

CONSUMER PROTECTION ACT MATTERS

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The Consumer Protection Act, 2009 (the Act) was signed into law by the President on 24 April 2009.

In terms of the Act, those provisions under which regulations are to be promulgated, and those under which the watchdog Consumer Protection Commission will be created, will come into effect on the "early effective date", 24 April 2010. The remaining provisions of the Act, and notably those with which supplier compliance is required, are expected to come into effect on 24 October 2010, "the general effective date".

A vast number of everyday transactions between suppliers and consumers will then be regulated in a myriad of ways by the Act. Suppliers need to be poised for compliance on the general effective date as the sanctions for transgressions of the Act can be severe.

Supplier firms requiring assistance and advice in respect of compliance or commenting and making

submissions on the draft regulations soon to be published under the Act should seek expert advice.

This newsletter highlights just a few of the many new forms of consumer transaction regulation introduced by the Act.

The Act is a radical attempt to reform the consumer market in order to provide a codified system of protection for all consumers, in all parts of the country.

The far-reaching provisions of the new Act are bound to redefine the way ordinary South Africans do business. While this may bring South Africa in line with international standards, the concern that the Act will create complex legal and practical problems is a real one and may even have an opposite effect to that intended, as it is apprehended that businesses may, in some cases, have to hike prices to pay for compliance efforts.

Nick Altini, Director

Application of the Consumer Protection Act

The Act applies to:

- every transaction occurring within the Republic;
- the promotion of any goods or services or of the supply of any goods or services;
- goods or services that are supplied or performed in terms of a transaction.

The Act has a very wide application and manufacturers, importers, retailers, distributors, agents and marketers should be conscious of the fact that the Act applies not only to the provision but also to the promotion and marketing (i.e. advertising) of goods and services as well as to actual agreements between suppliers and consumers in terms of which goods or services are supplied or offered. The definition of the term 'transaction' attempts to cover almost every agreement for, or act of supplying, goods or services occurring in South Africa made in the ordinary course of business. The term 'ordinary course of business' indicates that supply outside of the ordinary course of business, does not qualify as a transaction for the purposes of the Act. Where one friend privately sells a car to another, the transaction is not subject to the Act (unless the selling party ordinarily conducts the business of selling cars).

Although a transaction typically involves some form of consideration payable, a transaction also includes *'the supply of goods or services in the ordinary course of business to any of its members by a club, trade union, association, society whether incorporated or unincorporated... irrespective of whether there is a charge or economic contribution demanded or expected'*. The Act applies irrespective of whether the supplier resides or has its principal office outside the Republic, or operates on a for-profit basis or otherwise.

The term 'goods' is a common sense notion of things ordinarily traded and is defined to include almost any tangible or intangible item. This covers, but is not limited to, all consumables, as well as literature, music, information and legal interests in immovable property. 'Services' are defined to include any work or undertaking performed for the benefit of another including those relating to education, banking, advice and consultation, transportation, accommodation, electronic communication and entertainment, as well as the right to access or occupy premises. The Act applies to persons promoting or offering services even if that person does not actively participate in, supervise or engage in the service.

The upshot of this is that all parties to a transaction, at all stages of the supply chain, will have to pay closer attention to the way in which they conduct business and implement trading policies in order to avoid falling foul of the Act.

The application of the Act to pre-existing transactions and agreements is, however, limited. It generally does not apply to the marketing of any goods or services, transactions concluded and or goods and services supplied before the general effective date.

In addition, the Act exempts certain types of transactions. Exemptions include transactions in terms of which:

- goods or services are promoted or supplied to the State;
- the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value to be determined by the Minister (it is expected that these thresholds will be set at a level that will ensure that small businesses and juristic persons that are alter egos of individuals will be protected under the Act);
- the transaction constitutes a credit agreement under the National Credit Act (although the goods or services subject to the credit agreement will be subject to the Act. For example, in the case of the sale of a car on hire purchase, the credit agreement itself in terms of which the car is bought and sold will be subject to the National Credit Act, while the actual car, will have to meet with the quality and safety requirements of the Act);
- services are supplied under an employment contract;
- effect is given to a collective bargaining agreement.

Banking and related financial services and advice regulated under the Financial Advisory and Intermediate Services Act, the Long-term Insurance Act or the Short-term Insurance Act are also carved out.

