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The Consumer Protection Act, No.68 of 2008

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“Consumer protection is an integral part of a modern, efficient, effective and just market place. Confident consumers are one of the important drivers of competitiveness.”

Mandisi Mphahlela: Minister of Trade and Industry



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Executive Summary - The Consumer Protection Act No. 68 of 2008

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“The Consumer Protection Act will introduce general principles of consumer protection and serves as an overarching governing statement on consumer protection matters in South Africa.”

Department of Trade and Industry (the dti)

The Consumer Protection Act, No. 68 of 2008 was promulgated on 29th April '09 - there will be far reaching effects between suppliers & consumers

The Consumer Protection Act, No.68 of 2008 (“the CPA”)

- The CPA aims to create a fair, accessible & sustainable market place by:
 - prohibiting unfair market & business practices
 - promoting responsible consumer behaviour
 - legislating against unfair contractual terms
 - harmonising the laws that currently govern the protection of the consumer
 - establishing standards for protecting & informing consumers
 - establishing an enforcement process
- The CPA:
 - will replace many laws currently regulating consumer protection with a single, comprehensive framework for protecting consumer rights in South Africa. Provisions of the following Acts have been replaced:
 - ❖ Unfair Business Practices Act, 1988
 - ❖ Trade Practices Act, 1976
 - ❖ Sales and Service Matters Act, 1964
 - ❖ Price Control Act, 1964
 - ❖ Merchandise Marks Act, 1941
 - will have far reaching implications for the relationship between suppliers & consumers. It provides for numerous consumer rights
 - applies to all transactions occurring within South Africa involving the supply of goods & services to consumers, as well as to all marketing &/or advertisements transmitted or published in the course of business
 - is in response to findings that consumer laws in South Africa were “*outdated, fragmented & predicated on principles contrary to the democratic system”
- A National Consumer Commission will be created in terms of the CPA to ensure that consistent enforcement measures are adopted

Through measures adopted within the CPA, it seeks to promote a fair, efficient & transparent market place for consumers & business

Objectives of the CPA

- The objectives of the CPA are stated in its preamble:
 - “The people of South Africa recognise that it is necessary to develop and employ innovative means to:
 - (a) fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers;
 - (b) protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and
 - (c) to give effect to internationally recognised customer rights . . .

Purpose of the CPA

- The CPA aims to:
 - recognise & consolidate consumer rights
 - establish effective means for the enforcement of these rights
 - prohibit certain conduct & place certain obligations on suppliers of goods & services

The CPA: Consumer rights

- The CPA promotes & protects consumer rights by:
 - setting out / creating specific consumer rights, AND
 - imposing obligations upon certain people for purposes of ensuring that those rights are upheld, protected, maintained & respected, thereby protecting consumers from unscrupulous or unlawful behaviour
- The CPA has been drafted as a rights-based piece of legislation that includes 8 fundamental consumer rights. These are the right to:
 - equality
 - privacy
 - choice
 - disclosure & information
 - fair & responsible advertising
 - fair & honest dealings
 - fair, just & reasonable terms & conditions
 - fair value, good quality & safety

The core of the CPA is the *identification & enforcement of consumer rights . . .*

The CPA: Consumer Rights (Cont.)

- Some of the consumer rights & suppliers' accountabilities to consumers created by the CPA include:
 - imposing strict penalties on suppliers who engage in misleading advertising
 - imposing penalties on suppliers who sell sub-standard merchandise, making them liable for any damages incurred by users
 - allowing the consumer to demand an immediate refund if he/she has been sold a product of inferior quality
 - preventing suppliers of goods & services from changing the terms of any particular contract & allowing consumers to cancel contracts if they are not satisfied with the terms
 - preventing a supplier from automatically renewing contracts, thereby obligating the supplier to notify the consumer that it has ended & to offer a renewal

Applicability

- The CPA applies to:
 1. every transaction within the Republic unless exempt in terms of the CPA
 2. goods that are supplied or services that are performed in terms of a transaction to which the Act applies, even though those goods or services are supplied in addition to or in conjunction with other goods or services
 3. goods that are supplied in terms of transactions that are exempt from the Act, but only to the extent provided for in terms of the Act
 4. franchise agreements
 5. the supply of goods or services by clubs, trade unions, associations, societies or any other collection of persons, whether corporate or unincorporated or of voluntary organisations or associations to their members

... the CPA clearly sets out what is meant by “goods” & “services” & the manner in which a consumer is protected

Scope & ambit of the CPA: What are “goods”?

