

REPUBLIC OF SOUTH AFRICA

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# CONSUMER PROTECTION BILL

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*(As amended by the Select Committee on Economic and Foreign Affairs  
(National Council of Provinces)  
(The English text is the official text of the Bill)*

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(SELECT COMMITTEE ON ECONOMIC AND FOREIGN AFFAIRS)

**[B 19B—2008]**

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## GENERAL EXPLANATORY NOTE:

[                    ]     Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_                Words underlined with a solid line indicate insertions in existing enactments.

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# BILL

**To promote a fair, accessible and sustainable marketplace 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 consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements, to establish the National Consumer Commission, to repeal sections 2 to 13 and sections 16 to 17 of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), the Business Names Act, 1960 (Act No. 27 of 1960), the Price Control Act, 1964 (Act No. 25 of 1964), the Sales and Service Matters Act, 1964 (Act No. 25 of 1964), the Trade Practices Act, 1976 (Act No. 76 of 1976), the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), and the Businesses Act, 1991 (Act No. 71 of 1991), and to make consequential amendments to various other Acts; and to provide for related incidental matters.**

## PREAMBLE

The people of South Africa recognise—

That apartheid and other discriminatory laws of the past have burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality;

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;

That recent and emerging technological changes, trading methods, patterns and agreements have brought, and will continue to bring, new benefits, opportunities and challenges to the market for consumer goods and services within South Africa; and

That it is desirable to promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation and enhanced performance.

For the reasons set out above, and to give effect to the international law obligations of the Republic, a law is to be enacted in order to—

- promote and protect the economic interests of consumers;
- improve 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;
- protect consumers from hazards to their well-being and safety;
- develop effective means of redress for consumers;
- promote and provide for consumer education, including education concerning the social and economic effects of consumer choices;
- facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests; and
- promote consumer participation in decision-making processes concerning the marketplace and the interests of consumers.

**B**E IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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## CHAPTER 1

## INTERPRETATION, PURPOSE AND APPLICATION

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<b>1. In this Act—</b>	
<b>“accredited consumer protection group”</b> means a consumer protection group that has been accredited by the Commission in terms of section 78 for the purposes contemplated in that section or elsewhere in this Act;	
<b>“advertisement”</b> 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 means of which a person seeks to—	10
(a) bring to the attention of all or part of the public—	
(i) the existence or identity of a supplier; or	15
(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;	20
<b>“agreement”</b> means an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them;	
<b>“alternative dispute resolution agent”</b> means—	
(a) an ombud with jurisdiction;	25
(b) an industry ombud accredited in terms of section 82(6); or	
(c) a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud;	
<b>“applicable provincial consumer legislation”</b> means legislation concerning consumer protection that has been enacted by a province;	30
<b>“apply”</b> , when used in relation to a trade description, price, notice or any similar form of information, means to emboss, impress, engrave, etch, print or weave into, work into or onto, annex or affix to, or incorporate within;	
<b>“business”</b> means the continual marketing of any goods or services;	35
<b>“business name”</b> means a name under which a person carries on a business other than the person’s full name;	
<b>“Cabinet”</b> means the body of the national executive described in section 91 of the Constitution;	
<b>“clearly”</b> , in relation to the quality of any text, notice or visual representation to be produced, published or displayed to a consumer, means in a form that satisfies the requirements of section 22;	40
<b>“Commission”</b> means the National Consumer Commission established by section 85;	
<b>“complainant”</b> means—	45
(a) a person who has filed a complaint with the Commission in terms of section 71; or	
(b) the Commission in respect of a complaint that it has initiated, either directly or at the—	
(i) direction of the Minister in terms of section 86(b); or	50
(ii) request of a provincial consumer protection authority or other regulatory authority, as the case may be;	
<b>“consideration”</b> 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;	55
(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;
- “Constitution”** means the Constitution of the Republic of South Africa, 1996; 5
- “consumer”**, in respect of any particular goods or services, means—
- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
- (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 this Act by section 5(2) or in terms of section 5(3); 10
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and 15
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e);
- “consumer agreement”** means an agreement between a supplier and a consumer other than a franchise agreement;
- “consumer court”** means a body of that name, or a consumer tribunal, that has 20 been established in terms of applicable provincial consumer legislation;
- “consumer protection group”** means an entity promoting the interests or protection of consumers as contemplated in section 77;
- “court”** does not include a consumer court;
- “direct marketing”** means to approach a person, either in person or by mail or 25 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;
- “display”**, when used— 30
- (a) in relation to any goods, means placing, exhibiting or exposing those goods before the public in the ordinary course of business in a manner consistent with an open invitation to members of the public to inspect, and select, those or similar goods for supply to a consumer; or
- (b) in relation to a price, mark, notice or other visual representation, means to 35 place or publish anything in a manner that reasonably creates an association between that price, mark, notice or other visual representation and any particular goods or services;
- “distributor”**, in relation to any particular goods, means a person who, in the ordinary course of business— 40
- (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;
- “electronic communication”** means communication by means of electronic transmission, including by telephone, fax, sms, Bluetooth, wireless computer access, email, website, internet connection or any similar technology or device; 45
- “Electronic Communications and Transactions Act”** means the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002);
- “estimate”** means a statement of the projected total price for any service to be provided by a supplier, including any goods or components to be supplied in connection with that service; 50
- “equality court”** has the meaning set out in the Promotion of Equality and Prevention of Unfair Discrimination Act;
- “facility”** means any premises, space or equipment set up to fulfil a particular function, or at, in, or on which a particular service is available;
- “franchise agreement”** means an agreement between two parties, being the 55 franchisor and franchisee, respectively—
- (a) in which, for consideration paid, or to be paid, by the franchisee to the franchisor, the franchisor grants the franchisee the right to carry on business within all or a specific part of the Republic under a system or marketing plan substantially determined or controlled by the franchisor or an associate of the franchisor; 60
- (b) under which the operation of the business of the franchisee will be substantially or materially associated with advertising schemes or

- programmes or one or more trade marks, commercial symbols or logos or any similar marketing, branding, labelling or devices, or any combination of such schemes, programmes or devices, that are conducted, owned, used or licensed by the franchisor or an associate of the franchisor; and
- (c) that governs the business relationship between the franchisor and the franchisee, including the relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisor or an associate of the franchisor; 5
- “goods”** includes—
- (a) anything marketed for human consumption; 10
- (b) any tangible object not otherwise contemplated in paragraph (a), 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 product written or encoded on any medium, or a licence to use any such intangible product; 15
- (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; and
- (e) gas, water and electricity;
- “importer”**, with respect to any particular 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; 20
- “inspector”** means a person appointed as such in terms of section 88;
- “intermediary”** means a person who, in the ordinary course of business and for remuneration or gain, engages in the business of— 25
- (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, 30
- but does not include a person whose activities as an intermediary are regulated in terms of any other national legislation;
- “investigator”** means a person appointed as such in terms of section 88; 35
- “juristic person”** includes—
- (a) a body corporate;
- (b) a partnership or association; or
- (c) a trust as defined in the Trust Property Act, 1988 (Act No. 57 of 1988);
- “licence”**, depending on the context, means the authority, regardless of its specific title or form, issued to a person and in terms of which that person is either— 40
- (a) authorised in terms of a public regulation to conduct business; or
- (b) authorised by another person to—
- (i) access any facility or use any goods; or
- (ii) supply any goods or services; 45
- “loyalty credit or award”** means any—
- (a) benefit accruing to a consumer;
- (b) right to any goods, service or other benefit granted to a consumer; or
- (c) point, credit, token, device or other tangible or intangible thing which, when accumulated in sufficient quantities, entitles the holder to seek, request or assert a claim for any goods, service or other benefit, allocated to a consumer, in terms of a loyalty programme, irrespective of the name, nature, form or characterisation assigned by that loyalty programme to any such goods, service or other benefit, right or thing; 50
- “loyalty programme”** means any arrangement or scheme in the ordinary course of business, in terms of which a supplier of goods or services, association of such suppliers, or other person on behalf of or in association with any such suppliers, offers or grants to a consumer any loyalty credit or award in connection with a transaction or an agreement; 55
- “mark”**, when used as a noun, means any visual representation, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or 60

- container for goods or other sign capable of being represented graphically, or any combination of those things, but does not include a trade mark;
- “market”**, when used as a verb, means to promote or supply any goods or services;
- “MEC”** means the Member of the Executive Council; 5
- “Minister”** means the member of the Cabinet responsible for consumer protection matters;
- “National Credit Act”** means the National Credit Act, 2005 (Act No. 34 of 2005);
- “ombud with jurisdiction”**, in respect of any particular dispute arising out of an agreement or transaction between a consumer and a supplier who is— 10
- (a) subject to the jurisdiction of an ‘ombud’, or a ‘statutory ombud’, in terms of any national legislation, means that ombud, or statutory ombud; or
- (b) a ‘financial institution’, as defined in the Financial Services Ombud Schemes Act, 2004 (Act No. 37 of 2004), means ‘the ombud’, as determined in accordance with section 13 or 14 of that Act; 15
- “organ of state”** means an organ of state as defined in section 239 of the Constitution;
- “person”** includes a juristic person;
- “premises”** includes land, or any building, structure, vehicle, ship, boat, vessel, aircraft or container; 20
- “prescribed”** means determined, stipulated, required, authorised, permitted or otherwise regulated by a regulation made, or notice given, by the Minister in terms of this Act;
- “price”**, when used in relation to—
- (a) a representation required to be displayed by section 23, includes any mark, notice or visual representation that may reasonably be inferred to indicate or express an association between any goods or services and the value of the consideration for which the supplier is willing to sell or supply those goods or services; or 25
- (b) the consideration for any transaction, means the total amount paid or payable by the consumer to the supplier in terms of that transaction or agreement, including any amount that the supplier is required to impose, charge or collect in terms of any public regulation; 30
- “producer”**, with respect to any particular 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 35
- (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 paragraph (a); 40
- “prohibited conduct”** means an act or omission in contravention of this Act;
- “promote”** means to—
- (a) advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration; 45
- (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; 50
- “Promotion of Equality and Prevention of Unfair Discrimination Act”** means the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); 55
- “provincial consumer protection authority”** means a body established within the provincial sphere of government, and designated by the responsible Member of the Executive Council of a province to have general authority to deal with consumer protection matters within that province;
- “public regulation”** means any national, provincial or local government legislation or subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority; 60

- “Registrar”** means the Registrar of Companies appointed in terms of the Companies Act, 1973 (Act No. 61 of 1973), or the official performing similar functions in terms of any subsequent legislation;
- “regulation”** means a regulation made under this Act;
- “regulatory authority”** means an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry; 5
- “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, at the direction of, or to the consumer, or the right to use any premises or other property is granted, at the direction of, or to the consumer, but does not include a lease within the meaning of the National Credit Act; 10
- “repealed law”** means an Act mentioned in section 121(2), or a public regulation made in terms of such an Act;
- “respondent”** means a person or firm against whom a complaint or application has been initiated in terms of this Act; 15
- “retailer”**, with respect to any particular goods, means a person who, in the ordinary course of business, supplies those goods to a consumer;
- “service”** includes, but is not limited to—
- (a) any work or undertaking performed by one person for the direct or indirect benefit of another; 20
  - (b) the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002);
  - (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— 25
    - (i) constitutes advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); or
    - (ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), or the Short-term Insurance Act, 1998 (Act No. 53 of 1998); 30
  - (d) the transportation of an individual or any 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; 35
    - (iii) access to any electronic communication infrastructure;
    - (iv) access, or of a right of access, to an event or to any premises, activity or facility; or
    - (v) access to or use of any premises or other property in terms of a rental; 40
  - (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; and
  - (g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e), 45
- irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service;
- “service provider”** means a person who promotes, supplies or offers to supply any service;
- “sms”** means a short message service provided through a telecommunication system; 50
- “special-order goods”** means goods that a supplier expressly or implicitly was required or expected to procure, create or alter specifically to satisfy the consumer’s requirements;
- “supplier”** means a person who markets any goods or services;
- “supply”**, when used as a verb— 55
- (a) in relation to goods, includes sell, rent, exchange, hire and sell by instalment in the ordinary course of business for consideration; or
  - (b) in relation to services, means 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; 60
- “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 as a producer, importer, distributor or retailer of goods, or as a service provider;

“**this Act**” includes any Schedule to this Act, regulations made or notice issued by the Minister under this Act;

“**trade description**” means— 5

- (a) any description, statement or other direct or indirect indication, other than a trade mark, as to—
  - (i) the number, quantity, measure, weight or gauge of any goods;
  - (ii) the name of the producer or producer of any goods;
  - (iii) the ingredients of which any goods consist, or material of which any goods are made; 10
  - (iv) the place or country of origin of any goods;
  - (v) the mode of manufacturing or producing any goods; or
  - (vi) any goods being the subject of any patent, privilege or copyright; or
- (b) any figure, work or mark, other than a trade mark, that, according to the custom of the trade, is commonly understood to be an indication of any matter contemplated in paragraph (a); 15

“**trade mark**” means—

- (a) a trade mark as defined in section 2(1) of the Trade Marks Act, 1993 (Act No. 194 of 1993); or 20
- (b) a well-known trade mark as contemplated in section 35 of the Trade Marks Act, 1993;

“**transaction**” means—

- (a) 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; or
  - (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; or 30
- (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a); 35

“**Tribunal**” means the National Consumer Tribunal established by section 26 of the National Credit Act; 35

“**unconscionable**”, when used with reference to any conduct, means—

- (a) having a character contemplated in section 40; or
- (b) otherwise unethical or improper to a degree that would shock the conscience of a reasonable person; 40

“**unit price**” means a price for any goods or services expressed in relation to a well-known measure such as quantity, weight, volume, duration or other measurable unit by which the goods or services are allocated;

“**used goods**”, when used in respect of any goods being marketed, means goods that have been previously supplied to a consumer, but does not include goods that have been returned to the supplier in terms of any right of return contemplated in this Act; and 45

“**visual representation**” means any representation or illustration capable of being reproduced upon a surface, whether by printing or otherwise, but does not include a trade mark.

## **Interpretation** 50

2. (1) This Act must be interpreted in a manner that gives effect to the purposes set out in section 3.

(2) When interpreting or applying this Act, a person, court or Tribunal or the Commission may consider—

- (a) appropriate foreign and international law; 55
- (b) appropriate international conventions, declarations or protocols relating to consumer protection; and
- (c) any decision of a consumer court, ombud or arbitrator in terms of this Act, to the extent that such a decision has not been set aside, reversed or overruled by the High Court, the Supreme Court of Appeal or the Constitutional Court. 60

- (3) If a provision of this Act requires a document to be signed or initialled by a party to a transaction, that signing or initialling may be effected in any manner recognised by law, including by use of—
- (a) an advanced electronic signature, as defined in the Electronic Communications and Transactions Act; or 5
  - (b) an electronic signature, as defined in the Electronic Communications and Transactions Act.
- (4) The supplier must take reasonable measures to prevent the use of a consumer’s electronic signature for any purpose other than the signing or initialling of the particular document that the consumer intended to sign or initial. 10
- (5) Despite the periods of time set out in section 6, each successive threshold determined by the Minister in terms of that section continues in effect until a subsequent threshold in terms of that section takes effect.
- (6) When a particular number of business days is provided for between the happening of one event and another, the number of days must be calculated by— 15
- (a) excluding the day on which the first such event occurs;
  - (b) including the day on or by which the second event is to occur; and
  - (c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b), respectively.
- (7) Unless the context indicates otherwise, any use of the word “includes” or “including” in relation to a defined or generic word or expression, on the one hand, and one or more enumerated examples or specific items, on the other, is not to be construed as limiting the defined or generic expression to the examples or items so enumerated. 20
- (8) If there is an inconsistency between any provision of Chapter 5 of this Act and a provision of the Public Finance Management Act, 1999 (Act No. 1 of 1999), or the Public Service Act, 1994 (Proclamation No. 103 of 1994), the provisions of the Public Finance Management Act, 1999, or of the Public Service Act, 1994, as the case may be, prevail. 25
- (9) If there is an inconsistency between any provision of this Act and a provision of any Act not contemplated in subsection (8)— 30
- (a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and
  - (b) to the extent that paragraph (a) cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision. 35

## ***Part B***

### ***Purpose, policy and application of Act***

#### **Purpose and policy of Act**

- 3.** (1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by— 40
- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
  - (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers— 45
    - (i) who are low-income persons or persons comprising low-income communities;
    - (ii) who live in remote, isolated or low-density population areas or communities;
    - (iii) who are minors, seniors or other similarly vulnerable consumers; or 50
    - (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented; 55
  - (c) promoting fair business practices;
  - (d) protecting consumers from—
    - (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and

- (ii) deceptive, misleading, unfair or fraudulent conduct;
  - (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;
  - (f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism; 5
  - (g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
  - (h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers. 10
- (2) To better ensure the realisation of the purposes of this Act, and the enjoyment of the consumer rights recognised or conferred by this Act, the Commission, in addition to its responsibilities set out elsewhere in this Act, is responsible to—
- (a) take reasonable and practical measures to promote the purposes of this Act and to protect and advance the interests of all consumers, and in particular those consumers contemplated in subsection (1)(b); 15
  - (b) monitor and report each year to the Minister on the following matters:
    - (i) The availability of goods and services to persons contemplated in subsection (1)(b), including price and market conditions, conduct and trends affecting their consumer rights; 20
    - (ii) access to the supply of goods and services by small businesses and persons contemplated in subsection (1)(b); and
    - (iii) any other matter relating to the supply of goods and services; and
  - (c) conduct research and propose policies to the Minister in relation to any matter affecting the supply of goods and services, including proposals for legislative, regulatory or policy initiatives that would improve the realisation and full enjoyment of their consumer rights by persons contemplated in subsection (1)(b). 25

#### **Realisation of consumer rights**

4. (1) Any of the following persons may, in the manner provided for in this Act, approach a court, the Tribunal or the Commission alleging that a consumer's rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring: 30
- (a) A person acting on his or her own behalf;
  - (b) an authorised person acting on behalf of another person who cannot act in his or her own name; 35
  - (c) a person acting as a member of, or in the interest of, a group or class of affected persons;
  - (d) a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and 40
  - (e) an association acting in the interest of its members.
- (2) In any matter brought before the Tribunal or a court in terms of this Act—
- (a) the court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b); and 45
  - (b) the Tribunal or court, as the case may be, must—
    - (i) promote the spirit and purposes of this Act; and
    - (ii) make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not limited to—
      - (aa) any order expressly provided for in this Act; and 50
      - (bb) any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act.
- (3) If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b). 55
- (4) To the extent consistent with advancing the purposes and policies of this Act, the Tribunal or court must interpret any standard form, contract or other document prepared 60

- or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the consumer—
- (a) so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer; and
  - (b) so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to—
    - (i) the content of the document;
    - (ii) the manner and form in which the document was prepared and presented; and
    - (iii) the circumstances of the transaction or agreement.
- (5) In any dealings with a consumer or potential consumer in the ordinary course of business, a person must not—
- (a) engage in any conduct contrary to, or calculated to frustrate or defeat the purposes and policy of, this Act;
  - (b) engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead or deceive; or
  - (c) make any representation about a supplier or any goods or services, or a related matter, unless the person has reasonable grounds for believing that the representation is true.

### Application of Act

5. (1) This Act applies to—
- (a) every transaction occurring within the Republic, unless it is exempted by subsection (2), or in terms of subsections (3) and (4);
  - (b) the promotion of any goods or services, or of the supplier of any goods or services, within the Republic, unless—
    - (i) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph (a); or
    - (ii) the promotion of those goods or services has been exempted in terms of subsections (3) and (4);
  - (c) goods or services that are supplied or performed in terms of a transaction to which this Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services; and
  - (d) goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided for in subsection (5).
- (2) This Act does not apply to any transaction—
- (a) in terms of which goods or services are promoted to the State, or are supplied to or at the direction of the State; or
  - (b) if—
    - (i) the value of the transaction exceeds the threshold value determined by the Minister in terms of section 6; and
    - (ii) the goods or services are supplied to a person in the supply chain who, in the ordinary course of business—
      - (aa) markets those goods for resale, irrespective of whether to other persons in the supply chain or directly to consumers; or
      - (bb) applies or utilises those goods or services in the production of other goods or services, or in the marketing of any goods or services, irrespective of whether to other persons in the supply chain or directly to consumers; or
  - (c) if the transaction falls within an exemption granted by the Minister in terms of subsections (3) and (4).
- (3) A regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of this Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of—
- (a) any other national legislation; or
  - (b) any treaty, international law, convention or protocol.
- (4) The Minister, by notice in the *Gazette* after receiving the advice of the Commission, may grant an exemption contemplated in subsection (3)—
- (a) only to the extent that the relevant regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and



- (b) subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act.
- (5) If any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of this Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 60 and 61. 5
- (6) For greater certainty, the following arrangements must be regarded as a transaction between a supplier and consumer, within the meaning of this Act:
- (a) The supply of any 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; 10 15
  - (b) a solicitation of offers to enter into a franchise agreement;
  - (c) an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;
  - (d) a franchise agreement or an agreement supplementary to a franchise agreement; and 20
  - (e) the supply of any goods or services to a franchisee in terms of a franchise agreement.
- (7) Despite subsection (2)(b), this Act applies to a transaction contemplated in subsection (6)(b) to (e) irrespective of whether the value of that transaction falls above or below the threshold determined in terms of section 6. 25
- (8) The application of this Act in terms of subsections (1) to (7) extends to a matter irrespective of whether the supplier—
- (a) resides or has its principal office within or outside the Republic;
  - (b) operates on a for-profit basis or otherwise; or
  - (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; or 30
  - (d) is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public. 35

### Threshold determination

6. (1) On the early effective date as determined in accordance with item 2 of Schedule 2, and subsequently at intervals of not more than five years, the Minister, by notice in the *Gazette*, must determine a monetary threshold applicable to the value of transactions, for the purposes of section 5(2)(b)(i). 40
- (2) The initial threshold determined by the Minister in terms of this section takes effect on the general effective date as determined in accordance with item 2 of Schedule 2, and each subsequent threshold takes effect six months after the date on which it is published in the *Gazette*.

### Requirements of franchise agreements 45

7. (1) A franchise agreement must—
- (a) be in writing and signed by or on behalf of the franchisee;
  - (b) include any prescribed information, or address any prescribed categories of information; and
  - (c) comply with the requirements of section 22. 50
- (2) A franchisee may cancel a franchise agreement without cost or penalty within 10 business days after signing such agreement, by giving written notice to the franchisor.
- (3) The Minister may prescribe information to be set out in franchise agreements, generally, or within specific categories or industries.

## CHAPTER 2

## FUNDAMENTAL CONSUMER RIGHTS

## Part A

*Right of equality in consumer market*

- Protection against discriminatory marketing** 5
- 8.** (1) Subject to section 9, a supplier of goods or services must not unfairly—
- (a) 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; 10
  - (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 to any persons or category of persons; 15
  - (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 any goods or services offered by the supplier, 20
- on the basis of one or more grounds of unfair discrimination contemplated in section 9 of the Constitution or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.
- (2) Subject to section 9, a supplier must not directly or indirectly treat any person differently than any other, in a manner that constitutes unfair discrimination on one or more grounds set out in section 9 of the Constitution, or one or more grounds set out in Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act, when— 25
- (a) assessing the ability of the person to pay the cost, or otherwise meet the obligations, of a proposed transaction or agreement; 30
  - (b) deciding whether to enter into a transaction or agreement, or to offer to enter into a transaction or agreement;
  - (c) determining any aspect of the cost of a transaction or agreement to the consumer;
  - (d) interacting with the consumer— 35
    - (i) in the supplier's place of business, or
    - (ii) in the course of displaying or demonstrating any goods, testing or fitting any goods, or negotiating the terms of a transaction or agreement; or
  - (e) selecting, preparing, packaging or delivering any goods for or to the consumer, or providing any services to the consumer; 40
  - (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; 45
  - (i) determining whether to continue, enforce, seek judgment in respect of, or terminate a transaction or agreement; or
  - (j) determining whether to report, or reporting, any personal information of such person.
- (3) Subsections (1) and (2) also apply in respect of a consumer that is an association or juristic person, to prohibit unfair discrimination against that association or juristic person 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. 50
- (4) Nothing in this section is intended to limit the authority of a court to—
- (a) consider any conduct between a supplier and a consumer that is not 55 contemplated in this section; or

- (b) find that any such conduct constitutes unfair discrimination within the meaning of the Constitution or the Promotion of Equality and Prevention of Unfair Discrimination Act.

