

New Consumer Protection Act

Stand: 12. Juli 2009

1. General

The Consumer Protection Act, which was passed into law by President Kgalema Motlanthe on 24 April 2009 and published in the government gazette on 29 April 2009, will give consumers more legal clout and comes into full effect between 18 to 24 months after the signing.

The new law introduces a system of product liability so consumers can return goods to suppliers without penalty and at the supplier's risk and expense if the goods fail to meet the required standard. The legislation seeks to further protect consumers from "unscrupulous businesses" that engage in exploitation and unfair market practices. A key aim of the Act is to "empower consumers to make wise purchasing decisions". The Act seeks to promote fair, efficient and transparent market place for consumers and business.

The government appears to have set aside an annual budget of R51,3m for implementing the proposed legislation, but only time will tell the real cost to business. The act imposes obligations on any person that supplies goods and services in the ordinary course of business, with a few exceptions. The definitions in the act are wide. It allows for enforcement of rights by the consumer in a variety of new forums, including the National Consumer Commission, yet to be established, and the National Consumer Tribunal created under the National Credit Act.

To achieve its goal, the act proposes to repeal several laws, each dealing with aspects of consumer law, and replace them with a single Consumer Protection Act that will give priority to its own procedures for enforcement. It replaces existing provisions from five acts, including the Consumer Affairs (Unfair Business Practices) Act of 1988, Trade Practices Act of 1976, Sales and Service Matters Act of 1964, Price Control Act of 1964, and Merchandise Marks Act of 1941 (specifically Sections 2-13, and 16-17). It is important that all retail sector players are aware of whether they are bound by the provisions of the new law.

2. Who is considered a supplier?

Almost every supplier must comply with the act, irrespective of whether resident in SA or not, or whether operating on a not-for-profit basis. Even foreign producers who merely advertise their goods in SA may incur liability under the act. It does not depend on if the supplier is an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services, or is a public-private partnership.

The producer or importer, distributor or retailer, installer or provider of access in respect of any goods can be liable for any harm, including death, illness or injury to any natural person; loss or physical damage to any property; and certain economic loss. The consumer will not need to prove that the producer, importer, or distributor was negligent, as is the case at present. It is interesting to note that, even if a transaction is exempt from the Act, the strict liability provision applies to the goods themselves.

Suppliers should consider taking legal advice on their existing dispute-resolution provisions in their standard-form contracts, evaluating whether these will stand up to the provisions of the act. After extensive consideration of all the avenues of dispute resolution that the act affords, businesses may also need to develop appropriate dispute resolution policies proactively. These cost-effective policies should then be communicated to their employees and form part of standard business operating procedures.

For purposes of clarity, the following arrangements are regarded as transactions between the supplier and consumer:

- Memberships of associations, for example, a club membership; and
- A franchise arrangement between the franchisor and a franchisee.

However, the following transactions are considered exempt:

- Transactions in terms of which goods or services are promoted to the state or are supplied to or at the direction of the state;
- Transactions where the consumer is a juristic person whose asset value or annual turnover at the time the transaction is entered into, equals or exceeds a certain threshold (until the thresholds are set, one can't make any pronouncement as to the application of the act to juristic persons);
- A transaction in terms of which the agreement entered into pursuant to such transaction constitutes a credit agreement for the purposes of the National Credit Act, 2005;
- Transactions in terms of which services are supplied under an employment contract or which give effect to a collective bargaining agreement or collective agreement as defined in the Labour Relations Act, 1995; and
- Transactions that fall within an industry wide exemption, for example, the exemptions that have already been granted — where the service constitutes advice that is subject to regulation under the Financial Advisory and Intermediary Services Act, 2003, or insurers subject to the Short-Term Insurance Act, 1998, or the Long-Term Insurance Act, 1998.

If any goods are supplied within SA to any person in terms of a transaction that is exempt from the application of the act, those goods, and the importer or producer, distributor and retailer, respectively, are nevertheless subject to the provisions of the law in respect of product recall and strict liability.

