must be adequately displayed to the consumer either on the product itself or on the shelf used in connection with the goods or on which the goods are mounted for display or exposed for sale. A supplier must not require a consumer to pay a higher price than the displayed or advertised price for those goods or services.

- Product labelling and trade descriptions

Trade descriptions must not mislead the consumer as to the matter implied or expressed in that trade description. Trade descriptions must also not alter, deface, cover, remove or obscure a trade description or trade mark applied to any goods in a manner calculated to mislead customers. It must also disclose the presence of any genetically modified ingredients or components in goods in accordance with applicable regulations. Trade descriptions means:

(a) Any description, statement or other direct or indirect indication, other than a trade mark, as to-

(i) The number, quantity, measure, weight, gauge of any goods;

(ii) The name of the producer or producer of any goods;

(iii) The ingredients of which any goods consist, or material of which any goods are made;

(iv) The place or country of origin of any goods;

(v) The mode of manufacturing or producing of any goods;

(vi) Any goods being the subject of any patent, privilege or copyright; or

(b) Any figure, work or mark other than a trade mark, that, according to the custom of the trade, is commonly understood to be an indication of any matter contemplated in paragraph (a)

- Disclosure of reconditioned or grey market goods

Suppliers have to clearly indicate that a specific product is “grey” or has been reconditioned, rebuilt or remade.

- Sales records

Written sales records of all transactions for the supply of goods or services must be given to customers stipulating certain specified information. This includes all sales transactions concluded telephonically. Records must include at least the following:

(a) The suppliers full name, or registered business name, and VAT registration number, if any;

(b) The address of the premises at which, or from which, the goods or services were supplied;

(c) The date of the transaction;

(d) The name or description of the goods or services supplied or to be supplied;

(e) The unit price

(f) The quantity of goods or services supplied or to be supplied;

(g) The total price of the transaction before the applicable taxes;

(h) The amount of any applicable taxes; and

(i) The total price of the transaction.
CHAPTER 2 (cont)

• Disclosure of intermediaries

Brokers, sales representatives and estate agents, are also now required to disclose their associations or affiliations with the entities /persons they represent.

• Identification of deliverers, installers and others

Part E - Right to fair and responsible marketing

• General standards for marketing of goods or services

The Act prevents a producer, distributor, retailer or service provider from marketing goods or services in a manner that is misleading, fraudulent or deceptive in any way including in respect of the nature, properties, advantages or uses of the goods or services, the manner in which the goods may be supplied and the price.

• Bait marketing

A supplier must not advertise any goods or services as being available at a specific price, when they are not available, or are not available at the price.

• Negative option marketing

A supplier must not promote goods or services or offer to enter an agreement for the supply of goods or services on the basis that the agreement will automatically come into existence, unless the customer declines the offer. Such agreements will be considered void in terms of the Act.

• Direct marketing to customers

Direct marketers must inform customers of their right to rescind the agreement in terms of their cooling off rights. Goods left with the customer without arranging payment for them, are considered to be solicited goods.

• Catalogue marketing

This applies to agreements entered into in person or telephonically, if the contact is initiated by the customer, or by postal order or fax, where the customer is not afforded the opportunity to inspect the goods in advance. Before concluding the agreement the supplier must disclose the following information to the customer:

(a) The supplier’s name and license or registration number;
(b) Supplier’s physical business address and related contact details;
(c) Sales records as prescribed by this Act;
(d) The currency in which amounts under the agreement are payable;
(e) The supplier’s delivery arrangements;
(f) The supplier’s cancellation, return, exchange and refund policies, if any; and
(g) The manner and form in which a complaint may be lodged.
• Trade coupons and similar promotions

This includes offers or promises expressed in any manner of a prize, gift or award, free goods or services and/or a price reduction. A person must not make a promotional offer with the intention of not fulfilling it or fulfilling it other than as offered.

• Customer loyalty programmes

Despite any provision in any law, loyalty credits or awards are a legal medium of exchange when offered or tendered as consideration for any goods or services offered, or transaction contemplated, in terms of that loyalty programme. A person must not offer participation in a loyalty programme, or offer loyalty credits or awards with the intention of not providing it or providing it in a manner other than as offered. The sponsor of such a loyalty programme must also ensure that sufficient supplies of the offered goods or services are available at any time and must not limit or restrict capacity to supply those particular goods or services. The sponsor must also accept any tender of sufficient loyalty credits or awards as adequate consideration and must not deliver inferior quality goods or services. No service charge must be levied in respect of administration, processing or handling of such a transaction.