Regulatory authorities are entitled to apply for exemptions for the industry under their control, but only to the extent that the sector regulator has a remit to regulate consumer protection affairs, and to the extent that such regulation would not detract from rights that consumers in the relevant sector would otherwise enjoy under the Act. However, regardless of what exemptions apply, all importers, producers, distributors and retailers are always subject to safety standards that must be developed in terms of the Act and are strictly liable (liable without fault or negligence) for any damage caused by unsafe or defective goods.

Chris Charter, Director and Gregory Solik, Candidate Attorney

The price is right...or is it?

Suppose that you are browsing the aisles of your local store and discover, to your delight, that the price on imported tobacco has been slashed by 50%. Imagine then your disappointment if you were informed that the displayed price is incorrect and that, to support your habit, you are required to pay the full price as listed on the store's database.

The legal position until the general effective date of the Act is that the consumer would not be able to hold the supplier to the price indicated on the tobacco packaging or the shelf on which the tobacco was being advertised for sale. A price tag is merely an invitation by a supplier to do business with a consumer and does not constitute an offer to contract. A supplier is accordingly free to accept or reject any offer in the event that the price stipulated on a good does not align with the supplier's actual price.

This established principle dates back to the early 1900s and exists for very practical reasons. Smith J in the case of *Crawley v Rex 1909 TS* summarised the issue as follows:

"The mere fact that a tradesman advertises the price at which he sells goods does not appear to me to be an offer to any member of the public to enter into the shop and purchase goods, nor do I think that a contract is constituted when any member of the public comes in and tenders the price mentioned in the advertisement. It would lead to extraordinary results if that were the correct view of the case. Because then, supposing a shopkeeper were sold out of a particular class of goods, thousands of members of the public might crowd into the shop and demand to be served, and each one would have a right of action against the proprietor for not performing his contract".

The Act provides that a retailer must not display any goods for sale without displaying a price in relation to those goods, unless the goods are being displayed predominantly as a form of advertisement of the supplier, or of the supplier's goods, in an area within the supplier's premises to which the public does not ordinarily have access (such as a shop window).

Accordingly, the Act generally obliges a supplier to display a price for goods on sale. The Act further sets out a number of detailed

criteria for establishing whether a price is being "adequately displayed". Naturally, a supplier must not display conflicting prices for goods.

The underlying principle in relation to prices is that a supplier must not require a consumer to pay a price for any good higher than the price displayed for the good concerned or, if more than one price is concurrently displayed, higher than the lowest of the prices so displayed.

There are two exceptions to this principle, and where a supplier is not bound by a displayed price, namely -

- where the displayed price contains an inadvertent, and obvious, error and the supplier has corrected the error and taken reasonable steps to inform consumers of the error and the correct price; and
- where an unauthorised person has altered, defaced, covered, removed or obscured the price displayed or authorised by the supplier.

It is debatable whether the relevant provisions of section 23 of the Act could be interpreted to override the common law position that a price tag is merely an invitation to do business. It is interesting that the exceptions are referred to as circumstances where the supplier "is not bound" by a price. This construction seems to suggest that the consumer would be entitled to hold the supplier to a displayed price, unless the supplier could rely on one of the exceptions. This is a radical departure from the common law relating to displayed prices as it currently stands.

Seraj Haroun, Associate

The implied warranty of quality

Something that suppliers of goods to consumers will have to get used to is the imposed warranty of quality placed on all goods sold in transactions that are subject to the Act.

Gone are the days when suppliers can limit warranties to very short periods, or carve out bases for claims under warranties on defective goods. Every good sold (whether new or second hand) is subject to a six month warranty of quality, subject to one exception. It is permissible for suppliers to sell goods that are defective, or which may not be fit for purpose, on the express understanding that this is the case and having specified the nature of the defect in the good.

The six month implied warranty of quality means that consumers have the right to return defective goods within six months of delivery. The return must take place at the supplier's sole risk and expense. Most importantly, the consumer has an election as to whether to direct that the defective good should be, on the one hand, repaired or replaced, or on the other hand, that the consumer should be refunded the purchase price of the good, in full.

If the consumer elects to have the good repaired, then there is an implied three month warranty on the repair. The effect of this is that if the repair proves to be less than entirely effective or, if

during the three month period any other defect arises, the consumer may demand that the supplier replaces the good or refunds the consumer in full. The consumer does not have to permit the supplier a second opportunity to repair the defective good.

