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Consumer Protection Act Guide

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CONSUMER PROTECTION ACT, 2008

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NOTES ON THE GUIDE TO CONSUMER PROTECTION ACT NO 68 OF 2008

IMPORTANT NOTE AND DISCLAIMER

This guide is intended as an easy reference, pocket-sized guide for consumers, business owners, directors, advertisers, marketing consultants, franchises, and anybody involved in the supply of goods and services. The Act will affect virtually every business that trades in South Africa, as well as voluntary associations. It is intended to protect the vulnerable consumer, and thus knowledge of consumer rights across the board is essential.

The information contained herein is a summary of some of the key aspects of the Consumer Protection Act, 68 of 2008 (hereinafter referred to as 'the Act'), and the Regulations, and is issued to clients as a general overview thereof. Due to limitations in length of the guide, many parts of the Act have not been covered. The reader is advised to consult the Act itself or a professional adviser for further assistance and information.

The guide should not be treated as a substitute for legal advice. There are still many ambiguities and uncertainties surrounding some of the provisions of the Act which only time (and the courts) will be able to interpret and clarify. Professional advice must therefore be sought in relation to any aspect referred to in this guide.

All references to the masculine gender shall include the feminine (and vice versa).

While every care has been taken in the compilation of this guide, no responsibility of any nature whatsoever shall be accepted for any inaccuracies, errors or omissions.

1. PURPOSE AND POLICY

The general explanatory note of the Act states that it aims to *"promote a fair, accessible and sustainable market place for consumer products and services, and, for that purpose, to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible customer behavior, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements, to establish a National Consumer Commission and National Consumer Tribunal"*. (hereinafter referred to as the Commission and the Tribunal respectively).

The Act purports to fulfill the rights of historically disadvantaged persons and to promote their full participation as consumers.

It has the effect of codifying the common law, and the Constitution and has been described as a "Bill of Rights for Consumers".

The preamble of the Act sets out the overarching purposes and policy of the Act as:

- The promotion and protection of the economic interests of consumers;

- Improvement of access to and the quality of information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs;
- Protection of consumers from hazards to their well-being and safety;
- Development of effective means of redress for consumers, and the provision of a system of consensual resolution of disputes arising from consumer transactions;
- Promotion and provision for consumer education, including education concerning the social and economic effects of consumer choices;
- Facilitation of freedom of consumers to associate and form groups to advocate and promote their common interests;
- Promotion of consumer participation in decision-making processes concerning the market place and the interests of consumers.

2. INTERPRETATION OF THE ACT

The Act must be interpreted in a manner that gives effect to its purpose and policy. If any provision of the Act, read in its context, can be reasonably construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of the Act, and will best improve the realisation and enjoyment of consumer rights.

A person, court, the Commission or the Tribunal must also consider:

- Appropriate foreign and international law, international conventions, declarations or protocols relating to consumer protection
- Any decision of a consumer court, ombud or arbitrator in terms of the Act, to the extent that it has not been overruled, or set aside or reversed by the High Court, Constitutional Court or Supreme Court of Appeal.

No provision of the Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law;

When interpreting the Act, a court must start with the words and phrases used in the Act, and the context in which they occur. This is especially relevant in connection with the definitions contained in the Act. To this end care has been taken to include definitions in this guide, as the Act often has alternate meanings and definitions of words to be taken within the context of the topic and the Act rather than the ordinary meaning of the word in everyday life.

3. SCOPE AND APPLICATION

[Chapter 1, Section 5 of the Act]

The Act intends to regulate the marketing of goods and services to consumers as well as the relationships, transactions, advertisements and agreements between the consumers, suppliers, producers, distributors, importers, retailers, service providers and intermediaries of those goods and services.

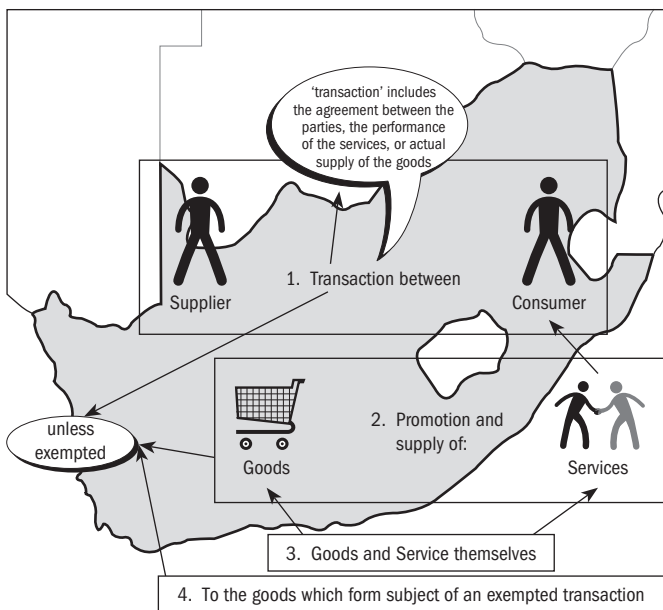
The principal commercial activities to which the Act applies are whether 'transactions', 'marketing', 'promotion' and 'supply' of goods and services are being conducted by the supplier in his ordinary course of 'business'.

Fundamental to the determination of the scope and application of the Act are therefore the definitions of market, advertise, promote, supply, transaction, the consumer, the supplier, the supply chain, and business.

Refer to the table on pages 43 to 45 for these important definitions.

It applies to:

- Every transaction occurring within the Republic of South Africa between suppliers and consumers (unless specifically exempted);
- The promotion or supply of any goods or services, within the Republic (unless exempted);
- To the goods or services themselves i.e. which are supplied or performed in terms of a transaction to which the Act applies;
- To the goods which form the subject of an exempted transaction.



Where the Act does not have application:

1. Juristic Persons whose asset value or annual turnover equals or exceeds R2 million:

- The Act is intended to protect the vulnerable consumer and not big business, and thus it does not apply to consumers who are juristic persons, whose asset value or annual turnover equals or exceeds the threshold value determined by the Minister, currently set at **R2 million**. The schedule on page 47 sets out how the threshold is to be calculated.
- **Juristic persons, for purposes of this Act include: a company, a close corporation, and also a body corporate, partnership or association, or a trust as defined in the Trust Property Control Act, 57 of 1988.**

2. The State:

- The Act does not apply where goods or services are promoted or supplied to the State.

3. Credit Agreement Transactions:

- A transaction that constitutes a credit agreement under the National Credit Act, 34 of 2005 is excluded, but the goods or services that are the subject of the credit agreement are not excluded.

4. Employment contracts:

- Services supplied under an employment contract are not included within the ambit of the Act.

5. Collective bargaining and bargaining agreements:

- Both an agreement giving effect to a collective bargaining agreement within the meaning of Section 23 of the Constitution and the Labour Relations Act, 66 of 1995, or agreement giving effect to a bargaining agreement as defined in Section 213 of the Labour Relations Act are not included.

6. Specific exemption granted by the Minister:

- If the transaction falls within an exemption granted by the Minister – where a regulatory authority has applied to the Minister for an industry-wide exemption from one or more provisions of the Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority.

Certain provisions nevertheless apply despite the exemptions listed in 1 to 6 above:

● Franchise Agreements


- ◆ The Act will apply to all franchise agreements in the Republic irrespective of whether the franchisee is a juristic person and falls above or below the threshold.

● Product Liability

- ◆ If any goods are supplied within the Republic 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 of those goods, respectively, are nevertheless subject to sections 60 and 61 (see page 29).

Definitions contained in the Act are of vital importance when determining its scope and application:

The definition of goods and services take on an entirely new meaning under the Act.

| GOODS | |
|--|---|
| <p>includes –</p> <ul style="list-style-type: none"> a) anything marketed for human consumption; b) any tangible object other than the above, including any medium on which anything is or may be written or encoded; c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible object written or encoded on any medium, or a license to use any such intangible object; d) a legal interest in land or any other immovable property other than an interest that falls within the definition of “service” in this section; e) gas, water and electricity. |  |

SERVICES

includes but is not limited to –

- a) any work or undertaking performed by one person for the direct or indirect benefit of another;
- b) the provision of any education, information, advice or consultation, except advice that is regulated by the Financial Advisory and Intermediary Services Act, 37 of 2002 (FAIS);
- c) any banking services or related or similar financial services or the undertaking, underwriting, or assumption of any risk by one person on behalf of another, except to the extent that any such service (i) constitutes advice or intermediary services that is subject to regulation by FAIS or (ii) is regulated in terms of the Long-Term or Short-Term Insurance Acts (no's 52 and 53 of 1998 respectively);
- d) the transportation of any individual or goods;
- e) the provision of – (i) any accommodation or sustenance (ii) any entertainment or similar intangible product or access to any such entertainment or intangible product (iii) access to any electronic communication infrastructure (iv) access to or the right of access to, any event or to any premises, activity or facility (v) access to or use of any premises or other property in terms of a rental;
- f) a right of occupancy of, or power or privilege over or in connection with any land or other immovable property, other than in terms of a rental;
- g) rights of a franchisee in terms of a franchise agreement;



All of the above is irrespective of whether the person promoting or offering or providing the service participates in, supervises or engages directly or indirectly in the service.

So who is a Consumer and who is a Supplier in terms of the Act?

CONSUMER

Means:

- a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
"Person" includes
 - An individual,
 - A juristic person who falls below the threshold,
 - Franchisee's are to be regarded as consumers irrespective of whether the franchisee is a juristic person which falls above or below the threshold.
- b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of the Act (see list 1 to 6 on pages 4 and 5);
- c) Any user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services, (if the context so requires or permits).

SUPPLIER

Defined in the Act as any person – who markets any goods or services;

Irrespective of whether the supplier –

- a) resides or has its principal office within or outside the Republic;
- b) operates a for profit business or a non-profit entity;

- c) 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;
- d) is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all;

Some examples of Suppliers (not an exhaustive list):

Retailers (furniture, clothing, music, car dealers), estate agents, tourism operators, airlines, casinos, marketing and advertising agencies, the print media industry, professional services rendered by accountants, auditors, attorneys, medical doctors, education, banking and financial services, transportation, telecommunication, NGO's and trade unions, voluntary associations, clubs, a society (even if nothing is charged for the service), municipalities;

Franchisors

In fact all service providers and intermediaries of those goods and services acting in the ordinary course of business;

Where an organisation operates in any part of the supply chain as producer, importer, distributor and retailer of goods or as a service provider to the extent of the application of the Act to such activities - for example, manufacturers need to consider the implications of the product liability provisions of the Act.

Refer to diagram on page 46 for diagram of consumer / supplier.

4. THE SUPPLY CHAIN

THE SUPPLY CHAIN

With respect to any particular goods or services, means the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether there is a producer, importer, distributor or retailer of goods, or as a service provider.



Services

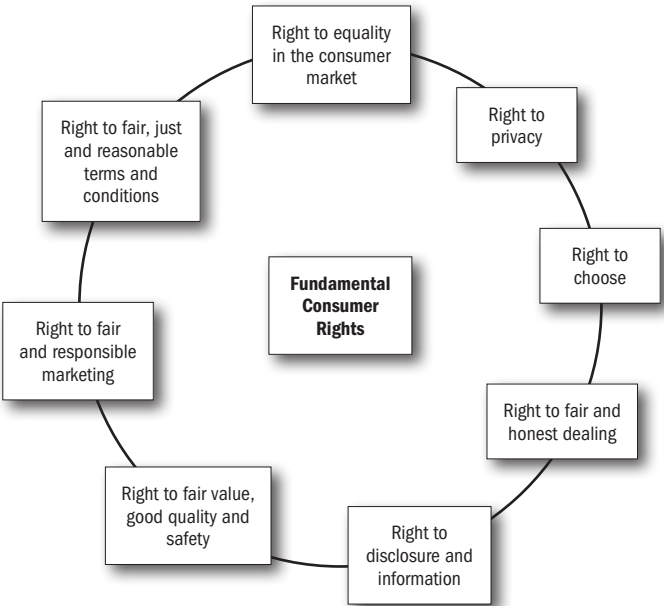


Goods

| | |
|--|--|
| In other words, the 'supply chain' refers to: | |
| Services provided by a: Service Provider | |
| Goods and Services provided by: | |
| Supplier, Service provider or intermediary (agent) | |
| Goods supplied by a: | |
| Producer Distributor Importer | } |
| Retailer | <div style="border: 1px solid black; padding: 10px; display: inline-block;"> <ul style="list-style-type: none"> Do not deal directly with the consumer </div> |

5. EIGHT FUNDAMENTAL CONSUMER RIGHTS

Chapter 2 of the Act introduces a formal set of consumer rights into law, based on internationally accepted and United Nations adopted consumer rights – as follows:



The Act integrates these eight fundamental consumer rights and consequently creates a corresponding duty or obligation on suppliers, thereby regulating their activities. The supplier's obligation to account to consumer's is also included in the Act (see pages 36 to 37).

