

Circular No. 1

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## IS YOUR BUSINESS READY FOR THE CONSUMER PROTECTION ACT?

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The Consumer Protection Act, due to commence in full on 31 March 2011, will have a significant impact on the conduct of business in South Africa. The Act regulates the daily interactions between suppliers and consumers and imposes restrictions on the contents of agreements between them.

In general terms, the Act applies to transactions within South Africa which are between suppliers and consumers for the supply of goods or services. The definitions of "goods" and "services" and other terms which inform the limits of the application of the Act are defined broadly to encompass most conceivable transactions made in the ordinary course of business.

Provisions of agreement which do not comply with the Act are void, or voidable, severable or subject to alteration by a court order (depending on the extent and nature of non-compliance). Any person who contravenes the Act may be subject to criminal prosecution or liable to pay an administrative fine of up to 10% of annual turnover, on failing to comply with a compliance notice issued by the National Consumer Commission.

The Act does exclude certain transactions from its ambit. Most notably, consumers which are juristic persons as defined (such as companies, bodies corporate and partnerships) with an asset value or annual turnover equal to or exceeding R3 000 000 (potentially subject to revision following public comment), are only given the protections set out in the provisions of the Act dealing with 'strict' product liability and safety monitoring by the National Consumer Commission. That said, franchisees enjoy all of the protections under the Act (subject to a few specific exclusions), regardless of their annual turnover or asset value.

The Act requires South African businesses to be fully compliant with the Act from 31 March 2011. Your business can ensure compliance by:

- reviewing key agreements to determine whether the Act applies to them;
- revising those agreements which are subject to the Act; and
- aligning commercial conduct to the requirements of the Act.

Although a discussion of all of the topics addressed by the Act and the Regulations to the Act (currently in draft form) is not possible in this communication, we have set out below an indication of just some of the actions which need to be taken before 31 March 2011:

## CONSUMER AGREEMENTS

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### **Does your business conclude written agreements with other parties for the supply of goods or services?**

Agreements entered into between suppliers and consumers (which could include distributors, retailers and end customers) must conform to the provisions of the Act. Amongst other things, such agreements should:

- be in plain language;
- be free of any unfair, unjust or unreasonable contract terms;
- give adequate and timely notice to consumers of certain types of terms;
- be free of any terms prohibited by the Act; and
- not attempt to negate warranties provided to consumers in the Act.

## FRANCHISE AGREEMENTS

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### **Is your business a franchisee or a franchisor? Are there any franchise relationships flowing from or occurring within the group of companies housing your business?**

The Act and Regulations regulate the contents of franchise agreements as well as the process leading up to their execution, in significant detail. The term “franchise agreement” is defined in general terms in the Act and may go beyond the most obvious examples of franchise arrangements.

It is important to note that franchisees enjoy all of the protections under the Act (subject to a few specific exclusions), regardless of their annual turnover or asset value. Further, franchise agreements in force at the time of the commencement of the Regulations will need to be revised to comply with the Regulations, within 6 months of the commencement date

## ‘STRICT’ PRODUCT LIABILITY

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### **Does your business import goods into South Africa, or produce, distribute or sell goods within South Africa? Does your business usually take steps to exclude liability for the consequences of product defects or failure? Does your business use only best quality components from other manufacturers in order to create final products?**

The Act provides that the importer, producer, distributor or retailer of any goods is liable for certain kinds of harm caused wholly or in part by, amongst other things, defects in or failures of such goods, even in the absence of negligence on their part. A supplier of services may even be held liable in respect of goods provided in conjunction with those services.

A consumer may approach any of the retailer, distributor, producer or importer liable under the relevant provision of the Act, for compensation, but liability as between those members of the supply chain is, in terms of the provision, joint and several. Although the provision provides grounds on which a supplier may escape liability, it still has a significant impact on:

- negotiations for the distribution of risk amongst members of the supply chain;
- arrangements between manufacturers of goods and the providers of components used in the manufacturing process;
- agreements between suppliers and any customers (the relevant provision applies to all consumers, regardless of whether they are juristic persons with significant asset or turnover values).

Please note that the provision discussed above came into effect on 24 April 2010.

## MARKETING

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**Does your business approach potential customers directly for the purposes of promoting its products or services? Does your business run promotional competitions?**

Businesses engaging in direct marketing and promotional competitions must ensure compliance with the provisions of the Act and the Regulations dealing with these forms of marketing. The Regulations take particular care to protect the privacy of potential customers exposed to direct marketing, resulting in tight restrictions on businesses engaging in it.

## INSPECTION, DELIVERY AND RETURN OF GOODS

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**Do customers order goods from your business on the basis of samples or descriptions?  
Does your business expressly regulate terms relating to the time, place and cost of delivery of goods ordered? Does your business have a narrow returns policy?**

The Act provides consumers with clear rights in respect of taking delivery of goods, including rights in respect of inspection and return of goods, which may be contrary to the standard practice of any particular business. The Act also provides a default position in respect of the time and place for delivery of goods and the bearing of risk in goods prior to the acceptance of delivery by a consumer, which should be varied by agreement between suppliers and consumers in circumstances where the default position is not commercially viable.

## REPAIR SERVICES

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**Does your business render services for the repair or maintenance of customers' property?  
Do the personnel of your business take possession of customers' property in order to do work on it?**

**Does your business provide customers with quotes or estimates in respect of services to be rendered?**

The Act imposes obligations and restrictions on a supplier of services in respect of the provision of estimates, the charging of fees for services rendered in relation to estimates as well as the retention and return of the property of a consumer. In addition, the Act provides consumers of services with a warranty in respect of installed parts which is over and above any warranty expressly provided by the supplier of services.

**DISPLAY AND DIRECT SALE**

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**Does your business display goods for sale to customers? Does your business publish catalogues or brochures disclosing goods and prices? Does your business make the purchase of goods or services conditional on the purchase of any other goods or services?**

The Act regulates the manner of disclosure of prices of goods and services as well as the sale of bundled goods and services. The concept of “bundling” is fairly broadly defined in the Act with the result that making an express warranty conditional on the purchase of replacement parts from a designated supplier may, for example, fall to be regulated by the Act.

**SAFETY WARNINGS**

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**Does your business supply goods which pose a risk of damage to property or injury or death to persons?**

In certain instances, suppliers will be required to draw consumers’ attention to risks inherent in goods which the supplier provides and to provide instructions for safe handling. The notice of risks and instructions for safe handling will have to comply with the requirements as to form and effectiveness set out in various provisions of the Act.

**Should you require further advice on any of the topics outlined above, general advice concerning the application of the Act and the Regulations to your business, or the revision of any agreements, please contact:**

**Keren Oliver on 031 – 536 8518 or Themba Zikhali on 031 – 536 8529**