• Promotional competitions

Promotional competition means any competition, game, scheme, arrangement, system, plan or device for distributing prizes by lot or chance if the competition is conducted in the ordinary course of business for the purpose of promoting a producer, distributor, supplier or the sale of any goods or services.

The promoter of a promotional competition must not require any consideration to be paid by a participant other than reasonable costs of posting or otherwise transmitting an entry form or device. The promoter must also not award a prize if it is unlawful to supply those goods or services to that prize winner but does not preclude awarding a prize to a person because that person’s right to possess or use the prize might be regulated or restricted. Rules for the competition must be prepared before the competition commences and those rules must be available on request without cost. Any person who is a director, member, partner, employee, agent or consultant of the promoter or a supplier of the goods or services in connection with that competition may not participate in the competition.

• Alternative work schemes

A person must not make a false representation with respect to the availability, actual or potential profitability, risk or other material aspect of the work, in terms of which one person invites another to conduct work from their homes.

• Referral selling

A supplier must not promote, offer, supply, agree to supply or induce a customer to accept goods or services on the basis that the consumer will receive a rebate, commission or other benefit if the consumer subsequently gives the supplier the names of consumers or assists the supplier to supply goods or services to other consumers.

• Agreements with persons lacking legal capacity

A supplier cannot enter into an agreement for the supply of goods or services if the consumer is subject to an order of a competent court holding that person to be mentally unfit. When the consumer was an unemancipated minor at the time the agreement was made, and there was no consent of an adult responsible for that minor the agreement is void unless the agreement was ratified by a responsible adult.
Part F - Right to fair and honest dealing

• Unconscionable conduct (Section 40)

Unconscionable conduct, force against a customer, coercion, undue influence, pressure, duress or harassment, unfair tactics and other similar conduct are prohibited in connection with the conclusion of an agreement, supply of and payment for goods and services, negotiation and finalization of an agreement and recovery of goods from a customer. It is unconscionable for a supplier to knowingly take advantage of a customer that is not able to protect his own interests because of some disability.

• False, misleading or deceptive representations (Section 41)

The Act prohibits false, exaggerated, misleading and deceptive marketing of goods and services, or permits or requires any other person to do so on behalf of the supplier.

• Fraudulent schemes and offers

The Act prohibits a person to distribute communication that offers products or services that falsely state that the communication is authorized by another person or that the author of the communication represents another person. It is also not permitted to directly or indirectly promote fraudulent currency schemes, financial transactions or transfer of property or legal rights.

• Pyramid and related schemes

Any multiplication, pyramid or chain letter scheme is prohibited by the Act.

  o A multiplication scheme exists where an effective interest rate of more than 20% above the REPO rate as determined by the South African Reserve Bank is on offer.
  o An arrangement is a pyramid scheme if participants receive compensation derived primarily from their recruitment of other persons as participants.
  o An arrangement is a chain letter scheme when it has various levels of participation, existing participants canvas and recruits new participants and each new participant is required to pay a certain consideration which is distributed to one, some or all of the existing participants.

• Consumer’s right to assume supplier is entitled to sell goods

Every consumer has the right to assume the supplier has the legal right or authority to supply the goods and in the case of an agreement to supply goods that the supplier has the legal right, or authority of the legal owner to sell the goods at the time the title to those goods passes to the consumer, or lease the goods at the time the lessee takes possession of the leased goods.
CHAPTER 2 (cont)

• Auctions

Auction includes a sale in execution of or pursuant to a court order to the extent that the order contemplates that the sale is to be conducted by an auction. When goods are sold in lots each lot is regarded as a separate transaction. The sale by auction is complete when the auctioneer indicates its completion by the fall of the hammer. Notice must be given in advance if there are reserve prices on goods or if the owner or auctioneer has the right to bid. Unless this is done the owner or auctioneer must not bid or employ any person to bid at the sale.