6. RIGHT TO EQUALITY IN THE CONSUMER MARKET

Protection against discriminatory marketing practices:

The Act prohibits any form of unfair discrimination in line with the Equality Act* and the Constitution.

Section 8: Protection against discriminatory marketing:

A supplier may not, on the basis if race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth:

- exclude any person or category of persons from accessing any goods or services offered by the supplier;

- b) grant any person or category of persons exclusive access to any goods or services offered by the supplier;
- c) assign priority of supply of any goods or services offered by the supplier to any person or category of persons;
- d) supply a different quality of goods or services to any person or category of persons;
- e) charge different prices for any goods or services;
- f) target particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services, or
- g) exclude a particular community, district population, or market segment from the supply of goods or services offered by the supplier.

A supplier must not directly or indirectly treat any person** differently in a manner that constitutes unfair discrimination on one or more of the grounds referred to in the table above, when:

- a) assessing the ability of the person to pay the cost, or otherwise meet the obligations of a proposed transaction or agreement;
- b) deciding whether to enter into a transaction or agreement or to offer to do so;
- c) determining any aspect of the cost of a transaction or agreement to the consumer;
- d) interacting with the consumer (i) in the supplier's place of business (ii) in the course of displaying or demonstrating any goods, testing or fitting them, or negotiating terms;
- e) selecting, preparing, packaging or delivering goods for or to the consumer or providing any services to the consumer;
- f) proposing or agreeing the terms and conditions of a transaction or agreement;
- g) assessing or requiring compliance by the person with the terms of a transaction or agreement;
- h) exercising any right of the supplier under a transaction or agreement in terms of this Act or applicable provincial consumer legislation;
- i) determining whether to continue, enforce, seek judgement in respect of or terminate a transaction or agreement;
- j) determining whether to report, or reporting any personal information of such person.

It is not discrimination *per se* that is prohibited, but discrimination that is unfair. The unfairness is to be determined within context, and taking into account various factors, such as whether the discrimination impinged on the consumer's human dignity, or whether the discrimination has a legitimate purpose.

The Equality Court has jurisdiction to consider whether conduct between a supplier and a consumer constitutes unfair discrimination even although such conduct was not contemplated in Section 8 of the Act (as listed above).

* 'Equality Act' refers to the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

** A consumer in this instance includes an association or juristic person which is discriminated against based on the characteristics of any natural person who is a member, associate, owner, manager, employee, client or customer of that association or juristic person.

Reasonable grounds for differential treatment in specific circumstances:

MINOR CHILDREN

It is not unfair for a supplier to refuse to supply goods or services to a minor or to require consent from the parents or guardian before supplying or providing access to any particular goods or services as a reasonable precaution to protect the health, welfare or safety of the minor, unless the supplier has reasonable grounds to believe the minor is emancipated.

GENDER

A supplier may designate separate but equal facilities for the exclusive use of persons of each gender or offer to supply or provide access to a facility exclusively to persons of one gender.

SPECIFIC NEEDS

A supplier may market any goods or services in a manner that implies or expresses a preference for a particular group of consumers who are distinguishable from the general population on the basis of Section 9 of the Constitution if those goods or services are reasonably intended or designed to satisfy the specific needs or interests that are common to or uniquely characteristic of that particular group of consumers.

AGE

A supplier may reasonably designate any facility or service, permanently or from time to time for the exclusive use of minors generally, minors who are above or below a specific age, or adults who have attained a specified age of at least 60 years, and may advertise or offer any goods or services at a discounted price on the basis that a minor had not reached a certain age or an adult has attained the age of at least 60 years old.

An accredited consumer group or an aggrieved consumer may:

- a) Institute proceedings before an Equality court, or
- b) File a complaint with the Commission, which must refer the complaint to the Equality Court if the complaint appears to be valid.

Section 10 sets out how the courts should approach the complaint, and states that there is a presumption that any differential treatment is unfair discrimination, unless it is established that the discrimination was fair.

The onus is on the supplier to prove that any differential treatment of a consumer was based on discrimination that was fair.

7. RIGHT TO PRIVACY

Right to restrict unwanted direct marketing:

Direct marketing means to approach a person either in person or by mail or electronic communication for the direct or indirect purpose of (a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person or (b) requesting the person to make a donation of any kind for any reason.

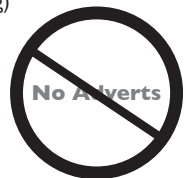
The Act limits unfettered use of consumer's personal information for unsolicited direct marketing campaigns by requiring direct marketers to provide consumers with an "opt out" option for unsolicited marketing communication.

RIGHT TO RESTRICT UNWANTED DIRECT MARKETING

| Right of consumer | Obligations of Supplier/Direct marketer |
|--|--|
| <p>Every person's right to privacy includes the right to</p> <ol style="list-style-type: none"> a) refuse to accept; b) require another person to discontinue; c) in the case of an approach other than in person, to pre-emptively block any approach or communication to that person if it is primarily for the purpose of direct marketing. | <p>A person authorising, directing or conducting any direct marketing is required to:</p> <ul style="list-style-type: none"> • ensure that a consumer who has registered a pre-emptive block or made a demand for the direct marketer to desist from further communication, is not contacted or directly marketed to in a similar way again (an employer needs to ensure that it's employees adhere to this requirement). |
| <p>A person who has been so approached may demand during or within a reasonable time after that communication, that the person responsible for initiating the communication, desist from initiating any further communication.</p> | <ul style="list-style-type: none"> • Is required to implement appropriate procedures to facilitate the receipt of such demands. |
| <p>The Commission may establish or recognise as authoritative a registry in which a person may register a pre-emptive block either generally or for specific purposes against any communication that is primarily for the purpose of direct marketing. No person may charge the consumer a fee for making a demand or registering a pre-emptive block.</p> <p>Note: the operation of Section 11(4)(b)(ii) has been delayed until a registry has been established.</p> | |
| <p>Regulation of time for contacting consumers</p> | |
| <p>A supplier may not engage in direct marketing directed at a consumer at home for any promotional purpose during a prohibited period except where the consumer has expressly or implicitly requested or agreed to it.</p> <p>Prohibited times include Sundays or public holidays, Saturdays before 09h00 and after 13h00, and all other days between the hours of 20h00 and 08h00 the following day. The direct marketer is not in breach if they send out the marketing during the allowed times even if the consumer receives it during the prohibited times (the onus to prove it was sent out in the allowed time rests on the direct marketer).</p> | |

Direct marketers must assume a comprehensive pre-emptive block has been registered by the consumer with the administrator, unless the administrator has confirmed in writing otherwise. Every direct marketer must register with the administrator and must annually confirm in writing their details. Direct marketer's cannot send promotional material to the consumer unless they have confirmed (and received that confirmation in writing) that no pre-emptive block in fact has been registered.

Regulation 4 sets out some mechanisms to block direct marketing communication, such as informing the direct marketer, placing a communication or sign on a postal box, post office box or other container for mail indicating that the consumer does not wish to receive any material related to direct marketing, or display the phrase "no adverts".



8. CONSUMER'S RIGHT TO CHOOSE

| | |
|--|---|
| <p>Right to select suppliers</p> | <p>Right to shop around for the best prices, goods and services;</p> <p>No Bundling Allowed:</p> <ul style="list-style-type: none"> • Consumers are not obliged to enter into additional agreements with suppliers from whom purchased goods or services; • Suppliers are not permitted to force consumers into an agreement with a designated third party, unless the supplier can show that the convenience to the consumer in having those goods or services bundled outweighs the limitation of the consumer's right to choose or results in economic benefit for the consumer or the supplier offers bundled goods or services separately and at individual prices. <p>Note: There is an exception in franchise arrangements: If any goods or services that the franchisee was required to purchase from and at the direction of the franchisor are reasonably related to branded products or services that are the subject of the franchise agreement, then bundling, as contemplated herein, would be allowed.</p> |
| <p>To request pre-authorisation for repairs or maintenance services</p> | <p>Right to pre-authorise or refuse repairs or maintenance services and the consumer is not liable to pay for them if done without pre-approval;</p> <p>Right to request written cost estimates/quotations prior to suppliers execution of repairs or maintenance, and suppliers are not allowed to charge for such quotes/cost estimates;</p> <p>Suppliers not permitted to charge consumers for any diagnostic work/inspections/disassembly or reassembly required in the preparation of an estimate. Where the service provider (before preparing the estimate) discloses the price for preparing the estimate to the consumer and the consumer approved it, then the service provider may recover the charge.</p> <p>Note: this section only applies to a transaction or consumer agreement with a price value above the prescribed threshold (currently set at R1-00, excluding Value Added Tax).</p> |
| <p>To cancel advance reservations, bookings or orders</p> | <p>Right to cancel advance bookings, reservations or orders;</p> <p>Suppliers are entitled to request a reasonable advance deposit and to impose a reasonable charge for cancellation, depending on the nature of the business and specific circumstances. They cannot charge if the cancellation was as a result of the death or hospitalisation of a person for whom or for whose benefit the booking or order was made.</p> <p>Note: This section does not apply to franchise agreements or special order goods.</p> |
| <p>To choose or examine goods</p> | <p>Suppliers do not have the right to charge consumers for loss or damage to property or goods, unless it resulted from gross negligence, recklessness or deliberate actions or criminal conduct on the part of the consumer;</p> <p>Consumers have the right to reject goods if they do not correspond with pre-approved samples, and suppliers are required to provide consumers with reasonable opportunity to examine goods purchased or delivered.</p> |

9. FIXED TERM CONTRACTS

Section 14: These provisions do not apply to transactions between juristic persons regardless of their annual turnover or asset value (see specific definition of juristic person per the Act on page 4).

Regulation 5 states that the default maximum period for a fixed-term consumer agreement is twenty four (24) months from date of signature by the consumer –

- a) unless such longer period is expressly agreed with the consumer and the supplier can show a demonstrable financial benefit to the consumer;
- b) unless differently provided for in a regulation, which provides specifications for an industry, sector, type of agreement, type of consumer;
- c) or in an industry code.

Cancellation of a fixed term agreement:

CANCELLATION BY THE CONSUMER:

Despite any provision of the consumer agreement to the contrary, the consumer may cancel that agreement upon the expiry of its fixed term, without penalty or charge, however,

the consumer remains liable to the supplier for any amounts owed to the supplier in terms of that agreement up to the date of cancellation.

The consumer may also cancel at any other time, by giving the supplier **twenty business days** notice in writing or other recorded manner and form, (and does not have to provide reasons for the cancellation), subject to the above, and in addition:

the supplier (i) may impose a reasonable cancellation penalty with respect to any goods supplied, services provided or discounts granted to the consumer in contemplation of the agreement enduring for its intended fixed term and (ii) must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation.

Consumers who entered into a fixed term contract prior to the Act can also cancel such agreements without reason or charge, by providing twenty business days notice in writing, however the supplier can levy a reasonable cancellation penalty. See table on page 48 regarding transitional provisions.

CANCELLATION BY THE SUPPLIER:

The supplier may cancel the agreement **twenty business days** after giving written notice to the consumer of a **material** failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time.

The supplier must notify the consumer in writing, (or any other recordable form), of the impending expiry date of the fixed term agreement, not more than eighty, nor less than forty business days before the expiry date. The notice must include a description of:

- (i) any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date; and
- (ii) the options available to the consumer as follows:

That on the expiry of the fixed term of the consumer agreement, it will be automatically continued on a month-to-month basis, subject to any material changes

of which the supplier has given notice, as contemplated above, unless the consumer expressly –

- (i) directs the supplier to terminate the agreement on the expiry date; or
- (ii) agrees to a renewal of the agreement for a further fixed term.

