

# A consumer's Constitution

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The *Consumer Protection Act (No 68 of 2008)* was promulgated on 24 April 2009. The act lays the foundation for introducing a single comprehensive legal framework for protecting consumer rights in South Africa. It sets out the entitlement of consumers and responsibility of suppliers of goods and services.

## Purpose and policy

The act aims to promote and advance the social and economic welfare of consumers in South Africa and to achieve this objective through, *inter alia*:

- Establishing a legal framework for maintaining a fair, accessible and efficient market place for consumers.
- Reducing the disadvantages experienced in accessing goods and services by vulnerable consumers.
- Protecting consumers from unfair trade practices.
- Encouraging responsible consumer behaviour.
- Promoting consumer empowerment and providing an efficient system of redress for consumers.

## To whom does it apply?

The act will affect almost all businesses and an industry will only be able to escape operation of the act, should it qualify for an exemption. Exemptions will be granted if the industry is already subject to regulation affording the same or more protection than the act.

The act does not apply to the following transactions:

- When goods or services are promoted or supplied to the state.
- Where a consumer is a juristic person whose asset value or annual turnover equals/ exceeds the threshold value determination by the minister.

In addition, the following transactions have been declared exempt:

- A credit agreement under the *National Credit Act*.
- Services supplied pursuant to the *Short-Term Insurance Act* and the *Long-Term Insurance Act* (subject to review after a period of 18 months).
- Services to be supplied under an employment contract.
- A collective bargaining agreement or collective agreement as set out in the *Labour Relations Act*.
- In respect of services pursuant to FAIS.

## Goods and services

The act covers:

- The supply of both goods and services delivered or rendered in the ordinary course of business by any person in the RSA.
- The promotion of such goods and services.
- The goods and services themselves.

Goods and services as contemplated by the act, include almost any form of good and/or services which could be delivered/supplied, both tangible and intangible. As a result almost all businesses will soon have to undertake a complete review of their standard agreements and day to day operational processes and procedures to ensure compliance with the act.

## How it may affect your business

The act is far-reaching in its effect and governs issues such as unfair contract terms, product liability, disclosure, pricing and marketing practices (to name but a few). The following form the basis of some of the material provisions of the act:

- The consumers' right to return goods to suppliers in certain circumstances.

- The prohibition and/or limitation of unjust, unreasonable or unfair contract terms.
- Limitation of suppliers' ability to contract out of liability.
- Fixed term agreements may not exceed a time period to be prescribed and may be cancelled at any time by the consumer on 20 days' notice.
- The introduction of implied warranties into agreements for the supply of goods, which suppliers cannot contract out of.
- The right to receive goods that are reasonably suitable for the purposes for which they are generally intended, that are of good quality, and in good working order and free of any defects and that will be usable and durable for a reasonable period of time.
- Introducing strict liability (negligence need not be shown) of the producer or importer, distributor or retailer of any goods for any harm occasioned by the supply of unsafe goods, a product failure, defect or hazard in any goods or inadequate instructions or warnings provided to the consumer in respect of any hazard associated with the use of goods.
- Effectively doing away with the practice of using "trading names", business name registration will be mandatory.
- Introduction of requirements for proper labelling and pricing to engender full disclosure.

### **Non-compliance**

The act will be enforced by a new National Consumer Commission. In addition, the National Consumer Tribunal (established under the *National Credit Act*) will have jurisdiction to adjudicate on complaints.

If a provision in an agreement does not comply with the act, then, depending on the nature and/or number of disallowed provisions, it might render that provision and sometimes the entire agreement and/or transaction void.

The act affords courts the power to grant orders dealing with contravention of the act. Contraventions may result in conviction, the imposition of a fine or imprisonment for 12 months, or both.

Importantly, the act provides for the imposition of an administrative penalty of the greater of 10% of annual turnover during the preceding financial year, or R1 million.

Of course, the reputational damage that may result from publicity generated by non-compliance with the act may in itself be the most damaging of penalties which should facilitate self-regulation.

### **Timing**

The provisions of the act, mainly dealing with the establishment of the National Consumer Commission and the minister's powers to make regulations, are set to come into effect on 24 April 2010 (the early effective date).

All other provisions will come into effect on 24 October 2010, unless the minister elects to defer the date by an additional six months (the general effective date).

### **Transitional provisions**

A word of warning, however – suppliers should not wait for the general effective date before adapting their agreements and business practices, as the act will apply to goods and services supplied after the general effective date, even if the agreement or transaction was concluded before the general effective date.

Where an agreement is for a fixed term, which will expire more than two years after the general effective date, the provisions of the act will not only apply to the goods or services supplied, but also to the agreement.

### **The way forward**

Suppliers of goods and services will need to consider how the act's detailed provisions will impact their businesses.

Every business should, for example (but without limitation):

- Take the act into account when concluding any new long term or fixed term agreements.
- Review its standard agreements and operational processes and procedures including staff interactions with consumers and training manuals.
- Review reputability of sources of supply and its contracts with those upstream suppliers in the supply chain in order to provide contractually for the transfer or apportionment of liabilities.
- Reassess insurance cover presently in place.
- Implement monitoring and recall procedures.
- Conduct training programmes.
- Consider compliance of current refund and return policies.

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Should you require more information on the *Consumer Protection Act* and specific advice on the application of its provisions to your business, please do not hesitate to contact Simone Monty on 011 775 6335 or email [simonemonty@eversheds.co.za](mailto:simonemonty@eversheds.co.za). **M&J**