

Regulatory Update 29-04-2009	Consumer Protection Act 2008 (promulgated)
A <b>Main &amp; sub-category</b>	Consumer protection – Consumer Protection Act - promulgated
B <b>Headline</b>	The Consumer Protection Act 68 of 2008 has been promulgated. While some parts dealing with administrative matters will come into effect on 24 April 2010, the bulk of the provisions dealing with the supplier – consumer relationship will only come into effect on 24 October 2010. The Act will have a material impact on all organisations' standard terms, potential liability, marketing practices, liability insurance, complaints handling, product labeling & display, product safety, loyalty schemes, pricing, sales records, pre-paid credits and waste disposal.
C <b>Affected areas</b>	All customer facing operations; marketing; sales; legal; compliance; risk; standards; health & safety; insurance
D <b>Regulatory source</b>	Notice 467 in Gov Gazette 32186 of 29 April 2009
E <b>Overview</b> [high level]	
1) <b>INTRODUCTION</b>	The Act seeks to advance the social and economic welfare of consumers in South Africa by providing a range of new statutory rights and safeguards. The Act will have a material impact on all businesses promoting or selling goods or services to consumers.
2) <b>APPLICATION</b> [s5 read with s1]	The Act applies to all marketing or selling of goods or services to <i>consumers</i> in the ordinary course of a supplier's business.
	<p>a) "consumer", in respect of any particular goods or services, means-</p> <ul style="list-style-type: none"> <li>i) a person to whom those particular goods or services are marketed or sold in the ordinary course of the supplier's business;</li> <li>ii) if the context so requires, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective whether that user, recipient or beneficiary was a party to a transaction for the supply of those goods/services;</li> <li>iii) under certain circumstances, a franchisee in terms of a franchise agreement.</li> </ul> <p>b) "goods" include: (i) anything marketed for human consumption; (ii) any tangible object not otherwise contemplated in (i) including any medium on which anything is or may be written or encoded; (iii) any literature, music, photograph, motion picture, game, information, data, software, code, or other intangible product written or encoded on any medium, or a license to use any such intangible product; (iv) 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 (v) gas, water and electricity</p> <p>c) "services" covers a very wide variety of services, including certain financial and intermediary services, transport, training, entertainment, etc.</p> <p>d) "supplier" means a person who markets any goods or services.</p>
	<b>Exceptions</b>
	<p>a) Section 5(2)-(8) provides for exclusions from the ambit of the Act. These are transactions -</p> <ul style="list-style-type: none"> <li>i) of which goods and services are supplied or promoted to the state,</li> <li>ii) where the consumer is a juristic person whose asset value or annual turnover, equals or exceeds the threshold value determined by the Minister;</li> <li>iii) that constitutes a credit agreement to the National Credit Act (goods or services subject to the credit agreement are not excluded); and</li> <li>iv) pertaining to services supplied under an employment contract, bargaining agreement (i.t.o the Constitution and the Labour Relations Act 66 of 1995) and a collective agreement (to the Labour Relations Act 66 of 1995).</li> </ul> <p>b) Any service which constitutes advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002; or which is regulated under the Long-term Insurance Act, 1998 or the Short-term Insurance Act, 1998. The exclusion of the Short-term and Long Term Insurance Acts are subject to those sector laws being aligned with the consumer protection measures provided for in the Act within 18 months from commencement of the Act, failing which, the provisions of the Act will apply. [Schedule 2 section 10]</p> <p>c) Only the provisions relating to consumer redress is applicable to hazardous chemical products. [s2(9)]</p> <p>d) If any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of this Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 60 (monitoring of goods) and 61 (product liability). [s5(5)]</p>
3) <b>MARKETING</b>	
a) <b>Direct Marketing</b>	
	<ul style="list-style-type: none"> <li>i) Consumers may refuse direct marketing. Direct Marketers must implement procedures to facilitate the receipt of demands to stop initiating any further communication. [s 11]</li> <li>ii) A consumer may rescind a transaction resulting from any direct marketing without reason or penalty. [s16]</li> <li>iii) Direct marketers who markets goods or services to a consumer and who concludes an agreement must inform the consumer of the right to rescind. [s32]</li> </ul>
b) <b>Ethics</b>	
	<ul style="list-style-type: none"> <li>i) Consumer may not be subjected to unfair discrimination on any of the grounds in the Constitution or other laws. [s8]</li> <li>ii) A supplier must not offer to supply or market any goods or services in a manner that is unfair, unreasonable or unjust or require a consumer 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. [s48]</li> <li>iii) A Consumer must be notified of a clause in an agreement that may - <ul style="list-style-type: none"> <li>(1) purports to limit the risk or liability of the supplier;</li> <li>(2) constitute an assumption of risk or liability by the consumer;</li> </ul> </li> </ul>