Note: see page 37 Section 64 relating to accountability of suppliers and the cancellation of a service facility.

| RIGHT TO COOLING OFF PERIOD AFTER DIRECT MARKETING (SECTION 16) | |
|---|---|
| Right of consumer | A consumer may rescind a transaction resulting from any direct marketing without reason or penalty, by notice to the supplier in writing, or another recorded manner and form, within five business days after the later of the date on which – <ul style="list-style-type: none"> a) the transaction or agreement was concluded; or b) the goods that were the subject of the transaction were delivered to the consumer. |
| Obligations of supplier | A supplier must – <ul style="list-style-type: none"> a) return any payment received from the consumer in terms of the transaction within fifteen business days after – <ul style="list-style-type: none"> (i) receiving notice of the rescission, if no goods had been delivered to the consumer in terms of the transaction; or (ii) receiving from the consumer any goods supplied in terms of the transaction; and b) not attempt to collect any payment in terms of a rescinded transaction, except as permitted in terms of section 20(6) – see page 15. |
| <p>Right to be informed of cooling off period: Section 32 (direct marketing to consumers):</p> <p>A person who is directly marketing any goods or services and who concludes a transaction or agreement with a consumer must inform the consumer in the prescribed manner and form of the right to rescind that agreement. If a person who has marketed any goods and services in terms of Section 32 has left the goods with the consumer without requiring or arranging payment for them, those goods are unsolicited goods to which section 21 applies (see page 15). This also ties in with the right to disclosure – see page 17.</p> | |
| <p><i>To the extent that this section applies to a transaction or agreement, it is in addition to and not in substitution for any right to rescind a transaction or agreement that may otherwise exist in law between a supplier and a consumer.</i></p> | |

Section 16 does not apply to a transaction if Section 44 of the Electronic Communications and Transactions Act, 25 of 2002 applies – whereby a consumer is entitled to cancel without reason and without penalty any transaction and any related credit agreement for the supply of goods or of services **seven days** after the date of the receipt of the goods or after the date of conclusion of the agreement.

Section 20: Consumer’s right to return goods

The consumer has a right to return goods and receive a refund as a result of direct marketing (Section 16), and also to return unsafe or defective goods as per Sections 55 and 56 (pages 27 and 28).

The consumer may return goods to the supplier, and receive a full refund of any consideration paid for those goods, if the supplier has delivered:

After exercising right to cooling off:

- a) goods to the consumer in terms of an agreement arising out of direct marketing, and the consumer has rescinded that agreement during the cooling off period, in accordance with section 16. Goods returnable in this instance must be returned to the supplier at the consumer's risk and expense within ten business days after delivery to the consumer.

Poor quality of goods or services:

- b) goods that the consumer did not have an opportunity to examine before delivery, and the consumer has rejected delivery of those goods for any of the reasons contemplated in section 19(5) (they are of a type and quality as reasonably contemplated in the agreement).

Different goods/unsuitable for purpose intended for:

- c) a mixture of goods, and the consumer has refused delivery of any of those goods, as contemplated in section 19(8) (some of the goods are of a different description not contemplated in the agreement), or
- d) goods intended to satisfy a particular purpose communicated to the supplier as contemplated in section 55(3), and within ten business days after delivery to the consumer, the goods have been found to be unsuitable for that particular purpose.

The scenarios listed in (b) to (d) above must be returned to the supplier at the supplier's risk and expense, within ten business days after delivery to the consumer.

The ability to return goods does not apply if:

- a) For reasons of public health or otherwise, a public regulation prohibits the return of those goods to a supplier once they have been supplied to, or at the direction of, a consumer; or
- b) After having been supplied to, or at the direction of, the consumer, the goods have been partially or entirely disassembled, physically altered, permanently installed, affixed, attached, joined or added to, blended or combined with, or embedded within, other goods or property.

Section 20(6): Upon return of any goods in terms of this section, the supplier must refund to the consumer the price paid for the goods, less any amount that may be charged by the supplier. The Act sets out the factors to be taken into account when determining the right of a supplier to impose a charge in Section 20(6), such as whether the goods will need re-packaging due to being opened, or have been used.

Return of goods due to unsafe, defective, poor quality:

Refer to page 28, Section 56. Right to return such goods is enforceable six months after delivery of the goods to the consumer. They may be returned at the supplier's risk and expense, without penalty to the consumer.

Unsolicited goods or services

For the purpose of the Act, goods or services are unsolicited in any of the following circumstances (Section 21):

- a) If, during any direct marketing of goods or services, a supplier or person acting on behalf of a supplier has left any goods with, or performed any service for, a consumer without requiring or arranging payment for them;

- b) If a consumer is a party to an agreement contemplating the periodic delivery of goods during the life of the agreement, and –
 - (i) during the course of that agreement, the supplier introduces goods or services that are **materially** different from the goods or services previously supplied to an extent not reasonably contemplated in the agreement, unless the consumer expressly consented to the material change; or
 - (ii) after the termination of that agreement, the supplier delivers any further goods to the consumer, other than in terms of a different agreement or transaction.
- c) If a supplier delivers goods or performs services at a location, date or time other than as agreed, and the consumer has rejected that delivery or performance of services, as contemplated in section 19(6),
- d) If a supplier delivers a larger quantity of goods than the consumer agreed to buy, the excess goods are unsolicited unless the consumer has rejected the entire delivery, as contemplated in section 19(7)(a); or
- e) If any goods have been delivered to, or any services performed for, a consumer by or on behalf of a supplier without the consumer having expressly or implicitly requested that delivery or performance.

However, if:

- a) Within ten business days after delivery of any goods to a consumer, the supplier informs the consumer that the goods were delivered in error, those goods become unsolicited only if the supplier fails to recover them within twenty business days after so informing the consumer; or
- b) If any goods are delivered to a consumer and –
 - (i) those goods are clearly addressed to another person, and have obviously been misdelivered; or
 - (ii) having regard to the circumstances of the delivery, it would be apparent to the ordinary alert consumer that the goods were intended to be delivered to another person, the goods become unsolicited goods only if the recipient informs the apparent supplier or the deliverer that the goods were delivered, and the goods are not recovered within the following twenty business days.

Obligations of person in possession of unsolicited goods:

A person who is in possession of goods contemplated in this section, must not frustrate or impede any reasonable action by the supplier or deliverer to recover the goods within the time and is not responsible for any cost pertaining to the recovery of the goods or further delivery of them to another person.

A person in possession of the goods is liable to the supplier or deliverer, as the case may be, for any additional costs for recovery of, or damage to, the goods arising as a result of anything done to frustrate or impede the lawful recovery of those goods.

A recipient of unsolicited goods may retain them without payment, or return them to the supplier (at the supplier's risk and expense).

Should the supplier not have indicated to the consumer that they were erroneously delivered within ten business days after the consumer had received them, then ownership will pass to the consumer, and he/she will not be required to pay for them. If the consumer did make payment, he/she can recover that amount together with interest calculated from the date the payment was made to the supplier.

Refer to Section 21 for further detail on the rights of the person who lawfully retains any unsolicited goods.

10. RIGHT TO DISCLOSURE AND INFORMATION

Sections 22 to 28 of the Act deal with the consumer's rights to:

Information in plain and understandable language:

- Section 22: Any notice, document or visual representation (hereinafter referred to as 'information') that a supplier is required to produce or provide to a consumer must be in plain and understandable language;
- The Act states that the requirement of 'plain and understandable language' will be fulfilled if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the information is intended, with average literacy skills and minimal experience as a consumer, could be expected to understand the content, significance and import of the information without undue effort, having regard to its: context, comprehensiveness and consistency, the organisation of the document, the vocabulary usage and sentence structure, the use of illustrations, examples and headings or other aids to reading and understanding;
- The Commission may publish guidelines for methods of assessing the use of plain and understandable language, which may be published for public comment.

Disclosure of price of goods or services:

- Section 23: This section does not apply if Section 43 of the Electronic Communications and Transaction Act applies to the transaction. Section 43 applies to the situation where a supplier offers goods or services for sale, for hire or for exchange by way of an electronic transaction – the Section then sets out what information must be made available to consumers on the website where such goods or services are offered.
- This right links in with the consumers' right to choose (see page 12) and particularly the pre-authorisation for repairs and maintenance. Where a consumer has pre-approved an estimate, then this section 23 will not apply to that transaction.
- Otherwise a supplier is required to display the price (can be a unit price) when he or she displays the goods for sale – by attaching it to the item in some way or representing it in a way that the consumer is able to understand what it was. The price must be in writing and in local currency. The requirement for disclosure of price does not apply to goods in advertising displays, or if goods are kept in an area where the public does not have access.
- A supplier is bound by a display price or reduction in price and may not charge a price higher than the displayed price or the lowest displayed price, if more than one price is displayed, however will not be bound if an unauthorised person has tampered with the price displayed or authorised by the supplier, or if the incorrect price was displayed in error inadvertently and the supplier has corrected the error or taken reasonable steps to inform consumers of the error and the correct price.

Product labelling and trade descriptions:

- Section 24: These must not be misleading to the consumer when attached to the goods as a label or trade description, or displayed alongside them or contained in advertising material from which a consumer can place an order.

- The Minister may prescribe categories of goods that are required to have trade descriptions attached to them.
- Regulation 6 relates to product labelling and trade descriptions for textiles, clothing, shoes and leather goods, and Regulation 7 to genetically modified organisms – where goods that contain at least 5% of genetically modified organisms are required to have a notice in plain and understandable language attached to them, stating that the good, ingredient or component “contains Genetically Modified Organisms”.
- A producer or importer of any goods that have been prescribed to have trade descriptions attached to them (as per paragraph above) must apply the trade description disclosing:
 - ◆ The country of origin of the goods, and
 - ◆ Any other prescribed information (see the Regulations).
- It is an offence for a supplier to use a misleading trade description or to alter or remove one applied to goods.

Disclosure of re-conditioned or grey market goods

- Section 25: Suppliers are required to warn consumers that goods are re-conditioned or that they have been imported without the approval or license of the registered owner of the trade market, being “grey market goods”. Regulation 8 sets out the detail of information to be disclosed.

Disclosure of Sales Records:

- Section 26: A supplier will be required to keep a written record of the transaction or a “sales record”, unless exempt by the Act, which information includes, inter alia:
 - ◆ Suppliers full name, registered business name, VAT registration number (if applicable), address, date of transaction, name and description of goods or services supplied, unit price, quantity, total price of the transaction before any taxes, amount of applicable taxes, total price including taxes;
- The Minister may provide an exemption for certain categories of goods or services, or circumstances of trade from providing sales record, for example, where the consumer expressly doesn’t require a sales record, a person trading as a hawker, and a transaction made in terms of Section 43 of the Electronic Communications and Transactions Act.

Disclosure by Intermediaries (e.g estate agents):

- Section 27: Intermediaries or agents must disclose information relating to the parties to a transaction. Regulation 9 sets out in detail the information required to be disclosed by different categories of intermediaries. This requirement does not extend to intermediaries who are the Executors or administrators of a deceased estate in regard to the estate’s property, nor to trustees of a trust in regard to the trust property. Refer to page 45 for a list of information required to be disclosed by intermediaries.

Identification of deliverers, installers and others:

- Section 28: Whenever a person is, at the consumer’s premises, engaged in direct marketing, or performing a service, or delivering or installing goods at the consumer’s premises, he or she is required to visibly wear or display a badge or identification device, or provide suitable identification on request by the consumer.

Other Sections in the Act which require disclosure:

- Also see **Section 32** (consumer to be informed of right to cancel a direct marketing agreement – see page 14);
- **Section 33(1)** – Catalogue marketing – certain information is required to be disclosed to the consumer where he or she has not had an opportunity to inspect the goods before concluding the agreement, for example where he or she orders the goods he or she saw in a catalogue by telephone, post or fax;
- **Sections 49(1) and 58(1)** – where there involves a risk to the consumer or a weakening of his or her position, the supplier is required to warn the consumer – see page 24 for more detail.

11. RIGHT TO FAIR AND RESPONSIBLE MARKETING

The Act prohibits unfair marketing practices, which includes – bait marketing, negative option marketing, catalogue marketing, referral selling, sets standards for customer loyalty programmes, and regulates promotional competitions.

The obligations set out in Sections 29 to 39 on suppliers apply equally to a producer, importer, distributor, retailer or service provider.

Section 29: General standards for marketing goods or services:

- Section 41 – the marketing must not be false or misleading (see page 22);
- Fraudulent or deceptive, or unlawful.
- Thus the nature and use of, and the conditions on which the goods and services may be acquired cannot be distorted.
- Puffery will most likely not be allowed.
- Refer to Sections 30 and 31 for information on the prohibitions against **bait marketing** (advertising particular goods or services as being available at a specified price in a way that misleads the consumer in regard to the actual availability of those goods or services from the supplier at the advertised price) and **negative option marketing** (where a supplier promotes any goods or services, or offers to enter into an agreement for them, or induces a person to accept them on the basis that they are to be supplied or will automatically come into existence unless the consumer declines such an offer or inducement). Such an agreement is unlawful and accordingly void.