### **Reasonable grounds for differential treatment in specific circumstances**

- 9.** (1) It is not a contravention of section 8 for a supplier to— 5
- (a) refuse to supply or provide access to any particular goods or services to a minor, or to require the consent of a parent, guardian or other responsible adult before supplying or providing access to any particular goods or services to an unemancipated minor—
- (i) in accordance with any public regulation; or 10
- (ii) as a reasonable precaution to protect the health, welfare or safety of a minor;
- (b) refuse on reasonable grounds to—
- (i) enter into an agreement with a minor for the supply of any goods or services; or 15
- (ii) continue, or renew, an agreement contemplated in subparagraph (i), unless the supplier has reason to believe that the minor is emancipated;
- (c) reasonably designate any facility or service, permanently, or from time to time, for the exclusive use of—
- (i) minors generally; 20
- (ii) minors who are above or below a specified age, or between specified ages; or
- (iii) adults who have attained a specified age of at least 60 years; or
- (d) advertise, offer or agree to supply, or supply, any goods or services at a discounted price solely on the basis that the consumer— 25
- (i) is a minor who has not yet attained a specified age; or
- (ii) is an adult who has attained a specified age of at least 60 years.
- (2) It is not a contravention of section 8 for a supplier to reasonably—
- (a) provide and designate separate but substantially equivalent facilities for the exclusive use of persons of each gender; or 30
- (b) offer to supply or provide access to a facility exclusively to persons of one gender.
- (3) It is not a contravention of section 8 for a supplier to 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 a ground of discrimination set out in section 9(3) of the Constitution, if the particular goods or services are reasonably intended or designed to satisfy any specific needs or interests that are common to, or uniquely characteristic of, that particular group of consumers. 35
- (4) Nothing in this section is intended to limit the authority of a court to—
- (a) assess the reasonableness of any conduct, to the extent contemplated in subsections (1)(b) or (c), (2) or (3), and determine whether any conduct not reasonably justified, as contemplated in those subsections, constitutes unfair discrimination within the meaning of the Constitution or the Promotion of Equality and Prevention of Unfair Discrimination Act; or 40
- (b) determine whether any conduct contemplated in section 8 was fair in the circumstances of a particular transaction or the marketing of any particular goods or services, as the case may be. 45

### **Equality court jurisdiction over this Part**

- 10.** (1) In respect of an alleged contravention of this Part, an accredited consumer protection group, or any person contemplated in section 20(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, may either— 50
- (a) institute proceedings before an equality court in terms of Chapter 4 of that Act; or
- (b) file a complaint with the Commission, which must refer the complaint to the equality court, if the complaint appears to be valid. 55
- (2) In any proceedings contemplated in this Part—

- (a) there is a presumption that any differential treatment contemplated in section 8 is unfair discrimination, unless it is established that the discrimination is fair; and
- (b) a court may draw an inference that a supplier has discriminated unfairly if—
  - (i) the supplier has done anything contemplated in section 8 with respect to a consumer in a manner that constituted differential treatment compared to that accorded to another consumer;
  - (ii) in the circumstances, the differential treatment appears to be based on a prohibited ground of discrimination; and
  - (iii) the supplier, when called upon to do so, has refused or failed to offer an alternative reasonable and justifiable explanation for the difference in treatment.

### **Part B**

#### ***Consumer's right to privacy***

#### **Right to restrict unwanted direct marketing** 15

**11.** (1) The right of every person to privacy includes the right to—

- (a) refuse to accept;
- (b) require another person to discontinue; or
- (c) 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.

(2) To facilitate the realisation of each consumer's right to privacy, and to enable consumers to efficiently protect themselves against the activities contemplated in subsection (1), a person who has been approached for the purpose of direct marketing 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.

(3) The Commission may establish, or recognise as authoritative, a registry in which any 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.

- (4) A person authorising, directing or conducting any direct marketing—
- (a) must implement appropriate procedures to facilitate the receipt of demands contemplated in subsection (2); and
  - (b) must not direct or permit any person associated with that activity to direct or deliver any communication for the purpose of direct marketing to a person who has—
    - (i) made a demand contemplated in subsection (2); or
    - (ii) registered a relevant pre-emptive block as contemplated in subsection (3).

(5) No person may charge a consumer a fee for making a demand in terms of subsection (2) or registering a pre-emptive block as contemplated in subsection (3).

(6) The Minister may prescribe regulations for the operation of a registry contemplated in subsection (3).

#### **Regulation of time for contacting consumers**

**12.** (1) A supplier must not engage in any direct marketing directed to a consumer at home for any promotional purpose during a prohibited period prescribed in terms of this section, except to the extent that the consumer has expressly or implicitly requested or agreed otherwise.

(2) In order to protect the privacy of consumers, the Minister, by notice in the *Gazette*, may prescribe specific days, dates, public holidays or times of days for the purpose of subsection (1).

*Part C**Consumer's right to choose***Consumer's right to select suppliers**

**13.** (1) A supplier must not require, as a condition of offering to supply or supplying any goods or services, or as a condition of entering into an agreement or transaction, that the consumer must— 5

- (a) purchase any other particular goods or services from that supplier;
- (b) enter into an additional agreement or transaction with the same supplier or a designated third party; or
- (c) agree to purchase any particular goods or services from a designated third party, 10

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 choice, or that the bundling of those goods or services appears to result in economic benefit for consumers. 15

(2) Except to the extent that any other law provides otherwise, in any transaction between a franchisee and franchisor in terms of their franchise agreement, it is a defence to an allegation that the franchisor, as supplier to the franchisee, has contravened this section if any goods or services that the franchisee was required to purchase from or at the direction of the franchisor are reasonably related to the branded products or services that are the subject of the franchise agreement. 20

**Expiry and renewal of fixed-term agreements**

**14.** (1) If a consumer agreement is for a fixed term—

- (a) that term must not exceed the maximum period, if any, prescribed in terms of subsection (3) with respect to that category of consumer agreement; 25
- (b) despite any provision of the consumer agreement to the contrary—
  - (i) the consumer may cancel that agreement—
    - (aa) upon the expiry of its fixed term, without penalty or charge, but subject to subsection (2)(a); or
    - (bb) at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (2)(a) and (b); or 30
  - (ii) the supplier may cancel the agreement 20 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; 35
- (c) of not more than 80, nor less than 40, business days before the expiry date of the fixed term of the consumer agreement, the supplier must notify the consumer in writing of the impending expiry date, including a notice of— 40
  - (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 in terms of paragraph (d); and
- (d) 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 in paragraph (c), unless the consumer expressly— 45
  - (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.

(2) Upon cancellation of a consumer agreement as contemplated in subsection (1)(b)— 50

- (a) 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; and
- (b) the supplier—
  - (i) may impose a reasonable cancellation penalty with respect to any goods supplied, or discounts granted, to the consumer in contemplation of the agreement enduring for its intended fixed term, if any; and 55
  - (ii) must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation,

- as prescribed in terms of subsection (3).
- (3) The Minister may, by notice in the *Gazette*, prescribe—
- (a) the maximum duration for fixed-term consumer agreements, generally, or for specified categories of such agreements;
  - (b) the manner and form of providing notices to the consumer in terms of subsection (1)(c);
  - (c) the manner, form and basis for determining the reasonableness of credits and charges contemplated in subsection (2); and
  - (d) other incidental matters as required to provide for the proper administration of this section.

### **Pre-authorisation of repair or maintenance services**

- 15.** (1) This section applies only to a transaction or consumer agreement—
- (a) with a price value above the threshold prescribed in terms of subsection (5); and
  - (b) if, in terms of that transaction or agreement, a service provider supplies a repair or maintenance service to, or supplies or installs any replacement parts or components in, any property belonging to or in the control of the consumer, and—
    - (i) the service provider has, or takes, possession of that property for the purpose contemplated in this paragraph; or
    - (ii) in any other case, the consumer requests an estimate before any services or goods are supplied.
- (2) A service provider to whom this section applies, must not charge a consumer for the supply of any goods or services contemplated in subsection (1), unless—
- (a) the supplier or service provider has given the consumer an estimate that satisfies the prescribed requirements, and the consumer has subsequently authorised the work; or
  - (b) the consumer, in writing, or by another recorded manner or form, has—
    - (i) declined the offer of an estimate, and authorised the work; or
    - (ii) pre-authorised any charges up to a specified maximum, and the amount charged does not exceed that maximum.
- (3) A service provider to whom this section applies must not charge a consumer for preparing an estimate required in terms of subsection (2)(a), including—
- (a) any cost of performing any diagnostic work, disassembly or re-assembly required in order to prepare an estimate; or
  - (b) any damage to or loss of material or parts in the course of preparing an estimate,
- unless, before preparing the estimate the service provider has disclosed the price for preparing that estimate, and the consumer has approved it.
- (4) If a supplier has provided an estimate for any service, or goods and services, the supplier may not charge the consumer a price for that service, or those goods and services, that exceeds the estimate, unless after providing the estimate—
- (a) the service provider has informed the consumer of the additional estimated charges; and
  - (b) the consumer has authorised the work to continue.
- (5) The Minister may, by notice in the *Gazette*, prescribe a monetary threshold for the purpose of subsection (1)(a).

### **Consumer's right to cooling-off period after direct marketing**

- 16.** (1) This section does not apply to a transaction if section 44 of the Electronic Communications and Transactions Act applies to that transaction.
- (2) 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.
- (3) 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—
- (a) the transaction or agreement was concluded; or
  - (b) the goods that were the subject of the transaction were delivered to the consumer.

- (4) A supplier must—
- (a) return any payment received from the consumer in terms of the transaction within 15 business days after—
    - (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).

**Consumer's right to cancel advance reservation, booking or order** 10

17. (1) This section does not apply to a franchise agreement, or in respect of any special-order goods.
- (2) Subject to subsections (3) and (4), a consumer has the right to cancel any advance booking, reservation or order for any goods or services to be supplied.
- (3) A supplier who makes a commitment or accepts a reservation to supply goods or services on a later date may— 15
- (a) require payment of a reasonable deposit in advance; and
  - (b) impose a reasonable charge for cancellation of the order or reservation, subject to subsection (5).
- (4) For the purposes of this section, a charge is unreasonable if it exceeds a fair amount in the circumstances, having regard to— 20
- (a) the nature of the goods or services that were reserved or booked;
  - (b) the length of notice of cancellation provided by the consumer;
  - (c) the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation; and
  - (d) the general practice of the relevant industry.
- (5) A supplier may not impose any cancellation fee in respect of a booking, reservation or order if the consumer is unable to honour the booking, reservation or order because of the death or hospitalisation of the person for whom, or for whose benefit the booking, reservation or order was made. 30

**Consumer's right to choose or examine goods**

18. (1) Despite any statement or notice to the contrary, a consumer or potential consumer is not responsible for any loss or damage to any goods displayed by a supplier, unless the loss or damage results from action by the consumer amounting to gross negligence or recklessness, malicious behaviour or criminal conduct. 35
- (2) If any goods are displayed in or sold from open stock, the consumer has the right to select or reject any particular item from that stock before completing the transaction.
- (3) If the consumer has agreed to purchase goods solely on the basis of a description or sample, or both, provided by the supplier, the goods delivered to the consumer must in all material respects and characteristics correspond to that which an ordinary alert consumer would have been entitled to expect based on the description or on a reasonable examination of the sample, as the case may be. 40
- (4) If a supply of goods is by sample, as well as by description, it is not sufficient that any of the goods correspond with the sample if the goods do not also correspond with the description. 45

**Consumer's rights with respect to delivery of goods or supply of service**

19. (1) This section does not apply to—
- (a) the supply of goods or services to a franchisee in terms of a franchise agreement; or
  - (b) a transaction if the performance of that transaction is governed by section 46 of the Electronic Communications and Transactions Act.
- (2) Unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods or services that—
- (a) the supplier is responsible to deliver the goods or perform the services— 55
    - (i) on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement;

- (ii) at the agreed place of delivery or performance; and
- (iii) at the cost of the supplier, in the case of delivery of goods; or
- (b) the agreed place of delivery of goods or performance of services is the supplier's place of business, if the supplier has one, and if not, the supplier's residence; and 5
- (c) goods to be delivered remain at the supplier's risk until the consumer has accepted delivery of them, in accordance with this section.
- (3) If an agreement does not provide a specific date or time for delivery of any goods or performance of any services, the supplier must not require that the consumer accept delivery or performance of the services at an unreasonable time. 10
- (4) The consumer is regarded to have accepted delivery of any goods on the earliest of the following circumstances:
  - (a) When the consumer expressly or implicitly communicates to the supplier that the consumer has accepted delivery of such goods; or
  - (b) when the goods have been delivered to the consumer, and— 15
    - (i) the consumer does anything in relation to the goods that would be inconsistent with the supplier's ownership of them; or
    - (ii) after the lapse of a reasonable time, the consumer retains the goods without intimating to the supplier that the consumer has rejected delivery of them, subject to subsection (5). 20
- (5) When a supplier tenders delivery to a consumer of any goods, the supplier must, on request, allow the consumer a reasonable opportunity to examine those goods for the purpose of ascertaining whether the consumer is satisfied that the goods—
  - (a) are of a type and quality reasonably contemplated in the agreement, and meet the tests set out in section 18(3) and (4); and 25
  - (b) in the case of a special-order agreement, reasonably conform to the material specifications of the special order.
- (6) If the supplier tenders the delivery of goods or the performance of any services at a location, on a date or at a time other than as agreed with the consumer, the consumer may either— 30
  - (a) accept the delivery or performance at that location, date and time;
  - (b) require the delivery or performance at the agreed location, date and time, if that date and time have not yet passed; or
  - (c) cancel the agreement without penalty, treating any delivered goods or performed services as unsolicited goods or services in accordance with section 21. 35
- (7) If the supplier delivers to the consumer a larger quantity of goods than the consumer agreed to buy, the consumer may either—
  - (a) reject all of the delivered goods; or
  - (b) accept delivery of the goods, and— 40
    - (i) pay for the agreed quantity at the agreed rate; and
    - (ii) treat the excess quantity as unsolicited goods in accordance with section 21.
- (8) If the supplier delivers to the consumer some of the goods the supplier agreed to supply mixed with goods of a different description not contemplated in the agreement, the consumer may— 45
  - (a) accept delivery of the goods that are in accordance with the agreement and reject the rest; or
  - (b) reject all of the delivered goods.

### **Consumer's right to return goods** 50

- 20.** (1) This section is in addition to and not in substitution for—
  - (a) the right to return unsafe or defective goods, contemplated in section 56; or
  - (b) any other right in law between a supplier and consumer to return goods and receive a refund.
- (2) Subject to subsections (3) to (6), 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— 55
  - (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; 60



- (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);
  - (c) a mixture of goods, and the consumer has refused delivery of any of those goods, as contemplated in section 19(8); or 5
  - (d) goods intended to satisfy a particular purpose communicated to the supplier as contemplated in section 55(3), and within 10 business days after delivery to the consumer, the goods have been found to be unsuitable for that particular purpose.
- (3) Subsection (2) does not apply with respect to any goods if— 10
- (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. 15
- (4) Goods returnable in terms of—
- (a) subsection (2)(a) must be returned to the supplier at the consumer’s risk and expense; or 20
  - (b) subsection (2)(b) to (d) must be returned to the supplier at the supplier’s risk and expense, within 10 business days after delivery to the consumer.
- (5) 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 in terms of subsection (6). 25
- (6) In determining the right of a supplier to impose a charge contemplated in subsection (5), if any goods returned to the supplier in terms of this section are—
- (a) in the original unopened packaging, the supplier may not charge the consumer any amount in respect of the goods; 30
  - (b) in their original condition and repackaged in their original packaging, the supplier may charge the consumer a reasonable amount for—
    - (i) use of the goods during the time they were in the consumer’s possession, unless they are goods that are ordinarily consumed or depleted by use, and no such consumption or depletion has occurred; or 35
    - (ii) any consumption or depletion of the goods, unless that consumption or depletion is limited to a reasonable amount necessary to determine whether the goods were acceptable to the consumer; or
  - (c) in any other case, the supplier may charge the consumer a reasonable amount— 40
    - (i) as contemplated in paragraph (b); and
    - (ii) for necessary restoration costs to render the goods fit for re-stocking, unless, having regard to the nature of the goods, and the manner in which they were packaged, it was necessary for the consumer to destroy the packaging in order to determine whether the goods— 45
      - (aa) conformed to the description or sample provided, in the case of goods that had not been examined by the consumer before delivery, as contemplated in subsection (2)(b); or
      - (bb) were fit for the intended purpose, in a case contemplated in subsection (2)(d). 50

### Unsolicited goods or services

- 21.** (1) For the purpose of this Act, goods or services are unsolicited in any of the following circumstances, subject to subsection (2):
- (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, those goods or services, as the case may be, are unsolicited; 55
  - (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 60

- previously supplied to an extent not reasonably contemplated in the agreement, the new goods or services are unsolicited, 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, those further goods are unsolicited goods; 5
- (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), those goods or services are unsolicited; 10
- (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, the goods or services, as the case may be, are unsolicited goods. 15
- (2) Despite subsection (1), if—
- (a) within 10 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 20 business days after so informing the consumer; or 20
- (b) any goods are delivered to a consumer and—
- (i) those goods are clearly addressed to another person, and have obviously been misdelivered; or 25
- (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 misdelivered, and the goods are not recovered within the following 20 business days. 30
- (3) If a person is in possession of goods contemplated in this section, the person—
- (a) must not frustrate or impede any reasonable action by the supplier or deliverer to recover the goods within the time allowed in subsection (2);
- (b) is not responsible for any cost pertaining to the recovery of the goods or further delivery of them to another person; and 35
- (c) is not liable for any loss or damage to the goods during the time they are in the person's possession or control, other than loss caused by the person's intentional interference with the goods, if any.
- (4) A person who fails to comply with subsection (3)(a) 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. 40
- (5) If a person is in possession of any unsolicited goods, the person may—
- (a) retain the goods; or 45
- (b) return the goods to the apparent supplier or deliverer at the risk and expense of the supplier or deliverer, as the case may be.
- (6) If a person lawfully retains any unsolicited goods—
- (a) the property in those goods passes unconditionally to the person, subject only to any right or valid claim that an uninvolved third party may have with respect to those goods; and 50
- (b) the person who supplied or delivered those goods is liable to any other person in respect of any right or valid claim relating to such goods.
- (7) A person has no obligation to pay a supplier for unsolicited goods or services, or a deliverer for the cost of delivery of any unsolicited goods. 55
- (8) A supplier must not demand or assert any right to, or attempt to collect, any payment from a consumer in respect of any charge relating to unsolicited goods left in the possession of a consumer, or the delivery of any such goods, or unsolicited services supplied to or for the benefit of, a consumer, except as contemplated in subsection (4).
- (9) If a consumer has made any payment to a supplier or deliverer in respect of any charge relating to unsolicited goods or services, or the delivery of any such goods, the consumer is entitled to recover that amount, with interest from the date on which it was 60

paid to the supplier, in accordance with the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975).

### *Part D*

#### *Right to disclosure and information*

#### **Right to information in plain and understandable language** 5

**22.** (1) The producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation—

(a) in the prescribed form, if any, for that notice, document or visual representation; or 10

(b) in plain language, if no form has been prescribed for that notice, document or visual representation.

(2) For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to— 15

(a) the context, comprehensiveness and consistency of the notice, document or visual representation; 20

(b) the organisation, form and style of the notice, document or visual representation;

(c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and

(d) the use of any illustrations, examples, headings or other aids to reading and understanding. 25

(3) The Commission may publish guidelines for methods of assessing whether a notice, document or visual representation satisfies the requirements of subsection (1)(b).

#### **Disclosure of price of goods or services**

**23.** (1) This section does not apply to a transaction if— 30

(a) a supplier has provided an estimate pertaining to that transaction, or the consumer has waived such an estimate, as contemplated in section 15; or

(b) section 43 of the Electronic Communications and Transactions Act applies to that transaction.

(2) In this section, “price” includes a unit price. 35

(3) Subject to subsection (4), a retailer must not display any goods for sale without displaying to the consumer a price in relation to those goods.

(4) A retailer is not required to display a price for any goods that are displayed predominantly as a form of advertisement of the supplier, or of goods or services, in an area within the supplier’s premises to which the public does not ordinarily have access. 40

(5) A price is adequately displayed to a consumer if, in relation to any particular goods, a written indication of the price, expressed in the currency of the Republic, is—

(a) annexed or affixed to, written, printed, stamped or located upon, or otherwise applied to the goods or to any band, ticket, covering, label, package, reel, shelf or other thing used in connection with the goods or on which the goods are mounted for display or exposed for sale; 45

(b) in any way represented in a manner from which it may reasonably be inferred that the price represented is a price applicable to the goods or services in question; or

(c) published in relation to the goods in a catalogue, brochure, circular or similar form of publication available to that consumer, or to the public generally, if — 50

(i) a time is specified in the catalogue, brochure, circular or similar form of publication as the time after which the goods may not be sold at that price, and that time has not yet passed; or

(ii) in any other case, the catalogue, brochure, circular or similar form of publication is dated, and in the circumstances may reasonably be regarded as not out of date. 55

- (6) Subject to subsections (7) to (10), a supplier must not require a consumer to pay a price for any goods or services—
- (a) higher than the displayed price for those goods or services; or
  - (b) if more than one price is concurrently displayed, higher than the lower or lowest of the prices so displayed. 5
- (7) Subsection (6) does not apply in respect of the price of any goods or services if the price of those goods or services is determined by or in terms of any public regulation.
- (8) If a price that was once displayed has been fully covered and obscured by a second displayed price, that second price must be regarded as the displayed price.
- (9) If a price as displayed contains an inadvertent and obvious error, the supplier is not bound by it after— 10
- (a) correcting the error in the displayed price; and
  - (b) taking reasonable steps in the circumstances to inform consumers to whom the erroneous price may have been displayed of the error and the correct price.
- (10) A supplier is not bound by a price displayed in relationship to any goods or services if an unauthorised person has altered, defaced, covered, removed or obscured the price displayed or authorised by the supplier. 15
- (11) If, in addition to displaying a price in relation to any goods or services, a supplier has advertised or displayed a placard or similar device announcing that prices are, will be or have been reduced by— 20
- (a) a monetary value, generally or in relationship to any particular goods or services, the displayed price for the purpose of subsection (6) must be regarded as being the price immediately displayed in relationship to the goods or services, minus the announced monetary reduction; or
  - (b) a percentage value, generally or in relationship to any particular goods or services, the displayed price for the purpose of subsection (6) must be regarded as being the price immediately displayed in relationship to the goods or services, minus an amount determined by multiplying that price by the percentage shown, 25
- unless the supplier has applied two or more prices immediately to the goods or services concerned, and the difference between the highest and lower or lowest of those applied prices is equivalent to the advertised or placarded reduction in price. 30

### Product labelling and trade descriptions

24. (1) For the purposes of this section, a trade description is applied to goods if it is— 35
- (a) applied to the goods, or to any covering, label or reel in or on which the goods are packaged, or attached to the goods;
  - (b) displayed together with, or in proximity to, the goods in a manner that is likely to lead to the belief that the goods are designated or described by that description; or
  - (c) is contained in any sign, advertisement, catalogue, brochure, circular, wine list, invoice, business letter, business paper or other commercial communication on the basis of which a consumer may request or order the goods. 40
- (2) A person must not—
- (a) knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description; or 45
  - (b) alter, deface, cover, remove or obscure a trade description or trade mark applied to any goods in a manner calculated to mislead consumers.
- (3) A retailer of goods must—
- (a) not offer to supply, display or supply any particular goods if the retailer knows, reasonably could determine or has reason to suspect that— 50
    - (i) a trade description applied to those goods is likely to mislead the consumer as to any matter implied or expressed in that trade description; or
    - (ii) a trade description or trade mark applied to those goods has been altered as contemplated in subsection (2)(b); and 55
  - (b) with respect to any goods within the retailer's control, take reasonable steps to prevent any other person from doing anything contemplated in paragraph (a) or subsection (2)(b).
- (4) The Minister may prescribe— 60
- (a) categories of goods that are required to have a trade description applied to them, as contemplated in subsection (5);

- (b) the rules to be used in accordance with any international agreement for the purpose of determining the country of origin of any goods or components of any goods; and
- (c) the information that is required to be included in any trade description, from among the categories of information contemplated in the definition of “trade description” in section 1. 5

(5) The producer or importer of any goods that have been prescribed in terms of subsection (4) must apply a trade description to those goods, disclosing—

- (a) the country of origin of the goods; and
- (b) any other prescribed information. 10

#### **Disclosure of reconditioned or gray market goods**

**25.** (1) A person who offers or agrees to supply, or supplies, any goods that—

- (a) have been reconditioned, rebuilt or remade; and
- (b) that bear the trade mark of the original producer or supplier,

must apply a conspicuous notice to those goods stating clearly that they have been reconditioned, rebuilt or remade, as the case may be. 15

(2) A person who markets any goods that bear a trade mark, but have been imported without the approval or licence of the registered owner of that trade mark, must apply a conspicuous notice to those goods in the prescribed manner and form.