- In terms of the CPA, “goods” include, but are not limited to:
 - anything marketed for human consumption
 - any tangible object or intangible product (e.g. literature, music, photographs, information, data, software, codes, or a license to use such products)
 - a legal interest in land or any other immovable property; and
 - gas, water & electricity

Scope & ambit of the CPA: What are “services”?

- “Services” include, but are not limited to:
 - any work or undertaking performed by one person for the direct or indirect benefit of another
 - the provision of any education, information, advice or consultation (with certain exceptions)
 - 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 (with certain exceptions)
 - the transportation of an individual or any goods (e.g. public transport by bus or taxi)
 - the provision of accommodation or sustenance (e.g. restaurants & hotels)
 - the provision of any entertainment or similar intangible product or access to any such entertainment or intangible product (e.g. the sale of tickets to a concert)
 - the provision of access to electronic communication infrastructure
 - the provision of access to, or of a right of access to an event
 - the provision of access to, or of a right of access to any premises, activity or facility
 - the provision of access to or use of any premises or other property in terms of a lease
 - the provision of a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property
 - the rights of a franchisee on terms of a franchise agreement
- The Act introduces an “implied warranty of quality” in respect of products purchased by a consumer

Although the CPA will be phased in gradually, in certain instances, it will have retrospective application & may apply to agreements entered into prior to promulgation of the Act

Timing of the Act

- The CPA will be introduced in two parts to afford business reasonable time to align their trading practices & systems to ensure compliance
 - the provisions dealing with the establishment of the National Consumer Commission, as well as the regulations to be promulgated in terms of the Act, will come into operation on 24 April 2010, i.e. one year after signature by the President of the Act
 - all other provisions will come into force on 24 October 2010, i.e. 18 months after the President signed the Act -this is called “the general effective date”
- Whilst the general effective date is deferred to 24 October 2010, the Act will apply to:
 - goods & services supplied after the general effective date even if the agreement or transaction was concluded before the general effective date
 - fixed term agreements that will expire more than 2 years after the general effective date, in which instance the provisions of the Act will apply not only to the goods & services supplied, but also the agreement itself (even if it was signed after the general effective date)
- Suppliers of goods & services should therefore carefully consider how the provisions of the CPA will impact their businesses, & in particular should:
 - take the Act into account when concluding new long-term or fixed-term agreements
 - review its standard agreements & operational processes

Suppliers of goods & services will need to *consider how the detailed provisions in the Act will impact their businesses & may require specialist advice*

Some implications of the CPA

- The CPA is likely to have a huge impact on virtually every business in SA. Some of the anticipated impacts on businesses may include:
 - South African consumers will be amongst the world's most protected consumers
 - businesses that supply goods that are shrink-wrapped (such as shrink-wrapped software) might experience difficulties with regard to the consumer's right to inspect goods
 - those businesses that have fixed term agreements with their customers may be required to give them notice prior to the expiry of the fixed term, which will result in an additional administrative burden
 - all agreements with consumers must be in plain & understandable language
 - the CPA alters the common law to be more favourable to consumers giving the consumer various warranties & indemnities - the warranties included in agreements are no longer the only warranties that apply
 - the court will be given the power to order businesses to redraft contracts, terms of business, terms of sale & other consumer related terms
 - promotional competitions will be governed by the CPA, rather than the Lotteries Act
 - refund policies will be impacted by the CPA
 - marketing campaigns will be affected & must be conducted in accordance with the Act mechanisms have been put in place to enable consumers to enforce their rights

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