Section 32: Direct marketing to consumers:

- Refer to Section 16 (page 14), a supplier is obliged to notify the consumer of his or her right to rescind a direct marketing agreement (within five business days), and if a person who has marketed such goods and left them with the consumer without requiring or arranging payment for them, they may become unsolicited goods to which Section 21 applies (see pages 15 to 16);

Sections 11, 12, 16, and 28 are all applicable to the direct marketer.

Section 33: Catalogue or Electronic marketing:

- Does not apply to a franchise agreement or to a transaction if Chapter 7 of the Electronic Communications and Transactions Act applies to it;
- It applies where a consumer has entered a transaction either telephonically, via the internet, or by postal order or fax, and in any other way where the consumer has not had a chance to inspect the goods before concluding the agreement;
- The supplier is required to disclose certain information prior to concluding the agreement or transaction, which information is contained in Section 33(3)(a) to (h). A copy of the agreement must be given to the consumer within ten business days after its conclusion. If such a copy is not delivered within this time period, the consumer may terminate the agreement without penalty.

Note: The requirements of Section 33 do not extend to an agreement or transaction that resulted from direct marketing.

Section 34 deals with **trade coupons** sets out the obligations of suppliers and rights of consumers relating thereto;

Section 35 sets standards for **customer loyalty programmes**.

Section 36: Regulates promotional competitions:

- The Act restricts the way in which promotional competitions are conducted;
- A prize includes a gift, reward, free goods or services, a price reduction or other free benefit;
- One may not inform another person that he or she has won a competition or a prize if no competition was conducted, or he or she did not win, or the prize was generally made available, or the prize is subject to a previously undisclosed condition, or the person is required to buy or pay for something for the prize (similar to an “administration fee”);
- A reasonable cost of electronically transmitting an entry to a promotional competition shall not exceed R1.50, this includes the total cost for all subsequent electronic communication to the consumer regarding that entry;
- Promoters must arrange that an independent accountant, registered auditor, attorney or advocate oversees and certifies the conducting of the competition and such a person must report this through the promoter’s internal audit reporting, or other appropriate validation or verification procedures. See page 44 for definitions of promoters and promotional competitions.

Section 37 regulates **alternative work schemes** – work from home schemes are still legally permissible, however the promoters of such schemes are not allowed to charge a person a fee for getting work, business, activity or investment, unless the person charged has actually been assigned and performed the work. An advert promoting a scheme of this nature must contain a warning about the uncertainty of the extent of the work or income, full details of the promoter and the nature of the work being offered;

Section 38 referral selling is still permissible in terms of the Act, provided it is not conditional upon an event occurring after the consumer agrees to enter into the transaction. In other words, a person must not promote, offer, supply or agree to supply or induce a consumer to accept any goods or services on the representation that the consumer will receive a rebate, commission or

benefit if the consumer subsequently gives the supplier the names of other consumers, or otherwise assists the supplier to supply goods or services to other consumers, and that the rebate or commission is contingent on the event occurring after the consumer agrees to the transaction.

Section 39 protects those persons who lack legal capacity to contract. A supplier cannot enter into a transaction or agreement with a mentally unfit customer or unemancipated minor, who was not assisted by his/her parent or guardian.

Note: the sections applying to catalogue marketing, trade coupons, and referral selling do not apply to franchise agreements.

12. RIGHT TO FAIR AND HONEST DEALING

The Consumer's right to fair and honest dealing encompasses the following provisions in the Act:

| | | | |
|---|--|--|---|
| Unconscionable conduct (Section 40) | Prohibiting false, misleading or deceptive representations (Section 41) | Fraudulent schemes and offers (Section 42) | Pyramid schemes (Section 43) |
| Consumer's right to assume the supplier is entitled to sell goods (Section 44) | Auctions (Section 45) Section 45 and the detailed provisions set out in the Regulations, relate to rules for the holding of auctions | Changes, deferrals and waivers and substitution of goods (Section 46) | Over-selling and over-booking (Section 47) |

Some of the provisions listed above are expanded upon in more detail as follows:

Unconscionable conduct:

- Section 40: A supplier (or agent of a supplier) must not use physical force, harassment, or undue influence against a consumer in connection with any marketing or supply of goods or services to the consumer, or when negotiating, executing or enforcing an agreement to supply goods or services or when demanding payment for them or recovery of goods from the consumer. This list is not exhaustive.
- It is also unconscionable for a supplier to knowingly take advantage of a consumer that is substantially unable to protect his or her own interests because of physical, mental disability or illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor;
- Unconscionable conduct that results in a transaction or agreement is deemed to be a prohibited transaction in terms of Section 51 (see page 25).

False and misleading or deceptive representations:

- Section 41: A supplier (or anyone else on behalf of the supplier) must not by words or conduct in relation to the marketing of goods and services:
 - ◆ directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;
 - ◆ use exaggeration, innuendo or ambiguity to a material fact;
 - ◆ fail to correct an apparent misapprehension on the part of the consumer, or permit or require an employee or agent to do so on behalf of the supplier.
- Section 41 sets out an extensive, but not exhaustive, list of examples of what amounts to a false, misleading or deceptive representation, including some of the following (not all have been included here, refer to the Section for further detail):
 - ◆ The nature, properties, advantages or uses of the goods or services;
 - ◆ The manner in or conditions on which the goods or services may be supplied;
 - ◆ The price of the goods or services;
 - ◆ The sponsoring of an event;
 - ◆ Any other material aspect of the goods or services.
- False misleading representations ties in with **right to choose** and the right of the consumer to obtain pre-authorised quotes and estimates (see page 12);
- A statement will, amongst others, be false, misleading or deceptive if the supplier falsely states or implies that a necessary service, maintenance or repair facilities or parts are readily available for or within a reasonable period, or any service, part, replacement, maintenance or repair is needed or advisable.
- Also ties in with the right to disclosure and misleading trade descriptions (see page 17).
- Where a supplier engages in deceptive, fraudulent or misleading marketing, the court may make a declaration to that effect, and make any further order that is just and reasonable in the circumstances -see page 25, Section 52-Powers of the court.

Over-selling and over-booking – Section 47

Supplier's obligations:

Must not accept payment for any goods or services unless the supplier has a reasonable basis for saying that he or she will be able to supply those goods or provide those services;

Must not supply goods or services that are materially different from the goods or services paid for;

Must honour a commitment to supply goods or services on a specified date or time.

Consequences of breach:

If the supplier fails to honour its commitment because of insufficient stock or capacity, it must refund the consumer the amount (if any) paid in respect of that commitment or reservation, plus interest at the prescribed rate, as well as compensate the consumer for costs directly incidental to the supplier's breach of contract.

Defences available to supplier:

Where the supplier offered to get another person to supply the consumer with comparable goods or services and the consumer accepted the offer or unreasonably refused it:

The supplier will not be liable if the shortage of stock or capacity is due to circumstances beyond the supplier's control and the supplier took reasonable steps to inform the consumer of the shortage of stock or capacity as soon as it was practicable to do so in the circumstances. The shortage will not be considered to have been beyond the supplier's control if it was as a result of the supplier's lack of diligence, thus the supplier will not be able to escape liability easily.

Refer to the Act for detail on sections 42–46, and particularly Regulations 13–16, which must be read together with Section 42(8), 51 and 120 of the Act, and which relate to:

- Prohibition on intermediary arranging transport contracts – Regulation 14
- Fraudulent Public Property syndication schemes – Regulation 15
- Prohibition on feasibility studies promising funding – Regulation 16
- Calculation of interest for multiplication scheme – Regulation 17
- Auctions – Regulations 18 to 33.

Note: Due to the limitations in length of this guide, the sections and regulations on auctions are not included, and the reader is urged to consult the Act and to obtain professional advice in this regard.

13. RIGHT TO FAIR, JUST AND REASONABLE TERMS AND CONDITIONS

Sections 48 to 52:

- The Act prohibits unfair unreasonable or unjust contract terms;
- Requires consumers to be given free copies of contracts;
- Outlaws unilateral changes to contracts;
- Outlaws certain types of agreements;
- Outlaws any form of contracting out.

Section 48: Unfair, unreasonable or unjust contract terms:

- A supplier must not offer to enter into an agreement to supply any goods or services at a price or on terms that are unfair, unreasonable or unjust, and must not negotiate an agreement for the supply of any goods or services in a manner that is unfair, unreasonable or unjust. The supplier is also prohibited from marketing any goods or services in an unfair or unjust manner;
- Waiver and exemption clauses are now also regulated – a supplier cannot require a consumer to waive any rights, assume any obligation, or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

What is considered unreasonable, unfair or unjust?

| One sided contracts | False, misleading or deceptive representation | Assumption of risk |
|--|--|---|
| Excessively one sided in favour of any other person other than the consumer. | Consumer relied on a false, misleading or deceptive representation of the type listed in Section 41 (see page 22) to the consumer's detriment. | The contract or agreement is subject to a term or condition or a notice to a consumer regarding an assumption of risk and in itself such a term or condition is unfair and the fact, nature and effect of that term was not drawn to the attention of the consumer. |
| Inequitable terms | | |
| Adverse terms to the consumer. | | |

- Regulation 44 provides a lengthy “**grey list**” of contract terms which are presumed not to be fair and reasonable. The list is not exhaustive, and it includes, inter alia, terms that limit the supplier’s liability for death or personal injury to the consumer, and the supplier’s vicarious liability for its agents. Regulation 44 lists 23 terms which are presumed to be unfair.

Section 49: Notice required for hazardous activity (indemnities):

A notice to consumers or provision of a consumer agreement that purports to –

| (a) Limit in any way the risk or liability of the supplier or any other person | (c) Indemnity | (d) Assumption of risk |
|--|---|--|
| (b) Be an acknowledgment of any fact by the consumer | Impose an obligation on the consumer to indemnify the supplier or any other person for any cause. | Constitute an assumption of risk or liability by the consumer. |

- Must be drawn to the attention of the consumer in a manner and form which is in plain language, and the fact, nature and effect thereof brought to the attention of the consumer in a conspicuous manner that is likely to attract the attention of an ordinarily alert consumer. The consumer must be given an adequate opportunity to receive and comprehend the provision or notice, before engaging in the hazardous activity.
- In addition, the supplier must specifically draw the fact, nature and potential effect of risk to the attention of the consumer as per the above paragraph and the consumer must have assented to the same by signing or initialing the provision or acknowledged the notice in another manner and indicated awareness of the risk. If the provision or notice concerns any activity or facility that is subject to any risk of an unusual character or nature, the presence of which the consumer could not reasonably be expected to be aware of or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate or that could result in serious injury or death.

Section 50: Written consumer agreements:

- The Minister may prescribe by Regulation categories of consumer agreements that are required to be in writing;
- If an agreement is in writing – either voluntarily or as required by the Act, then this Section applies irrespective of whether or not the consumer signs the agreement, and the supplier must provide the consumer with a free copy thereof, or electronic access thereto;
- It must be in plain and understandable language as per Section 22 and must set out an itemised breakdown of the consumer's financial obligations under the agreement.

Section 51: Prohibited transactions, agreements, terms or conditions:

The following terms and conditions are expressly prohibited in terms of Section 51:

(1) Where such a transaction, agreement, term or condition is intended to defeat or in effect defeats the purposes and policy of the Act, (2) mislead, or deceive the consumer, (3) subjects the consumer to fraudulent conduct, (4) waives or deprives the consumer of any rights, (5) avoids a supplier's obligations in terms of the Act, (6) sets aside or overrides any effect of any provision of the Act, (7) authorises the supplier to do anything that is unlawful or fail to do anything required in terms of the Act, (8) limits or exempts a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence (or any person acting for or controlled by the supplier) or amounts to an assumption of risk or liability by the consumer for a loss caused by such gross negligence (9) a provision that results from an offer made during the course of negative option marketing (10) a provision that imposes an obligation on the consumer to pay for damage or assume the risk of handling any goods displayed by the supplier (the consumer is only liable for any loss or damage that results from gross negligence or recklessness on the consumer's part).

- Section 51 sets out further prohibited terms and conditions, transactions or agreements, which include provisions relating to claims against the guardian fund, false acknowledgements, forfeiture of money, requiring the customer to pay for damaged display items, supplementary agreements, consenting to pre-determined costs, repossession of goods, undertakings to sign enforcement documentation, bank cards and pin codes.
- Should such terms be included, they are void to the extent they are prohibited.