• Changes, deferrals and waivers, and substitution of goods

The supply of goods and services as a result of a change to an existing agreement does not constitute a new agreement, if the changes are made in accordance with this Act. If both the supplier and consumer agree to the substitution of goods or services the transaction applies to the substituted goods or services rather than the goods or services originally contracted for.

• Over-selling and over-booking

A supplier must not accept payment or other consideration if the supplier cannot deliver or has no intention to deliver the goods or services or intends to supply goods or services that are materially different from the goods or services originally contracted for.

Have you ever been bumped off a flight as a result of overbooking? Well now you can claim damages suffered as a result of the supplier’s inability to supply the service plus interest as well as any consequential damages which directly resulted from the overbooking.

Part G - Right to fair, just and reasonable terms and conditions

• Unfair, unreasonable or unjust contract terms

A supplier may not offer to supply, enter into an agreement to supply goods or services or market any goods or services on terms or at prices that are unfair, unreasonable or unjust. It can also not be required from a customer to waive rights, assume obligations or waive any liability of the supplier on terms that are unfair, unreasonable or unjust.

The following are examples out of the Act of what will constitute an unfair, unreasonable or unjust transaction or agreement:

- if it is excessively one-sided in favour of any person other than the customer;
- if the terms of the transaction or agreement are so adverse to the customer as to be inequitable;
- if the customer relied on false, misleading or deceptive representation provided by or on behalf of the supplier, to the detriment of the consumer; or
- where the transaction is subject to an exclusion or limitation of liability or indemnity which is unfair, unreasonable, unjust or unconscionable; or
- where the fact, nature and effect of that term was not properly drawn to the attention of the consumer in the specified manner.
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CHAPTER 2 (cont)

• Notice required for certain terms and conditions

Any provision, agreement or notice to a consumer that:
- limits in a way the risk or liability of the supplier or any other person;
- constitutes an assumption of risk or liability by the consumer;
- imposes an obligation on the consumer to indemnify the supplier or any other person for any course; or
- be an acknowledgement of any fact by the consumer, must be written in plain language and 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. This must be done before the consumer enters into the transaction or agreement, begins to engage in the activity or enters or gains access to the facility or offer or is expected to offer consideration for the transaction or agreement.

• Written consumer agreements

A written agreement between a supplier and a consumer applies irrespective of whether or not the consumer signs it. Such an agreement must be provided to the consumer with a free copy or free electronic access to a copy of the terms and conditions of that agreement. If there is no written agreement between a supplier and a consumer the supplier must keep a record of transactions entered into over the phone or in any recordable form.

• Prohibited transactions, agreements, terms or conditions

The following are specifically prohibited by the Act:

- A supplier must not make a transaction or agreement subject to any terms or conditions if it:
  - misleads or deceives the consumer;
  - subjects the consumer to fraudulent conduct;
  - waives or deprives the consumer of a right; avoided supplier’s obligation or duty in terms of this Act;
  - sets aside or overrides the effect of any provision of this Act
  - authorises the supplier to do or fail to do anything unlawful or that is required by this Act;
  - limits or exempts a supplier from liability directly or indirectly attributable to the gross negligence of the supplier;
  - constitutes an assumption of risk or liability by the consumer;
  - imposes an obligation on the consumer to pay for damages to displayed goods;
  - requires of the consumer to enter into any supplementary agreements;
  - purports to cede to any person, charge, set off against a debt, or alienate in any manner, a right of the consumer to claim against the Guardian’s Fund;
  - falsely expresses an acknowledgement by the consumer that before the agreement, no representations or warranties were made;
  - requires the consumer to forfeit any money to the supplier if the consumer exercises any right in terms of the Act or to which the supplier is not entitled in terms of this Act or any other law;
  - expresses on behalf of the consumer the right to enter premises for the purpose of taking possession of goods, to sign in advance documentation to enforce an agreement or a consent to a predetermined value of goods;
  - expresses an agreement by the consumer to deposit with the supplier an identity document, credit or debit card, bank account or automatic teller machine access card, or provide personal identification code or number to be used to access an account.
CHAPTER 2 (cont)

• Warning concerning fact and nature of risks

The supplier of any activity or facility that is subject to unusual risk or risk of which the consumer could not reasonably be expected to be aware of or risk that could result in serious injury, must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer.