- (3) impose an obligation on the consumer to indemnify the supplier; or
- (4) be an acknowledgement of any fact by the consumer. [s49]
- iv) No one may make a false representation when he invites other persons to conduct work, business or an activity from their home including the investment of money. [s37]

### c) **Advertising / Promotions**

- i) A supplier may not advertise goods or services as available at a specified price and in a manner that may result in consumers being misled with regards to the actual availability of those goods or services. If a supplier advertises goods or services at a specified price the supplier must make those goods or services available at that price. [s30]
- ii) Anyone who makes a promotional offer must ensure that the supply of the prize is sufficient to accommodate all reasonable anticipated demands resulting from the offer. [s34(5)(a)]
- iii) Loyalty credits or awards are a legal medium of exchange when offered or tendered as consideration of any goods or services offered in terms of that loyalty program. [s35]
- iv) One may not promote on the representation that the consumer will receive a benefit if he gives the supplier names of prospective consumers and that rebate is contingent upon an event occurring after the consumer agrees to the transaction [s38]
- v) Suppliers may not imply a false representation concerning a material fact to a consumer. [s41]
- vi) A person must not carry on business, advertise, promote, offer to supply any goods or services, or enter in to a transaction or agreement with a consumer under any name except the person's full name as recorded in an identity document or a business name registered to that person. [s79]
- vii) A person must not directly or indirectly inform another person that the other person has:
  - (1) won a competition when no competition has been conducted or the prize for that competition is subject to a previously undisclosed condition;
  - (2) a right to a prize if the prize was generally available or offered to all similarly situated persons or class of persons. [s36(2)]
- viii) Promoters may not require any consideration to be paid save for reasonable costs of posting or transmitting an entry form. [s36(3)]
- ix) A person may not promote a multiplication scheme, a pyramid scheme or a chain letter scheme. [s43]

## 4) **LABELING, DISPLAY AND DISCLOSURE**

### a) **Product Labeling** [s24]

- i) A retailer may not supply or display any goods if he knows, (reasonably could determine or has reason to suspect that):
  - a trade description applied to those goods is likely to mislead the consumer as to any matter implied or expressed in that trade description; and
  - a trade description or trade mark applied to those goods has been altered
- ii) A retailer must, with respect to any goods within the retailer's control, take reasonable steps to prevent the above (par (i)).
- iii) The producer or importer of any goods that have been prescribed must apply a trade description to those goods disclosing the country of origin.
- iv) Producers, suppliers, importers that packages any prescribed goods must display a notice that discloses the presence on any genetically modified ingredients or components of those goods.

### b) **Display and disclosure**

- i) Retailers must not display goods for sale without displaying a price in relation to those goods. Retailers are only exempted if the goods are displayed predominantly as a form of advertisement of the supplier, or of goods, in an area within the supplier's premises to which the public does not ordinarily have access to. [s23]
- ii) One may not apply to any goods a trade description that may mislead the consumer or alter a trade description or trade mark [s24]
- iii) Suppliers must provide a written record of each transaction to the consumer. [s26]
- iv) Intermediaries must disclose the prescribed information to any person whom he solicits or agrees to represent or to whom he offers to supply, or supplies any service, goods or property belonging to a third person. [s28]
- v) Suppliers that have been re-conditioned and that bear the trade mark of the original producer or supplier must apply a notice stating clearly that the goods have been reconditioned. [s25]

## 5) **CONTRACTUAL ISSUES**

### **Agreement**

- a) A Supplier must not require a condition -
  - i) to the effect that the consumer must purchase any other goods or services from that supplier; or
  - ii) to enter into an additional agreement or transaction with the same supplier or agree to purchase any particular goods or services from a designated third party. [s13]
- b) It is an implied condition of every transaction for the supply of goods or services that -
  - i) the supplier is responsible to deliver the goods or perform the services on the agreed date and at the agreed time; at the agreed place of delivery or performance; and at the cost of the supplier.
  - ii) the agreed place of delivery of goods or performance of services is the supplier's place of business and if the supplier does not have one its residence; and
  - iii) goods to be delivered remain at the supplier's risk until the consumer has accepted delivery of them. [s19]
- c) A Supplier must not promote any goods or services on the basis that the goods or services are to be supplied, or the agreement or modification will automatically come into existence. Such an agreement, or modification, entered into as a result of an offer or inducement is void. [s31]
- d) If an agreement for the supply of goods or services is done telephonically or by postal order or fax a supplier must disclose a list of information to the consumer before the concluding of an agreement. [s33]