Section 52: Powers of the court:

- A court or Alternative Dispute Resolution (ADR) body is permitted to go beyond the mere wording of the Act and look at the underlying intentions of the Act or its spirit.
- Section 52(2) sets out a detailed list of factors for the court or ADR body to consider when making such a determination, for example :
 - ◆ those circumstances that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made, and the principles, purposes and provisions of the Act, irrespective of whether the Act was in force at the time. Such orders would include:
 - An order that any money or property be restored to the consumer;
 - An order that the consumer is compensated for losses or expenses relating to the transaction or the proceedings of the court.

- An order that the supplier ceases any practice, or alters any practice, form or document so as to avoid repetition of the supplier's conduct.

Where a provision or term is found to be unlawful, the court may make an order that the unlawful term or provision is severed from the agreement thereby rendering the rest of the transaction or agreement lawful and binding on the supplier and consumer. Where it is not reasonable to sever the offending provision or notice, the court may declare the entire agreement, provision or notice void as from the date that it purportedly took effect. The court may also make any other order that that is just and reasonable in the circumstances.

14. RIGHT TO FAIR VALUE GOOD QUALITY AND SAFETY

- **Sections 53 to 61:** The Act provides statutory warranties for safety and quality;
- Introduces a general product safety monitoring and recall regime;
- Extending strict liability to retailers for illness, injury, damage to property and death as a result of defective goods or improper labelling;
- Specific definitions are applicable to this part – including the definition of ‘defect’, ‘failure’, ‘hazard’ and ‘unsafe’ – see Table on page 45;
- The Act is designed to ensure the safety of consumers and to provide specifically for informed consent. Refer to page 24 and the requirements of Section 49 regarding informed consent – a supplier is required to draw the consumer's attention to any risk that could result in serious injury or death – and must draw the consumer's attention to this fact in a conspicuous, clear and understandable way.
- Product liability and safety law are both areas of law focused on:
 - ◆ unacceptable risks of death, injury or damage;
 - ◆ prevention of the realisation of those risks;
 - ◆ assuring compensation when or if the risks do realise.
- The Act establishes a form of modified strict liability of producers, importers, distributors or retailers - for harm caused by or as a result of, the supply of goods which are unsafe, or failed products, or defects or hazards in any goods, and for inadequate instructions or warnings provided to the consumer, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer.

| Consumer's rights | |
|--|--|
| To demand quality service Section 54 | To safe good quality goods Section 55 |
| <ul style="list-style-type: none"> To timely performance and completion of services; The performance of those services in a manner and quality persons are entitled to expect; Use, delivery and installation of goods free of defects; Return of any property or control over property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for performing those services. | This section does not apply to goods bought at an auction. |
| | <ul style="list-style-type: none"> Every consumer has the right to receive goods that are (a) reasonably suitable for the purposes for which they are generally intended (b) are of good quality in good working order and free of any defects (c) will be useable and durable for a reasonable period of time, and (d) comply with any applicable standards set under the Standards Act, 29 of 1993. |



| Supplier's obligations | Factors to take into account when determining whether the requirements of Section 55 have been met |
|---|---|
| <ul style="list-style-type: none"> If a supplier fails to perform a service to the standards per the above, the consumer may require the supplier to either - <ol style="list-style-type: none"> remedy any defect in the quality of the services performed or the goods supplied, or refund to the consumer a reasonable portion of the price paid for the services performed and the goods supplied having regard to the extent of the failure. | <ol style="list-style-type: none"> The manner in which and purposes for which the goods were marketed, packaged displayed, any instructions/warnings; The range of things that might reasonably be anticipated to be done with the goods; The time when the goods were produced or supplied. <ul style="list-style-type: none"> It is irrelevant whether a product failure or defect was latent or patent or whether it could have been detected before the consumer took delivery of the goods; A product failure or defect may not be inferred in respect of particular goods solely on the grounds that better goods have subsequently become available from the same supplier or any other producer or supplier. |
| <p>If a consumer has specifically informed the supplier of the particular purpose for the acquisition of the goods or the use thereof and the supplier:</p> <ol style="list-style-type: none"> Ordinarily offers to supply such goods; Acts in a manner consistent with being knowledgeable about the use of those goods, then the consumer has the right to expect that the goods are suitable for that specific purpose. | |
| <p>(a) and (b) do not apply to a transaction if the consumer (a) has been expressly informed that the particular goods were offered in a specific condition and (b) has expressly agreed to accept those goods in that condition or knowingly acted in a manner consistent with accepting the goods in that condition.</p> | |

Section 56: Implied warranty of quality:

- If the goods are not suitable for the purposes for which they are intended or otherwise fail to comply with the requirements listed in Section 55 (previous page), the consumer is entitled to return them at the supplier's risk and expense and without penalty and obtain a refund or have the items repaired or get a refund of the price paid. The choice is the consumer's.
- The consumer must return them within **six months** after being delivered;
- The consumer may claim against any of the entities in the supply chain (see page 7) in other words, the producer, importer, distributor, or retailer of the goods;
- This section does not apply if the goods fail to meet the necessary standard because they were tampered with after leaving the entity claimed against;
- If the goods are returned for repair, the supplier will have only one opportunity to repair the same, and if the problem re-occurs, they must be replaced or the consumer refunded;
- This right ties in with the right to choose and the right to request quotes/ estimates for the repair and maintenance of goods. In terms of this section (Implied warranty of quality) where the consumer allows the supplier to repair failed, defective or unsafe goods returned by the consumer within six months of delivery, and within three months after such repair, the failure, defect or unsafe feature re-appears or a further failure, defect or unsafe feature is discovered, then the supplier must either replace the goods, or refund the price paid by the consumer for the goods (the consumer may choose which option (s)he prefers);
- This implied warranty of quality entrenched in the Act is in addition to any other implied warranty or condition imposed by the common law and any express warranty given by the producer, importer, distributor or retailer.

Section 57: Warranty on repaired goods:

- All new and re-conditioned parts installed during repairs or maintenance, and the labour involved are automatically warranted for three months after installation (not applicable to goods that are subject to ordinary wear and tear from usage);
- This section compels a service provider to warrant new or reconditioned parts installed during repair or maintenance work, including labour, for a minimum of three months after installation. This warranty will be void if the consumer subjected the installed part or goods to misuse or abuse. Where reconditioned, rebuilt, remade or grey market parts or components (goods) are used in the performance of a repair, service or maintenance work this fact should expressly be disclosed to the consumer by the supplier (Section 25 and Regulation 8).

Section 58: Warning – Potentially hazardous activities and facilities:

- The supplier of any activity or facility with which certain types of risks are associated, of an unusual character-or a risk that may result in serious injury or death – must specifically draw that fact to the attention of consumers in accordance with Section 49 (see page 24). Failure to comply may lead to the imposition of an administrative fine (see page 40) and also liability for damages under Section 61. The definition of consumer includes the user of goods or recipient of services, irrespective of whether they were party to the transaction or not. Packagers of potentially hazardous goods must provide the consumer with instructions for safe handling and use for such goods.

Section 59: Safe disposal of certain goods:

- If the disposal of any type of goods, containers or packaging into a common waste disposal system is prohibited by any national legislation the supplier must accept the return of them without charge from the consumer. The supplier can then return them to the importer or manufacturer.

Section 60: Safety monitoring and recall:

- The Commission has the role of developing industry-wide codes of practice for product failures, defects or hazards and investigating them. It can warn the public of hazards and give written notice to the producer to conduct an investigation into the degree of risk posed to the public, and to carry out a recall programme.

Section 61: Strict liability for damage caused by goods:

- A producer, importer, distributor or retailer of goods is liable to a consumer on a no-fault basis (without proof of negligence on the part of the supplier of the goods) for any harm, including death, injury, physical damage or associated economic loss which was caused by:
 - ◆ The supply of unsafe goods;
 - ◆ A product failure, defect or hazard in any goods, or
 - ◆ Inadequate instructions or warnings provided to the consumer pertaining to the hazard arising from or associated with the use of any goods.
- For purposes of this section, a supplier includes a supplier who applies, installs or provides access to any goods;
- If more than one party is potentially liable, the consumer can sue any one of them, as their liability is joint and several. In other words, if the consumer sues one party (for example, the distributor), and receives payment, the distributor can then sue the other parties for a contribution towards the payment. A court may also apportion liability among persons who are found to be jointly and severally liable;
- The type of harm contemplated includes: death, injury or illness of a natural person, and any loss of or physical damage to property irrespective of whether it is movable or immovable, and any economic loss that results from any of these types of physical harm caused;
- 'Economic loss' means indirect financial losses that may result from death, injury, illness and damage to property.

The claim for damages must be brought within **three years** of:

- ◆ The death, injury, or the earliest time that the person became aware of the illness and its cause;
- ◆ The earliest time the person became aware of the loss or damage to property and
- ◆ The latest date on which the person suffered any economic loss – including loss of earnings, loss of profit or potential profit for any business whose activities might be suspended or affected by the harm, and possible financial support for dependants left behind. A claim that has prescribed cannot be instituted.

Possible defences available to supplier/any other person in the supply chain:

- Where it is unreasonable to expect the distributor or retailer to have known of the defect or hazard. In determining what is unreasonable, regard shall be had to the distributors or retailers role in marketing the goods to the consumer.

- Or that the shortcoming arose from: (a) complying with any public regulation (b) did not exist in the goods at the time they were supplied (c) adequate instructions were given to the consumer and the consumer failed to comply with them.
- A service provider should furthermore take cognisance of the fact that poorly performed service or maintenance work could cause harm to the consumer through product failure, unsafe, hazardous or defective goods. This would potentially place the service provider in the supply chain for product liability in terms of this Section. The use of poor quality parts or components in the performance of service or maintenance work or the use of unskilled and unqualified service technicians should be avoided at all costs.

Note: that Section 61 of the Act dealing with product liability already became effective on the early effective date. In other words, the liability arises where the goods are first supplied to a consumer on or after the early effective date.

15. THE ACT AND IMMOVABLE PROPERTY TRANSACTIONS

There is uncertainty as to the application of many sections of the Act and property transactions, which only time and the courts will be able to interpret and clarify.

Where the supplier is a seller of property (who sells property as his/her ordinary course of business), and the purchaser is a consumer as defined, the Act will have application.

Definition of “goods” and “services” as they relate to property transactions:

- The definition of “goods” in the Act includes a legal interest in land or any other immovable property, other than an interest that falls within the definition of “services”. In other words, the definition of “goods” includes the sale and purchase of immovable property. The definition of “services” includes the provision of accommodation or sustenance, access to or use of any premises or other property in terms of a rental (lease agreements).

Remedies for Purchasers/Consumers provided by the Act:

Right to fair and honest dealing:

- Sections 40 – 42, and 44: The Act deals with unconscionable conduct, false, misleading or deceptive representations (whether by word or conduct), fraudulent schemes or offers, and the consumers right to assume a supplier is entitled to sell goods. Consumers (purchasers) are entitled to fair and reasonable marketing.
- Estate agents will need to take cognisance of all the relevant provisions in the Act in regard to their marketing practices, and to all mandates that they take from sellers and purchasers (even in regard to “once-off” private transactions). All negotiations and representations made by sellers, estate agents, property developers, builders and other property dealers – to purchasers, must comply with the Act, so as to ensure that purchasers are treated lawfully and fairly.

Cooling off period:

- Refer to page 14, (Section 16).
- *This section may have the effect of allowing a cooling-off period when a property is purchased due to direct marketing, even if it is sold for more than R250 000 (i.e this cooling off right is in addition to the cooling off period in terms of Section 29A of the Alienation of Land Act, which applies where the value of the property is less than R250 000, and the purchaser is an individual).*

Disclosure and Information:

- Section 22 – 28: Consumers (purchasers/tenants where applicable) are entitled to information in plain and understandable language, and all agreements and documentation are required to comply. Purchasers must understand exactly what they are buying. The purchaser has the right to receive express notice of any term in an agreement which limits the risk or liability of the provider, or of any term which constitutes an assumption of risk or liability by the consumer. See page 18 for disclosure requirements of intermediaries (estate agents).

Consumer agreements:

- Sections 48 – 52: Unfair, unreasonable or unjust contract terms are not allowed in deeds of sale. The meaning and effect of all applicable terms and conditions of the agreement are required to be explained, and no terms or conditions that are deemed unfair for the consumer may be inserted.

Right to fair value, good quality and safety – Sections 53 – 60

A. Right to fair value:

- Sale prices could be scrutinised for reasonableness. In addition, the price should always be displayed when the property is being advertised for sale.

B. Right to good quality and safety:

Sections 55-56: (see page 27).