A person who packages any hazardous or unsafe goods must display in plain and understandable language a notice providing the consumer with adequate instructions for the safe handling of the goods.

• Recovery and safe disposal of designated products or components

If a supplier supplies components, remnants or goods packaged in material that is by law prohibited from disposal into a common waste collection system, that supplier must accept the return of such components and or packaging without charge to the customer.

• Safety monitoring and recall

Suppliers have to adopt, develop and apply industry-wide codes of practice to receive notice from a consumer of complaints of product failures, the return of goods and personal injury, illness or damage to property resulting from the use of sold products. They must also monitor the sources of information and analyse the information received, conduct investigations into the nature, causes, extent and degree of the risk to the public and resulting from this notify consumers thereof. If goods are unsafe it must be recalled for repair, replaced or refunded.

• Liability for damage caused by goods

The producer or importer, distributor or retailer of goods is liable for damage caused wholly or partially as a consequence of supplying unsafe goods, product failure or inadequate instructions or warnings irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer. In the case where more than one party is liable the liability is joint and several. In certain circumstances no liability arises.

This will have a big impact on third party liability insurance of producers, importers, distributors and retailers.

Part I - Supplier’s accountability to consumers

• Lay-buys

Amounts paid for goods in periodic installments remains the property of the consumer until delivery of such goods, and the goods remain the property of the supplier until the goods have been delivered to the consumer. If the supplier is unable to deliver the goods at the time the full price has been paid, the supplier must at the option of the consumer, deliver similar or superior goods or refund the consumer the full purchase price paid plus interest if the inability to supply the goods is beyond the control of the supplier. In any circumstances double the amount received as payment as compensation of breach of contract.

If the consumer terminates the contract before fully paying for goods the supplier may charge a penalty in respect for those goods and after deducting a termination penalty, must refund the consumer.
CHAPTER 2 (cont)

• Prepaid certificates, credits and vouchers

A prepaid certificate, card, voucher or similar device does not expire until the earlier of the date its full value has been redeemed or 3 years after the date on which it was issued. As the value of the prepayment remains the property of the consumer this has serious administrative and accounting implications for the supplier.

• Prepaid services and access to service facilities

If in terms of an agreement, a consumer agrees to pay or is required to pay a one-time periodic membership fee or any amount in respect of service or access to services to be provided at a date more than 25 business days after the payment is made, the amount remains the property of the consumer until the supplier makes a charge against it. A charge can only be made once each month in advance. Note the accounting implications for accurate recordkeeping required here.

If the supplier intends to close the facility the prepayments relate to, it must give written notice to the consumer at least 40 business days before the intended date of closure and no later than 5 business days after closing the facility, refund the consumer the balance of any money belonging to the consumer.

• Deposits in respect of containers, pallets or similar objects

If a person returns a bottle, container, reel or similar object to any supplier of goods ordinarily sold in that bottle or container or on that pallet or in that reel or similar object, the supplier must pay that person the amount of the deposit that is requires if any or that the supplier charged for that object, irrespective of whether the person returning the container paid a deposit for that object to the supplier. Consumers buying goods on pallets or in containers need to develop/improve their controls over such pallets or containers in order to claim the benefit of the refund.

• Return of parts and materials

Any parts or components removed from any goods and property in the course of repair or maintenance work must be kept separately from parts removed from other goods or property and return such goods or components to the consumer in a reasonably clean container unless the consumer declined the return of such goods. Return of components when a car is serviced fits into this category.
CHAPTER 3 - Protection of consumer rights and consumer’s voice

Part A - Consumer’s right to be heard and obtain redress

• Protection of consumer rights

If the consumer exercised his rights under this Act the supplier must not in any way discriminate directly or indirectly against that consumer, penalise the consumer, alter or propose to alter the original terms of the agreement or take any action to accelerate, enforce, suspend or terminate an agreement with the consumer.

• Enforcement of rights by consumer

A person may seek to enforce any rights in terms of a transaction or agreement or otherwise resolve any dispute with a supplier by:
  o referring the matter directly to the Tribunal;
  o referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
  o if the matter does not concern a supplier:
    • referring the matter to the applicable industry ombud;
    • applying to the consumer court of the province with jurisdiction over the matter;
    • referring the matter to alternative dispute resolution;
    • filing a complaint with the Commission; or
  o approach a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.