#### **Sales records 20**

**26.** (1) This section does not apply to a transaction if—

- (a) section 43 of the Electronic Communications and Transactions Act applies to that transaction; or
- (b) the transaction has been exempted in terms of subsection (3).

(2) A supplier of goods or services must provide a written record of each transaction to the consumer to whom any goods or services are supplied. 25

(3) The record contemplated in subsection (2) must include at least the following information:

- (a) The supplier’s full name, or registered business name, and VAT registration number, if any; 30
- (b) the address of the premises at which, or from which, the goods or services were supplied;
- (c) the date on which the transaction occurred;
- (d) a name or description of any goods or services supplied or to be supplied;
- (e) the unit price of any particular goods or services supplied or to be supplied; 35
- (f) the quantity of any particular goods or services supplied or to be supplied;
- (g) the total price of the transaction, before any applicable taxes;
- (h) the amount of any applicable taxes; and
- (i) the total price of the transaction, including any applicable taxes.

(4) The Minister may, by notice in the *Gazette*, exempt categories of goods or services, or circumstances of trade, from the application of subsections (2) and (3). 40

#### **Disclosure by intermediaries**

**27.** (1) An intermediary must—

- (a) disclose prescribed information to—
  - (i) any person whom the intermediary solicits or agrees to represent with respect to the sale of any property or services, or from whom the intermediary accepts any property for the purpose of offering it for sale; and 45
  - (ii) any person from whom the intermediary solicits an offer, or to whom the intermediary offers to supply or supplies— 50
    - (aa) any service to be performed by a third person; or
    - (bb) any goods or property belonging to a third person; and
- (b) keep the prescribed records of all relationships and transactions contemplated in this section.

(2) Subsection (1) does not apply to an intermediary who is— 55

- (a) the executor or other administrator of a deceased’s estate, in respect of any property of that estate;

- (b) the liquidator of an insolvent estate, in respect of any property of that estate; or
  - (c) a trustee in respect of any trust property.
- (3) The Minister may prescribe—
- (a) the information, including the manner and form of delivery of any such information, that an intermediary, or different categories of intermediary, must provide in terms of this section; and 5
  - (b) any records, including the form and content of any such records, that an intermediary, or different categories of intermediary, must keep in terms of this section. 10

### **Identification of deliverers, installers and others**

- 28.** Whenever a person is engaged in direct marketing in person at the premises of a consumer or potential consumer, or performing any services for a consumer at any such premises, or delivering any goods to, or installing any goods for, a consumer, at any such premises, that person must— 15
- (a) visibly wear or display a badge or similar identification device that satisfies any prescribed standards; or
  - (b) provide suitable identification on request by the consumer.

## *Part E*

### *Right to fair and responsible marketing* 20

#### **General standards for marketing of goods or services**

- 29.** A producer, importer, distributor, retailer or service provider must not market any goods or services—
- (a) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41; or 25
  - (b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of—
    - (i) the nature, properties, advantages or uses of the goods or services;
    - (ii) the manner in or conditions on which those goods or services may be supplied; 30
    - (iii) the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor's price for comparable or similar goods or services;
    - (iv) the sponsoring of any event; or 35
    - (v) any other material aspect of the goods or services.

#### **Bait marketing**

- 30.** (1) A supplier must not advertise any particular goods or services as being available at a specified price in a manner that may result in consumers being misled or deceived in any respect relating to the actual availability of those goods or services from that supplier, at that advertised price. 40
- (2) If a supplier advertises particular goods or services as being available at a specified price, and the advertisement expressly states a limitation in respect of the availability of those goods or services from that supplier at that price, the supplier must make those goods or services available at that price, to the extent of the expressed limits. 45
- (3) It is a defence to an alleged failure to comply with subsection (1) or (2) if—
- (a) the supplier offered to supply or procure another person to supply a consumer with the same or equivalent goods or services of the kind advertised within a reasonable time, in a reasonable quantity, and at the advertised price; and
  - (b) the consumer— 50
    - (i) unreasonably refused that offer; or
    - (ii) accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted.

**Negative option marketing**

- 31.** (1) A supplier must not—
- (a) promote any goods or services;
  - (b) offer to enter into or modify an agreement for the supply of any goods or services; or
  - (c) induce a person to accept any goods or services or to enter into or modify such an agreement,

on the basis that the goods or services are to be supplied, or the agreement or modification will automatically come into existence, unless the consumer declines such offer or inducement.

(2) An agreement purportedly entered into as a result of an offer or inducement contemplated in subsection (1) is void.

(3) A modification of an agreement purportedly agreed to as a result of an offer or inducement contemplated in subsection (1) is void.

**Direct marketing to consumers at home**

**32.** (1) 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, as set out in section 16.

(2) If a person who has marketed any goods as contemplated in subsection (1) left any goods with the consumer without requiring or arranging payment for them, those goods are unsolicited goods, to which section 21 applies.

**Catalogue marketing**

- 33.** (1) This section does not apply to—
- (a) a franchise agreement; or
  - (b) a transaction if Chapter 7 of the Electronic Communications and Transactions Act applies to it.

(2) This section applies to an agreement for the supply of goods or services that is not entered into in person, including an agreement concluded—

- (a) telephonically, if the contact is initiated by the consumer; or
- (b) by postal order or fax,

or in any similar manner in which, with respect to goods, the consumer does not have the opportunity to inspect the goods that are the subject of the transaction before concluding the agreement.

(3) Before concluding an agreement or transaction, a supplier must disclose the following information to a consumer, in an appropriate manner, having regard to the manner in which the supplier and consumer communicate in concluding the transaction:

- (a) The supplier's name and licence or registration number, if any;
- (b) the address of the supplier's physical business premises and related contact details;
- (c) the sales record information required by section 26;
- (d) the currency in which amounts under the agreement are payable;
- (e) the supplier's delivery arrangements, including—
  - (i) the identity of the shipper;
  - (ii) the mode of transportation; and
  - (iii) the place of delivery to the consumer;
- (f) the supplier's cancellation, return, exchange and refund policies, if any;
- (g) the manner and form in which a complaint may be lodged; and
- (h) any other prescribed information.

**Trade coupons and similar promotions**

- 34.** (1) This section does not apply to—
- (a) a franchise agreement;
  - (b) a loyalty programme, loyalty credit or award regulated in terms of section 35; or
  - (c) a promotional competition, as defined and regulated in terms of section 36.

(2) In this section, "promotional offer" means an offer or promise, expressed in any manner, of any prize, reward, gift, free good or service, price reduction or concession,

enhancement of quantity or quality of goods or services, irrespective of whether or not acceptance of the offer is conditional on the offeree entering into any other transaction.

- (3) A person must not make a promotional offer with the intention of—
- (a) not fulfilling it; or
  - (b) fulfilling it other than as offered. 5
- (4) Any document setting out a promotional offer must clearly state—
- (a) the nature of the prize, reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, or other discounted or free thing being offered; 10
  - (b) the goods or services to which the offer relates;
  - (c) the steps required by a consumer to accept the offer or to receive the benefit of the offer; and
  - (d) the particulars of any person from whom, any place where, and any date and time on or at which, the consumer may receive the prize, reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services or other discounted or free thing. 15
- (5) Subject to subsection (6), a person who makes or sponsors a promotional offer must—
- (a) ensure that the supply of the particular prize, reward, gift, free or reduced price good, or the capacity to provide enhanced quality or services, is sufficient to accommodate all reasonably anticipated demands resulting from the offer; 20
  - (b) not limit or restrict capacity to supply any such goods or services in response to the acceptance of the offer, on any basis other than that it applies to such a supply in exchange for any other form of consideration; 25
  - (c) not require the consumer to accept an inferior quality of any such goods or services than those generally available to any other consumer on the same date who tenders a different form of consideration; and
  - (d) not impose any monetary charge for the administration, processing or handling of a transaction in respect of which the consumer tenders a trade coupon. 30
- (6) It is a defence to an alleged failure to comply with subsection (5)(a) if the supplier offered to supply or procure another person to supply a consumer with comparable goods or services of the relevant kind to satisfy the consumer's acceptance of the promotional offer, and the consumer— 35
- (a) accepted the supplier's offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted; or
  - (b) unreasonably refused the supplier's offer.

### **Customer loyalty programmes**

- 35.** (1) Despite any provision in any law, agreement or notice to the contrary, for all purposes of this Act, loyalty credits or awards are a legal medium of exchange when offered or tendered as consideration for any goods or services offered, or transaction contemplated, in terms of that loyalty programme. 40
- (2) A person must not offer participation in a loyalty programme, or offer any loyalty credit or award with the intention of— 45
- (a) not providing it; or
  - (b) providing it in a manner other than as offered.
- (3) Any document setting out an offer contemplated in subsection (2) must clearly state—
- (a) the nature of the programme, credit or award being offered; 50
  - (b) the goods or services to which the offer relates;
  - (c) the steps required by a consumer to participate in the programme or to receive any benefit in terms of the programme; and
  - (d) any person from whom, any place where, and any date and time on or at which, the consumer may gain access to the programme, or to any loyalty credit or awards in terms of the programme. 55
- (4) Subject to subsections (5) and (6), the sponsor of a loyalty programme, or a supplier who offers or holds out a willingness, to accept any loyalty credits or awards as consideration or in exchange for any particular goods or services, must—



- (a) ensure that the supply of those particular goods or services available at any time is sufficient to accommodate all reasonably anticipated demands for those goods or services in exchange for loyalty credits or awards;
- (b) not limit or restrict capacity to supply those particular goods or services in exchange for such credits or awards on any basis other than that it applies to such a supply in exchange for any other form of consideration; 5
- (c) accept any tender of sufficient loyalty credits or awards as adequate consideration for the price of those particular goods or services if, at that time, it has capacity available for supply in exchange for any other form of consideration; 10
- (d) not require the consumer to accept an inferior quality of those particular goods or services than those generally available to any other consumer on the same date who tenders a different form of consideration;
- (e) not impose any monetary charge in respect of the administration, processing or handling of such a transaction if the consumer is required to pay a periodic fee to remain a member of the programme; and 15
- (f) not demand that the consumer purchase any other goods or services in connection with that transaction.

(5) A sponsor of a loyalty programme, or a supplier of goods or services who accepts loyalty credits or awards as consideration for any particular goods or services, may impose a partial or complete restriction on the availability of any such goods or services in exchange for loyalty credits or awards during any specific period, if the programme sponsor has directly or indirectly given notice in writing to the members of that programme at least 20 business days before the beginning of that period, but the total of all such periods within a calendar year must not exceed 90 days. 25

(6) It is a defence to an alleged failure to comply with subsection (4)(a) if the supplier offered to supply or procure another person to supply a consumer with comparable goods or services of the relevant kind to satisfy the consumer's request, for no consideration beyond the advertised price expressed in loyalty awards, and the consumer— 30

- (a) accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted; or
- (b) unreasonably refused that offer.

### Promotional competitions

36. (1) In this section— 35

- (a) **“participant”** means a person who enters, competes in or is otherwise eligible to win a promotional competition;
- (b) **“prize”** includes a reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, or other discounted or free thing; 40
- (c) **“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, sponsored, organised or conducted; and
- (d) **“promotional competition”** means any competition, game, scheme, arrangement, system, plan or device for distributing prizes by lot or chance if— 45
  - (i) it is conducted in the ordinary course of business for the purpose of promoting a producer, distributor, supplier, or association of any such persons, or the sale of any goods or services; and
  - (ii) any prize offered exceeds the threshold prescribed in terms of subsection (11), 50
 

irrespective of whether a participant is required to demonstrate any skill or ability before being awarded a prize.

(2) A person must not directly or indirectly inform another person that a participant has—

- (a) won a competition, if— 55
  - (i) no competition has in fact been conducted;
  - (ii) the person has not in fact won the competition;

- (iii) the prize for that competition is subject to a previously undisclosed condition; or
- (iv) the person is required to offer further consideration for the prize, after the results of the competition have been announced; or
- (b) a right to a prize— 5
  - (i) to which the person does not in fact have a right;
  - (ii) if the prize was generally available or offered to all similarly situated persons or class of persons; or
  - (iii) if, before becoming eligible to receive the prize, the person is required to offer further consideration for the prize or to purchase any particular goods or services. 10
- (3) The promoter of a promotional competition—
  - (a) must not require any consideration to be paid by or on behalf of any participant in the promotional competition, other than the reasonable costs of posting or otherwise transmitting an entry form or device; 15
  - (b) must not award a prize in a competition to—
    - (i) a winner of the competition if it is unlawful to supply those goods or services to that prize winner, but this subparagraph does not preclude awarding a prize to a person merely because that person’s right to possess or use the prize is or may be restricted or regulated by, or is otherwise subject to, any public regulation; or 20
    - (ii) any person who is—
      - (aa) a director, member, partner, employee or agent of, or consultant to the promoter or any other person who directly or indirectly controls or is controlled by, the promoter; or 25
      - (bb) a supplier of goods or services in connection with that competition; and
  - (c) must—
    - (i) prepare competition rules before the beginning of the competition;
    - (ii) make the competition rules available to the Commission and to any participant, on request and without cost; and 30
    - (iii) retain a copy of the competition rules for the prescribed period after the end of the competition.
- (4) For greater certainty in applying subsection (3)(a), but without limiting the generality of that paragraph, a promoter must be regarded as having required or received consideration in respect of a promotional competition if— 35
  - (a) a participant is required to pay any consideration, directly or indirectly, for the opportunity to participate in the promotional competition, for access to the competition or for any device by which a person may participate in the competition; or 40
  - (b) participation in the promotional competition requires the purchase of any goods or services, and the price charged for those goods or services is more than the price, excluding discounts, ordinarily charged for those or similar goods or services without the opportunity of taking part in a promotional competition. 45
- (5) An offer to participate in a promotional competition must clearly state—
  - (a) the benefit or competition to which the offer relates;
  - (b) the steps required by a person to accept the offer or to participate in the competition;
  - (c) the basis on which the results of the competition will be determined; 50
  - (d) the closing date for the competition;
  - (e) the medium through or by which the results of the competition will be made known; and
  - (f) any person from whom, any place where, and any date and time on or at which— 55
    - (i) a person may obtain a copy of the competition rules; and
    - (ii) a successful participant may receive any prize.
- (6) The requirements of subsection (5) may be satisfied either—
  - (a) directly on any medium through which a person participates in a promotional competition; 60
  - (b) on a document accompanying any medium contemplated in paragraph (a); or
  - (c) in any advertisement that—

- (i) is published during the time and throughout the area in which the promotional competition is conducted; and
  - (ii) draws attention to and is clearly associated with the promotional competition.
- (7) The right to participate in a promotional competition is fully vested in a person immediately upon— 5
- (a) complying with any conditions that are required to earn that right; and
  - (b) acquiring possession or control of the medium, if any, through which a person may participate in that promotional competition.
- (8) The right to any benefit or right conferred on a person as a result of that person's participation in a promotional competition is fully vested immediately upon the determination of the results of the competition. 10
- (9) A right contemplated in subsection (7) or (8) must not be—
- (a) made subject to any further condition; or
  - (b) contingent upon a person— 15
    - (i) paying any consideration to the promoter for the prize; or
    - (ii) satisfying any further requirements other than those stipulated in terms of subsection (5).
- (10) Section 35(5), read with the changes required by the context, applies equally in respect of any prize or right to a prize conferred on a person as a result of that person's participation in a promotional competition. 20
- (11) The Minister may prescribe—
- (a) a monetary threshold for the purpose of excluding competitions with low-value prizes from the definition of “promotional competition”;
  - (b) minimum standards and forms for keeping records associated with promotional competitions; and 25
  - (c) audit and reporting requirements in respect of promotional competitions.

#### **Alternative work schemes**

- 37.** (1) A person must not make a false representation with respect to the availability, or extent of availability, actual or potential profitability, risk or other material aspect of the work, business or activity involved in any arrangement of an activity for gain in terms of which one person— 30
- (a) invites, solicits or requires other persons to conduct the work, business or activity from their homes;
  - (b) represents to others as being practicable, to a considerable extent, to conduct the work, business or activity from their homes; or 35
  - (c) invites, solicits or requires other persons to perform any work, business or activity, invest money, or perform any work, business or activity in association with the investment of money.
- (2) An advertisement promoting any matter contemplated in subsection (1) must— 40
- (a) be accompanied by a cautionary statement in the prescribed wording and form, disclosing the uncertainty of the extent of—
    - (i) work, business or activity available; and
    - (ii) income or other benefit to be derived;
  - (b) disclose at least the following information: 45
    - (i) The full name, or registered business name, of the person promoting the matter, and the address and contact numbers of that person's primary place of conducting the business; and
    - (ii) the nature of the work, business, activity or investment.
- (3) A person must not place an advertisement contemplated in subsection (2) otherwise than in accordance with the requirements of this section. 50
- (4) A person who does anything contemplated in subsection (1)(a) to (c) must not charge any person a fee in respect of the promotion or conduct of any such work, business, activity or investment, except to the extent that the person charged has been assigned and performed the contemplated work, business, activity, or made or received the contemplated investment. 55

**Referral selling**

- 38.** (1) A person must not promote, offer, supply, 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 other benefit if—
- (a) the consumer subsequently—
    - (i) gives the supplier the names of consumers; or
    - (ii) otherwise assists the supplier to supply goods or services to other consumers; and
  - (b) that rebate, commission or other benefit is contingent upon an event occurring after the consumer agrees to the transaction.
- (2) A statement by a consumer, whether in an agreement or otherwise, to the effect that the consumer was motivated to enter into a transaction contemplated in subsection (1) predominately for the value of the goods or services, rather than for the rebate, commission or benefit, is not a defence to an allegation that a person has contravened subsection (1).
- (3) This section does not apply to a franchise agreement.

**Agreements with persons lacking legal capacity**

- 39.** (1) An agreement to enter into a transaction, or for the supply of any goods or services, to or at the direction of a consumer—
- (a) is void if the consumer is subject to an order of a competent court holding that person to be mentally unfit and the supplier knew, or could reasonably have determined, that the consumer was the subject of such an order; or
  - (b) is voidable at the option of the consumer, if—
    - (i) at the time the agreement was made the consumer was an unemancipated minor;
    - (ii) the agreement was made without the consent of an adult responsible for that minor; and
    - (iii) the agreement has not been ratified by either—
      - (aa) an adult responsible for that minor; or
      - (bb) the consumer after being emancipated or becoming an adult.
- (2) Subsection (1) does not apply to an agreement if the consumer, or any person acting on behalf of the consumer, directly or indirectly, by act or omission—
- (a) induced the supplier to believe that the consumer had an unfettered legal capacity to contract; or
  - (b) attempted to obscure or suppress the fact that the consumer did not have an unfettered legal capacity to contract.

**Part F*****Right to fair and honest dealing*****Unconscionable conduct**

- 40.** (1) A person must not use physical force against an individual, coercion, undue influence, pressure or harassment, unfair tactics or any other similar conduct, in connection with any—
- (a) marketing of any goods or services;
  - (b) supply of goods or services to a consumer;
  - (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
  - (d) demand for, or collection of, payment for goods or services by a consumer; or
  - (e) recovery of goods from a consumer.
- (2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a potential consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.
- (3) Section 51 applies to any court proceedings concerning this section.

**False, misleading or deceptive representations**

- 41.** (1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct—
- (a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer; 5
  - (b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or
  - (c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation, 10
- or permit or require any other person to do so on behalf of the supplier.
- (2) A person acting on behalf of a supplier of any goods or services must not—
- (a) falsely represent that the person has any sponsorship, approval or affiliation; or
  - (b) engage in any conduct that the supplier is prohibited from engaging in under subsection (1). 15
- (3) Without limiting the generality of subsections (1) and (2), it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect, that—
- (a) the supplier of any goods or services has any particular status, affiliation, connection, sponsorship or approval that they do not have; 20
  - (b) any goods or services—
    - (i) have ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship or approval that they do not have;
    - (ii) are of a particular standard, quality, grade, style or model;
    - (iii) are new or unused, if they are not or if they are reconditioned or 25 reclaimed, subject to subsection (4);
    - (iv) have been used for a period to an extent or in a manner that is materially different from the facts;
    - (v) have been supplied in accordance with a previous representation; or
    - (vi) are available or can be delivered or performed within a specified time; 30
  - (c) any land or other immovable property—
    - (i) has characteristics that it does not have;
    - (ii) may lawfully be used, or is capable of being used, for a purpose that is in fact unlawful or impracticable; or
    - (iii) has or is proximate to any facilities, amenities or natural features that it 35 does not have, or that are not available or proximate to it;
  - (d) the necessary service, maintenance or repair facilities or parts are readily available for or within a reasonable period;
  - (e) any service, part, replacement, maintenance or repair is needed or advisable;
  - (f) a specific price advantage exists; 40
  - (g) a charge or proposed charge is for a specific purpose;
  - (h) an employee, salesperson, representative or agent has the necessary authority to negotiate the terms of, or conclude, an agreement;
  - (i) the transaction affects, or does not affect, any rights, remedies or obligations of a consumer; 45
  - (j) a particular solicitation of, or communication with, the consumer is for a particular purpose; or
  - (k) the consumer will derive a particular benefit if they assist the supplier in obtaining a new or potential customer.
- (4) A representation contemplated in subsection (3)(b)(iii) to the effect that any goods 50 are new is not false, misleading or deceptive if those goods have been used only—
- (a) by or on behalf of the producer, importer, distributor or retailer; and
  - (b) for the purposes of reasonable testing, service, preparation or delivery.
- (5) Section 51 applies to any court proceedings concerning this section.

