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LEGAL UPDATE FAW 9/2009: SUMMARY OF CONSUMER PROTECTION ACT

On 24 April 2009 the Consumer Protection Bill was signed into law by outgoing President Kgalema Motlanthe.

The Consumer Protection Act 68 of 2008 ("the Act") provides for the setting up of a National Consumer Commission to promote the objectives of the Act. The Commission will be an enforcement and investigative body on consumer protection issues. The regulations of the Act have to be drafted and gazetted. Without these it will be difficult for businesses to understand their obligations.

The National Consumer Commission will be set up after 12 months from the date of signing of the bill by the President. It is envisaged that the provided time period will afford businesses reasonable time to align their trading practices for the purposes of complying with the Act. For the insurance industry an alignment must first take place between the provisions of the Act and the provisions of the Long Term Insurance Act, and the Act gives legislators 18 months in which to do so from the date of the Bill having been signed into law.

What follows is a brief summary of the provisions of the Act. Once alignment with the Long Term Insurance Act takes place, it will make sense to summarise the provisions within the ambit of the insurance legislation.

CHAPTER 1 – Interpretation, purpose, policy and application of the Act

(a) Interpretation, purpose and policy

The interpretative section deals with various definitions of certain terms which will have a certain meaning when applied in terms of the Act.

The primary purpose of the Act is to protect consumers against exploitation and unfair practices by unscrupulous businesses, and to empower consumers to make wise purchasing decisions. The Preamble to the Act briefly summarises the ambit of the Act to have the following desired results:

1. To promote a fair, accessible and sustainable marketplace for consumer products and services by setting national norms and standards relating to consumer protection.
2. To provide for the improved standards of consumer information.
3. To prohibit certain unfair marketing and business practices.
4. To promote responsible consumer behaviour.
5. To harmonise laws relating to consumer protection.
6. To provide a consistent enforcement framework.
7. To establish a National Consumer Commission.

(b) Application of the Act

The application of the Act is quite wide. The Act applies to every transaction involving the supply of goods and/or services in the ordinary course of business within the Republic of South Africa, to the promotion of such goods and services that could lead to such transactions and to the goods and services themselves after the transaction is completed.

Exemptions

The Act lists a number of transactions which are exempted from the provisions of the Act:

1	Transactions where goods or services are promoted to the State or are supplied to or at the direction of the State.
2	Transactions where the consumer is a juristic person whose asset value or annual turnover at the time the transaction is entered into, equals to or exceeds a certain threshold (until the thresholds are set in the Regulations to be gazetted it is difficult to make any definitive pronouncement as to the application of the Act to juristic persons).
3	A transaction which constitutes a credit agreement for the purposes of the National Credit Act 34 of 2005. Note, however, that the goods and services that are the subject of the agreement will remain subject to the provisions of the Act.
4	Transactions pertaining to services to be supplied under an employment contract, or which give effect to a collective bargaining agreement within the meaning of section 23 of the Constitution, or the Labour Relations Act 66 of 1995 (LRA), or those transactions giving effect to a collective agreement as defined in the LRA.
5	Transactions that fall within an industry wide environment may be exempted from the provisions of the Act if Regulators apply for an industry wide exemption. As an example, exemptions that have already been granted where the service constitutes advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act 37 of 2003 or insurers subject to the Short-Term Insurance Act 53 of 1998 or the Long-Term Insurance Act 52 of 1998.

The Long Term and Short Term Insurance Industries have been given a reprieve from the provisions of the Act for a period of 18 months, after which the Acts governing the industries must amend the respective Acts to be aligned to the Consumer Protection Act, failing which the provisions of the Consumer Protection Act will apply.

CHAPTER 2 — Fundamental consumer rights

This chapter is very wide and covers all aspects of the consumer's rights.

Suppliers may not discriminate against any person or communities from access to goods and services, or target particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services. No person may be discriminated unfairly on any one of the listed grounds in terms of section 9 of the Constitution of South Africa, or chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.

There are exceptions to the above and a supplier may not be regarded as being discriminating unfairly, if the supplier refuses to provide goods and services to minors who are not emancipated, or to reserve certain facilities for the exclusive use of genders, provided the facilities are substantially the same, or if the supplier reserves certain facilities for the exclusive use of minors or for that matter persons who have reached a certain specified age of 60 years.

The crux of the legislation is for suppliers to act fairly and reasonably in their dealings with consumers.