• Alternative dispute resolution

The consumer may seek to resolve any dispute by referring the matter to an alternative dispute resolution agent who may be:
  o an ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
  o an accredited industry ombud if the supplier is subject to the jurisdiction of any such ombud;
  o a person or entity providing conciliation, mediation or arbitration services;
  o applying to the consumer court of the province with jurisdiction over the matter.

If the alternative dispute resolution agent concludes that the matter cannot be resolved through this process he may terminate the process and notify both parties. The party referring the matter may then file a complaint to the Commissioner.

If the matter was resolved the dispute resolution agent must record the resolution of that dispute in the form of an order and if the parties to the dispute consent to that order, submit it to the Tribunal or the High Court to be made a consent order.

• Initiating complaint to Commission

Any person may file a complaint concerning a matter with regards to enforcement of rights by a consumer with the Commission. The Commission may directly initiate a complaint concerning any alleged conduct on its own motion.
PART B - COMMISSION INVESTIGATIONS

Investigation by Commission

The Commission may, on receipt of the complaint:
- issue a notice of non-referral to the complaint if it appears to be frivolous or vexatious, does not allege any facts that would constitute grounds for remedy or is prevented from being referred to the Tribunal;
- refer the complaint to an alternative dispute resolution agent;
- refer the complaint to another regulatory authority; or
- direct an inspector to investigate the complaint as quickly as practicable.

Outcome of investigation

After conclusion of the investigation the Commission may:
- issue a notice of non-referral to the complaint;
- refer the matter to the National Prosecuting Authority if the Commission alleges that a person committed an offence;
- if the Commission believes that a person has engaged in prohibited conduct:
  - refer the matter to the equality court if applicable;
  - propose a draft consent;
  - make a referral to the consumer court; or
  - issue a compliance notice.

Consent orders

If the matter has been investigated by the Commission, and the Commission and the respondent agree to the proposed terms of an appropriate order, the Tribunal or court, without hearing any evidence, may confirm an agreement as a consent order. After hearing a motion for a consent order, the Tribunal or a court must:
- make an order as agreed to and proposed by the Commission and the respondent;
- indicate any changes that must be made in the draft order before it will make the order; or
- refuse to make the order.

The consent order may include awards for damages if the complainant agrees to it.

Referral to Tribunal

The complainant may refer the matter directly to the consumer court or the Tribunal. If the matter is referred to the consumer court the complainant may still apply to the Tribunal for an order that the matter be referred to the Tribunal. The Tribunal must conduct a hearing and may make any applicable order contemplated in this Act or in section 150 or 151 of the National Credit Act.
Chapter 3 (cont)

Part C - Redress by court

- Powers of court to enforce consumer rights

The court may:
- order a supplier to alter or to discontinue any conduct inconsistent to this Act;
- make any order specifically contemplated in this Act; and
- award damages against the supplier for collective injury to all or a class of consumers generally.

This Act does not diminish any right of the consumer or the supplier:
- to recover interest or special damages
- to recover money paid if the consideration for the payment of it has failed.

Part D - Civil society support for consumer’s rights

- Support for consumer protection groups

The Commission may co-operate with, facilitate or otherwise support any of the following activities carried out by a consumer protection group:
- consumer advice and education activities and consumer-related publications;
- research, market monitoring, surveillance and reporting;
- promotion of consumer rights and advocacy of consumer interest;
- representation of consumers, either specifically or generally, in court;
- alternative dispute resolution through mediation or conciliation; and
- participation in national and international associations, conferences or forums concerned with consumer protection matters.

- Accredited consumer protection group may initiate action

An accredited consumer protection group may:
- Commence or undertake any act to protect the interest of a consumer individually or collectively as a group; and
- Intervene in any matter before any forum in the interests of consumers represented by such group.

An accredited consumer protection group may direct a generally stated concern or complaint to the Commission.

A consumer protection group may be accredited by the Commission if it functions predominantly to promote or represent the interests of all or a specific category of consumers generally, is committed to achieving the purposes of this Act and aims to promote and advance the consumer interests. The Commission must monitor the effectiveness of such a group and may request any information necessary to do so.
CHAPTER 4 - Business names and industry codes of conduct

Part A - Business names

• Identification of supplier

The Act provides that a person may only carry on business under the following names:
- Natural person in his full name as recorded in his identity document;
- Juristic person in its full registered name; or
- A business name registered under the Act.