- e) If the consumer is mentally unfit and the supplier knew it, any agreement to transact is void and if the consumer is an unemancipated minor the agreement is voidable. [s39]
- f) A prepaid certificate, card, credit, voucher or similar device does not expire until the earlier of the date on which its full value has been redeemed or 5 years after the date on which it was issued. [s63]
- g) A Supplier may not take advantage of the fact that a consumer was unable to protect his own interests because of physical or mental disability, illiteracy, ignorance or inability to understand the language of an agreement. [s40]
- h) If a consumer agreement is not in writing, the supplier must keep record of the transactions entered into over the telephone or any other recordable form. [s50]
- i) A Supplier must not make a transaction or agreement subject to a term or condition if -
  - i) its general purpose is to mislead or deceive the consumer ;
  - ii) it purports to waive or deprive a consumer of a right set out in the Act or limits a supplier from liability for any loss attributable to the gross negligence of the supplier. [s51] This does not preclude a supplier from requiring a personal identification code or number that in the normal course of business necessitates the provision of such code.

### **Cancellation**

- a) Consumers may cancel any advance booking, reservation or order for any goods or services to be supplied. No cancellation fees may be charged if the consumer is unable to honor the booking, reservation or order because of the death or hospitalization of the person for whom, it was made. [s17]
- b) A Consumer may cancel a fixed term agreement at any time by giving the supplier 20 business days notice. If the agreement has expired it will automatically continue on a month to month basis. Upon cancellation the consumer remains liable for any outstanding amounts and the supplier may impose a reasonable cancellation penalty. [s14] Section 14 is not applicable to transactions between juristic persons – regardless of their annual turnover or asset value.

## **6) DAMAGES / LIABILITY / RISK**

- a) Consumers are not responsible for damage to goods displayed by a supplier. [s18]
- b) Consumers may return goods to the supplier, and receive a full refund of any consideration paid if the supplier has delivered goods in terms of an agreement arising out of direct marketing. [s20]
- c) Consumers have a right to assume that the supplier has the legal right to supply the goods. Suppliers are fully liable for any charge or encumbrance pertaining to the goods in favour of any third party unless the supplier guarantees that the consumer is to have quiet possession of the goods. [s44]
- d) If suppliers fail to deliver goods on the specified date and time because of insufficient stock or capacity, the supplier must refund the consumer the amount paid (with interest) and compensate the consumer for any economic harm sustained. [s47(3)]
- e) Consumers may within 6 months after delivery of goods (carrying an implied guarantee under section 55) return the goods without penalty at the suppliers risk and expense. Suppliers may repair or replace the defective goods or refund the consumer. If a supplier chooses to repair the goods and within 3 months after repair the defect has not been remedied or a further defect is discovered the supplier must replace the goods or refund the consumer. [s56]
- f) Service providers must warrant every new or re-conditioned part installed during repair work for a period of 3 months after the date of installation. [s57]
- g) The producer, importer, distributor or retailer of any goods is liable for any harm caused as a consequence of: (i) supplying unsafe goods; (ii) a product failure, (iii) defect of hazard in any goods; or (iv) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from the use of any goods. [s61]
- h) A person that supplies hazardous goods to consumers must display on the packaging adequate instruction for the safe handling and use of those goods. [s58]
- i) If a supplier accepts payment in periodic installments, each amount paid by the consumer remains the property of the consumer and the goods remain at the risk of the supplier until delivery. [s62]
- j) Suppliers that have possession of property belonging to the consumer must not treat the property as his own he must exercise a reasonable degree of care and he would be liable to the owner for any loss. [s65]
- k) Suppliers performing a service to goods or property must retain the parts removed from the goods or property, keep them and return them to the consumer. [s67]
- l) If an employee incurred liability in terms of the Act for anything done in the course of employment or activities on behalf of their principal, the employer is jointly and severally liable. [s113]

## **7) REDRESS**

- a) If the consumer has exercised a right as set out in the Act the supplier must not -
  - i) discriminate against that consumer,
  - ii) penalize the consumer,
  - iii) alter the terms and conditions of a transaction with the consumer,
 to the consumer's detriment or take an action to accelerate, enforce, suspend or terminate an agreement with the consumer. [s68]
- b) Anyone may seek to enforce any right in terms of the Act by referring the matter directly to a Tribunal, ombud or a court if all other remedies have been exhausted. [s69]
- c) A consumer may resolve any dispute by referring the matter to an alternative dispute resolution agent. [s70]
- d) Anyone may file a complaint with the National Consumer Commission. [s71]
- e) A Court may order:
  - i) a supplier to alter or discontinue conduct inconsistent with the Act; and
  - ii) damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions that the Court considers just and equitable.