It would seem that where the Act applies, the purchaser has a right to return goods (to require the seller to take re-transfer of the property) if any of the requirements listed in Section 55 are not met.

Where the sale agreement **expressely** lists any patent (visible) defects, latent (unknown) defects, or specifies the exact condition of the property, the seller will most likely be protected. Such a clause must be expressly accepted by the purchaser (see text in last block on page 27).

Right to return defective goods:

- See page 28, Section 56.
- *It would seem that where the Act applies, the purchaser has the right to return the goods to the seller –without penalty and at the seller's risk and expense – within six months of delivery (registration of transfer at the deeds office). The purchaser has the choice as to whether the seller will be required to refund the full purchase price or repair the 'goods' (where applicable). The choice is with the purchaser – the seller cannot dictate the purchaser's options in this regard.*

Effect of the Act on the Voetstoets clause:

- There are conflicting views on the likely effect of the Act on the traditional voetstoets clause;

- Certainly, where the Act applies, traditional voetstoets clauses that breach the consumer's rights as per Section 55 of the Act will no longer be applicable;
- Property speculators, developers, builders and the like will be required to comply with sections 55–56. However it is also likely that the exception in Section 55(6) will relate to the voetstoets clause in that when the purchaser signs the deed of sale, and (s)he acknowledges that (s)he has been expressly informed that the property is sold in the specific condition that (s)he sees it, and which condition is listed in detail in the contract itself, and is acquainted with the property's condition, nature and extent, and accepts it as is, then the exception should apply.

16. THE ACT AND LEASES OF FIXED PROPERTY

- There is a great deal of uncertainty in regard to the Act, and how it affects the property industry, particularly lease agreements for immovable property;
- 'Lease' is not defined in the Act, however, 'service' includes access to or use of any premises or other property in terms of a 'rental' and 'rental' means an agreement for consideration in the ordinary course of business, in terms of which temporary possession of any premises or other property is delivered to or at the direction of the consumer, or the right to use any premises or other property is granted to or at the direction of the consumer, excluding a lease within the meaning of the National Credit Act.

Landlord as Supplier/ Tenant as Consumer:

- The Act applies where the landlord is in the business of letting properties, and the tenant meets the criteria of 'consumer' – being an individual or juristic body whose turnover or asset value is less than R2 million;
- The question arises as to what is meant by "the landlord being in the business of letting properties" – one view is that it includes the individual property owner who earns rental income from a property irrespective of what he or she does for a living. Another view is that the landlord must be a serial property renter before (s)he falls within the ambit of the Act;

Some sections in the Act which will apply to lease agreements:

- Sections 22 and 40 of the Act state that it is the inherent duty of the landlord to ensure the tenant understands the lease agreement, and to provide full disclosure and information;
- The tenant is entitled to information in plain and understandable language, which implies that tenants will have a right to claim that they did not understand the terms fully or were unduly influenced to sign. Sections 48 – 52 deal with unfair, unreasonable or unjust contract terms;
- The section in the Act which is creating the most controversy in relation to lease agreements is Section 14 – which deals with the renewal and expiry of fixed term agreements (see page 13);
- Most lease agreements are for a fixed period. Section 14 provides that the tenant may arbitrarily terminate the lease by providing twenty working days written notice to the landlord. A landlord can only terminate the lease if there was a material breach and the tenant has not remedied the same within the specified period provided for in the lease agreement;

- Upon cancellation by the tenant, the landlord may impose a reasonable cancellation penalty;
- Section 14 however does not apply to transactions between juristic persons, regardless of their annual turnover or asset value. The consequence may well be that landlords may insist on only transacting with a juristic person as tenant;
- In addition, fixed lease agreements under the Act now have a maximum duration of twenty-four months. After expiry of the agreement, it will continue on a month to month basis unless a new agreement is signed. Should the landlord wish to terminate the agreement upon its expiry, (s)he must notify the tenant in writing not more than eighty but not less than forty business days (before expiration of the agreement) of its looming expiry;
- If the agreement is to be renewed, a notice of any material changes that would apply would need to be provided to the tenant by the landlord within the same time frame.

17. BUSINESS NAMES

(Chapter 4 of the Act)

- The Act aims to regulate names that businesses use in their interaction with the public;
- All business (trading) names will be required to be registered, and a person will not be able to carry on business* with a consumer in any name other than the person's full name as per his/her identity book for sole proprietors, or the registered name if a juristic person, or a registered business name (trading);
- A franchisor or a franchisee, needs to ensure that the trading names of all the franchisees are registered. In most cases the franchisor will do the registration and include the registered name as part of the agreement with franchisees;

**Includes advertising, promoting, offering to supply or the supply of goods or services or entering into an agreement with a consumer.*

Registration would be via the portal of the Companies and Intellectual Property Commission (CIPC), as per the Companies Act, 71 of 2008, and Regulation 39 sets out the requirements for the forms to be lodged;

- The provisions relating to registration of business names could only become effective a minimum of one year after the Act comes into operation (after 1 April 2012);
- The Commission has discretion to cancel the registration if it has reasonable grounds to believe that the business owner has not been carrying on business under that name for a period of at least six months;
- Criteria for business names overlap with Companies Act.
- Business names must include the following particulars on any trade catalogue, business letter, order, sales record or statement:
 - ◆ The name, title or description under which the business is carried on;
 - ◆ The primary place at which, or from which, the business is carried on;
 - ◆ If the activity is carried on under a business name, the name of the person to which that business name is registered.

Identification of the supplier/Registration of business trading name:

| Registration of trading name with the Commission is required where: | No registration necessary |
|---|--|
| 1. You are trading as a sole proprietor under your personal name, e.g. John Smith, but you are trading as Fantastic Plumbing. | 1. You are trading with your full personal name – as is reflected on your identity document. |
| 2. You have a registered company and you trade under a different name. | 2. Where you have been actively conducting business under your business name for a period of at least one year before the date on which the Minister announces that the business trading name provisions are in effect (which will not be sooner than 1 April 2012). |

18. FRANCHISING

The Act regulates franchise agreements and relationships to some extent, although they are also regulated by the Competition Act, 89 of 1998, and to self-regulation within the industry.

- A franchisee is considered a “consumer” in terms of the Act, irrespective of whether the franchisee is a juristic person whose annual turnover or asset falls above or below the threshold set by the Minister;
- The Act defines a “transaction” between supplier and consumer for these purposes as:
 - ◆ A solicitation of offers to enter a franchise agreement;
 - ◆ An offer by a potential franchisor to enter a franchise agreement with a potential franchisee;
 - ◆ A franchise agreement or an agreement supplementary to a franchise agreement;
 - ◆ The supply of any goods or services to a franchisee in terms of a franchise agreement.

Section 7 sets out the requirements for franchise agreements as follows:

1. A franchise agreement must :
 - Be in writing and signed by or on behalf of the franchisee;
 - Include any prescribed information or address any prescribed categories of information, and
 - Comply with the requirements of Section 22 – right to information in plain and understandable language (see page 17).
 2. A franchisee may cancel a franchise agreement without cost or penalty within ten business days after signing such agreement by giving written notice to the franchisor. This exact text must be on the top of the first page of the agreement in bold writing.
- The Minister may prescribe information to be set out in franchise agreements, generally, or within specific categories or industries. Regulation

2 sets out in detail what is required to be included. These are exceptionally detailed provisos which need to be contained within franchise agreements. In total some six pages of provisos apply and requires detailed review. Of interest is one specific area – where a franchisor maintains a fund for marketing expenditure where the franchisee contributes to such fund. The franchisor is obliged to provide the franchisee with detailed quarterly management accounts as well as annual financial statements prepared in accordance with the prevailing accounting standards and legislation;

- Some sections of relevance to the franchise arrangement in the Act are: Provisions relating to unfair tactics (see page 21), inequitable terms of agreements (see page 24), liability for defective products would apply to both a franchisee and franchisor (see page 29), general standards for marketing of goods or services (see page 19), right to fair and honest dealing (see page 21), right to fair, just and reasonable terms and conditions (see page 23), and right to choose (see page 12).

Disclosure document for prospective franchisee:

- Regulation 3 requires that a disclosure document be provided to a prospective franchisee at least fourteen days before the signing of the franchise agreement, which document must inter alia contain:
 - ◆ The number of individual outlets franchised by the franchisor;
 - ◆ The document must be accompanied by a certificate on an official letterhead from a person eligible in law to be registered as the accounting officer of a close corporation or the auditor of a company, certifying that the business of the franchisor is a going concern, and that to the best of his or her knowledge, the franchisor is able to meet its current and contingent liabilities, is capable of meeting all its financial commitments in the ordinary course of business as they fall due and that the most recent annual financial statements have been drawn up in accordance with South African Generally Accepted Accounting Standards (SA GAAS), on the basis of accounting policies consistent with prior years and in accordance with the provisions of the Companies Act, and fairly reflects the financial position, affairs, operations and results of the franchisor as at that date and for the period to which they relate;
 - ◆ The disclosure document must be accompanied by a list of current franchisee's, and of outlets owned by the franchisor, stating in respect of any franchisee, the name under which it carries on business, the name of its representative, its physical address, its e-mail and telephone number;

Some provisions of the Act do not apply to franchise agreements at all, as follows:

- See page 12 relating to bundling (customer's right to choose and select suppliers);
- The consumer's right to cancel an advance reservation, booking or order (see page 12);
- Consumer's rights regarding delivery of goods or supply of services (see page 27);
- Over-selling and over-booking (see page 22);
- Catalogue marketing (see page 20);
- Trade coupons and similar promotions (see page 20);

- Referral selling (see page 20);
- Consumer agreements – particularly sections 49(1) and 50 – (see pages 23 to 26);
- Section 14 (expiry and renewal of fixed term agreements) would apply if the franchisee is a sole proprietor however does not apply if the franchisee is a juristic person (see page 13).

19. RIGHT TO ACCOUNTABILITY FROM SUPPLIERS

Suppliers are accountable to consumers in regard to:

- **Lay-by's:**

Section 62

Where a Supplier agrees to:

- Sell particular goods to a consumer;
- Accept payment for those goods in periodic instalments;
- And to hold those goods until the consumer has paid the full price for them.

Until the goods have been delivered to the consumer:

- Each amount paid by the consumer to the supplier remains the property of the consumer and is subject to Section 65;
- The goods remain at the risk of the supplier.

Where the supplier is unable to deliver the goods where the consumer has paid the full price for them:

At the option of the consumer, the supplier must either:

- Supply the consumer with an equivalent quantity of goods that are comparable or superior in description, design or
- Refund the consumer in full with interest (where the inability to supply the goods was beyond the control of the supplier) or
- Double the amount paid by the consumer as compensation for breach of contract in any circumstances not contemplated in (b).

- Where the consumer terminates the agreement before fully paying for the goods or fails to complete the payment for the goods within sixty business days after the anticipated date of completion, the supplier (a) may charge a termination penalty, and after deducting the same, must refund to the consumer any amount paid by the consumer under that agreement.
- This cancellation penalty can only be charged if the supplier informed the consumer of the fact and extent of the penalty before the consumer entered into the lay-by agreement. Regulation 34 prescribes the basis for calculating the maximum amount of a cancellation penalty as a reasonable one which must not exceed one per cent (1%) of the full purchase price of the goods. The supplier cannot charge the cancellation penalty where the failure to complete payment was due to death or hospitalisation of the consumer or if the supplier did not tell the consumer about the penalty before the consumer entered the lay-by agreement.

Pre-paid certificates, credits and vouchers:

- Section 63: Any pre-paid certificate, card, credit, voucher or similar device does not expire until the earlier of (a) the date on which its full value has been redeemed in exchange for goods or services or future access to services or (b) three years after the date on which it was issued (unless the supplier extends that period). The outstanding credit on the device remains the property of the consumer.

Pre-paid services and access to service facilities

- Section 64: For prepayments of services, the amount so paid remains the property of the consumer until the supplier makes a charge against it. The charge may be made once a month in advance for the pro rata portion of the amount held, to pay the month's cost of the membership or service;
- A supplier is obliged to give at least forty days written notice of intention to close a service facility, or make available alternative readily accessible facilities or services to the consumer, and no later than five business days after closing that facility, must refund to such consumer the balance of any money belonging to that consumer.