These warranties represent the minimum quality assurance that must accompany the sale and repair of every good, but are in addition to any other warranty that may be given by the supplier, or any other right the consumer may enjoy in law in respect of defective goods.

It is most important to note that it is unlawful to attempt to contract out of any right afforded to a consumer in terms of the Act. Even if a consumer were to sign terms and conditions upon purchasing a new good, which terms and conditions purported to limit the warranty in terms of duration, the nature of defects covered by the warranty, or rights available to the consumer under the warranty, such an agreement would be rendered void by the Act. Suppliers of goods will have to ensure that they are geared to deal with returns of defective goods and to make refunds where these are demanded.

Nick Altini, Director

The new price of loyalty

Many people are card-carrying members of at least one customer loyalty programme. Generally, these programmes operate on a very basic premise: the more the consumer spends with a particular supplier, the more loyalty credits or other rewards are accumulated. While spending is often an uncomplicated exercise, loyalty credit or reward redemption can be complicated for consumers.

The Act deals with customer loyalty programmes and this is the first attempt by the legislature to regulate such programmes.

The Act defines "loyalty credits or awards" in respect of any particular loyalty programme to include: any benefit accruing to a consumer (being a loyalty programme member), any right to any goods or services, or any points, credits, tokens or other devices that may entitle the consumer to claim goods, services or other benefits in terms of that loyalty programme.

The Act establishes loyalty credits or awards as a legal medium of exchange when offered as consideration for any goods or services in terms of the relevant loyalty programme to which those loyalty credits or awards relate. A loyalty programme therefore effectively creates a currency. The Act in turn, creates specific obligations for sponsors of, or suppliers who participate in, loyalty programmes, related to the use of this currency in any exchange. These obligations may countermand or qualify the currency rules as provided for by that loyalty programme.

Firstly, sponsors or suppliers must ensure a sufficient supply of goods or services available at any time "*to accommodate all reasonably anticipated demands for those goods or services in exchange for loyalty credits or awards*". Sponsors or suppliers can also not restrict or limit the supply of goods or services to be

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acquired using loyalty credits or awards on any basis that would not be applicable to an ordinary paying (cash) customer. The Act further provides that sponsors or suppliers may not offer goods or services to consumers using loyalty credits or awards of an inferior quality to those which would be available to an ordinary paying customer. In addition, where a consumer is required to pay a periodic fee in relation to that consumer's membership of the loyalty programme, that consumer cannot be required to pay any monetary charge for administration, processing or handling in redeeming any loyalty credit or award. Finally, the supplier cannot require that the consumer purchase any other goods or services as a condition of redeeming a loyalty credit or award.

The Act does allow for suppliers to impose closed periods in respect of goods or services available for exchange using loyalty credits or rewards, but consumers must be adequately notified (in writing,

at least 20 business days prior to the closed period). Closed periods cannot exceed a total of 90 days within any calendar year.

It is apparent that customer loyalty programmes, particularly those that are more sophisticated in their methods of reward and redemption, will require more planning and forethought than those who offer these loyalty programmes may currently contemplate. The fact that a consumer is utilising a loyalty credit or reward as consideration for a good or service as opposed to, for example, cash, must not in any way prejudice that consumer such that she receives an inferior good or service, or is subject to limitations or restrictions in acquiring the good or service that his loyalty credit or award entitles him to.

Aneeka Savahl, Associate

Promotional competitions - two notable changes

The Act will repeal section 54 of the Lotteries Act and its Regulations dealing with promotional competitions. The Act reiterates most of the provisions of the soon-to-be repealed legislation relating to promotional competitions, but with two notable changes.

The first notable change relates to the definition of 'promotional competition'. The Act defines a promotional competition as "*any game, competition, scheme, arrangement, system, plan or device for distributing prizes by lot or chance, conducted in the ordinary course of business for the purposes of promoting goods, services or persons, where the prize exceeds a certain threshold, and irrespective of whether or not participants are required to demonstrate any skill or ability before being awarded a prize*". Under the Lotteries Act, it is possible to argue that a competition which involves an element of skill by a participant is not a promotional competition, as the element of skill suggests that the distribution of prizes is not by chance. The revised definition in the Act closes that loophole by making the element of skill irrelevant, thus having the effect that more competitions will fall within the definition of a 'promotional competition' (and thus be subject to regulation).