The implication of this is that informal “trading names” will no longer be allowed. There is however relief for businesses which were actively conducting business under such a name for a period of at least one year before a date to be announced by the Minister.

• Registration of business names

A person may file a notice with the registrar with payment of a fee to register any number of business names also translated into any number of official languages, change a registered business name or transfer a registered business name into that of another person. If the name applied for does not meet the criteria for business names set out in the Act the Registrar must notify the applicant accordingly and follow the procedures as set out in the Companies Act with regards to resolving disputed names.

A registered business name might be cancelled if the person who registered the name is not carrying on business under that name or did not carry on business under that name for the past six months.

This implies that people may not be allowed to register a name just for the sake of preventing someone else to use the name. They must actively carry on business and may be required to prove that they do so, under such a name.

• Criteria for business names

A business name may comprise words in any language irrespective of whether the words are commonly used or contrived for the purpose, together with:
- any letters, numbers or punctuation marks;
- any of the following symbols: +, &, #, @, %, =;
- any other symbols permitted by the regulations; or
- round brackets used in pairs to isolate any part of the name, alone or in combination.

A business name must not be the same or confusingly similar to that of another juristic person, registered trade mark belonging to another person or a mark, word or expression, the use of which is restricted in terms of the Merchandise Marks Act. It must furthermore not imply or suggest that the business is part or associated with another person, an organ of the state, or any other person, foreign state or international organisation.
CHAPTER 4 (cont)

Part B - Industry code of conduct

• Industry codes

Industry code means a code regulating the interaction between and among persons conducting business in the same industry or regulating the interaction, or providing for alternative dispute resolution between parties and consumers. These codes might be prescribed by the Minister or might be recommended by the Commission acting out of its own initiative or in response to a proposal from persons conducting business within a particular industry. These codes must be consistent with the purposes of this Act. If the code meets all the requirements of this Act the Minister may register the code as an ‘accredited industry’ ombud and the effectiveness thereof must be monitored by the Commission.

CHAPTER 5 - National consumer protection institutions

Part A - National and Provincial co-operation

• Co-operative exercise of concurrent jurisdiction

In terms of the Act the respective provincial consumer protection authorities will perform their functions within their provinces but also, at the direction of the Minister, across its provincial boundaries.

• Provincial consumer protection authorities

A provincial consumer protection authority has jurisdiction within its province to issue compliance notices in terms of this Act on behalf of the Commission, facilitate the mediation or conciliation of a dispute, refer a dispute to the provincial court within the province and request the Commission to initiate a complaint in respect of any apparent prohibited conduct or offence in terms of this Act.

Part B - Establishment of National Consumer Commission

• Establishment of National Consumer Commission

The National Consumer Commission is established by the Act as an organ of the state within the public administration, but as an institution outside the public service. The Commission has jurisdiction throughout the Republic and is a juristic person.

• Minister may direct policy and require investigation

By notice in the Gazette the Minister may issue policy directives to the Commission in respect of the application, administration and enforcement of this Act. The Minister may also at any time direct the Commission to investigate an alleged contravention of this Act or any matter or circumstance with respect to the purpose of this Act.
CHAPTER 5 (cont)

• Appointment of the Commissioner

The Commissioner, suitably qualified and experienced in economics and law, commerce, industry or public affairs, is appointed by the Minister after proper consultation with the relevant Parliamentary Commission. At least one person must be appointed and may be reappointed on the expiry of an agreed term of office, and a Deputy Commissioner also suitably qualified may be appointed as well.

• Appointment of inspectors and investigators

The Commissioner appoints any suitable employee of the Commission or any other suitable person working for the State as an inspector. The Commissioner may also appoint or contract with any suitably qualified person as an investigator to conduct research, audits, inquiries or other investigations on behalf of the Commission.

• Conflicting interest

The Commissioner or any of the employees of the Commission may not, in the performance of their duties, undermine the integrity of the Commission, make private use or profit from confidential information obtained or divulge any information to any third party. They must also not participate in any investigation, hearing or decision where they have a direct financial interest or similar personal interest.