**Fraudulent schemes and offers** 55

- 42.** (1) A person must not initiate, sponsor, promote or knowingly participate in the distribution of any communication that—
- (a) offers to supply, or enter into an agreement to supply, any goods or services, or offers to enter into a transaction, or invites offers to enter into a transaction; 60
  - and

- (b) falsely states, implies or represents that—
- (i) the communication is authorised by another person; or
  - (ii) the author of the communication represents another person.
- (2) A person must not directly or indirectly promote, or knowingly join, enter or participate in— 5
- (a) a fraudulent currency scheme, as described in subsection (3);
  - (b) a fraudulent financial transaction, as described in subsection (4);
  - (c) a fraudulent transfer of property or legal rights, as described in subsection (5); or
  - (d) any other scheme declared by the Minister in terms of subsection (8), 10  
or cause another person to do so.
- (3) An arrangement, agreement, practice or scheme is a fraudulent currency scheme if it involves a person—
- (a) with the intent to defraud another person, representing that the first person is capable of— 15
    - (i) producing currency by washing, dipping or otherwise treating any substance that is not currency with a chemical substance, or exposing it to an electrical charge, or to radiation of any kind; or
    - (ii) producing currency, or increasing a sum of money, through scientific means, invocation of any juju or use of other invisible medium; or 20
  - (b) making or issuing any currency, or making representations as being capable of doing so, unless the person is an authorised producer of that currency.
- (4) An arrangement, agreement, practice or scheme is a fraudulent financial transaction if it involves any proceeds of a specified unlawful activity—
- (a) with intent to promote the carrying on of a specified unlawful activity; and 25
  - (b) is designed in whole or in part to—
    - (i) conceal or disguise the nature, location, source of ownership or control of the proceeds of a specified unlawful activity; or
    - (ii) avoid a lawful transaction.
- (5) An arrangement, agreement, practice or scheme is a fraudulent transfer of property or legal rights if it involves a person, by false pretence and with the intent to defraud another person— 30
- (a) obtaining any property from that person or any third person, as the case may be; or
  - (b) inducing that person or any third person to— 35
    - (i) deliver property at the direction of the first person; or
    - (ii) confer a benefit of any kind on any person at the direction of the first person on the understanding that the benefit has or will be paid for.
- (6) A person must not directly or indirectly represent, by false pretence or with the intent to defraud, another person to the effect that the first person is in possession of— 40
- (a) any property;
  - (b) information relating to the whereabouts of any property or relating to any legal rights or potential legal claims; or
  - (c) has the ability to effect the transfer of any property or to locate or determine the whereabouts of an individual. 45
- (7) A person must not—
- (a) invite another person to participate for a fee in assisting to effect a transfer of any property that the first person is not authorised to transfer; or
  - (b) seek, demand or accept any consideration from another person in connection with any unlawful activity contemplated in this section. 50
- (8) The Minister, by regulation made in accordance with section 120, may declare any arrangement, agreement, practice or scheme to be a scheme contemplated in subsection (2)(d), if it is similar in purpose or effect to a scheme contemplated in that subsection.

### Pyramid and related schemes

43. (1) In this section— 55
- (a) “**consideration**” has the meaning set out in section 1, except that it does not include—
    - (i) the purchase of any goods at cost to be used in making sales, or not for resale;

- (ii) the purchase of any goods in exchange for which the seller of those goods offers to repurchase the participant's products under reasonable commercial terms; or
- (iii) the participant's time and effort in pursuit of sales or recruiting activities; and 5
- (b) **“participant”** means a person who is admitted to a scheme for consideration.
- (2) A person must not directly or indirectly promote, or knowingly join, enter or participate in—
  - (a) a multiplication scheme, as described in subsection (3);
  - (b) a pyramid scheme, as described in subsection (4); 10
  - (c) a chain letter scheme, as described in subsection (5); or
  - (d) any other scheme declared by the Minister in terms of subsection (6), or cause any other person to do so.
- (3) A multiplication scheme exists when a person offers, promises or guarantees to any consumer, investor or participant an effective annual interest rate, as calculated in the prescribed manner, that is at least 20 per cent above the REPO Rate determined by the South African Reserve Bank as at the date of investment or commencement of participation, irrespective of whether the consumer, investor or participant becomes a member of the lending party. 15
- (4) An arrangement, agreement, practice or scheme is a pyramid scheme if— 20
  - (a) participants in the scheme receive compensation derived primarily from their respective recruitment of other persons as participants, rather than from the sale of any goods or services; or
  - (b) the emphasis in the promotion of the scheme indicates an arrangement or practice contemplated in paragraph (a). 25
- (5) An arrangement, agreement, practice or scheme is a chain letter scheme if—
  - (a) it has various levels of participation;
  - (b) existing participants canvass and recruit new participants; or
  - (c) each successive newly recruited participant— 30
    - (i) upon joining—
      - (aa) is required to pay certain consideration, which is distributed to one, some or all of the previously existing participants, irrespective of whether the new participant receives any goods or services in exchange for that consideration; and
      - (bb) is assigned to the lowest level of participation in the scheme; and 35
    - (ii) upon recruiting further new participants, or upon those new participants recruiting further new participants, and so on in continual succession—
      - (aa) may participate in the distribution of the consideration paid by any such new recruit; and
      - (bb) moves to a higher level within the scheme, until being removed 40 from the scheme after reaching the highest level.
- (6) The Minister, by regulation made in accordance with section 120, may declare any arrangement, agreement, practice or scheme to be a scheme contemplated in subsection (2)(d), if it is similar in purpose or effect to a scheme contemplated in that subsection.

#### **Consumer's right to assume supplier is entitled to sell goods** 45

- 44.** (1) Subject to subsection (2), every consumer has a right to assume, and it is an implied provision of every transaction or agreement, that—
- (a) in the case of a supply of goods, the supplier has the legal right, or the authority of the legal owner, to supply those goods;
  - (b) in the case of an agreement to supply goods, the supplier will have a legal right, or the authority of the legal owner, to— 50
    - (i) sell the goods at the time the title to those goods is to pass to the consumer; or
    - (ii) lease the goods at the time the lessee is to take possession of the leased goods; 55
  - (c) as between the supplier and the consumer, the supplier is fully liable for any charge or encumbrance pertaining to the goods in favour of any third party unless—
    - (i) such a charge or encumbrance is disclosed in writing to the consumer before the transaction or agreement is concluded; or 60
    - (ii) the supplier and consumer have colluded to defraud the third party; and

(d) the supplier guarantees that the consumer is to have and enjoy quiet possession of the goods, subject to any charge or encumbrance disclosed as contemplated in paragraph (c)(i).

(2) If, as a result of any transaction or agreement in which goods are supplied to a consumer, a right or claim of a third party pertaining to those goods is infringed or compromised the supplier is liable to the third party to the extent of the infringement or compromise of that person's rights pertaining to those goods, except to the extent of a charge or encumbrance disclosed as contemplated in subsection (1)(c)(i). 5

### **Auctions**

**45.** (1) In this section, "auction" includes a sale in execution of or pursuant to a court order, to the extent that the order contemplates that the sale is to be conducted by an auction. 10

(2) When goods are put up for sale by auction in lots, each lot is, unless there is evidence to the contrary, regarded to be the subject of a separate transaction.

(3) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in any other customary manner, and until that announcement is made, a bid may be retracted. 15

(4) Notice must be given in advance that a sale by auction is subject to—

(a) a reserved or upset price; or

(b) a right to bid by or on behalf of the owner or auctioneer, in which case the owner or auctioneer, or any one person on behalf of the owner or auctioneer, as the case may be, may bid at the auction. 20

(5) Unless notice is given in advance that a sale by auction is subject to a right to bid by or on behalf of the owner or auctioneer—

(a) the owner or auctioneer must not bid or employ any person to bid at the sale; 25

(b) the auctioneer must not knowingly accept any bid from a person contemplated in paragraph (a); and

(c) the consumer may approach a court to declare the transaction fraudulent, if this subsection has been violated.

(6) The Minister may prescribe requirements to be complied with by an auctioneer, or different categories of auctioneer, in respect of— 30

(a) the conduct of an auction;

(b) the records to be maintained with respect to property placed for auction; and

(c) the sale of any such property by auction.

### **Changes, deferrals and waivers, and substitution of goods** 35

**46.** (1) The supply of goods or services as a result of a change to an existing agreement, or a deferral or waiver of a right under an existing agreement, is not to be treated as creating a new agreement for the purposes of this Act, if the change, deferral or waiver is made in accordance with this Act or the agreement.

(2) If, after delivery to the consumer of goods that are the subject of a transaction, the consumer and the supplier agree to substitute other goods for all or part of the goods sold— 40

(a) from the date of delivery of the substituted goods, the transaction applies to the substituted goods rather than the goods originally described; and

(b) if the transaction was the subject of a written agreement, or the sales record identified any specific goods, the supplier must prepare and deliver to the consumer an amended agreement or sales record, describing the substituted goods, but without making any other changes to the original document. 45

### **Over-selling and over-booking**

**47.** (1) This section does not apply to— 50

(a) a franchise agreement; or

(b) a consumer agreement pertaining to the supply of any special-order goods.

(2) A supplier must not accept payment or other consideration for any goods or services if the supplier—

(a) has no reasonable basis to assert an intention to supply those goods or provide those services; or 55



- (b) intends to supply goods or services that are materially different from the goods or services in respect of which the payment or consideration was accepted.
- (3) If a supplier makes a commitment or accepts a reservation to supply goods or services on a specified date or at a specified time and, on the date and at the time contemplated in the commitment or reservation, fails because of insufficient stock or capacity to supply those goods or services, or similar or comparable goods or services of the same or better quality, class or nature, the supplier must—
- (a) refund to the consumer the amount, if any, paid in respect of that commitment or reservation, together with interest at the prescribed rate from the date on which the amount was paid until the date of reimbursement; and
- (b) in addition, compensate the consumer for costs directly incidental to the supplier's breach of the contract, except to the extent that subsection (5) provides otherwise.
- (4) It is a defence to an alleged failure to supply any goods or services, as contemplated in subsection (3), if—
- (a) the supplier offered to supply or procure another person to supply a consumer with comparable goods or services of the relevant kind to satisfy the consumer's request; and
- (b) the consumer—
- (i) accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted; or
- (ii) unreasonably refused that offer.
- (5) Subsection (3)(b) does not apply if—
- (a) the shortage of stock or capacity is due to circumstances beyond the supplier's control, subject to subsection (6); and
- (b) 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.
- (6) Without limiting the generality of subsection (5)(a), a shortage of stock or capacity is not "due to circumstances beyond the supplier's control" if the shortage results partially, completely, directly or indirectly from a failure on the part of the supplier to adequately and diligently carry out any ordinary or routine matter pertaining to the supplier's business.

### ***Part G***

#### ***Right to fair, just and reasonable terms and conditions***

- Unfair, unreasonable or unjust contract terms**
- 48. (1)** A supplier must not—
- (a) offer to supply, supply, or enter into an agreement to supply, any goods or services—
- (i) at a price that is manifestly unfair, unreasonable or unjust; or
- (ii) on terms that are unfair, unreasonable or unjust;
- (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
- (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—
- (i) to waive any rights;
- (ii) assume any obligation; or
- (iii) 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.
- (2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—
- (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
- (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;

- (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
- (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer or potential consumer contemplated in section 49 (1), and—
  - (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
  - (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

#### **Notice required for certain terms and conditions**

- 49.** (1) Any notice to consumers or potential 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;
  - (b) constitute an assumption of risk or liability by the consumer;
  - (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
  - (d) be an acknowledgement of any fact by the consumer,
- must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).
- (2) In addition to subsection (1), if a provision or notice concerns any activity or facility that is subject to any risk—
- (a) of an unusual character or nature;
  - (b) the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or
  - (c) that could result in serious injury or death,
- the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsections (3) to (5), and the consumer must have assented to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.
- (3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.
- (4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer—
- (a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and
  - (b) before the earlier of the time at which the consumer—
    - (i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or
    - (ii) is required or expected to offer consideration for the transaction or agreement.
- (5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1).

#### **Written consumer agreements**

- 50.** (1) The Minister may prescribe categories of consumer agreements that are required to be in writing.
- (2) If a consumer agreement between a supplier and a consumer is in writing, whether as required by this Act or voluntarily—
- (a) it applies irrespective of whether or not the consumer signs the agreement; and
  - (b) the supplier must provide the consumer with a free copy, or free electronic access to a copy, of the terms and conditions of that agreement, which must—
    - (i) satisfy the requirements of section 22; and
    - (ii) set out an itemised break-down of the consumer's financial obligations under such agreement.

### Prohibited transactions, agreements, terms or conditions

- 51.** (1) A supplier must not make a transaction or agreement subject to any term or condition if—
- (a) its general purpose or effect is to—
    - (i) defeat the purposes and policy of this Act; 5
    - (ii) mislead or deceive the consumer; or
    - (iii) subject the consumer to fraudulent conduct;
  - (b) it directly or indirectly purports to—
    - (i) waive or deprive a consumer of a right in terms of this Act;
    - (ii) avoid a supplier's obligation or duty in terms of this Act; 10
    - (iii) set aside or override the effect of any provision of this Act; or
    - (iv) authorise the supplier to—
      - (aa) do anything that is unlawful in terms of this Act; or
      - (bb) fail to do anything that is required in terms of this Act;
  - (c) it purports to— 15
    - (i) limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier;
    - (ii) constitute an assumption of risk or liability by the consumer for a loss contemplated in subparagraph (i); or 20
    - (iii) impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier, except to the extent contemplated in section 18(1);
  - (d) it results from an offer prohibited in terms of section 31;
  - (e) it requires the consumer to enter into a supplementary agreement, or sign a 25 document, prohibited by subsection (2)(a);
  - (f) it purports to cede to any person, charge, set off against a debt, or alienate in any manner, a right of the consumer to any claim against the Guardian's Fund;
  - (g) it falsely expresses an acknowledgement by the consumer that— 30
    - (i) before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier; or
    - (ii) the consumer has received goods or services, or a document that is required by this Act to be delivered to the consumer;
  - (h) it requires the consumer to forfeit any money to the supplier— 35
    - (i) if the consumer exercises any right in terms of this Act; or
    - (ii) to which the supplier is not entitled in terms of this Act or any other law;
  - (i) it expresses, on behalf of the consumer—
    - (i) an authorisation for any person acting on behalf of the supplier to enter any premises for the purposes of taking possession of goods to which the 40 agreement relates;
    - (ii) an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed; or
    - (iii) a consent to a predetermined value of costs relating to enforcement of the 45 agreement, except to the extent that is consistent with this Act; or
  - (j) it expresses an agreement by the consumer to—
    - (i) deposit with the supplier, or with any other person at the direction of the supplier, an identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying 50 document or device; or
    - (ii) provide a personal identification code or number to be used to access an account.
- (2) A supplier may not—
- (a) directly or indirectly require or induce a consumer to enter into a 55 supplementary agreement, or sign any document, that contains a provision contemplated in subsection (1);
  - (b) request or demand a consumer to—
    - (i) give the supplier temporary or permanent possession of an instrument referred to in subsection (1)(j)(i) other than for the purpose of 60 identification, or to make a copy of such instrument; or

- (ii) reveal any personal identification code or number contemplated in subsection (1)(j)(ii); or
  - (c) direct, or knowingly permit, any other person to do anything referred to in this section on behalf or for the benefit of the supplier.
- (3) A purported transaction or agreement, provision, term or condition of a transaction or agreement, or notice to which a transaction or agreement is purported to be subject, is void to the extent that it contravenes this section. 5

### **Powers of court to ensure fair and just conduct, terms and conditions**

- 52.** (1) If, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that— 10
- (a) the supplier contravened section 40, 41 or 48; and
  - (b) this Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability,
- the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3). 15
- (2) In any matter contemplated in subsection (1), the court must consider—
- (a) the fair value of the goods or services in question;
  - (b) the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position; 20
  - (c) those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made, irrespective of whether this Act was in force at that time;
  - (d) the conduct of the supplier and the consumer, respectively; 25
  - (e) whether there was any negotiation between the supplier and the consumer, and if so, the extent of that negotiation;
  - (f) whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier; 30
  - (g) the extent to which any documents relating to the transaction or agreement satisfied the requirements of section 22;
  - (h) whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any— 35
    - (i) custom of trade; and
    - (ii) any previous dealings between the parties;
  - (i) the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and 40
  - (j) in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.
- (3) If the court determines that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, the court may—
- (a) make a declaration to that effect; and 45
  - (b) make any further order the court considers just and reasonable in the circumstances, including, but not limited to, an order—
    - (i) to restore money or property to the consumer;
    - (ii) to compensate the consumer for losses or expenses relating to— 50
      - (aa) the transaction or agreement; or
      - (bb) the proceedings of the court; and
    - (iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.
- (4) If, in any proceedings before a court concerning a transaction or agreement between a supplier and a consumer, a person alleges that an agreement, a term or condition of an agreement, or a notice to which a transaction or agreement is purportedly subject, is void in terms of this Act or failed to satisfy any applicable requirements set out in section 49, the court may— 55
- (a) make an order—
    - (i) in the case of a provision or notice that is void in terms of any provision of this Act— 60

- (aa) severing any part of the relevant agreement, provision or notice, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the transaction, agreement, provision or notice as a whole; or
- (bb) declaring the entire agreement, provision or notice void as from the date that it purportedly took effect; or
- (ii) in the case of a provision or notice that fails to satisfy any provision of section 49, severing the provision or notice from the agreement, or declaring it to have no force or effect with respect to the transaction; and
- (b) make any further order that is just and reasonable in the circumstances with respect to that agreement, provision or notice, as the case may be.

## *Part H*

### *Right to fair value, good quality and safety*

#### **Definitions applicable to this Part**

- 53.** (1) In this Part, when used with respect to any goods, component of any goods, or services—
- (a) **“defect”** 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, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;
  - (b) **“failure”** means the inability of the goods to perform in the intended manner or to the intended effect;
  - (c) **“hazard”** means a design characteristic that—
    - (i) has been identified as, or declared to be, a hazard by or in terms of any applicable public regulation; or
    - (ii) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised; and
  - (d) **“unsafe”** means that, due to a design characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.

#### **Consumer’s rights to demand quality service**

- 54.** (1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to—
- (a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;
  - (b) the performance of the services in a manner and quality that persons are generally entitled to expect;
  - (c) the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and
  - (d) the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services,
- having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.
- (2) If a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either—
- (a) remedy any defect in the quality of the services performed or goods supplied; or
  - (b) refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure, at the option of the supplier.

### Consumer's rights to safe, good quality goods

**55.** (1) This section does not apply to goods bought at an auction, as contemplated in section 45.

(2) Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that—

- (a) are 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, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and
- (d) comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation.

(3) In addition to the right set out in subsection (2)(a), if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, and the supplier—

- (a) ordinarily offers to supply such goods; or
- (b) acts in a manner consistent with being knowledgeable about the use of those goods,

the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.

(4) In determining whether any particular goods satisfied the requirements of subsection (2) or (3), all of the circumstances of the supply of those goods must be considered, including but not limited to—

- (a) the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of the goods;
- (b) the range of things that might reasonably be anticipated to be done with or in relation to the goods; and
- (c) the time when the goods were produced and supplied.

(5) For greater certainty in applying subsection (4)—

- (a) it is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods; and
- (b) 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 or any other producer or supplier.

(6) Subsection (2)(a) and (b) do not apply to a transaction if the consumer—

- (a) has been expressly informed that particular goods were offered in a specific condition; and
- (b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.

### Implied warranty of quality

**56.** (1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.

(2) Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must either—

- (a) repair or replace the failed, unsafe or defective goods; or
- (b) refund to the consumer the price paid by the consumer for the goods,

at the option of the supplier, subject to subsection (3).

(3) If a supplier elects in terms of subsection (2) to repair any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must—

- (a) replace the goods; or
  - (b) refund to the consumer the price paid by the consumer for the goods.
- (4) The implied warranty imposed by subsection (1), and the right to return goods set out in subsection (2), are each in addition to—
- (a) any other implied warranty or condition imposed by the common law, this Act 5  
or any other public regulation; and
  - (b) any express warranty or condition stipulated by the producer or importer,  
distributor or retailer, as the case may be.

### **Warranty on repaired goods**

- 57.** (1) A service provider warrants every new or reconditioned part installed during any repair or maintenance work, and the labour required to install it, for a period of three months after the date of installation or such longer period as the supplier may specify in writing. 10
- (2) A warranty in terms of this section—
- (a) is concurrent with any other deemed, implied or express warranty; 15
  - (b) is void if the consumer has subjected the part, or the goods or property in which it was installed, to misuse or abuse; and
  - (c) does not apply to ordinary wear and tear, having regard to the circumstances in which the goods are intended to ordinarily be used.

### **Warning concerning fact and nature of risks** 20

- 58.** (1) The supplier of any activity or facility that is subject to any—
- (a) risk of an unusual character or nature;
  - (b) risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or 25
  - (c) risk that could result in serious injury or death,
- must specifically draw the fact, nature and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49.
- (2) A person who packages any hazardous or unsafe goods for supply to consumers must display on or within that packaging a notice that meets the requirements of section 22, and any other prescribed standards, providing the consumer with adequate instructions for the safe handling and use of those goods. 30
- (3) Subsection (2) does not apply to any hazardous or unsafe goods to the extent that a substantially similar label or notice has been applied in terms of any other public regulation. 35
- (4) A person who installs any hazardous or unsafe goods contemplated in subsection (2) for a consumer, or supplies any such goods to a consumer in conjunction with the performance of any services, must give the consumer the original copy of—
- (a) any document required in terms of that subsection; or
  - (b) any similar document applied to those goods in terms of another public 40  
regulation.

### **Recovery and safe disposal of designated products or components**

- 59.** If any public regulation prohibits the disposal or deposit of any particular goods, or any components, remnants, containers or packaging of any goods, into a common waste collection system— 45
- (a) any person who in the ordinary course of business supplies goods of that kind to consumers, must accept the return of any such goods, components, remnants, containers or packaging from any consumer, without charge to the consumer, irrespective of whether that person supplied the particular object to that particular consumer; and 50
  - (b) any person who in the ordinary course of business produces, imports or distributes any such goods as part of the supply chain by which those goods reach the consumer, must in turn accept the return of any such goods, components, remnants, containers or packaging from any supplier contemplated in paragraph (a). 55

### Safety monitoring and recall

- 60.** (1) The Commission must promote, within the framework of section 82, the development, adoption and application of industry-wide codes of practice providing for effective and efficient systems to—
- (a) receive notice of—
    - (i) consumer complaints or reports of product failures, defects or hazards;
    - (ii) the return of any goods because of a failure, defect or hazard;
    - (iii) personal injury, illness or damage to property caused wholly or partially as a result of a product failure, defect or hazard; and
    - (iv) other indication of failure, defect or hazard,
  - (b) monitor the sources of information contemplated in paragraph (a), and analyse the information received with the object of detecting or identifying any previously undetected or unrecognised potential risk to the public from the use of or exposure to those goods;
  - (c) conduct investigations into the nature, causes, extent and degree of the risk to the public;
  - (d) notify consumers of the nature, causes, extent and degree of the risk pertaining to those goods; and
  - (e) if the goods are unsafe, recall those goods for repair, replacement or refund.
- (2) If the Commission has reasonable grounds to believe that any goods may be unsafe, or that there is a potential risk to the public from the continued use of or exposure to the goods, and the producer or importer of those goods has not taken any steps required by an applicable code contemplated in subsection (1), the Commission, by written notice, may require that producer to—
- (a) conduct an investigation contemplated in subsection (1); or
  - (b) carry out a recall programme on any terms required by the Commission.
- (3) A producer or importer affected by a notice issued in terms of subsection (2) may apply to the Tribunal to set aside the notice in whole or in part.

### Liability for damage caused by goods

- 61.** (1) This section does not apply to any genetically modified organisms regulated in terms of the Genetically Modified Organisms Act, 1997 (Act No. 15 of 1997).
- (2) Except to the extent contemplated in subsection (5), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (6), caused wholly or partly as a consequence of—
- (a) supplying any unsafe goods;
  - (b) a product failure, defect or hazard in any goods; or
  - (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,
- irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.
- (3) A supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purposes of this section.
- (4) If, in a particular case, more than one person is liable in terms of subsection (1), their liability is joint and several.
- (5) Liability of a particular person in terms of this section does not arise if—
- (a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;
  - (b) the alleged unsafe product characteristic, failure, defect or hazard—
    - (i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or
    - (ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case subparagraph (i) does not apply;
  - (c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to—
    - (i) that person's role in marketing the goods to consumers; and



- (ii) the state of scientific and technical knowledge at the time the goods were under the control of that person; or
- (d) the claim for damages is brought more than three years after the—
  - (i) death or injury of a person contemplated in subsection (6)(a);
  - (ii) earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection (6)(b); or
  - (iii) earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in subsection (6)(c); or
  - (iv) the latest date on which a person suffered any economic loss contemplated in subsection (6)(d).
- (6) Harm for which a person may be held liable in terms of this section includes—
  - (a) the death of, or injury to, any natural person;
  - (b) an illness of any natural person;
  - (c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and
  - (d) any economic loss that results from harm contemplated in paragraph (a), (b) or (c).
- (7) Nothing in this section limits the authority of a court to—
  - (a) assess whether any harm has been proven and adequately mitigated;
  - (b) determine the extent and monetary value of any damages, including economic loss; or
  - (c) apportion liability among persons who are found to be jointly and severally liable.

