



Consequences of non-compliance with the Consumer Protection Act 68 of 2008

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This brief provides a short exposition of the consequences of non-compliance with the Consumer Protection Act. It also addresses the regulatory impact of the Act and its effect on agreements and relationships with consumers; and touches on the realisation of consumer rights and the role of consumer groups.

The Department of Trade and Industry ("DTI") has postponed the effective date of the Consumer Protection Act 68 of 2008 ("CPA") to 1 April 2011. Although this will allow businesses more time to prepare for the implementation of the CPA, all suppliers of goods and services are encouraged to step up with their preparations to ensure that they will be able to comply once it becomes effective. Although the regulations to the CPA have not yet been published, the DTI has indicated that the first draft may be finalised towards the end of October 2010.

Regulatory impact

The CPA applies to every transaction occurring within the Republic (i.e. goods and services provided to consumers for consideration in the ordinary course of business), unless exempted, and to the promotion of any goods and services. In this context, a consumer includes not only individuals, but also juristic persons whose asset value or annual turnover at the time of the transaction equals or exceeds R3 million, as well as the actual user of the goods and the recipient or beneficiary of the services, whether or not the user, recipient or beneficiary was a party to the original transaction.

The CPA will have a profound impact on the way businesses interact and conduct business with consumers (natural and juristic persons). Businesses will be required to audit and review not only their commercial practices (i.e. business relationships and procedures), but also their terms and conditions.

Realisation and enforcement of consumer rights

The CPA has, by taking a rights based approach, expanded upon consumer rights. It not only creates a new legal framework, but also new regulatory structures for the realisation and enforcement of consumer rights.

The regulatory structure incorporates the National Consumer Commission ("NCC") and the National Consumer Tribunal ("NCT"), and also allows for self-regulatory systems (i.e. industry codes of conduct), alternative dispute resolution mechanisms and accreditation of industry ombudsmen.

The NCC is established by the CPA as an investigative body which will have the power to issue compliance notices to a person who has committed prohibited conduct and to

enforce it (see Sections 99 – 100). It is an offence to fail to act in accordance with a compliance notice.

The NCT has been established by the National Credit Act 34 of 2005 and will similarly act as an adjudicative body for purposes of the CPA. It is also an offence if any person contravenes or fails to comply with an order of the NCT.

Any of the following persons may approach a court, the NCT or the NCC alleging that a consumer's rights in terms of the CPA have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:

- ▶ a person acting on his or her own behalf;
- ▶ an authorised person acting on behalf of another person who cannot act in his or her own name;
- ▶ a person acting as a member of, or in the interest of, a group or class of affected persons (i.e. class actions);
- ▶ a person acting in the public interest, with leave of the NCT or court, as the case may be; and
- ▶ an association acting in the interest of its members (i.e. consumer protection groups).

Consumer protection groups

The NCC may co-operate with, facilitate or otherwise support various activities carried out by consumer protection groups, which include:

- ▶ promotion of consumer rights and advocacy of consumer interests;
- ▶ representation of consumers, either specifically or generally, in court; and
- ▶ alternative dispute resolution through mediation or conciliation.

An accredited consumer protection group may commence or undertake any act to protect the interests of a consumer individually, or of consumers collectively, in any matter or before any forum contemplated in the CPA. The consumer protection group may also intervene in any matter before any forum contemplated in the CPA, if the interests of consumers represented by that group are not otherwise adequately represented in that forum.

Relationships with consumers and consumer agreements

The CPA introduces new controls over fairness of contracts and proposes to regulate a wide variety of market practices. Prohibited conduct under the CPA includes "unconscionable conduct" and "misleading" or "deceptive" practices. In the context of agreements, "unfair, unreasonable or unjust" contracts or terms are prohibited. The CPA allows the Minister to make regulations relating to unfair, unreasonable or unjust contract terms. Once the regulations have been published, businesses should review their terms and conditions in order to determine whether such clauses should be removed or amended. The CPA also allows consumers to exit from certain contractual commitments (such as fixed-term agreements) where it was previously not possible to do so.

If the court determines that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, the court may make certain orders in that regard which include: severing any part of the relevant agreement, provision or notice; or altering it to the extent required to render

it lawful; or declaring the entire agreement, provision or notice void as from the date that it purportedly took effect.

Penalties and administrative fines

Any person convicted of an offence may be liable for a fine or imprisonment for a period not exceeding 12 months, or both a fine and imprisonment.

The NCT may impose an administrative fine in respect of prohibited or required conduct. An administrative fine imposed may not exceed the greater of 10 per cent of the respondent's annual turnover during the preceding financial year, or R1 000 000.

Conclusion

Clearly, non-compliance with the CPA will result in regulatory risk for any business that transacts with consumers. However, the reputational risk of non-compliance could be as severe.

Businesses would be well advised to actively prepare for the CPA to mitigate these risks. This will protect their business interests as well as their reputations and help them to avoid negative public opinion and potential loss of business arising from, for example, damaging media reports about their non-compliance with the CPA or complaints by consumers about their disregard for the purposes of the CPA and consumer rights in general.

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Ina Meiring is a specialist in banking and regulatory law. Prior to joining Werksmans in October 2007, Ina held the position of Group Legal Counsel at Absa. She actively participated in various banking industry forums and still serves as a member of the Standing Committee for Review of the National Payment System Act. Ina graduated from RAU with a BA LLB. She later went on to complete her LLM at the same university and following this obtained an LLD from UNISA. She was a highly regarded lecturer at both RAU and UNISA law faculties for some 22 years. Ina has delivered many papers and contributed to various publications throughout her career.

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