This does not diminish any right of the consumer or supplier to recover interest or special damages where it may be recoverable, or to recover money paid if the consideration for the payment of it has failed. [s71]

	f) The National Consumer Commission is established as an organ of state within the public administration but is an institution outside the public service. [s85]										
<b>F Compliance issues</b>	For a main overview, see Part E above. In a project separate from this bulletin, we have identified approximately 218 steps / measures which organisations should take to ensure compliance and manage legal risk.										
<b>G Effective dates</b>	Schedule 2 to the Act provides for various transitional provisions. While some parts dealing with administrative matters will come into effect on 24 April 2010, the bulk of the provisions dealing with the supplier – consumer relationship will only come into effect on 24 October 2010.										
<b>H Penalties/offence</b>	<ol style="list-style-type: none"> <li>1) Non-compliance does not automatically create an offence as consumers in general were not interested in jailing suppliers but merely wanted compensation or refunds for losses suffered. Only in cases where the supplier failed to comply with an order would it become a criminal matter.</li> <li>2) It is an offence to – <ol style="list-style-type: none"> <li>a) disclose any personal or confidential information concerning the affairs of any person obtained in carrying out any function in terms of the Act or as a result of initiating a complaint; [s107]</li> <li>b) hinder any person who is exercising a power or performing a duty imposed by the Act; [s108]</li> <li>c) contravenes or fails to comply with an order of the Tribunal; and [s109]</li> <li>d) alter, obscure, falsify, remove or omit a displayed price, labeling or trade description without authority [s110].</li> </ol> </li> <li>3) Anyone convicted of an offence can be liable to imprisonment for up to 10 years a fine or both. [s111]</li> <li>4) The National Consumer Tribunal may impose administrative fines of up to 10% of the respondent's annual turnover during the preceding financial year and a fine of R1 000 000. [s112]</li> </ol>										
<b>I Regulatory body</b>	Department of Trade and Industry										
<b>J External advisor comment</b>	<ol style="list-style-type: none"> <li>1) The regulations (without which the Act cannot come into effect) are expected to be finalised in the third or fourth quarter of 2009. It is not known at this stage whether they will be published for comment first.</li> <li>2) It is advisable to establish a formal program within the organisation to evaluate the impact of the Act and to start putting measures in place to ensure compliance once the law comes into effect.</li> <li>3) Areas that will definitely require scrutiny are: <table border="0" style="width: 100%;"> <tr> <td style="width: 50%;">a) standard form agreements &amp; warranties;</td> <td style="width: 50%;">b) product safety standards;</td> </tr> <tr> <td>c) marketing practices;</td> <td>d) loyalty schemes;</td> </tr> <tr> <td>e) liability insurance;</td> <td>f) pricing disclosures and sales records;</td> </tr> <tr> <td>g) complaints handling &amp; procedures;</td> <td>h) pre-paid credits; and</td> </tr> <tr> <td>i) product labeling &amp; display;</td> <td>j) waste disposal.</td> </tr> </table> </li> <li>4) Avoid different departments / business units in the organisation taking a piecemeal approach as it may lead to inconsistencies, duplication and even conflicting approaches to compliance.</li> <li>5) Guard against knee-jerk reactions to expected “fear-mongering” or hype generated by external parties seeking to sell advisory services and/or insurance.</li> <li>6) Especially product liability insurance must be approached with extreme care as Insurers may inflate premiums at first due to the fear of the unknown. Insurers must prove that they have had regard to countries where similar laws have been in force for a while. South Africans are generally perceived as less litigious than, e.g. Americans.</li> </ol>	a) standard form agreements & warranties;	b) product safety standards;	c) marketing practices;	d) loyalty schemes;	e) liability insurance;	f) pricing disclosures and sales records;	g) complaints handling & procedures;	h) pre-paid credits; and	i) product labeling & display;	j) waste disposal.
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