### *Part I*

#### *Supplier's accountability to consumers*

#### **Lay-bys**

- 62.** (1) If a supplier agrees to sell particular goods to a consumer, to accept payment for those goods in periodic instalments, and to hold those goods until the consumer has paid the full price for the goods—
- (a) each amount paid by the consumer to the supplier remains the property of the consumer, and is subject to section 65, until the goods have been delivered to the consumer; and
  - (b) the particular goods remain at the risk of the supplier until the goods have been delivered to the consumer.
- (2) If a supplier is unable to deliver any goods contemplated in subsection (1) when the consumer has paid the full price for those goods, the supplier must either, at the option of the consumer—
- (a) supply the consumer with an equivalent quantity of goods that are comparable or superior in description, design and quality; or
  - (b) refund to the consumer—
    - (i) the money paid by the consumer, with interest in accordance with the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), if the inability to supply the goods is due to circumstances beyond the supplier's control; or
    - (ii) double the amount paid by the consumer, as compensation for breach of contract in any circumstances not contemplated in subparagraph (i).
- (3) Without limiting the generality of subsection (2)(b)(i), a failure to supply the goods is not “due to circumstances beyond the supplier's control” if the shortage results partially, completely, directly or indirectly from a failure on the part of the supplier to adequately and diligently carry out any ordinary or routine matter pertaining to the supplier's business.
- (4) If a consumer contemplated in subsection (1) terminates the agreement before fully paying for the goods, or fails to complete the payment for the goods within 60 business days after the anticipated date of completion, the supplier—
- (a) may charge a termination penalty in respect of those goods, subject to subsections (5) and (6); and
  - (b) after deducting any such termination penalty, must refund to the consumer any amount paid by the consumer under that agreement.

- (5) A cancellation penalty contemplated in subsection (4) may not be charged—
- (a) if the consumer's failure to complete payment was due to the death or hospitalisation of the consumer; or
  - (b) in any other case, unless the supplier informed the consumer of the fact and extent of the penalty before the consumer entered into the lay-by agreement. 5
- (6) The Minister may prescribe a basis for calculating the maximum amount of a cancellation penalty contemplated in subsection (4).

### **Prepaid certificates, credits and vouchers**

- 63.** (1) This section applies only to a transaction in which a supplier—
- (a) accepts consideration from a person in exchange for a prepaid certificate, card, credit, voucher or similar device; and 10
  - (b) expressly or implicitly agrees to provide goods or services to any person who subsequently presents that certificate, card, credit, voucher or similar device, up to the value represented by it,
- but does not apply with respect to such a device, or the value represented by it, after all of the value of the device has been exchanged for goods, services or future access to services. 15
- (2) A prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) 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 20
  - (b) three years after the date on which it was issued, or at the end of a longer or extended period agreed by the supplier at any time.
- (3) Any consideration paid by a consumer to a supplier in exchange for a prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) is the property of the bearer of that certificate, card, credit, voucher or similar device to the extent that the supplier has not redeemed it in exchange for goods or services, or future access to services. 25

### **Prepaid services and access to service facilities**

- 64.** (1) If, in terms of any agreement, a consumer agrees or is required to pay— 30
- (a) a one-time or periodic membership fee or any similar charge; or
  - (b) any amount in respect of services or access to services to be provided at a date more than 25 business days after the payment is made, other than by way of a prepayment device contemplated in section 63,
- the amount so paid remains the property of the consumer until the supplier makes a charge against it in accordance with subsection (2). 35
- (2) A supplier may make a charge against the consumer's money contemplated in subsection (1) once each month in advance for the pro-rata portion of the amount so held, as required to pay the ensuing month's cost of the membership or service.
- (3) If a supplier intends to close a facility to which the supplier has committed to provide future access in terms of an agreement with a consumer to provide any service, without making available a reasonably accessible alternative facility, the supplier must— 40
- (a) give written notice of that intention to such consumer at least 40 business days before the intended date of closure; and 45
  - (b) no later than five business days after closing that facility, refund to such consumer the balance of any money belonging to that consumer in terms of this section.
- (4) Subsection (3)(b), read with the changes required by the context, applies equally in respect of any involuntary closing of a facility contemplated in this section. 50

### **Supplier to hold and account for consumer's property**

- 65.** (1) Subsection (2) does not apply to a supplier that is—
- (a) a bank, as defined in the Banks Act, 1990 (Act No. 94 of 1990);
  - (b) a mutual bank, as defined in the Mutual Banks Act, 1993 (Act No. 124 of 1993); or 55

- (c) any other financial institution that is similarly licensed and authorised to conduct business and take deposits from the public in terms of any national legislation.
- (2) When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the supplier— 5
  - (a) must not treat that property as being the property of the supplier;
  - (b) in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and 10
  - (c) is liable to the owner of the property for any loss resulting from a failure to comply with paragraph (a) or (b).
- (3) A person who assumes control of a supplier's property as administrator, executor or liquidator of an estate—
  - (a) has a duty to the consumer— 15
    - (i) to diligently investigate the circumstances of the supplier's business to ascertain the existence of any money or other property belonging to the consumer and in the possession of the supplier; and
    - (ii) to ensure that any such money or property is dealt with for the consumer's benefit in accordance with this section; and 20
  - (b) is liable to the consumer for any loss, unless that person has acted—
    - (i) in good faith; and
    - (ii) without knowledge of the existence of the consumer's interest.

#### **Deposits in respect of containers, pallets or similar objects**

- 66.** (1) 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. 25
- (2) If a person returns a bottle, container, pallet, reel or similar object contemplated in subsection (1) to any supplier of goods ordinarily sold in that bottle or container or on that pallet or in or on that reel or similar object, the supplier must pay that person the amount of the deposit— 30
- (a) if any, that is required to be charged in terms of any public regulation on the date on which the object is returned to the supplier; or
  - (b) that the supplier charged for that object, or ordinarily charges for such an object, 35
- irrespective of whether the person returning the container paid a deposit for that object to that supplier.

#### **Return of parts and materials**

- 67.** (1) When a supplier is authorised to perform any service to any goods or property belonging to or ordinarily under the control of the consumer, the supplier must— 40
- (a) retain any parts or components removed from any goods or property in the course of any repair or maintenance work;
  - (b) keep those parts or components separate from parts removed from other goods or property; and
  - (c) return those parts or components to the consumer in a reasonably clean container, 45
- unless the consumer declined the return of any such parts or materials.
- (2) This section does not apply to any substance, parts or components that are required—
- (a) in terms of any warranty under which the work was carried out, to be returned to, or disposed of at the direction of, the producer or distributor; 50
  - (b) in terms of any insurance claim under which the work was carried out, to be returned to, or disposed of at the direction of, the insurer; or
  - (c) in terms of any public regulation, to be recovered or disposed of in a safe manner in the interests of environmental safety or public health and safety. 55

## CHAPTER 3

## PROTECTION OF CONSUMER RIGHTS AND CONSUMERS' VOICE

## Part A

*Consumer's right to be heard and obtain redress***Protection of consumer rights** 5

- 68.** (1) If a consumer has exercised, asserted or sought to uphold any right set out in this Act or in an agreement or transaction with a supplier, the supplier must not, in response—
- (a) discriminate directly or indirectly against that consumer, compared to the supplier's treatment of any other consumer who has not exercised, asserted or sought to uphold such a right; 10
  - (b) penalise the consumer;
  - (c) alter, or propose to alter, the terms or conditions of a transaction or agreement with the consumer, to the detriment of the consumer; or
  - (d) take any action to accelerate, enforce, suspend or terminate an agreement with the consumer. 15
- (2) If an agreement or any provision of an agreement is, in terms of this Act, declared to be void, or is severed from the agreement in terms of section 52(4), the supplier who is a party to that agreement must not, in response to that decision—
- (a) directly or indirectly penalise another party to that agreement; 20
  - (b) alter the terms or conditions of any other transaction or agreement with another party to the impugned agreement, except to the extent necessary to correct a similarly unlawful provision; or
  - (c) take any action to accelerate, enforce, suspend or terminate another agreement with another party to the impugned agreement. 25

**Enforcement of rights by consumer**

- 69.** (1) A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by—
- (a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute; 30
  - (b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud; or
  - (c) if the matter does not concern a supplier contemplated in paragraph (b)— 35
    - (i) referring the matter to the applicable industry ombud, accredited in terms of section 82(6), if the supplier is subject to any such ombud; or
    - (ii) if the supplier is not subject to an industry ombud contemplated in subparagraph (i)—
      - (aa) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court; 40
      - (bb) referring the matter to another alternative dispute resolution agent contemplated in section 70; or
      - (cc) filing a complaint with the Commission in accordance with section 71; or 45
  - (d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.
- (2) If an industry ombud contemplated in subsection (1)(c)(i) concludes that there is no reasonable probability of the parties resolving their dispute through the process provided for in the relevant industry code— 50
- (a) the agent may terminate the process by notice to the parties; and
  - (b) the party who referred the matter to the industry ombud may then file a complaint with the Commission in accordance with the procedure referred to in section 71.

**Alternative dispute resolution**

- 70.** (1) If an alternative dispute resolution agent—
- (a) concludes that there is no reasonable probability of the parties resolving their dispute through that process, the agent may terminate the process by notice to the parties; or 5
  - (b) has resolved, or assisted parties in resolving, their dispute, the agent may—
    - (i) record the resolution of that dispute in the form of an order; and
    - (ii) if the parties to the dispute consent to that order, submit it to the High Court to be made a consent order, in terms of its rules.
- (2) With the consent of a complainant, a consent order confirmed in terms of subsection (1)(b) may include an award of damages to that complainant. 10

**Initiating complaint to Commission**

- 71.** (1) Any person may file a complaint concerning a matter contemplated in section 69 (1)(c)(ii) or (2)(b) with the Commission in the prescribed manner and form, alleging that a person has acted in a manner inconsistent with this Act. 15
- (2) The Commission may directly initiate a complaint concerning any alleged prohibited conduct on its own motion, or—
- (a) when directed to do so by the Minister in terms of section 86(b); or
  - (b) on the request of—
    - (i) a provincial consumer protection authority; 20
    - (ii) another regulatory authority; or
    - (iii) an accredited consumer protection group.

**Part B****Commission investigations****Investigation by Commission** 25

- 72.** (1) Upon initiating or receiving a complaint in terms of this Act, the Commission may—
- (a) issue a notice of non-referral to the complainant in the prescribed form, if the complaint—
    - (i) appears to be frivolous or vexatious; 30
    - (ii) does not allege any facts which, if true, would constitute grounds for a remedy under this Act; or
    - (iii) is prevented, in terms of section 116, from being referred to the Tribunal;
  - (b) refer the complaint to an alternative dispute resolution agent, a provincial consumer protection authority or a consumer court for the purposes of assisting the parties to attempt to resolve the dispute in terms of section 70, unless the parties have previously and unsuccessfully attempted to resolve the dispute in that manner; 35
  - (c) refer the complaint to another regulatory authority with jurisdiction over the matter for investigation; or 40
  - (d) direct an inspector to investigate the complaint as quickly as practicable, in any other case.
- (2) At any time during an investigation, the Commission may designate one or more persons to assist the inspector conducting the investigation contemplated in subsection (1). 45

**Outcome of investigation**

- 73.** (1) After receiving a report of an investigation into a complaint, the Commission may—
- (a) issue a notice of non-referral to the complainant in the prescribed form;
  - (b) refer the matter to the National Prosecuting Authority, if the Commission alleges that a person has committed an offence in terms of this Act; or 50
  - (c) if the Commission believes that a person has engaged in prohibited conduct—
    - (i) refer the matter to the equality court, as contemplated in section 10, if the complaint involves a matter in terms of Part A of Chapter 2;

- (ii) propose a draft consent order in terms of section 74;
  - (iii) make a referral in accordance with subsection (2); or
  - (iv) issue a compliance notice in terms of section 100.
- (2) In the circumstances contemplated in subsection (1)(c)(iii), the Commission may refer the matter— 5
- (a) to the consumer court of the province in which the supplier has its principal place of business in the Republic, if—
    - (i) there is a consumer court in that province; and
    - (ii) the Commission believes that the issues raised by the complaint can be dealt with expeditiously and fully by such a referral; or 10
  - (b) to the Tribunal.
- (3) If the Commission refers a matter to a consumer court in terms of subsection (2)(a), any party to that referral may apply to the Tribunal, in the prescribed manner and form and within the prescribed time, for an order that the matter be referred to the Tribunal. 15
- (4) If an application has been made to the Tribunal in terms of subsection (3), the Tribunal may order that the matter be referred to it instead of the consumer court if the balance of convenience or interests of justice so require.
- (5) A consumer court hearing a matter referred to in this section—
- (a) must conduct its proceedings in a manner consistent with the requirements applicable to hearings of the Tribunal; and 20
  - (b) may make any order that the Tribunal could have made after hearing that matter.
- (6) An order of a consumer court made after hearing a matter referred to in terms of this section has the same force and effect as if it had been made by the Tribunal. 25

### Consent orders

- 74.** (1) If a matter has been investigated by the Commission, and the Commission and the respondent agree to the proposed terms of an appropriate order, the Tribunal or a court, without hearing any evidence, may confirm that agreement as a consent order.
- (2) With the consent of a complainant, a consent order confirmed in terms of subsection (1) may include an award of damages to the complainant. 30

### Referral to Tribunal

- 75.** (1) If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to— 35
- (a) the consumer court, if any, in the province within which the complainant resides, or in which the respondent has its principle place of business in the Republic, subject to the provincial legislation governing the operation of that consumer court; or
  - (b) the Tribunal, with leave of the Tribunal. 40
- (2) If a matter is referred directly to a consumer court in terms of subsection (1), the respondent may apply to the Tribunal, in the prescribed manner and form and within the prescribed time, for an order that the matter be referred to the Tribunal, and the provisions of section 73(4) apply to such an application.
- (3) A referral to the Tribunal, whether by the Commission or by a complainant in terms of subsection (1), must be in the prescribed form. 45
- (4) The Tribunal—
- (a) must conduct a hearing into any matter referred to it under this Chapter, in accordance with the requirements of this Act, and the applicable provisions of the National Credit Act pertaining to the proceedings of the Tribunal; and 50
  - (b) may make any applicable order contemplated in this Act or in section 150 or 151 of the National Credit Act, read with the changes required by the context.
- (5) The Chairperson of the Tribunal may assign any of the following matters arising in terms of this Act to be heard by a single member of the Tribunal, in accordance with section 31(1)(a) of the National Credit Act: 55
- (a) An application in terms of section 73(3);
  - (b) an application for leave as contemplated in subsection (1)(b);
  - (c) an application in terms of subsection (2);
  - (d) an application in terms of section 106; or

- (e) an application for an extension of time, to the extent that the Tribunal has authority to grant such an extension in terms of this Act.

### *Part C*

#### *Redress by court*

#### **Powers of court to enforce consumer rights** 5

- 76.** (1) In addition to any other order that it may make under this Act or any other law, a court considering a matter in terms of this Act may—
- (a) order a supplier to alter or discontinue any conduct that is inconsistent with this Act;
  - (b) make any order specifically contemplated in this Act; and 10
  - (c) award damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of this Act.
- (2) This Act does not diminish any right of the consumer or the supplier—
- (a) to recover interest or special damages in any case where by law interest or special damages may be recoverable; or 15
  - (b) to recover money paid if the consideration for the payment of it has failed.

### *Part D*

#### *Civil society support for consumer's rights*

#### **Support for consumer protection groups** 20

- 77.** The Commission may co-operate with, facilitate or otherwise support any of the following activities carried out by a consumer protection group:
- (a) Consumer advice and education activities and consumer-related publications;
  - (b) research, market monitoring, surveillance and reporting;
  - (c) promotion of consumer rights and advocacy of consumer interests; 25
  - (d) representation of consumers, either specifically or generally, in court;
  - (e) alternative dispute resolution through mediation or conciliation; and
  - (f) participation in national and international associations, conferences or forums concerned with consumer protection matters.

#### **Accredited consumer protection group may initiate actions** 30

- 78.** (1) An accredited consumer protection group may—
- (a) 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 this Act; and
  - (b) intervene in any matter before any forum contemplated in this Act, if the interests of consumers represented by that group are not otherwise adequately represented in that forum. 35
- (2) In addition to any other authority set out in this Act, an accredited consumer protection group may direct a generally stated concern or complaint to the Commission in respect of any matter within the purposes of this Act. 40
- (3) The Commission may accredit a consumer protection group if that person or association—
- (a) functions predominantly to promote or represent the interests of all or a specific category of consumers generally;
  - (b) is committed to achieving the purposes of this Act; and 45
  - (c) engages in, or makes a realistic proposal to engage in, actions to promote and advance the consumer interests of persons contemplated in section 3(1)(b).
- (4) The Commission may impose reasonable conditions on the accreditation of a consumer protection group to further the purposes of this Act.
- (5) The Commission— 50
- (a) must monitor the effectiveness of any accredited consumer protection group relative to the purposes and policies of this Act; and

- (b) may reasonably require any accredited consumer protection group to provide information necessary for the purposes of monitoring in terms of paragraph (a).
- (6) The Minister may prescribe standards, procedures and related matters for the Commission to follow in assessing whether an applicant for accreditation meets the requirements of this section. 5

## CHAPTER 4

### BUSINESS NAMES AND INDUSTRY CODES OF CONDUCT

#### Part A

#### *Business names* 10

#### **Identification of supplier**

- 79.** (1) A person must not carry on business, advertise, promote, offer to supply or supply any goods or services, or enter into a transaction or agreement with a consumer under any name except—
- (a) the person's full name as— 15
- (i) recorded in an identity document or any other recognised identification document, in the case of an individual; or
- (ii) registered in terms of a public regulation, in the case of a juristic person; or
- (b) a business name registered to, and for the use of, that person in terms of section 80, or any other public regulation. 20
- (2) A person doing anything contemplated in subsection (1) must include the following particulars on any trade catalogue, trade circular, business letter, order for goods, sales record or statement of account that the person issues:
- (a) The name, title or description under which the business is carried on; 25
- (b) a statement of the primary place at which, or from which, the business is carried on; and
- (c) if the activity is carried on under a business name, the name of the person to whom that business name is registered.
- (3) If a person— 30
- (a) does anything contemplated in subsection (1) under a name that is not that person's full name, or a business name registered to that person, the Commission may issue a compliance notice to that person, in terms of section 100, requiring the person—
- (i) within a reasonable time, to— 35
- (aa) apply for registration of the business name in terms of section 80; or
- (bb) discontinue that conduct under that business name; and
- (ii) if the application to register that business name is unsuccessful for any reason contemplated in this Part, to discontinue that conduct under that name within 40 business days after receiving notice of the failure of the application; 40
- (b) fails to comply with any requirement of subsection (2), the Commission may issue a compliance notice to the person in terms of section 100; or
- (c) does anything contemplated in subsection (1) under a business name that is registered to another person, that other person may apply to the court for an order contemplated in subsection (4). 45
- (4) The court hearing an application contemplated in subsection (3)(c) may make an order directing a person to stop using a business name within a period, and on any terms, that the court considers just, equitable and expedient in the circumstances.

#### **Registration of business names** 50

- 80.** (1) A person may file a notice with the Registrar in the prescribed manner and form, and with payment of the prescribed fee, to—
- (a) register any number of business names being used, or to be used, by that person in carrying on the person's business;



- (b) register the same business name translated into any number of official languages of the Republic;
  - (c) change a registered business name; or
  - (d) transfer a registered business name to another person.
- (2) The Registrar must register— 5
- (a) a business name, or translation or change of a business name, as filed, if it satisfies the requirements of section 81; or
  - (b) a transfer of a business name, as filed.
- (3) If the Registrar believes on reasonable grounds that a person has applied to register a business name, or a translation or change of a business name, that does not satisfy the requirements of section 81— 10
- (a) the Registrar must notify the applicant accordingly; and
  - (b) the procedures set out in the Companies Act, 1973 (Act No. 61 of 1973), for resolving disputed names of companies, read with the changes required by the context, apply to the resolution of the disputed business name. 15
- (4) If, during the time that a business name is registered to a person, the Registrar, on reasonable grounds, believes that the person has not been carrying on business under that name for a period of at least six months, the Registrar—
- (a) by notice in the prescribed form, may require the person to whom the business name is registered to show cause in the prescribed manner and form why the registration should not be cancelled; and 20
  - (b) may cancel the registration by notice in the prescribed form if the person to whom the business name is registered fails to respond to the notice within the prescribed time, or fails to provide—
    - (i) satisfactory evidence that the person is conducting business under the registered business name; or
    - (ii) a reasonable explanation for not conducting business under that name as noted by the Registrar. 25
- (5) A person affected by a decision of the Registrar in terms of subsection (4) may apply to the Tribunal to review the determination. 30

#### **Criteria for business names**

- 81.** (1) Subject to subsection (2), a business name may comprise words in any language irrespective of whether the words are commonly used or contrived for the purpose, together with—
- (a) any letters, numbers or punctuation marks; 35
  - (b) any of the following symbols: +, &, #, @, %, =;
  - (c) any other symbol permitted by the regulations made in terms of subsection (3); or
  - (d) round brackets used in pairs to isolate any part of the name, alone or in any combination. 40
- (2) A business name—
- (a) must not be the same as, or confusingly similar to—
    - (i) a name of a juristic person incorporated in terms of the Companies Act, 1973 (Act No. 61 of 1973), the Close Corporations Act, 1984 (Act No. 69 of 1984), or the Co-operatives Act, 2005 (Act No. 14 of 2005); 45
    - (ii) a registered trade mark belonging to another person, or a mark in respect of which an application has been filed in the Republic for registration as a trade mark or a well-known trade mark as contemplated in section 35 of the Trade Marks Act, 1993 (Act No. 194 of 1993), unless the applicant for registration of the mark as a business name either— 50
      - (aa) is the registered owner or applicant for registration of the mark; or
      - (bb) has been granted a licence to that mark; or
    - (iii) a mark, word or expression, the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), except to the extent permitted in terms of that Act; 55
  - (b) must not falsely imply or suggest, or be such as would reasonably mislead, a person to believe incorrectly that the business—
    - (i) is part of, or associated with, any other person or entity;
    - (ii) is an organ of state or a court, or is operated, sponsored, supported or endorsed by the State or by any organ of state or a court; 60

- (iii) is owned, managed or conducted by persons having any particular educational designation or who are regulated persons or entities;
  - (iv) is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of—
    - (aa) any foreign state, head of state, head of government, government or administration or any department of such a government or administration; or
    - (bb) any international organisation; or
  - (c) must not include any words, expression or symbol that, in isolation or in context within the name, fall into the category of expression contemplated in section 16(2) of the Constitution. 10
- (3) The Minister may prescribe additional commonly recognised symbols for use in business names, as contemplated in subsection (1)(c). 5

## *Part B*

### *Industry codes of conduct* 15

#### **Industry codes**

- 82.** (1) In this section—
- (a) **“industry code”** means a code—
    - (i) regulating the interaction between or among persons conducting business within an industry; or 20
    - (ii) regulating the interaction, or providing for alternative dispute resolution, between a person contemplated in subparagraph (i) and consumers; and
  - (b) **“proposal”** or **“proposed industry code”** includes any existing scheme that has been voluntarily established within an industry to regulate the conduct of persons conducting business within that industry. 25
- (2) The Minister, by regulation, may—
- (a) prescribe an industry code on the recommendation of the Commission in terms of subsection (3); or
  - (b) withdraw all or part of a previously prescribed industry code, on the recommendation of the Commission in terms of subsection (5). 30
- (3) The Commission, acting on its own initiative, or in response to a proposal from persons conducting business within a particular industry, may recommend a proposed industry code to the Minister after—
- (a) publishing the proposed industry code for public comment;
  - (b) considering any submissions made during the public comment period; 35
  - (c) consulting with—
    - (i) persons conducting business within the relevant industry; and
    - (ii) relevant accredited consumer protection groups; and
  - (d) making any revisions to the proposed industry code as published for comment. 40
- (4) An industry code must be consistent with the purposes and policies of this Act.
- (5) The Commission—
- (a) on the request of the Minister, must review the effectiveness of any industry code relative to the purposes and policies of this Act;
  - (b) may otherwise conduct a review contemplated in paragraph (a) at intervals of at least five years; and 45
  - (c) after conducting a review contemplated in this subsection, and taking the steps required by subsection (3), may make further recommendations to the Minister, including a recommendation to amend or withdraw all or part of a previously prescribed code. 50
- (6) If—
- (a) a proposed industry code provides for a scheme of alternative dispute resolution; and
  - (b) the Commission considers that the scheme is adequately situated and equipped to provide alternative dispute resolution services comparable to those generally provided in terms of any public regulation, 55
- the Commission, when recommending that code to the Minister, may also recommend that the scheme be accredited as an “accredited industry ombud”.
- (7) The Commission—

- (a) must monitor the effectiveness of any industry code relative to the purposes and policies of this Act; and
  - (b) may reasonably require persons conducting business within the relevant industry to provide information necessary for the purposes of—
    - (i) monitoring in terms of paragraph (a); or
    - (ii) a review in terms of subsection (5).
- (8) A supplier must not, in the ordinary course of business, contravene an applicable industry code.