The second notable change is that there is no exemption for competitions that do not involve a 'subscription' as defined. The Lotteries Act defines a 'subscription' as the payment of any consideration in respect of the right to participate in a competition.

Currently under the Lotteries Act, if promotional competitions do not involve the payment of such consideration, they are exempt from the provisions of the Lotteries Act and its Regulations for promotional competitions. By contrast, the Act does not mention any exemption for promotional competitions that do not involve a subscription. The only exemption is for competitions where the prizes on offer have a low value, one that is below a threshold to be prescribed by the Minister of Trade and Industry.

Under the Act, offers to participate in promotional competitions must state minimum prescribed information, such as precise details of the offer to enter the competition and prizes, the steps required to accept the offer, how results will be determined, the closing date for the competition, and the manner in which the results will be made known. Also, consumers cannot be required to pay any consideration in respect of the competition other than the reasonable costs of entering the competition. It is therefore important that the rules of a promotional competition are carefully drafted to ensure compliance with the provisions of the Act. Competition rules must be in place before the competition is advertised and must be made available to any prospective entrant or the Consumer Commission on request.

Ilhaam Jakoet, Associate

Application of the Consumer Protection Act to franchising

The Act will significantly change the landscape within which franchise arrangements operate.

Up to now, there has not been any legislation in place dealing specifically with franchise arrangements, and the franchise sector has relied on self regulation. In the new regime, franchise arrangements and transactions between franchisors and franchisees are expressly regulated by the Act.

In terms of the Act, a franchisee is regarded as a "consumer" as defined in the Act and consequently franchisees are afforded various protections, as consumers, under the Act although certain provisions of the Act are expressly stated to not apply to franchisees.

The Act defines the term 'franchise' as "*including a solicitation of offers to enter into a franchise agreement; an offer from a potential franchisor to enter into a franchise agreement with a potential franchisee; a franchise agreement; an agreement supplementary to a franchise agreement and the supply of any goods or services to a franchisee in terms of a franchise agreement.*"

The Act prescribes that franchise agreements must be in writing and signed by the franchisee. Furthermore, franchise agreements must comply with the 'plain and understandable language requirements' detailed in section 22 of the Act (and as explained elsewhere in this newsletter). In addition, franchise agreements must also include the terms and information that will be prescribed by the Minister of Trade and Industry from time to time.

Section 13 of the Act provides that consumers have a right to choose suppliers and products. The Act further provides that a franchisor may not require a franchisee to purchase goods or services from the franchisor or a designated third party unless the franchisor can show convenience to the franchisee that outweighs the limitation on the franchisees' freedom of choice and results in an economic benefit to the franchisee as a consumer. If the franchisor is unable to meet these requirements, then the franchisor is permitted to show that the goods or services that the franchisee was required to purchase reasonably relate to the branded products or services germane to the franchise and that forcing the franchisee to purchase them is justifiable as a method of not diluting the franchise brand.

The Act also provides that the franchisee may cancel a franchise agreement in writing (without having to show cause for the cancellation), without cost or penalty within 10 business days of the franchisee signing the agreement.

Franchisors need to become familiar with the provisions of the Act dealing with franchise agreements and ensure that they will conduct their franchise arrangements in a compliant manner from the general effective date of the Act.

Cézanne Britain-Renecke, Senior Associate

The consumer's right to be informed in plain and understandable language

The Act grants every consumer the right to be provided with information relating to goods or services by the supplier of those goods and services in language that is 'plain and understandable'. Section 22 of the Act states:

"... [A] notice, document, or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort."

Section 22 assumes an objective and low standard of literacy, skill and experience with respect to the average consumer. A supplier has to assess any consumer against this standard to ascertain whether the particular consumer would understand the information provided in so far as it relates to a transaction, as well as his obligations flowing from the information provided. Suppliers must have regard to the context, comprehensiveness, consistency, organisation, vocabulary usage, sentence structure and the use of illustrations and examples in any notice given to consumers. A failure on the part of a supplier to comply with the 'plain and

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understandable language' requirements of the Act may leave the supplier unable to enforce its rights against consumers and open to censure in terms of the enforcement provisions of the Act.