• Finances

The Commission is financed from:
- money appropriated by Parliament;
- any fees payable to the Commission in terms of this Act;
- income derived from its investments and deposits of surplus money; and
- money accruing from any other source.

• Reviews and reports to Minister

The Minister must at least once every 5 years conduct an audit review of the exercise of the functions and powers of the Commission. The Commission must report on its activities at least once a year.
Part C - Functions of the Commission

• General provisions concerning Commission functions

The Commission is responsible for carrying out the functions and exercise the powers assigned to it in terms of this Act having regard to international developments and may consult any person, organisation or institution with regards to any matter relating to consumer protection. The Minister must prescribe at least two official languages to be used by the Commission in any documents it is required to deliver in terms of this Act.

• Development of codes of practice relating to Act

The Commission may develop, and promote the voluntary use of codes and practice in respect of:
  o use of plain language in documents;
  o a standarised or uniform means of presenting and communicating information;
  o alternative dispute resolution; or
  o any matter to better achieve the purposes of this Act.

• Promotion of legislative reform

The Commission must identify any other national or provincial legislation or other public regulation that affects the welfare of consumers and is consistent with the purposes of this Act and develop proposals for reform of that legislation after consultation with the relevant provincial consumer protection authorities, organs of state and consumer protection groups, alternative dispute resolution groups and suppliers.

• Promotion of consumer protection within organs of state

The Commission must consult with all relevant consumer protection authorities, organs of state within the national sphere of government, regulatory authorities, consumer protection groups, and ombuds with respect to delivery of goods and services supplied to customers in order to identify practices inconsistent with this Act and to develop proposals for reform of any such practices.

• Research of public information

The Commission is responsible for implementing education and information measures of the nature and dynamics of the consumer market and to provide guidance thereon by issuing explanatory notices and publishing any orders and findings of the Tribunal or a court in respect of a breach of the Act.

• Relations with other regulatory authorities

The Commission may liaise with any provincial consumer protection authority or other regulatory authority on matters of common interest and negotiate agreements with any regulatory authority in order to co-ordinate and harmonise the exercise of jurisdiction over consumer matters. The Commissioner may also participate in the proceedings of any regulatory authority and advise or receive advice from any such authority.
CHAPTER 5 (cont)

• Advice and recommendations to Minister

The Commission is responsible to:
  o advise the Minister on matters relating to consumer protection;
  o recommend to the Minister changes to bring about uniformity in the legislation in the various provinces;
  o report annually on market practices and the implications for consumer choice and competition in the consumer market;
  o enquire into and report to the Minister on any matter concerning the purpose of this Act; and
  o advise the Minister in respect of any matter referred to it by the Minister.

CHAPTER 6 - Enforcement of the Act

Part A - Enforcement by Commission

• Enforcement functions of Commission

The Commission is responsible to enforce this Act by:
  o promoting informal resolution of any dispute arising in terms of this Act between a consumer and a supplier;
  o receiving complaints concerning alleged prohibited conduct and offences and dealing with those complaints;
  o monitor the consumer market to ensure that prohibited conduct and offences are prevented as well as the effectiveness of accredited consumer groups, industry codes and alternative dispute resolution schemes, service delivery to consumers by organs of state and any regulatory authority;
  o investigating and evaluating alleged prohibited conduct and offences;
  o issuing and enforcing compliance notices;
  o negotiating and concluding undertakings and consent orders;
  o referring to the Competition Commission any concerns regarding market share, anti-competitive behavior or conduct;
  o referring matters to the Tribunal, and appearing before the Tribunal; and
  o referring alleged offences in terms of this Act to the National Prosecuting Authority.

• Compliance notices

Compliance notices in the prescribed form may be issued by the Commission to a person or organisation that the Commission on reasonable grounds believes has engaged in prohibited conduct. If the requirement of the compliance notice has been satisfied, the Commission must issue a compliance certificate.

• Objection to notices

A person issued with a notice may object within 15 business days after receiving the notice or such period allowed by the Tribunal on good cause shown.
CONSUMER PROTECTION ACT

CHAPTER 6 (cont)

Part B - Powers in support of investigations

• Summons

At any time during an investigation the Commissioner may issue a summons to any person who is believed to be able to furnish information on the subject or to have possession or control of any book, document or other object that has bearing on the case to appear before the Commission, inspector or independent investigator or deliver such evidence mentioned. An inspector or investigator may interrogate and administer an oath to the person named in the summons and retain any such book, document or other object for the duration of the investigation.