## CHAPTER 5

### NATIONAL CONSUMER PROTECTION INSTITUTIONS

#### *Part A*

#### *National and provincial co-operation*

#### **Co-operative exercise of concurrent jurisdiction**

- 83.** (1) As contemplated in section 41(2) of the Constitution, the Minister must consult with the responsible Member of any relevant provincial Executive Council—
- (a) to co-ordinate and harmonise the functions to be performed by the Commission and one or more provincial consumer protection authorities; and
  - (b) when necessary, to facilitate the settlement of any dispute between the Commission and one or more provincial consumer protection authorities, concerning the functions to be performed by them relating to consumer protection.
- (2) If this Act contemplates that the respective provincial consumer protection authorities will perform a particular function within their respective provinces, and—
- (a) within a particular province, no provincial consumer protection authority has been established; or
  - (b) the Minister concludes on reasonable grounds that the provincial consumer protection authority within a particular province is unable to perform that function effectively,
- the Minister must consult with the responsible MEC of that province to determine the steps to be taken to ensure the fulfilment of that statutory obligation.
- (3) At the request of the relevant MEC of a province, or a provincial consumer protection authority, the Commission—
- (a) may engage with that provincial consumer protection authority in co-operative activities of research, publication, education, staff development and training; and
  - (b) in consultation with the Minister, may—
    - (i) engage with that provincial consumer protection authority in staff exchanges or secondments; or
    - (ii) provide technical assistance or expertise to that provincial consumer protection authority.
- (4) At the request of the relevant MEC of a province, or a provincial consumer protection authority, the Commission may engage with that provincial consumer protection authority in co-operative activities to detect and suppress prohibited conduct or offences in terms of this Act, if there are reasonable grounds to believe that any such conduct or offences may be occurring within the province, or across its provincial boundaries.
- (5) At the direction of the Minister, the Commission must engage with any relevant provincial consumer protection authority in co-operative activities to detect and suppress prohibited conduct or offences in terms of this Act, occurring within the province or across its provincial boundaries.
- (6) The Commission may request a provincial consumer protection authority to submit any report or information related to the activities of that provincial consumer protection authority to the Commission.

**Provincial consumer protection authorities**

- 84.** A provincial consumer protection authority has jurisdiction within its province to—
- (a) issue compliance notices in terms of this Act on behalf of the Commission to any person carrying on business exclusively within that province; 5
  - (b) facilitate the mediation or conciliation of a dispute arising in terms of this Act between or among persons resident, or carrying on business exclusively within that province;
  - (c) refer a dispute contemplated in paragraph (b) to the provincial consumer court within that province, if there is one; and 10
  - (d) request the Commission to initiate a complaint in respect of any apparent prohibited conduct or offence in terms of this Act arising within that province.

**Part B*****Establishment of National Consumer Commission*****Establishment of National Consumer Commission** 15

- 85.** (1) The National Consumer Commission is hereby established as an organ of state within the public administration, but as an institution outside the public service.
- (2) The Commission—
- (a) has jurisdiction throughout the Republic;
  - (b) is a juristic person; 20
  - (c) must exercise the functions assigned to it in terms of this Act or any other law, or by the Minister, in—
    - (i) the most cost-efficient and effective manner; and
    - (ii) in accordance with the values and principles mentioned in section 195 of the Constitution. 25

**Minister may direct policy and require investigation**

- 86.** The Minister may—
- (a) by notice in the *Gazette*, issue policy directives to the Commission with respect to the application, administration and enforcement of this Act, but any such directives must be consistent with this Act; and 30
  - (b) at any time direct the Commission to investigate—
    - (i) an alleged contravention of this Act; or
    - (ii) any matter or circumstances with respect to the purposes of this Act, whether or not those circumstances appear at the time of the direction to amount to a possible contravention of this Act. 35

**Appointment of Commissioner**

- 87.** (1) The Minister must appoint a suitably qualified and experienced person as Commissioner of the Commission, who—
- (a) is responsible for all matters pertaining to the functions of the Commission under this Act; and 40
  - (b) holds office for an agreed term not exceeding five years.
- (2) A person may be reappointed as Commissioner on the expiry of an agreed term of office.
- (3) The Commissioner is the accounting authority for the Commission, and as such is responsible for— 45
- (a) all income and expenditure of the Commission;
  - (b) all revenue collected by the Commission;
  - (c) all assets, and the discharge of all liabilities of the Commission; and
  - (d) the proper and diligent implementation of the Public Finance Management Act, 1999 (Act No. 1 of 1999), with respect to the Commission. 50
- (4) The Commissioner may—
- (a) assign management or other duties to employees with appropriate skills to assist the Commission in the management, or control over the functioning, of the Commission; and

- (b) delegate, with or without conditions, any of the powers or functions of the Commissioner to any suitably qualified employee of the Commission, but any such delegation does not divest the Commissioner of responsibility for the exercise of any power or performance of any duty.

(5) The Minister must, in consultation with the Minister of Finance, determine the Commissioner's remuneration, allowances, benefits and other terms and conditions of employment. 5

### **Appointment of inspectors and investigators**

**88.** (1) The Commissioner—

- (a) may appoint any suitable employee of the Commission or any other suitable person employed by the State, as an inspector; and 10
- (b) must issue each inspector with a certificate in the prescribed form stating that the person has been appointed as an inspector in terms of this Act.

(2) When an inspector performs any function of an inspector in terms of this Act, the inspector— 15

- (a) must be in possession of a certificate of appointment issued to that inspector in terms of subsection (1);
- (b) must show that certificate to any person who—
  - (i) is affected by the inspector's actions in terms of this Act; and
  - (ii) requests to see the certificate; and 20
- (c) has the powers of a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and may exercise the powers conferred on a peace officer by law.

(3) The Commissioner may appoint or contract with any suitably qualified person as an investigator to conduct research, audits, inquiries or other investigations on behalf of the Commission. 25

(4) A person appointed in terms of subsection (3) is not an inspector within the meaning of this Act.

### **Conflicting interests**

**89.** The Commissioner, and any other employee of the Commission, or person appointed by the Commission to be an inspector or investigator, may not— 30

- (a) engage in any activity that may undermine the integrity of the Commission;
- (b) participate in any investigation, hearing or decision concerning a matter in respect of which that person has a direct financial interest or any similar personal interest; 35
- (c) make private use of, or profit from, any confidential information obtained as a result of performing that person's official functions in the Commission; or
- (d) divulge any information referred to in paragraph (c) to any third party, except as required as part of that person's official functions within the Commission.

### **Finances** 40

**90.** (1) The Commission is financed from—

- (a) money appropriated by Parliament;
- (b) any fees payable to the Commission in terms of this Act;
- (c) income derived from its investment and deposit of surplus money in terms of subsection (2); and 45
- (d) money accruing from any other source.

(2) The Commission may invest or deposit money of the Commission that is not immediately required for contingencies or to meet current expenditures—

- (a) on a call or short-term fixed deposit with any registered bank or financial institution in the Republic; or 50
- (b) in an investment account with the Corporation for Public Deposits established in terms of section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984).

(3) The financial year of each of the Commission is the period of 12 months beginning 1 April each year, and ending on the following 31 March, except that the first financial year— 55

- (a) begins on the early effective date, as defined in item 1 of Schedule 2; and
- (b) ends on the next following 31 March.

## Reviews and reports to Minister

**91.** (1) At least once every five years, the Minister must conduct an audit review of the exercise of the functions and powers of the Commission.

(2) In addition to any other reporting requirement set out in this Act, the Commission must report to the Minister at least once every year on its activities, as required by the Public Finance Management Act, 1999 (Act No. 1 of 1999). 5

## Part C

### Functions of Commission

#### General provisions concerning Commission functions

**92.** (1) The Commission is responsible to carry out the functions and exercise the powers assigned to it by or in terms of this Act or any other national legislation. 10

(2) In carrying out its functions, the Commission may—

(a) have regard to international developments in the field of consumer protection; or

(b) consult any person, organisation or institution with regard to any matter relating to consumer protection. 15

(3) In respect to a particular matter within its jurisdiction or responsibility, the Commission may exercise its responsibility by way of an agreement contemplated in section 97(1)(b).

(4) The Minister must prescribe at least two official languages to be used by the Commission in any documents it is required to deliver in terms of this Act, for all or any part of the Republic, to give maximum effect to the requirements set out in section 6(3) and (4) of the Constitution. 20

#### Development of codes of practice relating to Act

**93.** The Commission may develop, and promote the voluntary use of, codes of practice in respect of— 25

(a) use of plain language in documents;

(b) a standardised or uniform means of presenting and communicating the information contemplated in sections 23 to 28;

(c) alternative dispute resolution in terms of section 70; or 30

(d) any other matter to better achieve the purposes of this Act.

#### Promotion of legislative reform

**94.** In order to better achieve the purposes of this Act in relation to laws that govern matters affecting consumers, the Commission must—

(a) identify any national or provincial legislation, or other public regulation, that— 35

(i) affects the welfare of consumers; and

(ii) is inconsistent with the purposes of this Act;

(b) consult with—

(i) relevant provincial consumer protection authorities; 40

(ii) organs of state within the national sphere of government; and

(iii) consumer protection groups, alternative dispute resolution agents and suppliers,

with respect to legislation identified in terms of paragraph (a) with the object of developing proposals for reform of that legislation; and 45

(c) report from time to time to the Minister with recommendations for achieving the progressive transformation and reform of law contemplated in this section.

#### Promotion of consumer protection within organs of state

**95.** (1) In order to better achieve the purposes of this Act in relation to goods and services supplied to consumers by or through any organs of state, the Commission must— 50

- (a) consult with relevant provincial consumer protection authorities, organs of state within the national sphere of government, regulatory authorities, consumer protection groups, and ombuds with respect to the delivery of any such goods or services, with the object of—
    - (i) identifying any practices that are inconsistent with the purposes and policies of this Act; and 5
    - (ii) developing proposals for reform of any such practices; and
  - (b) report from time to time to the Minister with recommendations for achieving the progressive transformation and reform of practices contemplated in this section. 10
- (2) The Commission—
- (a) must monitor the effectiveness of entities contemplated in subsection (1) relative to the purposes and policies of this Act in relation to goods and services supplied to consumers through organs of state; and
  - (b) may reasonably require entities contemplated in subsection (1) to provide information necessary for the purposes of— 15
    - (i) monitoring in terms of paragraph (a); or
    - (ii) a report prepared in terms of subsection (1)(b).

### Research and public information

- 96.** The Commission is responsible to increase knowledge of the nature and dynamics of the consumer market, and to promote public awareness of consumer protection matters, by—
- (a) implementing education and information measures to develop public awareness of the provisions of this Act; and
  - (b) providing guidance to the public by— 25
    - (i) issuing explanatory notices outlining its procedures, or its non-binding opinion on the interpretation of any provision of this Act;
    - (ii) applying to a court for a declaratory order on the interpretation or application of any provision of this Act; or
    - (iii) publishing any orders and findings of the Tribunal or a court in respect of a breach of the Act. 30

### Relations with other regulatory authorities

- 97.** (1) The Commission may—
- (a) liaise with any provincial consumer protection authority or other regulatory authority on matters of common interest and, without limiting the generality of this power, may monitor, require necessary information from, exchange information with, and receive information from, any such authority pertaining to—
    - (i) matters of common interest; or
    - (ii) a specific complaint or investigation; 40
  - (b) negotiate agreements with any regulatory authority—
    - (i) to co-ordinate and harmonise the exercise of jurisdiction over consumer matters within the relevant industry or sector; and
    - (ii) to ensure the consistent application of the principles of this Act;
  - (c) participate in the proceedings of any regulatory authority; and 45
  - (d) advise, or receive advice from, any regulatory authority.
- (2) A regulatory authority that, in terms of any public regulation, exercises jurisdiction over consumer matters within a particular industry or sector may—
- (a) negotiate agreements with the Commission, as anticipated in subsection (1)(b); and 50
  - (b) exercise its jurisdiction by way of such an agreement in respect of a particular matter within its jurisdiction.
- (3) The President may assign to the Commission any duty of the Republic to exchange information with a similar foreign agency in terms of an international agreement relating to the purposes of this Act. 55
- (4) The Commission may liaise with any foreign or international authorities having any objects similar to the functions and powers of the Commission.

## Advice and recommendations to Minister

- 98.** In addition to any other advice or reporting requirements set out in this Part, the Commission is responsible to—
- (a) advise the Minister on matters relating to consumer protection and on the determination of national norms and standards regarding consumer protection in terms of this Act that should apply generally throughout the Republic; 5
  - (b) recommend to the Minister changes to bring about uniformity in the legislation in the various provinces in relation to consumer protection in terms of this Act;
  - (c) report annually on market practices and the implications for consumer choice and competition in the consumer market; 10
  - (d) enquire into and report to the Minister on any matter concerning the purposes of this Act; and
  - (e) advise the Minister in respect of any matter referred to it by the Minister.

## CHAPTER 6 15

### ENFORCEMENT OF ACT

#### *Part A*

#### *Enforcement by Commission*

#### **Enforcement functions of Commission**

- 99.** The Commission is responsible to enforce this Act by— 20
- (a) promoting informal resolution of any dispute arising in terms of this Act between a consumer and a supplier, but is not responsible to intervene in or directly adjudicate any such dispute;
  - (b) receiving complaints concerning alleged prohibited conduct or offences, and dealing with those complaints in accordance with Part B of Chapter 3; 25
  - (c) monitoring—
    - (i) the consumer market to ensure that prohibited conduct and offences are prevented, or detected and prosecuted; and
    - (ii) the effectiveness of accredited consumer groups, industry codes and alternative dispute resolution schemes, service delivery to consumers by organs of state, and any regulatory authority exercising jurisdiction over consumer matters within a particular industry or sector; 30
  - (d) investigating and evaluating alleged prohibited conduct and offences;
  - (e) issuing and enforcing compliance notices;
  - (f) negotiating and concluding undertakings and consent orders contemplated in section 74; 35
  - (g) referring to the Competition Commission any concerns regarding market share, anti-competitive behaviour or conduct that may be prohibited in terms of the Competition Act, 1998 (Act No. 89 of 1998);
  - (h) referring matters to the Tribunal, and appearing before the Tribunal, as permitted or required by this Act; and 40
  - (i) referring alleged offences in terms of this Act to the National Prosecuting Authority.

#### **Compliance notices**

- 100.** (1) Subject to subsection (2), the Commission may issue a compliance notice in the prescribed form to a person or association of persons whom the Commission on reasonable grounds believes has engaged in prohibited conduct. 45
- (2) Before issuing a notice in terms of subsection (1) to a regulated entity, the Commission must consult with the regulatory authority that issued a licence to that regulated entity. 50
- (3) A compliance notice contemplated in subsection (1) must set out—
- (a) the person or association to whom the notice applies;
  - (b) the provision of this Act that has not been complied with;
  - (c) details of the nature and extent of the non-compliance;



- (d) any steps that are required to be taken and the period within which those steps must be taken; and
  - (e) any penalty that may be imposed in terms of this Act if those steps are not taken.
- (4) A compliance notice issued in terms of this section remains in force until— 5
- (a) it is set aside by the Tribunal, or a court upon a review of a Tribunal decision concerning the notice; or
  - (b) the Commission issues a compliance certificate contemplated in subsection (5).
- (5) If the requirements of a compliance notice issued in terms of subsection (1) have been satisfied, the Commission must issue a compliance certificate. 10
- (6) If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission may either—
- (a) apply to the Tribunal for the imposition of an administrative fine; or
  - (b) refer the matter to the National Prosecuting Authority for prosecution as an 15 offence in terms of section 110(2),
- but may not do both in respect of any particular compliance notice.

### **Objection to notices**

- 101.** (1) Any person issued with a notice in terms of section 100 may apply to the Tribunal in the prescribed manner and form to review that notice within— 20
- (a) 15 business days after receiving that notice; or
  - (b) such longer period as may be allowed by the Tribunal on good cause shown.
- (2) After considering any representations by the applicant and any other relevant information, the Tribunal may confirm, modify or cancel all or part of a notice.
- (3) If the Tribunal confirms or modifies all or part of a notice, the applicant must 25 comply with that notice as confirmed or modified, within the time period specified in it.

## ***Part B***

### ***Powers in support of investigation***

#### **Summons**

- 102.** (1) At any time during an investigation being conducted in terms of section 72(1)(d), the Commissioner may issue a summons to any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject— 30
- (a) to appear before the Commission, or before an inspector or independent investigator, to be questioned at a time and place specified in the summons; or 35
  - (b) to deliver or produce to the Commission, or to an inspector or independent investigator, any book, document or other object referred to in paragraph (a) at a time and place specified in the summons.
- (2) A summons contemplated in subsection (1)— 40
- (a) must be signed by the Commissioner, or by an employee of the Commission designated by the Commissioner; and
  - (b) may be served in the same manner as a subpoena in a criminal case issued by the magistrate's court.
- (3) An inspector or investigator before whom a person is summoned to appear, or to whom a person is required to deliver any book, document or other object, may — 45
- (a) interrogate and administer an oath to, or accept an affirmation from, the person named in the summons; and
  - (b) retain any such book, document or other object for examination, for a period not exceeding two months, or such longer period as the Tribunal, on application and good cause shown, may allow. 50
- (4) A person questioned by the Commission or by an inspector or investigator conducting an investigation must answer each question truthfully and to the best of that person's ability, but—
- (a) a person is not obliged to answer any question if the answer is self-incriminating; and 55
  - (b) the person asking the questions must inform that person of the right set out in paragraph (a).

(5) No self-incriminating answer given or statement made by any person to the Commission, or an inspector or investigator exercising powers in terms of this Act, will be admissible as evidence against that person in criminal proceedings against that person instituted in any court, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 108(3) or 109(2)(d), and then only to the extent that the answer or statement is relevant to prove the offence charged. 5

### Authority to enter and search under warrant

**103.** (1) A judge of the High Court or a magistrate may issue a warrant to enter and search any premises that are within the jurisdiction of that judge or magistrate if, from information on oath or affirmation, there are reasonable grounds to believe that— 10

(a) a contravention of this Act has taken place, is taking place, or is likely to take place on or in those premises; or

(b) anything connected with an investigation in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises.

(2) A warrant to enter and search may be issued at any time and must specifically— 15

(a) identify the premises that may be entered and searched; and

(b) authorise an inspector or a police officer to enter and search the premises and to do anything listed in section 104.

(3) A warrant to enter and search is valid until one of the following events occurs:

(a) The warrant is executed; 20

(b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;

(c) the purpose for issuing it has lapsed; or

(d) the expiry of one month after the date it was issued.

(4) A warrant to enter and search may be executed only during the day, unless the judge, regional magistrate or magistrate who issued it authorises that it may be executed at night at a time that is reasonable in the circumstances. 25

(5) A person authorised by warrant issued in terms of subsection (2) may enter and search premises named in that warrant.

(6) Immediately before commencing with the execution of a warrant, a person executing that warrant must either— 30

(a) if the owner, or person in control, of the premises to be searched is present—

(i) provide identification to that person and explain to that person the authority by which the warrant is being executed; and

(ii) hand a copy of the warrant to that person or to the person named in it; or 35

(b) if none of those persons is present, affix a copy of the warrant to the premises in a prominent and visible place.

### Powers to enter and search

**104.** (1) A person who is authorised under section 103 to enter and search premises may— 40

(a) enter upon or into those premises;

(b) search those premises;

(c) search any person on those premises if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation; 45

(d) examine any article or document that is on or in those premises that has a bearing on the investigation;

(e) request information about any article or document from the owner of, or person in control of, the premises or from any person who has control of the article or document, or from any other person who may have the information; 50

(f) take extracts from, or make copies of, any book or document that is on or in the premises that has a bearing on the investigation;

(g) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to—

(i) search any data contained in or available to that computer system; 55

(ii) reproduce any record from that data;

(h) seize any output from that computer for examination and copying; and

(i) attach and if necessary remove from the premises for examination and safekeeping anything that has a bearing on the investigation.

(2) Section 102(5) applies equally to an answer given or statement made to an inspector or police officer in terms of this section.

(3) An inspector authorised to conduct an entry and search in terms of section 103 may be accompanied and assisted by a police officer.

### **Conduct of entry and search**

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**105.** (1) A person who enters and searches any premises under section 104 must conduct the entry and search with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy.

(2) During any search under section 104(1)(c), only a female inspector or police officer may search a female person, and only a male inspector or police officer may search a male person. 10

(3) A person who enters and searches premises under section 104, before questioning anyone, must—

(a) advise that person of the right to be assisted at the time by an advocate or attorney; and 15

(b) allow that person to exercise that right.

(4) A person who removes anything from premises being searched must—

(a) issue a receipt for it to the owner of, or person in control of, the premises; and

(b) return it as soon as practicable after achieving the purpose for which it was removed. 20

(5) During a search, a person may refuse to permit the inspection or removal of an article or document on the grounds that it contains privileged information.

(6) If the owner or person in control of an article or document refuses in terms of subsection (5) to give that article or document to the person conducting the search, the person conducting the search may request the registrar or sheriff of the High Court that has jurisdiction to attach and remove the article or document for safe custody until that court determines whether or not the information is privileged. 25

(7) A police officer who is authorised to enter and search premises under section 103, or who is assisting an inspector who is authorised to enter and search premises under section 104, may overcome resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window of the premises. 30

(8) Before using force in terms of subsection (6), a police officer must audibly demand admission and must announce the purpose of the entry, unless it is reasonable to believe that doing so may induce someone to destroy or dispose of an article or document that is the object of the search. 35

(9) The Commission may compensate anyone who suffers damage because of a forced entry during a search when no one responsible for the premises was present.

### **Claims that information is confidential**

**106.** (1) When submitting information to the Commission, the Tribunal, or an inspector or investigator appointed in terms of this Act, a person may claim that all or part of that information is confidential. 40

(2) Any claim contemplated in subsection (1) must be supported by a written statement explaining why the information is confidential.

(3) The Commission, Tribunal, inspector or investigator, as the case may be, must—

(a) consider any claim made in terms of subsection (1); and 45

(b) notify the claimant whether or not the information contemplated in subsection (1) will be treated as if it had been determined to be confidential.

(4) When making any ruling, decision or order in terms of this Act, the Commission or Tribunal may take into account any information that has been the subject of a claim in terms of subsection (1). 50

(5) If any reasons for a decision in terms of this Act would reveal any information that has been the subject of a claim in terms of subsection (1), the Commission or Tribunal, as the case may be, must provide a copy of the proposed reasons to the party claiming confidentiality at least five business days before publishing those reasons.