Section 22 also has implications for disclosures made by intermediaries, and mandates that such disclosures be made in plain and understandable language. Specifically, where a supplier has an intermediary who solicits clients on its behalf, then that intermediary must disclose the terms and conditions of supply in respect of whatever product he or she is soliciting the consumer for. The disclosure must be in language that is plain and understandable to the consumer. Furthermore, where an intermediary is soliciting an offer from someone, or where an intermediary is offering the supply of services, then he or she must inform the consumer in plain and understandable language of any services to be performed by an entity other than the intermediary. If the intermediary is selling goods belonging to an entity other than him

or herself, such information must also be disclosed to the consumer in plain and understandable language.

The Act also places obligations on suppliers to advertise goods as being available at a particular price in a manner such that consumers would not be misled by, or be unclear as to what the price being advertised actually is. Along similar lines, the Act deals with false representations made by any person dealing with a consumer. 'False representation' refers to unfair tactics or unfair conduct by a supplier who knowingly takes advantage of the fact that a consumer was unable to protect his or her own interests, owing to illiteracy, ignorance, or inability to understand the language of an agreement or representation.

Jay-Ann Jacobs, Director

Right to fair, just and reasonable conditions

The Act affords all consumers the right to terms and conditions in agreements that are fair, just and reasonable.

In giving effect to this right, the Act prohibits suppliers from supplying goods or services at a price that is unfair, unreasonable, or unjust; or from entering into an agreement whose terms are unfair, unreasonable, or unjust. Terms and conditions are unfair, unreasonable, or unjust if such terms and conditions are so skewed to the detriment of the consumer, and in favour of the supplier, that they can be said to be inequitable, or if the consumer relied on a false or misleading representation made by the supplier in concluding the relevant agreement.

The Act also requires that where an agreement has a clause that: a) limits liability of the supplier; b) imposes an obligation or risk on the consumer; c) imposes liability on the consumer; d) indemnifies the supplier or any third party for any cause; or e) purports to be an acknowledgement of any fact by the consumer, then such a clause should be pointed out or brought to the attention of the consumer in plain and understandable language and in a conspicuous manner. Failure to do so would render the agreement unjust, unfair and unreasonable.

In addition, where a provision is subject to an unusual risk, one that could result in death or injury, or one which the consumer would reasonably and ordinarily not have been aware of or notice, this must be brought to the consumer's attention in plain and understandable language, and the consumer must specifically assent to that risk. Such a provision would be considered to have been brought to the attention of the consumer if the consumer has demonstrated that he is aware of, and accepts the provision in question. Awareness of, and acceptance by, the consumer could presumably be demonstrated by the consumer initialling next to that provision. These risk-bearing provisions have to be brought to the attention of the consumer before the relevant transaction is concluded. In addition, the consumer must be afforded sufficient time to understand the relevant risk.

Jay-Ann Jacobs, Director

CONTACT US

For advice, please contact a Consumer Protection Act specialist listed below.



Nick Altini
Director
T +27 (0)11 290 7115
E nick.altini@dcladh.com



Jay-Ann Jacobs
Director
T +27 (0)21 481 6325
E jayann.jacobs@dcladh.com



Chris Charter
Director
T +27 (0)11 290 7112
E chris.charter@dcladh.com



Derek Wille
Director
T +27 (0)21 405 6085
E derek.wille@dcladh.com

JOHANNESBURG

6 Sandown Valley Crescent
Sandown
Sandton 2196
Private Bag X40
Benmore 2010
South Africa
Dx 154 Randburg
T +27 (0)11 286 1100
F +27 (0)11 286 1264
E jhb@dcladh.com

1 Protea Place
Sandown
Sandton 2196
Private Bag X7
Benmore 2010
South Africa
Dx 42 Johannesburg
T +27 (0)11 290 7000
F +27 (0)11 290 7300
E jhb@dcladh.com

CAPE TOWN

11 Buitengracht Street
Cape Town 8001
PO Box 695
Cape Town 8000
South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300
F +27 (0)21 481 6388
E ctn@dcladh.com

5th floor Protea Place
Protea Road
Claremont 7708
PO Box 23110
Claremont 7735
South Africa
Dx 5 Cape Town
T +27 (0)21 683 2621
F +27 (0)21 671 9740
E ctn@dcladh.com

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