

THE CONSUMER PROTECTION ACT
RURAL HOUSING LOAN FUND

presented by
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14 October 2010



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Status of the Act



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- Consumer Protection Act 68 of 2008 - signed into law on 24 April 2009.
- Currently awaiting draft regulations to be circulated for comment.
- Certain organisational provisions of the Act came into effect on 24 April 2010, as well as –
 - no-fault liability for goods first provided from 24th April 2010;
 - cooling-off period for franchisees; and
 - the establishment of a National Consumer Commission.
- Some fixed-term agreements concluded before 31.3.2011 must comply with Act.



Status of the Act

- All other provisions come into effect on 31 March 2011 unless:
the Minister by notice in the Government Gazette:
 - again defers the effective date for any of these other provisions for no longer than 6 months, if extra time is needed to prepare the administrative systems required to implement the provision; or
 - defers the application date of the Act to a municipality on request from the relevant Minister.

Consumer protection legislation



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- Rationale:
 - discriminatory and unfair market practices;
 - proliferation of low-quality and unsafe products;
 - lack of awareness of rights;
 - limited redress for consumers; and
 - weak enforcement capacity.
- Purpose of the Act (s3).



Application of the Act

- the Act applies (subject to exemptions) to:
 - every **transaction** in South Africa concerning the supply of goods or services;
 - the promotion of **goods** and **services** or of the supplier in South Africa; and
 - the goods and services themselves.



Exemptions from application

- the Act does not apply to transactions when:
 - consumer is the State;
 - consumer = juristic person with annual turnover or asset value over the threshold to be determined by Minister from time to time, (we expect the amount to be about **R 3million** – this is currently subject to public comment);
 - **credit agreement (the goods or services are still subject to the Act); s5(2)(d) of the Act provides as follows:**
 - “The Act does not apply to any transaction that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act”;
 - services supplied by an employee;
 - a transaction giving effect to a collective bargaining agreement; or



Exemptions from application

- industry-wide exemption from one or more provisions of the Act.
- However, the provisions on:
 - product recall (section 60); and
 - product liability (section 61),will apply to all goods, even if the transaction is exempt.



Transaction

- agreement between consumer & supplier for the supply (or potential supply) of goods or services, in the **ordinary course** of supplier's business, for **consideration**;
- actual supply of goods or services to or at the direction of consumer, for consideration; or
- supply of goods or services by a club, trade union, society etc. to its members; and
- franchise-related agreements.



Consumer

- person to whom goods or services are **promoted** or supplied in the ordinary course of the supplier's business;
- person who has entered into a transaction with supplier in the ordinary course of the supplier's business;
- **user** of goods or **recipient** or **beneficiary** of services (even when the user, recipient or beneficiary wasn't a party to the transaction); and
- franchisee in terms of franchise agreement.

- **anything** marketed for human consumption;
- any other tangible object, including any medium on which anything is written or encoded;
- any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or licence to use such intangible product;
- legal interest in land or other immovable property, except an interest within the definition of "service"; and
- gas, water and electricity.



Services

- any work or undertaking performed by one person for the direct or indirect benefit of another;
- **provision of education, information, advice or consultation, except advice regulated by Financial Advisory and Intermediary Services (FAIS) Act;**
- **banking services, related or similar financial services, or undertaking, underwriting or assumption of risk by a person on behalf of another, except:**
 - **advice and intermediary services regulated by FAIS Act;** or
 - service regulated by Long-term / Short-term Insurance Acts etc.



Key provisions

- new consumer rights: - equality, privacy, right to choose, right to disclosure, right to good quality and safety, right to honest dealing;
- new product labelling rules;
- “bundling” prohibited;
- business name registration mandatory;
- consumers can cancel fixed-term agreements;
- deposits and prepayments must be held in separate account; and
- plain language in contracts, notices, warnings etc.

- May not be misleading, fraudulent or deceptive in any way;
- Must not discriminate;
- Bait marketing outlawed;
- Negative option marketing prohibited – agreement will be void;
- Catalogue marketing regulated – must disclose certain information to consumer;
- Trade coupons, loyalty programmes & promotional competitions regulated; and
- Referral selling prohibited.