Unfair discrimination

If anyone feels they are being unfairly discriminated against, they may take the matter to the Equality Court. As an illustration, a few years ago the Chairman of the Human Rights Commission was refused a haircut in a certain salon in Pretoria, which was clearly based on one of the section 9 grounds of unfair discrimination based on race. He took the matter to the Equality Court and won the case.

Rights to privacy

Besides the right to equality the consumer also has the right to privacy. When it comes to direct marketing, the consumer has the right to require another person to discontinue communicating with them, or in the case of an approach other than in person, to pre-emptively block any approach or communication to that person, if the approach or communication is primarily for the purpose of direct marketing.

Supplier contriving conditions that would force you to buy from that specific supplier

Consumers also have a right to choose and select suppliers and a supplier may not require, as a condition of offering to supply or supplying any goods or services that the consumer must purchase the goods and services from that supplier or a designated third party, unless the supplier can show that it is convenient for the consumer to do so, and there is an economic benefit in doing so, in which case it should be cheaper for the consumer.

Automatic renewal of cell phone contract

There is a section dealing with expiry and renewal of fixed-term agreements. If consumers are in a fixed term contract, such as a cell phone contract, they should be happy to hear that automatic renewal of contracts for a fixed length will be a thing of the past. The Act prohibits suppliers to automatically renew a two year contract for a further two years without permission in writing from the customer to do so. A consumer may cancel a contract on expiry of the fixed term, without penalty or charge, or at any other time on giving the supplier 20 business days notice in writing or other recorded manner or form.

Cooling off periods, cancellation of advance bookings and orders and returning goods

Yes, consumer rights such as cooling off periods after direct marketing, a consumer's rights to cancel an advance reservation booking or order, the consumer's right to examine and return goods, and the time periods within which this must take place, are dealt with in the Consumer Protection Act

Transparency of pricing and services information of suppliers

Another section of chapter 2 deals with the Right to Disclosure and Information. In terms of this the consumer has a right to information in plain and understandable language, and a full disclosure of the pricing commitment or services.

Sales records

Sales records must be kept by suppliers, and the section dealing with Disclosure and keeping of records will no doubt also be aligned with the Financial Advisory and Intermediaries Act (FAIS).

Fair and responsible marketing

Consumers have a right to fair and responsible marketing, right to fair and honest dealing as well as the right to fair, just and reasonable terms and conditions. Terms and conditions must not be unfair, unreasonable or unjust. BenefitsAtWork is currently reviewing its rules and policy documents, and we will again look at all aspects relating to the consumer's fundamental rights as protected by chapter 2, once the Act is aligned with the Long Term Insurance Act. Many aspects of the Act which are basic to protecting the consumer's basic fundamental rights are already embodied in legislation such as FAIS.

CHAPTER 3 – Protection of consumer rights and consumer's voice

Consumers have a right to complain and uphold any right set out in the Act and seek appropriate redress. Until such time as the Long Term Insurance Act is amended and brought in line with the Consumer Protection Act, policyholders will not be able to seek redress under the Consumer Protection Act if they have a dispute with an insurer.

Once the Consumer Protection Act comes into force, a complaint against a business which falls within the jurisdiction of the Act, can be referred to:

- The National Consumer Tribunal. The tribunal was established in terms of the National Credit Act (NCA), but it will rule on matters that relate to both the NCA and the Consumer Protection Act.
The National Consumer Tribunal will have the power to impose administrative fines of up to 10 percent of a company's annual turnover in the previous financial year or R1 million, whichever is greater.
- An ombudsman, such as the Ombudsman for Banking Services if the complaint relates to the banking industry.
- A provincial consumer court, if one has been established in the relevant province. These courts will be run by the Department of Trade and Industry.
- The National Consumer Commission, which will be established in terms of the Act.

If a consumer is unable to obtain redress after pursuing all of the avenues above, complaints can be taken to a court that has jurisdiction over the matter.

CHAPTER 4 – Business names and industry codes of conduct

This chapter deals with the identification of suppliers and business names, and the manner in which suppliers may use trade names and the usage thereof. Suppliers will be subject to industry codes of conduct in terms of regulations.

CHAPTER 5 – National consumer protection institutions

This chapter deals with Provincial consumer protection authorities, as well as the setting up, and functions of the National Consumer Commission.

CHAPTER 6 — Enforcement of Act

This chapter deals with the enforcement powers of the National Consumer Commission and Tribunals, and penalties.

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