(6) Within five business days after receiving a notice in terms of subsection (3)(b), or a copy of proposed reasons in terms of subsection (5), a party may apply to a court for an appropriate order to protect the confidentiality of the relevant information. 55

*Part C**Offences and penalties***Breach of confidence**

- 107.** (1) It is an offence to disclose any personal or confidential information concerning the affairs of any person obtained— 5
- (a) in carrying out any function in terms of this Act; or
  - (b) as a result of initiating a complaint or participating in any proceedings in terms of this Act.
- (2) Subsection (1) does not apply to information disclosed— 10
- (a) for the purpose of the proper administration or enforcement of this Act;
  - (b) for the purpose of the administration of justice; or
  - (c) at the request of an inspector, regulatory authority or Tribunal member entitled to receive the information.

**Hindering administration of Act**

- 108.** (1) It is an offence to hinder, oppose, obstruct or unduly influence any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by this Act. 15
- (2) A person commits an offence if that person, having been summoned—
- (a) fails without sufficient cause to appear at the time and place specified or to remain in attendance until excused; or 20
  - (b) attends as required, but—
    - (i) refuses to be sworn in or to make an affirmation; or
    - (ii) fails to produce a book, document or other item as ordered, if it is in the possession of, or under the control of, that person.
- (3) A person commits an offence if that person, having been sworn in or having made an affirmation— 25
- (a) fails to answer any question fully and to the best of his or her ability, subject to section 102(5); or
  - (b) gives false evidence, knowing or believing it to be false.

**Offences relating to Commission and Tribunal** 30

- 109.** (1) A person commits an offence if that person contravenes or fails to comply with an order of the Tribunal.
- (2) A person commits an offence if that person—
- (a) does anything calculated to improperly influence the Tribunal or a regulator concerning any matter connected with an investigation; 35
  - (b) anticipates any findings of the Tribunal or a regulator concerning an investigation in a way that is calculated to influence the proceedings or findings;
  - (c) does anything in connection with an investigation that would have been contempt of court if the proceedings had occurred in a court of law; 40
  - (d) knowingly provides false information to a regulator;
  - (e) defames the Tribunal, or a member the Tribunal, in their respective official capacities;
  - (f) wilfully interrupts the proceedings of a hearing or misbehaves in the place where a hearing is being conducted; 45
  - (g) acts contrary to a warrant to enter and search; or
  - (h) without authority, but claiming to have authority in terms of section 103—
    - (i) enters or searches premises; or
    - (ii) attaches or removes an article or document.

**Offences relating to prohibited conduct** 50

- 110.** (1) It is an offence for any person to alter, obscure or remove a displayed price or trade description without authority.

(2) It is an offence to fail to act in accordance with a compliance notice, but no person may be prosecuted for such an offence in respect of the compliance notice if, as a result of the failure of that person to comply with that notice, the Commission has applied to the Tribunal for the imposition of an administrative fine.

## **Penalties** 5

**111.** (1) Any person convicted of an offence in terms of this Act is liable—  
 (a) in the case of a contravention of section 107 (1), to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or  
 (b) in any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment. 10

(2) Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in subsection (1).

## **Administrative fines**

**112.** (1) The Tribunal may impose an administrative fine only in the circumstances expressly provided for in this Act. 15

(2) An administrative fine imposed in terms of this Act may not exceed the greater of—

- (a) 10 per cent of the respondent's annual turnover during the preceding financial year; or
- (b) R1 000 000. 20

(3) When determining an appropriate administrative fine, the Tribunal must consider the following factors:

- (a) The nature, duration, gravity and extent of the contravention;
- (b) any loss or damage suffered as a result of the contravention;
- (c) the behaviour of the respondent; 25
- (d) the market circumstances in which the contravention took place;
- (e) the level of profit derived from the contravention;
- (f) the degree to which the respondent has co-operated with the Commission and the Tribunal; and
- (g) whether the respondent has previously been found in contravention of this Act. 30

(4) For the purpose of this section, the annual turnover of a supplier at the time when an administrative fine is assessed, is the total income of that supplier during the immediately preceding year, as determined in the prescribed manner.

(5) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the Constitution. 35

## **Vicarious liability**

**113.** (1) If an employee or agent of a person is liable in terms of this 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. 40

(2) This section does not apply in respect of criminal liability.

## **Part D**

### **Miscellaneous matters**

## **Interim relief**

**114.** (1) A person who has applied for relief to a court, or the complainant in a complaint that has been referred to the Tribunal, may apply to a court subject to its rules, or to the Tribunal, as the case may be, for an interim order in respect of that application or complaint, and the court or Tribunal may grant such an order if—

- (a) there is evidence that the allegations may be true;
- (b) an interim order is reasonably necessary to— 50
  - (i) prevent serious, irreparable damage to that person; or
  - (ii) to prevent the purposes of this Act being frustrated;

- (c) the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and
  - (d) the balance of convenience favours the granting of the order.
- (2) An interim order in terms of this section must not extend beyond the earlier of—
- (a) the conclusion of a hearing into an application or a complaint; or 5
  - (b) the date that is six months after the date of issue of the interim order.
- (3) If an interim order has been granted, and a hearing into that matter has not been concluded within six months after the date of that order, the court or Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months. 10

### **Civil actions and jurisdiction**

- 115.** (1) If an agreement, provision of an agreement, or a notice to which a transaction or agreement is purported to be subject, has been declared by a provision of this Act to be void, that agreement, provision or notice must be regarded as having been of no force or effect at any time, unless a court has declared that the relevant provision of this Act does not apply to the impugned agreement, provision or notice. 15
- (2) A person who has suffered loss or damage as a result of prohibited conduct, or dereliction of required conduct—
- (a) may not institute a claim in a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order; or 20
  - (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form—
    - (i) certifying whether the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act; 25
    - (ii) stating the date of the Tribunal’s finding, if any; and
    - (iii) setting out the section of this Act in terms of which the Tribunal made its finding, if any.
- (3) A certificate referred to in subsection (2)(b) is sufficient proof of its contents. 30
- (4) An appeal or application for review against an order made by the Tribunal in terms of this Act suspends any right to commence an action in a civil court with respect to the same matter, unless the court orders otherwise.

### **Limitations of bringing action**

- 116.** (1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after— 35
- (a) the act or omission that is the cause of the complaint; or
  - (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.
- (2) A complaint in terms of this Act may not be referred to the Tribunal or to a consumer court in terms of this Act, against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct. 40

### **Standard of proof**

- 117.** In any proceedings before the Tribunal, or before a consumer court in terms of this Act, the standard of proof is on a balance of probabilities. 45

### **Serving documents**

- 118.** Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person, will have been properly served when it has been either— 50
- (a) delivered to that person; or
  - (b) sent by registered mail to that person’s last known address.

**Proof of facts**

- 119.** (1) In any criminal proceedings in terms of this Act—
- (a) if it is proved that a false statement, entry or record or false information appears in or on a book, document, plan, drawing or computer storage medium, the person who kept that item may be presumed to have made the statement, entry, record or information, unless the contrary is proved; and 5
  - (b) an order certified by the Chairperson of the Tribunal is conclusive proof of the contents of the order of the Tribunal, unless the contrary is proved.
- (2) A statement, entry, record or information in or on any book, document, plan, drawing or computer storage medium is admissible in evidence as an admission of the facts in or on it by the person who appears to have made, entered, recorded or stored it unless it is proved that that person did not make, enter, record or store it. 10

**CHAPTER 7****GENERAL PROVISIONS****Regulations** 15

- 120.** (1) The Minister may—
- (a) make any regulations expressly authorised or contemplated elsewhere in this Act, in accordance with subsection (2);
  - (b) in consultation with the Commission, and by notice in the *Gazette*, make regulations for matters relating to the functions of the Commission, 20 including—
    - (i) forms;
    - (ii) time periods;
    - (iii) information required;
    - (iv) additional definitions applicable to those regulations; 25
    - (v) filing fees;
    - (vi) access to confidential information; and
    - (vii) manner and form of participation in Commission procedures;
  - (c) in consultation with the Chairperson of the Tribunal, and by notice in the *Gazette*, make regulations for matters relating to the functions of the Tribunal, 30 and rules for the conduct of matters before the Tribunal in terms of this Act; and
  - (d) make regulations regarding—
    - (i) any forms required to be used for the purposes of this Act; and
    - (ii) in general, any ancillary or incidental matter that is necessary for the 35 proper implementation and administration of this Act.
- (2) Before making any regulations in terms of subsection (1)(a), the Minister—
- (a) must publish the proposed regulations for public comment;
  - (b) may consult with accredited consumer protection groups; and
  - (c) must consult the Commission and provincial regulatory authorities. 40
- (3) A regulation in terms of this Act must be made by notice in the *Gazette*.

**Consequential amendments, repeal of laws and transitional arrangements**

- 121.** (1) The laws referred to in Schedule 1 are hereby amended in the manner set out in that Schedule.
- (2) Subject to subsection (3) and the provisions of Schedule 2, the following Acts are hereby repealed: 45
- (a) Sections 2 to 13 and sections 16 to 17 of the Merchandise Marks Act, 1941 (Act No. 17 of 1941);
  - (b) Business Names Act, 1960 (Act No. 27 of 1960);
  - (c) Price Control Act, 1964 (Act No. 25 of 1964); 50
  - (d) Sale and Service Matters Act, 1964 (Act No. 25 of 1964);
  - (e) Trade Practices Act, 1976 (Act No. 76 of 1976); and
  - (f) Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988).
- (3) The repeal of the laws specified in this section does not affect the transitional arrangements, which are set out in Schedule 2. 55

**Short title and commencement**

**122.** This Act is called the Consumer Protection Act, 2008, and comes into operation in accordance with item 2 of Schedule 2.



**Schedule 1**

(Section 121)

**Amendment of laws****A: National Credit Act, 2005****Amendment of section 31 of Act 34 of 2005**

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1. Section 31 of the National Credit Act, 2005 (in this Schedule referred to as the principal Act), is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) The Chairperson is responsible to manage the caseload of the Tribunal in terms of this Act or any other legislation, and must assign each application or other matter referred to the Tribunal in terms of this Act or any other legislation to—
- (a) a member of the Tribunal, to the extent that this Act, section 75 (5) of the Consumer Protection Act, 2008, or any other legislation provides for a matter to be considered by a single member of the Tribunal; or
- (b) a panel composed of any three members of the Tribunal, in any other case.”

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**Insertion of section 126A in Act 34 of 2005**

2. The following section is hereby inserted after section 126:

**“Restrictions on certain practices relating to credit agreements**

- 126A.** (1) A person must not promote, offer to supply, supply or induce any person to accept the supply of any service that has as its dominant function—
- (a) the breaching of a credit agreement; or
- (b) the unauthorised transfer of any right of a credit provider under a credit agreement to a third person.
- (2) Subsection (1)(b) does not apply in respect of—
- (a) any negotiation, by an attorney on behalf of a consumer, with the credit provider concerned; or
- (b) any action carried out by, on behalf of or with the permission of the credit provider concerned.
- (3) A person who offers to supply, or supplies, any service for the express or implied purpose of—
- (a) improving a consumer’s credit record, credit history or credit rating; or
- (b) causing a credit bureau to remove credit information from its records concerning that consumer,
- may not charge a consumer, or receive any payment from the consumer, for the credit repair service until that service has been fully performed, and must provide each consumer with a disclosure statement in the prescribed manner and form.
- (4) Subsection (3) does not apply in respect of any credit repair service rendered by an attorney, or a registered credit bureau.
- (5) A person who offers to supply, or supplies—
- (a) any service for the express or implied purpose of investigating fees, charges or interest charged on a credit agreement; or
- (b) a computer software programme originating within the Republic, which is programmed to calculate fees, charges, or interest charged on a credit agreement, for valuable consideration,
- must provide each consumer of the service or software, as the case may be, with a disclosure statement in the prescribed manner and form.
- (6) This section does not apply to a debt counsellor in respect of any action authorised in terms of this Act.”

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**Insertion of section 141A in Act 34 of 2005**

3. The following section is hereby inserted after section 141:

**“Extended application of this Part**

**141A.** This Part applies to any matter before the Tribunal irrespective of whether the matter arises in terms of this Act or any other legislation.” 5

**Amendment of section 142 of Act 34 of 2005**

4. Section 142 of the principal Act is hereby amended—

(a) by the substitution for paragraph (b) of subsection (3) of the following paragraph:

“(b) consent orders in terms of this Act or the Consumer Protection Act, 2008;” and 10

(b) by the substitution for subsection (4) of the following subsection:

“(4) At the conclusion of a hearing, the Tribunal must make [any] an order permitted in the circumstances in terms of this Act, or the Consumer Protection Act, 2008, and must issue written reasons for its decisions.” 15

**Amendment of section 143 of Act 34 of 2005**

5. Section 143 of the principal Act is hereby amended by the substitution for paragraph (a) of the following paragraph:

“(a) The National Credit Regulator, or the National Consumer Commission in the case of a matter arising in terms of the Consumer Protection Act, 2008;” 20

**Amendment of section 147 of Act 34 of 2005**

6. Section 147 of the principal Act is hereby amended—

(a) by the insertion at the end of paragraph (a) of subsection (2) of the following words: 25

“or section 75(1)(b) of the Consumer Protection Act, 2008, as the case may be”; and

(b) by the insertion at the end of paragraph (b) of subsection (2) of the following words:

“or section 75(1)(b) of the Consumer Protection Act, 2008, as the case may be”. 30

**Amendment of section 148 of Act 34 of 2005**

7. Section 148 of the principal Act is hereby amended by the insertion at the end of paragraph (b) of subsection (2) of the following words:

“or section 69(2)(b) or 73 of the Consumer Protection Act, 2008, as the case may be”. 35

**Amendment of section 150 of Act 34 of 2005**

8. Section 150 of the principal Act is hereby amended—

(a) by the insertion in the words preceding paragraph (a) of the following words before the word “including”: 40

“or the Consumer Protection Act, 2008;”;

(b) by the insertion in paragraph (d) of the following words immediately after the word “Act”:

“or the Consumer Protection Act, 2008”; and

(c) by the insertion in paragraph (i) of the following words immediately after the word “Act”: 45

“or the Consumer Protection Act, 2008”.

**Amendment of section 151 of Act 34 of 2005**

9. Section 151 of the principal Act is hereby amended—
- (a) by the insertion at the end of subsection (1) of the following words:
    - “or the Consumer Protection Act, 2008”;
  - (b) by the insertion in the words preceding subsection (2)(a) of the following words immediately after the word “Act”:
    - “, or the Consumer Protection Act, 2008,”;
  - (c) by the insertion in subsection (3)(f) of the following words immediately after the word “Regulator”:
    - “, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008,”;
  - (d) by the insertion in subsection (3)(g) of the following words immediately after the word “Act”:
    - “, or the Consumer Protection Act, 2008, as the case may be”.

**Amendment of section 152 of Act 34 of 2005** 15

10. Section 152 of the principal Act is hereby amended—
- (a) by the insertion at the end of paragraph (a) of subsection (1) of the following words:
    - “, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008”;
  - (b) by the insertion at the end of paragraph (b) of subsection (1) of the following words:
    - “, or provincial consumer protection authority, in the case of a matter arising in terms of the Consumer Protection Act, 2008”;
  - (c) by the insertion at the end of paragraph (d) of subsection (1) of the following words:
    - “, or, in the case of a matter arising in terms of the Consumer Protection Act, 2008, an alternative dispute resolution agent as defined in that Act”.
  - (d) by the insertion of the words immediately after “Regulator” in subsection (2) of the following words:
    - “, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008,”.

**B: Lotteries Act, 1997****Amendment of section 1 of Act 57 of 1997**

1. Section 1 of the Lotteries Act, 1997 (Act No. 57 of 1997) is hereby amended by the substitution for the definition of “promotional competition” of the following definition:
  - “**promotional competition**” has the meaning set out in section 36 of the Consumer Protection Act, 2008”.

**Repeal of section 54 of Act 57 of 1997**

2. Section 54 of the Lotteries Act, 1997 (Act No. 57 of 1997), is hereby repealed. 40

## Schedule 2

(Section 121(2))

### Transitional provisions

#### Definitions

1. (1) In this Schedule— 5
- “**early effective date**” means the date on which the provisions mentioned in item 2(1) took effect;
- “**general effective date**” means the date on which the provisions mentioned in item 2(2) took effect;
- “**pre-existing agreement**” means an agreement that was made before the general effective date; and 10
- “**pre-existing loyalty programme**” means a loyalty programme that had any participating consumers immediately before the general effective date.
- (2) A reference in this Schedule—
- (a) to a section by number is a reference to the corresponding section of this Act; 15
- or
- (b) to an item or a subitem by number is a reference to the corresponding item or subitem of this Schedule.

#### Incremental effect of Act

2. (1) Chapters 1 and 5 of this Act, section 120 and any other provision authorising the Minister to make regulations, and this Schedule, take effect on the date that is one year after the date on which this Act was signed by the President. 20
- (2) Subject to subitem (3), and items 4 and 5, any provision of this Act not contemplated in subitem (1) takes effect on the date that is 18 months after the date on which this Act was signed by the President. 25
- (3) The Minister, by notice published in the *Gazette* at least 20 business days before the date contemplated in subitem (2), may—
- (a) defer the effective date of any provision contemplated in that subitem for a period of not more than six additional months, on the grounds that additional time is required for adequate preparation of the administrative systems necessary to ensure the efficient and effective implementation of that provision; or 30
- (b) on request from the member of the Cabinet responsible for local government matters, defer until further notice the application of this Act to— 35
- (i) any particular municipality other than a high capacity municipality as defined in terms of the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003); or
- (ii) any organ of state that is responsible to a municipal authority, in its capacity as a supplier of any goods or services to consumers, on the grounds that additional time is required for adequate preparation of the administrative systems necessary to ensure that the municipality or organ of state can meet its obligations in terms of this Act efficiently and effectively. 40

#### Application of Act to pre-existing transactions and agreements

3. (1) Except to the extent expressly set out in this item, this Act does not apply to— 45
- (a) the marketing of any goods or services before the general effective date;
- (b) any transaction concluded, or agreement entered into, before the general effective date; or
- (c) any goods supplied, or services provided, to a consumer before the general effective date.
- (2) The sections of this Act listed in the first column of the following 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— 50

- (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:

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.	5
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.	10
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.	15
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	20
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.	25
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.	30
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.	

(3) Section 35 applies to any pre-existing loyalty programme, but only with respect to any— 35

- (a) offer to participate in that programme, or document setting out such an offer, that is made or published on or after the general effective date;
- (b) tender by a consumer, on or after the general effective date, of any loyalty credit or award in that programme as consideration for any supply of goods or services; and 40
- (c) any supply of goods or services if, on or after the general effective date, the consumer tendered any loyalty credit or award in the programme as consideration for those goods or services.

(4) Section 61 applies to any goods that were first supplied to a consumer on or after the early effective date. 45

(5) Any provision of this Act not otherwise contemplated in subitems (2) to (4) applies to any pre-existing conduct, circumstance, transaction or agreement only to the extent required to ensure proper interpretation of, or compliance with and enforcement of, the provisions that are mentioned in subitems (2) to (4).

#### Delayed operation of section 11(4)(b)(ii) 50

4. Despite section 11, the provisions of section 11 (4)(b)(ii) remain inoperative until a date declared by the Minister by notice in the *Gazette* after—

- (a) the Commission has established or recognised a register as contemplated in section 11(3); and
- (b) in the case of a register established by the Commission, the Minister has received advice from an independent auditor that the Commission has established reasonable and effective means to receive, compile and utilise information in the manner contemplated in section 11. 5

### **Relief from requirement to register business names**

5. (1) Section 79(1), (2) and (3)(a) and (b), and sections 80 and 81, do not take effect until a date determined by the Minister by notice in the *Gazette*, which date must be at least one year following the general effective date. 10

(2) The Minister must publish a notice contemplated in subitem (1) at least six months before the date on which that notice is to take effect.

(3) The Commission may not take any action to enforce—

- (a) section 79(1) at any time against a person for the use of a business name, if that person— 15
  - (i) had registered that business name before the general effective date in terms of any public regulation other than a repealed law; or
  - (ii) was actively conducting business under that business name for a period of at least one year before the date on which section 79 took effect.

(4) Any business name that, as of the general effective date, was registered in terms of any repealed law, must be regarded as having been registered in terms of this Act, as of the effective date. 20

(5) The register of business names, as maintained by the Companies and Intellectual Property Registration Office in terms of any of the repealed laws, is continued as the register of business names contemplated in this Act. 25

### **General preservation of regulations, rights, duties, notices and other instruments**

6. (1) Any right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of a repealed law that had not been spent or fulfilled immediately before the general effective date, must be considered to be a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act. 30

(2) A notice given by any person to another person in terms of any provision of a repealed law must be considered as notice given in terms of any comparable provision of this Act, as from the date that the notice was given under the repealed law. 35

(3) A document that, before the general effective date, had been served in accordance with a repealed law, must be regarded as having been satisfactorily served for any comparable purpose of this Act.

(4) An order given by an inspector in terms of any provision of a repealed law and in effect immediately before the general effective date, continues in effect, subject to the provisions of this Act. 40

### **Provincial regulatory capacity**

7. Until provincial legislation has been enacted in a province establishing for that province a provincial consumer protection authority as contemplated in this Act, the Minister, by notice in the *Gazette*, may delegate to the relevant MEC of that province any or all of the functions of the Commission to be exercised within that province and in accordance with this Act. 45

### **Continued application of repealed laws**

8. (1) Despite the repeal of the repealed laws, for a period of three years after the general effective date the Commission may exercise any power in terms of any such repealed law to investigate any breach of that law that occurred during the period of three years immediately before the general effective date. 50

(2) In exercising authority under subitem (1), the Commission must conduct the investigation as if it were proceeding with a complaint in terms of this Act.

### State employees enforcing previous Acts

9. (1) An individual who, immediately before the early effective date, was employed by the State, assigned to the Department of Trade and Industry and tasked with administration or enforcement of any of the repealed laws, is an employee of Commission, as of the effective date, subject to the Public Service Act, 1994 (Proclamation No. 103 of 1994). 5

(2) The transfer of departmental employees to the Commission must be effected in accordance with—

- (a) section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995); and
- (b) any collective agreement reached between the State and the trade union parties of the Departmental Chamber of the Public Service Bargaining Council before the effective date. 10

(3) A person mentioned in subitem (1) remains subject to any decisions, proceedings, rulings and directions applicable to that person immediately before the early effective date, and any proceedings against such a person that were pending immediately before the early effective date, must be disposed of as if this Act had not been enacted. 15

(4) Any person transferred in terms of subitem (1)—

- (a) remains a member of the Government Employees' Pension Fund mentioned in section 2 of the Government Employees' Pension Law, 1996 (Act No. 21 of 1996); and 20
- (b) is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of the public service mentioned in section 8(1)(a)(i) of the Public Service Act, 1994.

## **MEMORANDUM ON THE OBJECTS OF THE CONSUMER PROTECTION BILL, 2008**

### **1. BACKGROUND**

Various developments over the past few years have indicated that consumer protection legislation needed an overview. These include—

- discriminatory and unfair market practices;
- proliferation of low-quality and unsafe products;
- lack of awareness of rights;
- limited redress;
- inadequate protection for consumers;
- weak enforcement capacity.

A number of reports have commented on the weaknesses in consumer protection legislation. These include—

#### **An International Legislative Benchmarking Study**

Reviewed the scope of consumer law in various countries, including Argentina, Brazil, Chile, India, the UK, Finland, Botswana, Malawi, Uganda and Canada.

#### **A South African National Consumer Survey**

Established the extent to which consumers are aware of their rights, the types of violations and consumer's view of what could be done to improve access to redress.

#### **A Review of Consumer Protection Measures in South Africa**

Reviewed current legislative and other mechanisms that protect consumers at national, provincial, local and industry level. Seventy pieces of legislation reviewed.

#### **Case statistics from complaints resolution and investigations**

Trend analysis of cases based on number, type and sector as dealt with at national and provincial level.