Direct Marketing

"to approach a person, by mail, by electronic communication or in person, for the direct or indirect purpose of promoting or offering to supply...goods or services";

- **5 day cooling-off period without reason or penalty;**
- Persons engaging in direct marketing must have identification & must inform consumer of right to cancel;
- Consumer can require that no further approach be made or register a pre-emptive block;
- Prohibited times for direct marketing; and
- If unsolicited goods delivered - keep without paying.



Consumer's right to choose

Right to return goods & get full refund if:

- unsuitable for purpose communicated to supplier; and
- couldn't examine goods before delivery and they don't comply with the description or sample.

Right to cancel order

- supplier may require reasonable deposit; and
- impose reasonable cancellation fee, unless consumer dies or is hospitalised;
- doesn't apply to special-order goods.

- Unless otherwise specified in an agreement,
 - delivery of any goods is at the supplier's cost; and
 - goods at supplier's risk until consumer accepts delivery.
- **If you deliver too much, the consumer can keep the goods without paying.**
- If you deliver at a time or place not agreed, the consumer can:
 - require proper delivery, or
 - cancel the agreement without penalty and keep the goods without paying.
- Suppliers must give a written record for each transaction containing the prescribed information.



Unfair contract terms

a supplier must not:

- offer to supply, supply, or contract to supply any goods or services **at a price** or **on terms** that are unfair, unreasonable or unjust;
- **market** any goods or services, or **negotiate**, enter into or **administer** a transaction in an unfair, unreasonable or unjust manner;
- require a person to whom goods or services are supplied to **waive any rights**, **assume any obligation** or **waive any liability** of supplier on unfair, unreasonable or unjust terms.

Unfair contract terms-remedies



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- If unfair, unreasonable or unjust, a provision or the entire contract **is void**.
- consumers can sue if:
 - the supplier inserted an unfair, unreasonable or unjust term; and
 - CPA doesn't provide remedy sufficient to correct the injustice.



Warranties of quality

"every consumer has the right to safe, good quality goods"

- implied warranties: goods
 - reasonably suitable for their usual intended purpose;
 - good quality, in good working order and free of defects;
 - usable and durable for a reasonable period of time; and
 - comply with any applicable standards set out under the Standards Act.
- Services: Consumer has a right to **timeous, quality** service.

What if unsafe goods cause damage?



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- liability for producer, importer, distributor, retailer and person who installs or gives access to goods as part of services (joint and several);
- for any harm caused wholly or partly as a consequence of:
 - supplying unsafe goods;
 - a product failure, defect or hazard in goods; and
 - inadequate instructions or warnings provided to the consumer ;
- **irrespective of whether harm resulted from negligence of supplier and whether supplier acted wrongfully.**

For what type of harm will a supplier be liable?



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- the death of, or injury to, any natural person;
- an illness of any natural person;
- any loss of, or physical damage to, any property, irrespective whether it is movable or immovable; and
- any economic loss that results from the above
etc.

Defences to a product liability claim



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Defences:

- harm is due to compliance with public regulation;
- the hazard / defect was not present when I supplied the goods;
- the hazard / defect arose because of following usage instructions;
- I couldn't have known of the defect / hazard in the light of my role in the supply chain; and
- claims prescribe after 3 years.

Consumer protection institutions



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- National Consumer Commission (“NCC”)-
 - enforces Act.
- Powers given to ombuds, industry ombuds, alternative dispute resolution agents -
 - resolve disputes.
- National Consumer Tribunal-
 - adjudicates on applications or allegations of prohibited conduct.



Enforcement of the Act

- enforcement by NCC
 - compliance notices;
 - if non-compliance, Commissioner may either:
 - apply to Tribunal to impose administrative fine; or
 - refer the matter to the NPA for prosecution as an offence.
- risk of invalidity of offending provision, notice or agreement;
- cease order; and/or
- damages;
- substantial disruption of your business.



Penalties

- fine or prison (up to 12 months) or both;
- Tribunal may impose an administrative fine: max
 - **10% of the respondent's turnover during last financial year;** or
 - R1 million, whichever is the greater.
- must be paid into National Revenue Fund.



What do we recommend?

- train relevant staff;
- systems for **quality assurance**;
- obtain **indemnities** from suppliers and service providers;
- review all **agreements** with consumers;
- marketing- ensure your advertising complies with the Act;
- notices and **warnings**;
- comment on regulations, if necessary;
- consider obtaining additional **insurance**; and
- apply for industry exemption if appropriate.

questions?



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