3. New rights for consumers

It is clear that big business, in its capacity as a consumer, will be excluded from the protection of the act because they should be able to look after itself. A business is considered big business in terms of this Act once it exceeds a certain turnover threshold. At this current moment the legislator has not published the exact turnover thresholds yet.

Importantly, consumers will be able to cancel contracts when certain contractual terms are not to their liking. In future, businesses will not be able to induce consumers to accept contracts in which the suppliers' obligations and liabilities are waived. Consumers may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to meet the required standard within 10 business days after delivery to the consumer.

Regarding direct marketing, the consumer has the right to rescind a transaction within 5 days after concluding a contract or the delivery of goods.

The cancellation of an advanced booking, reservation or order for any goods is also possible. The cancellation fee should be a fair amount in the circumstances, otherwise it is unreasonable.

The Act now allows a consumer who suffers harm caused by any unsafe goods, product failure or defect, or even from inadequate instructions or warnings on packaging, to sue almost any person involved in getting that product to market, irrespective of whether that person was negligent.

The consumer can now choose between a variety of routes to solve problems. These include alternative dispute resolution (ADR) agents and industry ombuds, a National Consumer Commission, a National Consumer Tribunal, provincial consumer courts and also the equality courts. In the first instance, when a consumer is exercising any rights afforded by the act, including the right to be heard and obtain redress, suppliers may not respond in a discriminatory or penalising manner against that consumer. Suppliers may not alter conditions or agreements detrimentally just because a consumer is exercising any of the rights afforded by the act.

In order to enforce consumer rights, Section 76 of the act gives the courts the power to order suppliers to alter or discontinue any of their conduct that may be inconsistent with the provisions of this consumer legislation. Courts may also award damages against a supplier for collective injury to all or a class of consumers generally.

Overall, the act gives consumers a wide range of actions against a supplier, but the early stages of its implementation will see much uncertainty.

4. Higher costs for companies

Big business should brace itself for soaring insurance premiums and higher production costs in the light of new consumer protection law. They can expect to pay higher insurance claims because of the greater risk of lawsuits involving product liability. This could have a detrimental effect on smaller businesses that may not be able to afford insurance premiums and may be squeezed out of the market.

Further, manufacturers and retailers would have to pay close attention to their product quality and safety processes. Most of the costs to business are unknown at this stage and will only become known long after the law has taken effect.

The Act will mean that, in the case of transporters, clearing and forwarding agents, their standard trading terms and conditions can no longer absolve them from liability and responsibility for cargo unless this has been properly disclosed to customers in plain language. Some transporters are not insured at all, passing all the risk to the customer as their standard trading terms and conditions either absolve them from all liability or limit their liability.

Moreover, the Consumer Protection Act will also offer greater opportunity for insurers to recover from transporters and clearing agents on claims already paid out to the consumer.

5. Specific provisions for Franchise

The new consumer protection act also contains specific provisions for franchise agreements. All franchises will have to revisit their franchise agreements. Franchisees will be given much greater protection under the new law, e.g. the franchisee may cancel a franchise agreement without cost or penalty within 10 days after signing such agreement.

The present situation is that there is no legislation dealing specifically with franchising. Certain general provisions in the Competition Act would be relevant to franchising, such as that a franchisor may not fix a franchisee's prices. Like all consumers, franchisees will be able to avail themselves of enforcement mechanisms introduced by the CPB.

6. Conclusion

The Consumer Protection Act is the first comprehensive legislation to guard the consumer. Herewith South Africa follows international practice. This is now considered necessary and its implementation successful in general.

However, the implementations of the regulations will cause significant costs to the suppliers. In addition to potential transformation cost in the production process, the insurance costs in will rise significantly.

Furthermore the general terms and conditions, delivery -, franchise and other contracts must be revised comprehensively.

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Stellenbosch, 12. Juli 2009

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