

THE CONSUMER PROTECTION ACT NO 68 OF 2008



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With effect from 1 April 2011, the remaining provisions of the Consumer Protection Act No 68 of 2008 (the “CPA”) which had not previously been implemented under the earlier transitional provisions of the CPA, together with the final regulations (the “Regulations”) of the Act, have now come into full force and effect.

Along with the National Credit Act No 34 of 2005, the CPA is the most significant and extensive piece of consumer legislation that has been passed by our legislature in South Africa. It formulates, entrenches and advances the rights and remedies of consumers in respect of the marketing, promotion, distribution, supply and the sale of goods and services.

It will have a profound impact upon our law and the National Consumer Commission - the enforcement authority set up under the Act - has already begun investigations into possible consumer-related infringements within certain industries and has also begun to receive and actively process consumer complaints.

Application Of The Act:

The Act will apply to every transaction involving the supply of goods or the performance of services, occurring within the Republic of South Africa, and to the promotion of goods or services.

The definitions of what constitutes goods or services are extremely broad, such that even those suppliers or businesses who may genuinely believe that they are excluded from the provisions of the Act, may find themselves on a proper analysis to be caught by its provisions.

Goods include inter alia anything marketed for human consumption, any tangible product including any medium on which anything may be written or encoded and any information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product.

Services include inter alia any work performed by one person for the direct or indirect benefit of another.



The Exclusions

The Act will not apply to any transaction:

- In terms of which goods or services are promoted or supplied to the State;
- In terms of which the consumer is a juristic person whose asset value or annual turnover equals or exceeds the current stated threshold value of R3million;
- If the transaction falls within an exemption granted by the Minister;
- That constitutes a credit agreement under the National credit Act, although the goods or services that are the subject matter of the credit agreement are not excluded from the ambit of the CPA;
- Pertaining to services supplied under an employment contract or any transaction giving effect to a collective bargaining agreement or a collective agreement under the Labour Relations Act.

Be careful – the exclusions are not necessarily absolute.

A number of significant exceptions apply to the various exclusions:

(i)Strict Liability

Firstly, in respect of any of the stated exclusions, the goods pertaining to that transaction, together with the importer, producer, distributor or retailer of those goods, respectively, are all nevertheless subject to certain sections within the Act, including in particular the principle of strict liability which has been introduced by virtue of the provisions of Section 61 of the Act. This section of the Act has particular relevance to the insurance industry and product liability claims and we touch upon this in greater detail below.

(ii)Franchise Agreements

Secondly, notwithstanding the stated threshold of R3million which applies to consumers who are juristic persons, transactions relating to franchise agreements are regulated and governed in full by the provisions of the Act, irrespective of whether the size of the juristic person falls below or above the stated threshold value.

The definition of franchise agreements is extremely broad and could potentially cover a number of distribution channels, arrangements or agreements relating to the sale of goods or the supply of services.

(iii) Stated Threshold Value of R3 million

Thirdly, the assessment and calculation of the customer's asset value or annual turnover, at the time of the relevant transaction, is practically not without difficulty and may cause considerable uncertainty and confusion in terms of whether the particular juristic person is or is not covered by the various provisions of the Act.



In this regard –

- The threshold is to be determined with reference to the juristic person’s asset value, as set out in its balance sheet, or its annual turnover, as set out in its income statement, for the immediately previous financial year.
- This in itself presents an immediate practical difficulty for suppliers, who may not necessarily have any knowledge of what asset value or annual turnover has been recorded in that juristic person’s financial statements for the previous financial year. In the rush to conclude business, particularly in sales intensive environments, this aspect could be easily overlooked or not fully investigated.
- Even if a supplier makes the necessary enquiries and obtains the financial statements, whatever figures are recorded therein do not automatically represent the true position.
- If, between the date of the financial statements being used to calculate the asset value or annual turnover, and the date on which the calculation is being made, that juristic person has acquired any subsidiary company, associated company or joint venture not shown on those financial statements, or has divested itself of any subsidiary company, associated company or joint venture shown on those financial statements, the value of those recently acquired or divested assets or the turnover generated by those recently acquired or divested assets must be accounted for in the calculation of that juristic persons asset value or annual turnover.

One can immediately appreciate the practical difficulties for the supplier, in attempting to make such a calculation at the time of the relevant transaction and the recent, often heard reaction by various suppliers that “we have nothing to worry about, as we only supply to big business that is not covered by the Act...” may not necessarily represent the true position.

Implications For The Insurance Industry:

The Act represents a significant piece of legislation for the insurance industry.

Direct Impact Upon Insurance Legislation And Policy Wordings

First, the Act may ultimately have a direct bearing on the Short Term Insurance Act and the Long term Insurance Act.

The CPA provides that both the Short and Long Term Insurance Acts are excluded from the ambit of the CPA, “...subject to those sector laws being aligned with the consumer protection measures provided for in this Act within a period of 18 months from the commencement of this Act...”.

One will have to wait and see what the outcome will be in respect of the proposed alignment between the provisions of the Short and Long Term Insurance Acts and the



consumer protection measures set out in the CPA.