Supplier to account for and hold consumer's property:

- Section 65: A supplier will be liable to the consumer for any loss resulting from the supplier's failure to exercise care, diligence and skill normally required of a person caring for the property of another, or if the supplier treats the property as his/her own property;
- Property includes a repayment, deposit, membership fee or other money, ordinarily under the control of the consumer, (this does not apply to a bank as defined in the Banks Act, 94 of 1990, a mutual Bank as defined in the Mutual Banks Act, 124 of 1993, or any other financial institution that takes deposits from the public in terms of any national legislation);
- This is the case where the service provider takes possession of the consumer's property in order to perform repair, service or maintenance work. A thorough pre-work inspection should thus always be performed in the presence of the consumer and any condition of the property recorded.

Section 66: Deposits in respect of containers, pallets or similar objects:

- The Minister may prescribe a minimum or maximum deposit that a supplier must or may require a consumer to pay in respect of the return of a bottle, container, pallet, reel or similar object used in respect of the packaging or delivery of any goods.

Return of parts and materials:

- A supplier must retain any parts and components removed from any goods or property during repair or maintenance work, keep them separate and return them to the consumer in a reasonably clean container unless the consumer declines the return. The above does not apply to work performed in terms of a warranty, an insurance claim or where the parts or components must in terms of public regulation be disposed of in a certain manner and in the interest of public health and safety or environmental safety.

20. ENFORCEMENT AND DISPUTE RESOLUTION

The Act prevents suppliers from discriminating, intimidating or penalising consumers who seek to enforce their rights.

Any of the following persons may ensure that the rights of consumers are realised and protected:

- The individual;
- An authorised person acting on behalf of another;
- A person acting as a member of or in the interests of an affected group or class;
- A person acting in the public interest (amicus curiae/leave of tribunal or court association, acting in the interests of its members);
- Association acting on behalf of members;
- Authorised person on behalf of incapacitated person;
- Accredited Consumer Groups – may take up matters on behalf of consumers through the Commission, Tribunal and the Courts and also initiate complaints. The group has to meet certain criteria in order to be accredited and the Commission plays a monitoring role.

Enforcement of Rights by Consumer:

- The consumer does not have to lodge a complaint directly with the supplier;
- Consumers will be able to approach the Commission, the Tribunal, provincial structures and specified courts for assistance in protection of their rights;
- The aggrieved consumer may refer the matter to an Ombud Scheme with jurisdiction (if the supplier is subject to the jurisdiction of any such Ombud) – for example the Credit Information Ombudsman, the Long-Term Insurance or Short-Term Insurance Ombudsman, the Ombudsman for Banking Services, or
- If the matter does not concern a supplier as contemplated in paragraph above, the consumer may refer the matter to:
 - ◆ The applicable industry Ombudsman accredited in terms of Section 82,(for example the Motor Vehicle Industry Ombud), or
 - ◆ To the consumer court of the province with jurisdiction over the matter, or
 - ◆ May refer the matter to another alternative dispute resolution agent, or
 - ◆ File the complaint with the Commission, or
- May approach a court with jurisdiction over the matter if all other remedies available to that person in terms of national legislation have been exhausted.

Alternative Dispute Resolution (ADR):

- The Act provides for Alternative Dispute Resolution (ADR) and for agreements reached through this process to be recorded as consent orders by the High Court or the Tribunal, which consent order can include an award for damages. Once a complainant has consented to an award of damages in a consent order, he or she cannot institute a claim in a civil court for damages. If the ADR agent does not believe that there is

a reasonable probability that the matter will be settled, the agent may terminate the process by notice and the complainant may then refer the matter to the Commission.

Ombud:

- A complainant may lodge a complaint with the relevant Ombud;
- The Ombud may record a resolution or settlement as an order which in turn can be made a consent order by a court or the Tribunal;
- If the matter is not resolved by the Ombud, the complainant may then approach either the Commission or the Tribunal, whichever is applicable.

Roles and Powers of the National Consumer Commission:

- May receive and investigate complaints concerning alleged prohibited conduct or offences. If an investigation is started, the Commissioner may issue a summons to any person whom it believes possesses any evidence or could provide information to appear before it, be questioned or produce the evidence;
- The Commission or investigator appointed by it can apply to a court for a search warrant if there are reasonable grounds for believing that a contravention of the Act has taken place on or in the premises. Sections 103 to 105 deal with the authority to enter and search under warrant, and the conduct of entry and search;
- May negotiate consent orders that may include an award for damages to a complainant, and propose a draft consent order;
- Co-operate with and facilitate or support various activities by consumer protection groups (education, research, market monitoring, advocacy and alternative dispute resolution);
- To investigate complaints and refer them to and ADR agent, a provincial consumer protection authority, the National Prosecuting Authority (NPA) for prosecution, courts, Consumer Court, Tribunal (where the Commission believes the person has engaged in prohibited conduct), Equality Court (where complaints of a discriminatory marketing practice appear valid);
- May issue compliance notices (administrative enforcement of the Act), and enforce them;
- Failure to comply with the notice may result in the Commission referring the matter to the Tribunal for the imposition of an administrative fine or to the NPA for prosecution as an offence – but the Commission may not do both in respect of any particular compliance notice;
- Conduct awareness and education compliance campaigns;
- Establish a registry for pre-emptive blocking of spam marketing;
- Issue a notice of non-referral to the complainant – where the complaint appears to be vexatious or frivolous, or does not allege any facts that would give rise to a remedy under the Act, or is referred more than three years after the act or omission or the course of conduct ceased, or relates to conduct that has been the subject of other proceedings under the Act;
- Investigate and recall defective products.

Tribunal:

Is the last resort for disputes within the structures of the Act.

Some key matters that the Tribunal may deal with:

- To adjudicate or review cases referred by the Commission and impose administrative penalties;
- To hear referrals by consumers if they were issued with a non-referral notice by the Commission;
- To hear applications for agreements or resolutions to be made a consent order (by ADR agent);
- To hear referrals from the Commission relating to prohibited conduct;
- In regard to business names, the Tribunal may hear a matter referred to it where the registration of a business name was cancelled by CIPC– to be reviewed on application;
- The Tribunal may, inter alia, declare conduct to be prohibited, and issue an interdict in relation thereto, confirm consent orders, and impose administrative fines as follows:

Administrative fines:

- ◆ The Tribunal will be able to impose administrative fines of up to 10% of a respondent's annual turnover during the preceding financial year or R1 000 000 (One Million Rand), whichever is the greater, for non-compliance relating to prohibited or required conduct;
- ◆ Failure to comply with an order of the Tribunal constitutes an offence – punishable by a fine or imprisonment up to ten years or both;
- ◆ The Tribunal cannot make an order for damages / compensation.

Consumer Courts:

- Is a court or tribunal set up in terms of provincial legislation – alternative to the Commission and Tribunal;
- May record a resolution or settlement as an order and made a consent order by a court or the Tribunal;
- The Commission may, if it believes that a person has engaged in prohibited conduct, refer the matter to the Consumer Court;
- If a consumer approaches the Commission regarding a complaint and the Commission issues a notice of non-referral the consumer may then refer the matter to the Consumer Court.

Ordinary Courts:

- Ordinary courts may only assist a consumer if all the consumer's other remedies have been exhausted;
- Criminal courts may deal with criminal offences created by the Act, and the civil courts with claims for damages and enforcement of rights. Only the courts may make an order for loss or damages suffered as a result of a breach of the Act;
- Certain sections specifically authorise the courts to deal with certain matters – such as contraventions of section 40 (unconscionable conduct), section 41 (false, misleading or deceptive representations, section 48 (unfair, unreasonable or unjust contract terms);
- Refer to page 25 (section 52) for powers of the court.

- The court may also award damages against a supplier for collective injury to all or a class of consumers and also decide on the just and equitable distribution of such damages;
- The Courts can impose penalties for offences and will adjudicate over contractual issues;
- The Equality court has jurisdiction over the sections relating to unfair discrimination in the Act.

Offences and Penalties:

Although the Act aims to de-criminalise its enforcement and rather ensure compliance administratively, there are a few remaining offences, as follows:

- **Breach of confidence** – it is an offence to disclose any personal or confidential information concerning the affairs of a person obtained in carrying out any function or as a result of initiating a complaint or participating in any proceedings in terms of this Act;
The penalty for breach of confidence is a fine or imprisonment for a period not exceeding ten years or both.
- **Hindering administration of the Act** – hindering, obstructing or unduly influencing any person who is exercising a power or performing a duty in terms of the Act, or if a person is summoned fails, without sufficient cause, to appear or refuses to be sworn in or make an affirmation or having been sworn in fails to answer a question fully or gives false evidence, knowing and believing it to be false.
- **Offences relating to the Commission or Tribunal** – Some of these offences include failure to comply with an order of the Tribunal, defamation of the Tribunal or knowingly providing false information to a regulator.
- **Offences relating to prohibited conduct** – It is an offence for any person to alter, obscure, falsify, remove or omit a displayed price, labelling or trade description without authority. It is also an offence to fail to act in accordance with a compliance notice, and it has been referred by the Commission to the NPA.
The penalty for the above is a fine or imprisonment for a period not exceeding twelve months or both.

Vicarious liability:

- If an employee or agent of a person is liable in terms of the Act for anything done or omitted in the course of that person's employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person (this does not apply in respect of criminal liability).

Interim relief:

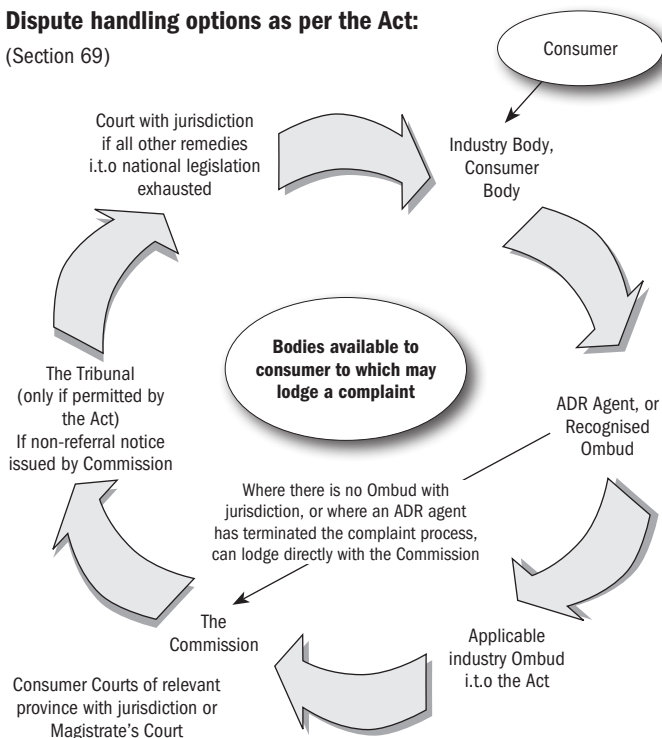
An aggrieved consumer may obtain interim relief prior to the conclusion of the hearing of a complaint, to be granted by the Tribunal.

The order may be extended twice after the date of its issue, for periods of six months, if:

- if there is evidence that the allegations may be true;
- if an interim order is reasonably necessary to:
 - ◆ prevent serious, irreparable damage to that person;
 - ◆ prevent the purposes of the Act from being frustrated;
- the respondent has been given a reasonable opportunity to be heard;
- the balance of convenience favours the granting of the order.

Dispute handling options as per the Act:

(Section 69)



21. TRANSITIONAL PROVISIONS AND IMPLEMENTATION DATES

The Act had two implementation dates:

- Certain parts of the Act came into effect on the 24th April 2009, when it was signed by the President and gazetted in Gazette No. 32186, with the entire Act being implemented on the 1 April 2011;
- **Early effective date:** 12 months after signature - 24 April 2010 - Chapters 1, and 5, Section 120 (regulations) operational;
- **General effective date:** 18 months after signed by the President, in other words 1 October 2010, which date was subsequently deferred by a further five months until 1 April 2011. All the provisions of the Act were thus implemented, together with the Regulations on the 1 April 2011.

Application of the Act to pre-existing agreements and arrangements:

The Act does not apply to the following if they occurred before the general effective date of the Act:

| | | |
|---|--|--|
| The marketing of any goods or services | Any transaction concluded or agreement entered into | Any goods supplied or services provided to a consumer |
|---|--|--|

Certain provisions of the Act shall apply to pre-existing agreements between suppliers and consumers in certain instances, as follows:

- Where the pre-existing agreement would have been subject to the Act if it had been in effect at the time the agreement was made; and
- Where the supplier and consumer is bound for a fixed term until a date that is on or after the second anniversary of the general effective date.

In other words, the agreement contemplated must be one in terms of the Act and the agreement must be effective for at least 2 years after the general effective date, that is, 2 years calculated from October 2010 (for example, an agreement that shall expire in October 2012 or anytime thereafter).

