



THE CONSUMER PROTECTION ACT: A BRIEF OVERVIEW

Until recently, the field of consumer protection law remained largely unregulated and it is due to the shortcomings in the protection of consumers that the South African Government signed the Consumer Protection Act, No. 68 of 2008 into law on 24 April 2009.

While it is incorrect to assume that no prior legislation regulated this field of law, it is important to recognise that the various pieces of legislation, which were already in existence, are both scattered and fragmented and have resulted in a lack of understanding of basic consumer rights, an inadequate consumer voice and continuous exploitation of consumers.

Therefore, in an attempt to promote a consistent legislative and enforcement framework in this field, the Consumer Protection Act, having two phases of implementation (an early effective date of 29 April 2010 and the general effective date, which was delayed to 1 April 2011) will aim to promote a fair, accessible and sustainable marketplace for consumer products and services and make provision for improved standards of consumer information, to prohibit certain unfair marketing and business practices.

Who will the Consumer Protection Act affect?

The act applies to every transaction which occurs within South African borders irrespective of whether the supplier resides or has its principal place of business within these borders.

The term "Consumer" describes persons to whom goods or services are marketed, who have entered into transactions with suppliers, users of particular goods or recipients/beneficiaries of services. Although the definition of "consumer" is broad, it is subject to certain exclusions.

Juristic persons, whose net asset value or annual turnover exceeds the monetary threshold of R3 million at the time of the transaction, are excluded from the protection of the Act.

Furthermore, the Act is not applicable in respect of the following:

- Goods or services promoted or supplied to the state;
- Credit agreements, in terms of the National Credit Act, but not goods or services;
- Services under employment contracts;
- Agreements giving effect to collective bargaining agreements; and
- Agreements giving effect to bargaining agreements (Section 213 of the Labour Relations Act).

Although the Act has repealed many of the of the existing provisions from acts such as the Consumer Affairs Unfair Business Practices Act of 1988; and the Trade Practices Act of 1976, the Act should be applied concurrently to other legislation protecting consumers, such as the National Credit Act, No. 35 of 2005. However, if the Act provides better protection to a consumer than any other piece of legislation, then that legislation will not apply. Conversely, where an existing piece of legislation already protects the consumer adequately or better than the Consumer Protection Act, then that piece of legislation will take precedence.

The Primary Focus of the Act

The Act focuses primarily on four areas: marketing and advertising practises, consumer agreements and contracts, franchise agreements and strict liability. In addition, there are a number of other areas that are visited. Chapter 2 of the Act regulates the specific rights of the consumer.

Consumer Right No. 1: Right of equality: this right entails a prohibition on any form of unfair discrimination in the consumer market, including the right to unlimited access to goods and services, the right to high-quality goods and services, the right to fair pricing of goods and services and the right to lodge complaints.

Consumer Right No. 2: Right to privacy: this right entails certain limits on the unfettered use of consumer's personal information for unsolicited direct marketing campaigns by requiring all direct marketers to provide consumers with an "Opt out" option for unsolicited marketing communication. Consumers can also register a pre-emptive block on a register to be operated by government or industry.

Consumer Right No. 3: Right to Choose: this entails the right of a consumer to select a supplier of his or her own choice, the right to cancel or renew a fixed term contract without penalty or charge, the right to receive quotes prior to authorisation for repairs of maintenance, the right to cancel direct marketing transactions within five (5) business days ("cooling-off" period) without incurring penalties, and the right to return goods and receive refunds within fifteen days

Consumer Right No. 4: Disclosure and information: this right entails provisions which require simple and transparent contracts which supply consumers the right to information in plain and understandable language, requiring the compulsory display of prices and provision of transaction records, the right to sale records such as receipts and invoices, requiring product labels and trade descriptions not to be misleading, and allowing the consumer the right to the identification of deliverers, installers and others.

Consumer Right No. 5: Fair and responsible advertising, marketing and promotion: this right prohibits unfair marketing practices such as bait marketing, referral, negative option marketing, and sets standards for customer loyalty programs

Consumer Right No. 6: Fair and honest dealings: this right prohibits false, misleading and deceptive representations; prohibits overselling and overbooking; and prohibits unconscionable conduct.

Consumer Right No. 7: Right to Fair, just and reasonable terms and conditions: this right prohibits unfair, unreasonable or unjust contract terms and requires consumers to be given free copies of contracts. This right outlaws unilateral changes to contracts and in addition outlaws certain types of agreements (minors, negative option, etc) or any form of contracting out.

Consumer Right No. 8: Right to Fair Value, Good Quality and safety: this right facilitates the access to quality service, safe goods and services and redress by providing statutory warranties for safety and quality and most importantly by extending strict liability to retailers for illness, injury, damage to property and death as a result of defective goods or improper labelling.

Consumer Right No. 9: Right to Accountability from Suppliers: this right provides that consumers that are subject to lay-by agreements may be entitled to the supply of equivalent or superior products, alternatively, request full refund of money paid, plus interest, where the goods or services provided are defective or improper. Furthermore, suppliers in possession of any prepaid certificates, credits, vouchers, membership fees or other money belonging to the consumers, must not treat such property as theirs; exercise care, diligence and skill; and assume liability for any losses suffered by consumers in this regard.

The Consumer's Voice

A consumer is entitled to have their voice heard and the right to redress free of discrimination, intimidation or penalization from suppliers. A consumer, who feels that their consumer rights have been limited or infringed, has a number of avenues available to him or her including referring complaints to alternative dispute resolution forum, referring a complaint to a particular ombudsman identified in the Act or referring a matter to the National Consumer Commission (similar to the Competition Commission). Furthermore the courts have the power to order suppliers to alter or discontinue any conduct that is inconsistent with the Act and to award damages against a supplier for collective injury to all or a class of consumers and also decide on the just and equitable distribution of such damages.

Contravention of the Act

In cases of contravention of the Act, the National Consumer Commission may, as an initial step in its investigation, issue a compliance notice which sets out a contravention or alleged contravention by a supplier, affording a supplier the opportunity to rectify the contravention and avoid prosecution under the Act. Failure to adhere to the provisions of the act may result in a fine, and in severe cases, even imprisonment. These fines may not exceed the greater of 10% of the supplier's annual turnover during the preceding financial year or a R1 000 000. In the penalisation provisions of the Act, express provisions are made for vicarious liability, and allow any employer to be held liable jointly and severally with its employee for a contravention of the CPA.

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