Of course, whilst conjecture at this point, this may have a bearing on the manner in which insurance products are promoted, marketed, distributed and sold; and, crucially, this process of alignment may also impact upon the manner in which policy wordings (and notably the typical exceptions, exclusions and other clauses which regulate the Insurer's exposure to risk under the policy) are constructed and interpreted.

The impact of increased liabilities and insurance claims within South Africa

On a more immediate level, the Act will affect and increase the potential liabilities that businesses will face whilst doing business in South Africa. For Insurers, this will inevitably lead to a far greater risk of exposure to various insurance claims under general liability policies which cover inter alia personal injury, property damage and product liabilities.

A quick history lesson – changing contractual terms

Prior to the commencement of the CPA, the law of sale and contract was typically governed by the old conservative Roman-Dutch maxim that provided a deliberate and serious agreement had been entered into between two parties, no matter how harsh the terms, that agreement would be binding on the parties.

Whilst our law and the courts had over time formulated and developed various ways in which the potential, inequitable consequences of this principle could be managed, such as for example the principle that exclusionary clauses (such as disclaimers) should be narrowly construed. It is fair to say that the notion of equity or fairness between two contracting parties (and in particular individual consumers on the one hand and large corporate businesses on the other) had a somewhat limited application.

Put simply, the position of the consumer under contractual terms of sale or supply was often a particularly vulnerable one.

With the advent of the CPA, the position has changed dramatically. The Act itself has been described as a Bill of Rights for consumers, and it provides a series of rights afforded to the consumer when purchasing goods or services.

In this respect, the Act provides for the consumer's right to fair, just and reasonable terms and conditions of supply.

Suppliers will have to tread with care in terms of what terms and conditions are now included in their contracts of supply. The Act and the Regulations set out, extensively, various terms and conditions that are considered to be unfair or unjust. The Act also provides for certain absolute prohibited terms and conditions, one such example being any provision in terms of which the supplier attempts to limit or exempt its liability for gross negligence.

The Act also extensively regulates the manner in which certain terms, most notably those that attempt to limit the risk or liability of the supplier (for example, disclaimers), must be worded, constructed and drawn to the attention of the consumer (i.e. in a



conspicuous manner) prior to that consumer entering into the applicable transaction. Our courts are also afforded extensive powers to wade in and effectively alter or strike out those provisions of a contract that fall foul of the Act.

It is clear that the safety net often provided to suppliers by the “fine-print” of their agreements with consumers, will now come under far greater scrutiny and attack with the advent of the CPA.

Product liability – strict liability for suppliers

One of the most significant developments with the new Act is the introduction of strict liability for any harm caused by the supply of unsafe goods, product failure or defect or hazard, or the provision of inadequate instructions and warnings to a consumer pertaining to any hazard arising from or associated with the use of any goods.

It will now not be necessary for the injured party (i.e. the consumer) to establish negligence on the part of the supplier, which from a practical perspective often represented a significant and difficult obstacle for the consumer to overcome in establishing a legal liability on the part of the supplier. All that the consumer will now need to show is a causal link between the harm suffered and the product that was supplied.

The easing of the evidentiary hurdle in this regard will, no doubt, lead to significantly more product liability claims and litigation in the fullness of time.

Moreover, Section 61 which introduces strict liability, casts the net far wider in terms of those parties that a consumer can now go after for loss, damage or injury suffered. The section provides that the entire supply chain, namely the producer, importer, distributor and retailer, can all be held liable for the harm or damage suffered. This will provide the consumer with the ability to go after any of the parties in the supply chain, or for that matter just one, then leaving it to that party to go to the trouble and expense of having the other relevant parties joined to the pending litigation.

Some Other Aspects To Consider:

The Act will ultimately contribute to a far-greater claims dominated society.

Crucially, the Act introduces the ability of persons to launch class actions on behalf of or in the interest of a group or class of affected persons.

The Act also provides that our courts must develop the common law to improve the realisation and enjoyment of consumer rights. In addition, any ambiguity between the provisions of the Act must be construed in a manner that best promotes the spirit and purpose of the Act, and will best improve the realisation and enjoyment of consumer rights.

Any ambiguity in any standard form, contract or other document prepared or published



by a supplier, must be interpreted and resolved to the benefit of the consumer.

Where there is existing legislation that may provide for the protection of consumer rights, within a particular industry, the provisions of that legislation and the CPA will apply concurrently, and to the extent that this cannot apply, then those provisions that extend the greatest protection to the consumer will prevail.

As previously mentioned, the National Consumer Commission, is expressly provided with the power to investigate any alleged prohibited conduct and offences under the Act.

The era of the consumer is well and truly upon us and suppliers have much to do if they are to fully appreciate and understand the implications and potential liabilities under the Act, and to implement the appropriate and necessary risk management solutions.

Important Notice:

Kindly note that this publication is not and shall not be construed as legal advice and is issued solely for general information purposes. It is not an exhaustive account of all the provisions of the Consumer Protection Act No 68 of 2008.

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