Refer to table on page 48 for a list of Sections that apply to Pre-Existing agreements.

22. TABLES

SOME IMPORTANT DEFINITIONS IN THE ACT

(Section 1)

Advertisement means any direct or indirect visual or oral communication transmitted by any medium, or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by which a person seeks to (a) bring to the attention of all or part of the public – (i) the existence or identity of a supplier or (ii) the existence, nature, availability, properties, advantages or uses of any goods or services that are available for supply or the conditions on or prices at which any goods or services are available for supply (b) promote the supply of any goods or services or (c) promote any cause.

Consideration means anything of value given and accepted in exchange for goods or services, including:

- a) money, property, a cheque, or other negotiable instrument, a token, a ticket, electronic credit, credit, debit, or electronic chip or similar object;
- b) labour, barter, or other goods or services;
- c) loyalty credit or award, coupon or other right to assert a claim, or
- d) any other thing, undertaking, promise, agreement or assurance irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly or involves only the supplier and consumer or other parties in addition to the supplier and consumer.

Business means the continual marketing of any goods or services.

Market when used as a verb, means to promote or supply goods or services.

Promote means:

- a) to advertise, display of goods or services or the offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration;
- b) make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration, or
- c) engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.

Promoter means a person who directly or indirectly promotes, sponsors, organises or conducts a promotional competition, or for whose benefit such a competition is promoted, organised or conducted.

Promotional competition means any competition, game, scheme, arrangement, system, plan or device for distributing prizes by lot or chance. Such a competition must be conducted in the ordinary course of business and the purpose of the competition must be to promote a producer, distributor, supplier or to promote the actual sale of any goods or services. To qualify as promotional competition in terms of the Act, the value of the prize offered cannot exceed the prescribed threshold. The Minister has in fact prescribed the monetary threshold for competitions with “low-value prizes” for the purposes of excluding the regulatory requirements of the Act. The threshold is set at R1.00 (one Rand).

Supply when used as a verb means in relation to goods, to agree to sell, rent, exchange and hire in the ordinary course of business for consideration, or in relation to services – to agree to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.

The words ‘supplier’ and ‘supply’ therefore do not stand in direct relationship to one another. ‘Supplier’ relates to the person who markets goods or services but ‘supply’ refers to transactions or actions of performance or provision.

Transaction means in respect of a person acting in the ordinary course of business:

- (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration;
- (ii) the supply by that person of any goods to or at the direction of a consumer for consideration, or
- (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration.

A ‘transaction’ also includes (a) the supply of goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity and (b) a franchisor/franchisee arrangement [Section 5(6)].

Service Provider means a person who promotes, supplies or offers to supply any service.

Retailer means a person who in the ordinary course of business supplies goods to a consumer.

Producer with respect to any goods, means a person who (a) grows, nurtures, harvests, mines, generates, refines, creates, manufactures, or otherwise produces the goods within the Republic or causes any of those things to be done with the intention of making them available for supply in the ordinary course of business or (b) by applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that the person is a person contemplated in (a).

Importer with respect to any goods means a person who brings those goods or causes them to be brought from outside the Republic into the Republic with the intention of making them available for supply in the ordinary course of business.

Distributor in relation to any particular goods means a person who in the ordinary course of business:

- a) is supplied with those goods by a producer, importer or other distributor, and
- b) in turn supplies those goods to either another distributor or to a retailer.

Intermediary means a person who in the ordinary course of business and for remuneration or gain engages in the business of (a) representing another person with respect to the actual or potential supply of any goods or services (b) accepting

possession of any goods or other property from a person for the purpose of offering the property for sale or (c) offering to sell to a consumer, soliciting offers for or selling to a consumer any goods or property that belongs to a third person or service to be supplied by a third person but does not include a person whose activities as an intermediary are regulated in terms of any other national legislation.

Specific definitions relating to Right to fair value, good quality and safety:

Defect means means (i) any material imperfection in the manufacture of the goods or components or in performance of the services that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances, or (ii) any characteristic of the goods or components that renders the goods or components less useful, safe or practicable than persons generally would be reasonably entitled to expect in the circumstances.

Failure means the inability of the goods to perform in the intended manner or to the intended effect.

Hazard means a characteristic that (i) has been identified as, or declared to be, a hazard in terms of any other law, or (ii) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised.

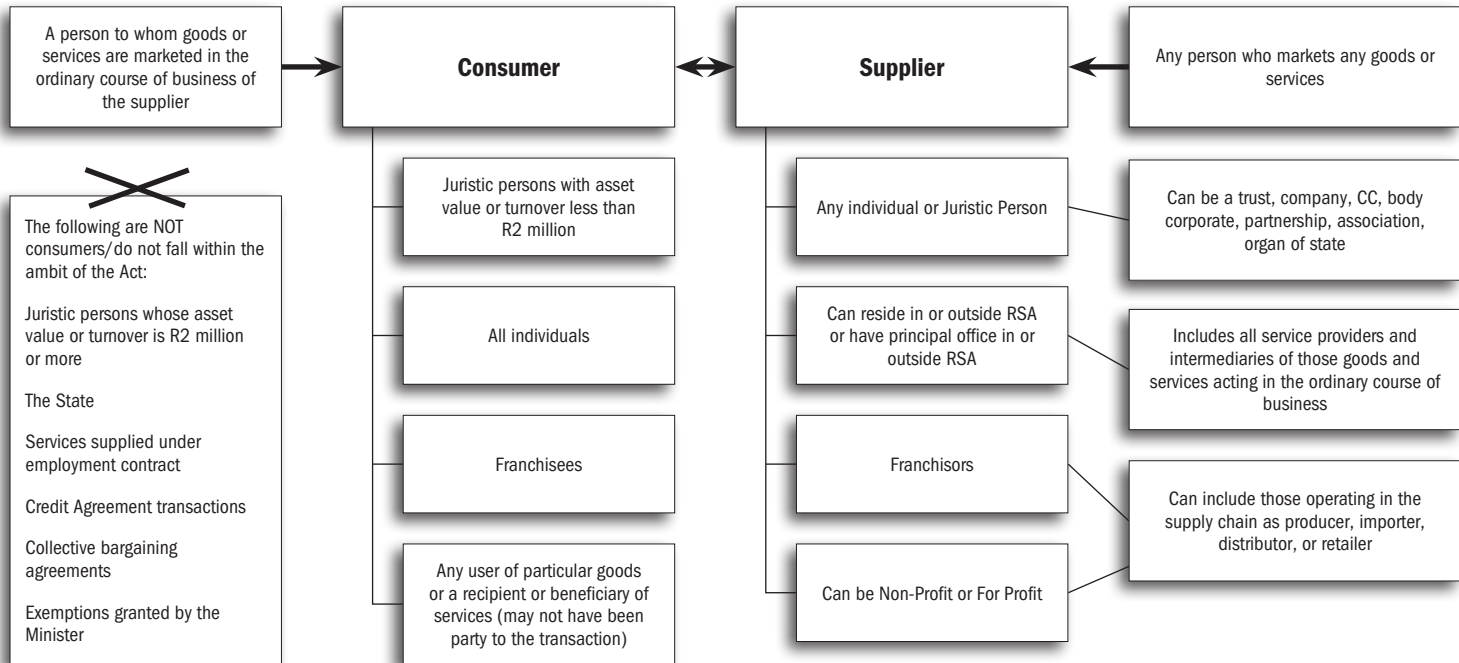
Unsafe means that due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.

INFORMATION TO BE DISCLOSED BY INTERMEDIARIES/AGENTS/ ESTATE AGENTS

Regulation 9

1. Full names, physical address, postal address, phone number, cell number, fax number, email address and its registration number, if any.
2. Identity number, unless the intermediary is a juristic person, in which case the intermediary must disclose its registration number.
3. If the intermediary is a juristic person, the contact details of its public officers.
4. The exact service to be rendered by the intermediary.
5. Upon the consumer's request, the fee the intermediary shall receive for providing the services.
6. The costs the consumer is liable for, and under what circumstances the costs can be recovered.
7. The frequency with which the consumer shall receive written accounts updating the consumer on its mandate.
8. All relevant information that the consumer requires in order to decide whether or not to acquire the intermediaries services, or whether to continue with the services.
9. The commission, consideration fees, charges or brokerage payable to the intermediary by any other person.
10. Details of any code of conduct or other standard applicable to the intermediary or the service.

In addition, intermediaries are obliged to disclose whether he or she has ever been found guilty of any offence involving dishonesty which was punishable by criminal imprisonment without the option of a fine; placed under sequestration, liquidation or judicial management or is still an unrehabilitated insolvent as well as any other relevant information. Any personal interest the intermediary may have in the services or goods which may give rise to a potential conflict of interest must also be disclosed to the consumer in writing and the intermediary must take all reasonable steps to ensure the consumer is treated fairly.



DETERMINATION OF MONETARY THRESHOLD VALUE FOR JURISTIC PERSONS

| Valuation of Assets | Calculation of Annual turnover |
|--|--|
| <p>Based on gross value of a juristic person's assets, in particular:</p> <ul style="list-style-type: none"> a) the asset value equals the total assets less any amount shown on that balance sheet for depreciation or diminution of value; b) the assets are to include all assets on the balance sheets of the juristic person, including any goodwill or intangible assets included in their balance sheets; c) no deduction may be taken for liabilities or encumbrances of the juristic person; d) "assets in the Republic" includes all assets arising from activities in the Republic. | <ul style="list-style-type: none"> (1) Based on gross revenue from income in, into or from the Republic arising from the following transactions and events as recorded on the juristic person's income statement: (a) the sale of goods (b) the rendering of services (c) the use by others of the juristic persons' assets yielding interest, royalties and dividends. (2)(a) When calculating turnover the following amounts may be excluded: <ul style="list-style-type: none"> (i) any amount that is properly excluded from gross revenue in accordance with SA GAAS; (ii) taxes, rebates, or any similar amount calculated and paid in direct relation to revenue e.g sales tax, VAT, excise duties, sales rebates. (2)(b) Revenue excludes gains arising from noncurrent assets and from foreign currency transactions; (2)(c) For banks and insurance entities, revenue includes those amounts of income required to be included in an income statement in terms of South African Generally Accepted Accounting Practice (SA GAAP), but excluding those listed in (2)(b) above. |
| <p>Financial reporting standards applicable: assets and turnover of a juristic person must be calculated in accordance with SA GAAS.</p> | |
| <p>Form of financial statements: financial statements used as a basis for calculating assets or turnover of juristic persons (a) must be juristic persons' audited financial statements if (i) in terms of any law the juristic person is required to produce such statements or (ii) the juristic person has audited statements for the relevant period and (b) otherwise must be prepared in accordance with SA GAAS.</p> | |

| SECTION OF ACT | EXTENT OF APPLICATION TO PRE-EXISTING AGREEMENT |
|-----------------------|--|
| 14 | Only subsections (1)(b) to (d) and (2) apply with respect to the expiry and possible renewal of the agreement, on or after the general effective date. |
| 18 to 21 | Apply only with respect to goods that are deliverable or delivered to the consumer in terms of the agreement, on or after the general effective date. |
| 22 | Applies only to a notice, document or visual representation that is required to be produced, provided or displayed to the consumer, on or after the general effective date. |
| 25 | Applies only with respect to any goods supplied to the consumer in terms of the agreement, on or after the general effective date. |
| 26 | Applies only with respect to any transactions occurring in terms of the agreement, on or after the general effective date. |
| 31 | Applies only to any purported amendment to the agreement made, on or after the general effective date. |
| 44 | Applies only with respect to any goods supplied to the consumer in terms of the agreement, on or after the general effective date. |
| 53 to 58 | Apply only with respect to any goods or services supplied to the consumer in terms of the agreement, on or after the general effective date. |
| 64(1) and (2) | Apply only to an amount paid or payable by the consumer in terms of the agreement, on or after the general effective date. |
| 64(3) and (4) | Apply only with respect to any closure of a facility contemplated in those provisions, if it will occur on or after the effective date. |
| 65 | Applies only with respect to an amount paid or payable by the consumer, or to property that comes into the possession of the supplier, on or after the general effective date. |
| | <p>The sections of this Act listed in the first column of the above table apply, to the extent indicated in the second column, to a pre-existing agreement between a supplier and a consumer, if that pre-existing agreement –</p> <ul style="list-style-type: none"> a) would have been subject to this Act if this Act had been in effect at the time the agreement was made; and b) contemplates that the parties to it will be bound for a fixed term until a date that is on or after the second anniversary of the general effective date. |