No self incriminating evidence given by such a person may be used as evidence against that person in criminal proceedings.

• Authority to enter and search under warrant

A judge of the High Court or a magistrate may issue a warrant to enter and search any premises that are within the jurisdiction of that judge or magistrate if there are reasonable grounds to believe that a contravention of this Act took place or is taking place. The warrant may only be executed during the day unless the judge or magistrate authorises that it may be executed during the night.

• Powers to enter and search

A person who is authorised to enter and search premises may enter and search the premises or any person on the premises if there are reasonable grounds for believing that the person has personal possession of an article or document that has bearing on the investigation. He/she may also request information about any relevant article or document, take extracts or make copies of any document or book and use any computer on the premises including requiring assistance from any person on the premises to use such computer.

• Conduct of entry and search

A person who enters and searches premises must conduct the entry and search with strict regard to decency and order, and with regard for each person’s right to dignity, freedom, security and privacy.

• Claims that information is confidential

Whenever a claim is made to an investigator or inspector that information is confidential it must be done in writing stating reasons for such claim. The Commissioner, Tribunal, inspector or investigator must consider the claim and notify the claimant whether or not the information will be treated as confidential or not.
CHAPTER 6 (cont)

Part C - Offences and penalties

• Breach of confidence

Information about the personal affairs of any person obtained in carrying out the functions of this Act may not be disclosed and it is an offence to do so.

• Hindering administration of Act

It is an offence to hinder, oppose, obstruct or unduly influence any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by this Act. The following will be offences:
  o a person, having been summoned, fails to appear without sufficient cause;
  o attends as required but refuses to be sworn in or make available any book, document or other item in the possession or under his/her control;
  o fails to answer any question fully and to the best of his or her ability; or
  o gives false evidence.

• Offences relating to Commission or Tribunal

A person commits an offence if that person:
  o contravenes or fails to comply with an order of the Tribunal;
  o attempts to improperly influence the Tribunal or a regulator concerning any matter connected with an investigation;
  o attempts to influence the proceedings or findings of the Tribunal or a regulator;
  o does anything that would have been contempt of court had the proceedings occurred in a court of law;
  o knowingly provide false information to a regulator;
  o defames the Tribunal, or a member of the Tribunal, in their respective official capacities;
  o willfully interrupts the proceedings of a hearing or misbehaves in the place the hearing is conducted;
  o acts contrary to a warrant to enter and search; or
  o without authority, but claiming to have authority, to enter and search premises or attach or remove any article or document.

• Offences relating to prohibited conduct

It is an offence for any person to alter, obscure, falsify, remove or omit a displayed price, labelling or trade description without authority or to fail to act in accordance with a compliance notice.

• Penalties

For breach of confidence a person could be fined or sent to prison for a period not exceeding 10 years or to both a fine and imprisonment. In any other case a person might be fined or imprisoned for a period not exceeding 12 months or both.

• Administrative fines

An administrative fine may not exceed 10% of the respondent’s annual turnover during the preceding year or R100,000 taking into account factors like the nature and duration of the offence, losses and damages suffered, behaviour and cooperation of the respondent, market circumstances and the level of profit derived from the contravention and previous contraventions of this Act.
CONSUMER PROTECTION ACT

CHAPTER 6 (cont)

• Vicarious liability

A person or agent and his employer are jointly and severable liable for anything done or omitted. This section does not apply in respect of criminal liability.

Steps to be taken

Suppliers need to consider the impact of this Act on their businesses. Things to consider are:

• engagement letters and standard terms and conditions attached to it need to be considered and reviewed to ensure that the provisions of this Act are not contravened;
• safety, durability and warranties of products and business lines;
• marketing, packaging and display of goods and services;
• disclosure of information about goods and services;
• training of staff in terms of the provisions of this Act;
• position of the entity in the supply chain; and
• appropriateness of insurance cover.

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CONTACT:

Japie Schoeman
Partner
+27 11 488 1786
jschoeman@bdo.co.za

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