Existing provisions relating to the protection of consumers in South Africa are fragmented and outdated, and are mostly incorporated in legislation that is merely incidental to consumer protection. They are further premised on principles that are no longer applicable to the values of the democratic and developing society. This state of affairs has resulted in uneven regulation, with heavy regulation in some industries, and a reliance on self-regulation in other industries, leaving consumers and business, especially small business, vulnerable and subject to widespread abuse.

There are currently no general rules of law relating to the consumer's most basic rights to information, disclosure, fairness, transparency, etc. The current legislative framework does not address the challenges of discriminatory and unfair market practices, proliferation of low quality and unsafe products, lack of awareness of rights, inadequate protection and limited redress as well as weak enforcement systems.

The Department of Trade and Industry ("the dti") considers it desirable to create and promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities. A research project to review and recommend a consumer protection regime suitable for South Africa was therefore commissioned. The scope for this research also entailed conducting an international legislative benchmarking study to benchmark the current South African consumer protection regime against international regulatory frameworks.

The review included focus group discussions with various stakeholders, including industry associations, sector regulators, NGO's, various professional bodies, other government departments, business and consumers from a range of different income and racial profiles. It also included review of current consumer protection measures, a national consumer survey, statistical analysis of cases from complaints resolution, investigations conducted and a general audit of the consumer protection environment in South Africa.



In 2004, that review culminated in the publication of a Draft Green Paper on Consumer Policy Framework. The research outcomes indicated, amongst other things, that many countries, also from Africa, Latin America and the Caribbean, Asia and the Pacific regions, including Argentina, Brazil, Chile, India, the UK, Finland, Canada, Botswana, Uganda and Malawi, have adopted a rights-based approach to consumer protection and developed comprehensive laws that outline upfront the rights and obligations of consumers.

The Draft Consumer Policy Framework, which recommended that comprehensive consumer protection legislation be formulated to implement the consumer protection policy and to create the necessary infrastructure to regulate the market for consumer goods and services, was presented to the parliamentary Portfolio Committee on Trade and Industry and tabled at NEDLAC.

Public consultation workshops were conducted in all provinces and comments from various stakeholders were received and reviewed. A pilot regulatory impact assessment of the policy was conducted. In 2006, the dti published a draft Consumer Protection Bill for public comment. After considering the many submissions and consulting with stakeholders in industry, government and civil society, the Bill has been extensively revised to its present form.

## **2. PURPOSE OF BILL**

The core purpose of the Bill remains true to the vision set out in the policy framework, and in the public exposure draft. As formulated in clause 3, the purposes of the Bill are to promote and advance the social and economic welfare of consumers in South Africa by—

- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
- (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—
  - (i) who are low-income persons or persons comprising low-income communities;
  - (ii) who live in remote, isolated or low density population areas or communities;
  - (iii) who are minors, seniors or other similarly vulnerable consumers;
  - (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;
- (c) promoting fair business practices;
- (d) protecting consumers from—
  - (i) unconscionable, unfair, unreasonable or unjust or otherwise improper trade practices; and
  - (ii) deceptive, misleading, unfair or fraudulent conduct;
- (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;
- (f) promoting consumer confidence and empowerment, and the development of a culture of consumer responsibility through individual and group education, vigilance, advocacy and activism;
- (g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
- (h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.

## **3. SUMMARY OF BILL**

### **3.1 Repeal and replacement of current laws**

Under the existing regulatory framework, the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 91 of 1988), and various other laws regulate consumer protection. This Bill proposes to repeal several laws replacing them with a single

Consumer Protection Act, which will also give priority to its own procedures for enforcement and will modify the common law in several respects. The laws that will be repealed, as set out in clause 121 and the consequential amendments, are:

- (a) Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988)
- (b) Trade Practices Act, 1976 (Act No. 76 of 1976)
- (c) Sale and Service Matters Act, 1964 (Act No. 25 of 1964)
- (d) Business Names Act, 1960 (Act No. 27 of 1960)
- (e) Businesses Act, 1991 (Act No. 71 of 1991)
- (f) Price Control Act, 1964 (Act No. 25 of 1964)
- (g) Sections 2 to 13 and sections 16 to 17 of the Merchandise Marks Act, 1941 (Act No. 17 of 1941)
- (h) Section 54 of the Lotteries Act, 1997 (Act No. 57 of 1997), and related regulations.

### **3.2 SCOPE OF BILL**

The Bill will apply to most transactions in the ordinary course of business between parties within the Republic, to the promotion of goods and services that could lead to such transactions, and to the goods and services themselves after the transaction is completed. This includes franchise transactions or agreements as described in clause 5(6). The Bill applies to goods or services whether promoted by a for profit business, or by a non-profit entity, the State or entities contracted by the State, including Public Private Partnerships.

The dti believes that large transactions involving large businesses and the State do not require the protection offered by the Bill because they would benefit from the flexibility of operating in an unregulated market. Therefore, the Bill will not apply to transactions when—

- (a) the consumer is the State, or any organ of state; or
- (b) the transaction is between two parties who are part of the “supply chain” (e.g. when a distributor sells goods to a retailer) if the value of the transaction falls above a threshold prescribed by the Minister.

The use of a threshold will mean that the protection of the Bill will extend to small shop-keepers and other businesses, when they make routine or minor purchases for the purpose of their business.

However, despite those exceptions, clauses 60 and 61, which deal with unsafe goods, will apply to all goods introduced to the market, even if they were the subject of an exempt transaction.

The Bill is intended to provide a general default regime of consumer protection. It is not to displace or over-ride more specific schemes of consumer protection established in terms of any industry-specific law. Therefore, clause 5(3) provides for the Minister to grant industry-wide exemptions from the application of specific provisions of this Bill on the request of a relevant industry regulator, if the National Consumer Commission (“the Commission”) advises that the specific industry scheme offers at least as much protection for consumers as they would have under this Bill.

In addition, clause 2(9) specifically provides that in case of a conflict between this Bill and any other law protecting consumers within an industry, the laws are to be enforced concurrently, as far as possible, and beyond that, the law that provides the greater degree of protection for consumers is to prevail.

### **3.3 Meaning of transaction and consumer**

The Bill identifies the following elements that make a transaction a consumer transaction, and thus bringing it within the scope of the Bill if—

- (a) it is an interaction or agreement to interact between a consumer and supplier in the ordinary course of the supplier’s business, including in terms of any public regulation;
- (b) there is an exchange of consideration; or
- (c) the interaction concerns the supply or potential supply of goods or services to or at the direction of the consumer.

The definition of consumer is extended to the actual users of goods or services, regardless of who actually may have conducted a transaction or paid for the goods or services. Thus, depending on the context, a consumer means—

- (a) a person to whom goods or services are marketed in the ordinary course of business;
- (b) a person who has entered into an agreement or transaction with a supplier;
- (c) a user of the goods or a recipient or beneficiary of the services; or
- (d) a franchisee in terms of a franchise agreement.

#### **4. CONSUMER PROTECTION**

The Bill codifies a number of fundamental consumer rights, as discussed below.

##### **4.1 The right to equal access to the consumer market**

The right to equal access expands on and is conceptually linked to both the Bill of Rights and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000). It protects communities, districts, market segments or populations from being unfairly discriminated against with regards to access to goods or services of different quality or pricing.

In addition, there is a general prohibition against consumers being subjected to unfair discrimination (as defined in the Constitution) when they are entering into a transaction or agreement, and in all aspects of the conduct of the supplier towards the consumer in the course of the transaction.

Clause 9 sets out a small number of well-defined, long-standing and widely accepted commercial practices that allow differential treatment of consumers of a particular sex, age or gender, and states that those practices are not to be construed as unfair discrimination, if the conduct is reasonable. This will harmonise this Bill with other laws that require differential treatment, for example, the prohibition of sales of alcohol to under-age minors. It will also permit the common practice of discounted prices for children, or for persons over a certain age, and will permit the continued use of separate facilities for different genders. In addition, it will allow suppliers to target their marketing to specific population groups to the extent that is reasonable, having regard to the goods and services being offered.

The equality court is recognised as having exclusive jurisdiction to adjudicate contraventions of this part in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act. If a complaint under this Part is directed to the Commission, it will be referred to the equality court.

##### **4.2 Right to privacy**

The right of consumers to privacy includes the right to accept, refuse or block any approach for the purpose of direct marketing. To enable consumers to exercise this right the Act provides for consumers to make a formal demand to a marketer to discontinue any such approach to that consumer, and it contemplates the establishment of an “Exclusion Register” either by industry or by the Commission. Such a register would allow consumers to pre-emptively block direct marketing approaches. To further protect consumers, the Minister may prescribe certain days, dates and times during which it is prohibited to contact consumers for promotional purposes.

##### **4.3 Consumer’s right to choose**

In order to enhance consumer choice the Bill introduces a number of provisions that are aimed at assisting consumers to select goods or services on the basis of having examined the goods and compared prices. To this end consumers have the following rights:

- (a) Suppliers are prohibited from requiring consumers to purchase bundled goods or services as described in clause 13, unless it can be proven that the bundling results in economic benefit for consumers.
- (b) The right to choose includes the right to decide whether or not to continue a commercial arrangement during the course of an agreement, and once it has expired. Clause 14 establishes the consumer’s right to cancel a fixed-term

agreement, limits the rights of suppliers to impose cancellation charges, and sets out rules governing the expiring of such agreements.

- (c) Suppliers of repair, maintenance or replacement services cannot charge consumers for these services unless the consumer was provided with an estimate which the consumer has authorised. Upfront disclosure for preparing an estimate is also required. Any repairs or maintenance cost above the original estimate has to be authorised by the consumer. However, the supplier can exceed the original estimate if the consumer in writing declines the estimate or pre-authorises any charges up to a specified maximum. The Minister may exempt certain transactions or services below a certain threshold.
- (d) Consumers who are approached by direct marketers often feel psychologically pressured to agree to a transaction. Because that sort of agreement is often not an exercise of free choice, clause 16 establishes the consumers' right to cancel such an agreement without penalty during a brief "cooling-off period" of five business days (i.e. one calendar week).
- (e) The right to choose also includes the right of the consumer to cancel advance reservations or bookings, but suppliers may charge advance deposits and impose reasonable cancellation penalties. Clause 17(4) describes circumstances under which a cancellation penalty may be considered unreasonable.
- (f) The right to choose encompasses the consumer's right to examine goods. This particularly applies to circumstances where the consumer is buying on the basis of a description or sample. Such goods, when delivered, must correspond with the description or sample, or the consumer has a limited right to return them under clause 20.

Under certain circumstances, as described in clause 21, goods or services delivered to or performed for consumers may be regarded as unsolicited, in which case the consumer has no obligation to pay for them, and the return of the goods to the supplier is at the supplier's own risk and expense.

#### **4.4 Right to disclosure and information**

The right to disclosure aims to ensure that consumers understand the terms and conditions of the transactions or agreements they enter into and are able to make informed choices about the products and services they consume. The Bill seeks to advance that right with the following provisions:

- (a) The Bill makes it compulsory to display prices for any goods that are displayed for sale. If two prices are displayed for the same goods, the lowest has to be charged. If an advertisement or notice states that prices are subject to a reduction or sale price, clause 23(11) provides for a consistent application of such notices, so that consumers can better compare prices in a consistent fashion.
- (b) Trade descriptions applied to any goods must not be misleading, and must not be tampered with. The Minister may prescribe categories of goods to which a trade description must be applied. If goods are reconditioned that has to be disclosed, and if they have been imported without the benefit of the manufacturer's warranty (so called "grey market goods"), that fact must be disclosed.
- (c) Clause 26 makes it compulsory for sales records of every transaction to be provided to the consumer and prescribes the information that must be contained in a sales record. The Minister has authority to exempt certain categories of transaction from that requirement.
- (d) Clause 26 sets out disclosure requirements that intermediaries who are not regulated under another law have to comply with. This includes commissions earned, and entities whom they represent. The Minister may prescribe the information or records that intermediaries or categories of intermediaries must keep.
- (e) Persons who attend at a consumer's place of business or residence to deliver or install any goods, or perform any services, must wear satisfactory identification.

Any printed information, document or notice that the Bill requires a supplier to produce, provide or deliver to a consumer must satisfy the plain language requirements of clause 22. Clause 22(2) outlines the circumstances under which a document would

be considered to be in plain language, and the Commission may publish guidelines for methods assessing whether a document satisfies that requirement.

#### **4.5 Right to fair and responsible marketing**

To restrain or correct the worst abuses in the area of the marketing of goods or services, the Bill introduces or re-enacts a number of provisions to address the following matters:

- (a) The Bill sets out standards for fair and responsible marketing and provides a general prohibition against marketing that is misleading, fraudulent or deceptive, as described in clause 35.
- (b) A number of specific marketing and selling practices are prohibited, including bait marketing, negative options and referral selling.
- (c) Clause 32 outlines standards to be adhered to when suppliers engage in direct marketing. Consumers have to be informed and provided with the identity of the agents or person and informed of their right to rescind the agreement during the cooling-off period.
- (d) Clause 33 establishes standards for the conduct of catalogue sales, clause 34 regulates the use of trade coupons, and clause 37 regulates the marketing of work from home schemes.
- (e) The Bill regulates loyalty programmes by requiring sponsors of loyalty programmes to meet their obligations when loyalty credits are tendered, prohibits offering inferior quality products or requiring the bundling of “reward” goods or services with “revenue” products, requires a supplier to accept the tender of sufficient loyalty credits as adequate consideration for goods and services at any time, subject to limited black-out periods. If the sponsor of a loyalty programme keeps a register of members, the sponsor may increase the price of “rewards” only after notifying the members.
- (f) The Bill replaces the current Lottery Act scheme for regulating promotional competitions. Clause 36 prohibits offering prizes with the intention of not providing them. It also prohibits informing consumers that they have won a prize when no competition has been conducted, or they have never entered a competition, or making the prize subject to a previously undisclosed condition payment of any consideration, whether for participating in the competition or for the prize itself.

Clause 39 addresses the legal status of agreements between suppliers and persons who lack legal capacity to enter into such an agreement.

#### **4.6 Right to honest and fair dealing**

Unconscionable conduct, force, coercion, undue influence, pressure or harassment, unfair tactics or conduct is prohibited in connection with any marketing, supply, negotiation, collection or recovery of goods from consumers. A supplier or a person acting on his or her behalf is prohibited from making false, misleading or deceptive representations in respect of any goods and services under the circumstances listed in clause 41.

The Bill retains the existing prohibitions against fraudulent schemes and offers, pyramid and related schemes.

In terms of clause 44, the consumer has the right to assume, and it is an implied term of every transaction, that the supplier or lessor has legal right to sell or lease the goods for full title of the goods to pass to the consumer. If a third party has a legal claim over the goods, the supplier is liable to that third party, unless it can be shown that the supplier and consumer colluded to defraud the third party. However, this does not apply to used goods or immovable property.

New provisions in clause 45 aim to ensure fairness in auctions by regulating the participation of owners or their agents as bidders, and requiring notice of any reserve bid or upset price.

There is a prohibition against overselling and overbooking, which requires a supplier not to accept consideration for any goods or services unless they reasonably expect to have capacity to supply them or intend to provide goods or services that are materially different. Consumers have to be refunded in full with interest and consumers can also claim contractual and consequential damages, including economic losses.

#### **4.7 Right to fair, just and reasonable terms and conditions**

Unreasonable transactions as described in clause 48 are prohibited, as are unjust or unfair terms or conditions.

Currently contracts are regulated in terms of the common law. The Bill aims to codify and improve on the common law by addressing unfair contract terms and provide consumers with remedies where there have been breaches of contract.

Provisions that seek to limit the supplier's liability must be specifically and conspicuously brought to the attention of the consumer, as outlined in clause 49.

Certain agreements or provisions of agreements are listed as unlawful in clause 51, and are void from inception irrespective of the common law or provision of other laws.

Clause 58 provides guidance to the courts with regards to how they should assess unconscionable conduct, unfair, unjust or unreasonable contract terms, or deal with prohibited contract terms.

#### **4.8 Right to fair value, good quality and safety**

This Part aims to safeguard the safety of consumers and to establish a regime of product liability, irrespective of negligence on the part of anyone in the supply chain, which currently does not exist in South Africa.

The Bill provides for a general right for consumers to receive goods that are of good quality and free from defects, as described in clause 55. However, an exception is allowed where the consumer has been expressly informed of the condition of the goods and has expressly agreed to buy them in that particular state.

It provides that consumers have a right to receive goods that are reasonably suitable for the purpose for which they are intended, of good quality, in good working order, free of defects, and useable and durable for a reasonable period of time. In addition, if the consumer had informed the supplier of the use he wants to put the goods to, the consumer has the right to expect that it will be suitable for that particular purpose.

The Bill imposes an obligation on the supplier to issue alerts of any activity or facility that is subject to any hazard that could result in serious injury or death to consumers; notice or instructions of safe handling of goods; notice on how to inhibit any risk associated with the use of goods, and to remedy or mitigate the effects, and provide for the safe disposal of the goods. Suppliers are obligated under the Bill to accept the return of waste goods that may not be accepted in the common waste collection system. Clause 60 creates a framework for industry codes to be developed, establishing schemes of product safety monitoring and, if needed, product recall. The Commission would have authority to order an investigation and recall of any dangerous or defective products covered by any such industry code. In terms of clause 61, a producer, distributor or supplier of a good is strictly liable for any harm wholly or partly caused as a consequence of product defect or failure, with certain exceptions. The liability provided for in the Bill is in addition to any other liability of that person in terms of any law, and extends to loss arising from death, illness or injury, or loss or damage to any property.

#### **4.9 Suppliers accountability to consumers**

The Bill would hold suppliers accountable to consumers for any money or other property belonging to the consumer, but held by the supplier under any agreement, including advance payments for services to be supplied at a later date.

In respect of lay-bys it provides that suppliers are accountable for amounts paid by consumers for lay-bys, and that the goods remain at the risk of the supplier. It further requires the supplier to compensate the consumer if the supplier is unable to produce the goods once the full price has been paid by the consumer.

Clause 63 provides that prepaid certificates, credits and vouchers remain negotiable for up to five years, and that the supplier is obligated to honour them when presented.

The Minister may make regulations to set deposits of containers, pallets and similar objects to be refunded to the consumer when they return it to the supplier. Finally, clause 67 requires suppliers to return parts and materials remaining from maintenance work.

#### **4.10 Right to be heard and obtain redress**

The Bill aims to make redress accessible, and to protect consumers from being victimised if they act to enforce their rights.

Clause 69 outlines the available avenues of redress, including the courts, alternative dispute resolution, and complaint to the Commission. If a complaint arises in an industry in which a statutory ombud scheme is in place, the consumer must pursue a resolution through that scheme before making a complaint to the Commission.

An ombud, consumer court or provincial authority that has resolved a complaint may record the agreement as an order, which must then be confirmed as a consent order by the courts.

If a complaint is made to the Commission, it will investigate, and may make a referral to the Tribunal, which may resolve the matter by making certain orders as contemplated in clause 75.

In addition to their jurisdiction to hear a matter initiated directly by a consumer, the courts have jurisdiction to hear appeals against Tribunal decisions, and may order suppliers to alter or discontinue certain practices, award damages against suppliers for collective injury to all or a class of consumers, to be paid to any person on any terms that the court might decide.

### **5. CONSUMER'S VOICE**

#### **5.1 Role of civil society**

The Bill promotes consumer activism. The dti believes that having informed and active consumers will enhance market and price competition. The Bill recognises the role of civil society in consumer protection by providing for the support of any juristic person or association of persons that meet the set criteria as consumer protection groups.

In terms of clause 77, activities that may be supported are consumer advice and education, research, market monitoring, surveillance and reporting, the promotion of consumer rights and lobbying, representation of consumers, alternative dispute resolution through mediation and conciliation and participation in national and international associations and conferences.

Accredited consumer protection groups may also enforce consumer rights by—

- (a) commencing or undertaking any lawful act to protect the interests of a consumer individually or a group of consumers collectively in any matter or before any forum contemplated in the Bill; and
- (b) intervening in any matter before any forum contemplated in this Act if the interest of consumers represented by that group are not otherwise adequately represented in that forum.

In addition, accredited consumer protection groups have a right to be consulted in respect of any proposed industry code of practice, and any proposed regulations.

### **6. INDUSTRY REGULATION**

#### **6.1 Registration of business names**

Currently, business name registration is optional, serving to protect businesses from other persons encroaching on a trading identity. The dti believes that consumers have a right, and need, to be able to ascertain the identity of the legal person with whom they are dealing. Therefore, the Bill proposes a significant change in the current business name registration scheme by making it mandatory rather than voluntary.

Under the Bill, a person who carries on business may only do that in the person's own full name as recorded in an official form of identification, registered name or a registered alternative business name. Trade catalogues and circulars have to reflect that name, description of the business and statement of the place where it is carried on.

The provisions regarding the criteria for, and registration of, business names have been revised, modernised and harmonised with proposals under discussion for criteria applicable to companies in terms of the Companies Act.

## 6.2 Development of industry codes

Clause 82 establishes a scheme for the development through consultation of industry codes of conduct relating to consumer matters, and provides for them to receive the force of law by being prescribed by the Minister.

## 7. CO-OPERATIVE GOVERNANCE

The Bill recognises that consumer protection is a matter that falls under the functional area of concurrent jurisdiction between provincial and national government in terms of Schedule 4 to the Constitution. To this end, the Bill provides for the Minister to consult the Members of the Provincial Executive Councils responsible for consumer affairs with respect to the—

- (a) co-ordination and harmonisation of the functions of the Commission and the provincial consumer protection authorities;
- (b) facilitation of settlement of any dispute between the Commission and any provincial consumer protection authority;
- (c) determination of steps to be taken to ensure the performance of a particular function by a provincial consumer protection authority, in the case where—
  - (i) no provincial consumer protection authority has been established; or
  - (ii) the Minister has concluded that the existing provincial consumer protection authority is unable to perform that function effectively.

The Bill further sets out the matters over which provincial consumer protection authorities have jurisdiction in respect of activities occurring or application by persons carrying on business exclusively within their provinces, including—

- (a) issuing, on behalf of the Commission, of compliance notices;
- (b) facilitation of mediation and conciliation of disputes arising in terms of this Act; and
- (c) referral of unresolved disputes to provincial consumer courts.

The provincial consumer protection authorities may also request the Commission to initiate a complaint in respect of any apparent prohibited conduct or offence in terms of the Act.

## 8. REGULATORY INSTITUTIONS

The Bill proposes the establishment of the Commission, which, together with the Tribunal, will provide for the effective administration of the Act.

The Commission will be established as an organ of state responsible to the Minister. The Commission will be the primary administrative regulator under the Act responsible for carrying out education, research, investigation of complaints and enforcement of the Act.

The Tribunal established under the National Credit Act, 2005 (Act No. 34 of 2005), will conduct hearings on complaints under the Act and adjudicate certain disputes and alleged prohibited conduct under the Act. The Bill encourages disputants to seek resolution of their disputes through mediation, conciliation and arbitration in their provincial consumer courts, ombuds or other such agencies. The decisions of the Tribunal can be appealed against or reviewed by the High Court.

The Bill requires the Commission to—

- (a) promote and support the development of a fair, transparent, sustainable, responsible, efficient, effective and accessible consumer market and industry, particularly to serve the needs of historically disadvantaged persons, low-income persons and communities, and remote, isolated or low-density areas and communities;
- (b) conduct research and make proposals for reform to improve access to the consumer market or generally to achieve the objectives of the Act;
- (c) develop or accredit codes of practice relating to the Act and promote public awareness of consumer protection matters; and
- (d) investigate and evaluate alleged prohibited conduct and enforce compliance with the Act.



## **9. ENFORCEMENT OF ACT**

The Bill gives the Commission power to—

- (a) issue a compliance notice to a person or association of persons whom the Commission on reasonable grounds believes has engaged in prohibited conduct. It is an offence to fail to comply with a compliance order.
- (b) issue notice of non-referral to the complainant in respect of a complaint that appears to be frivolous or vexatious, or does not allege reliable facts that may constitute grounds for a remedy under this Act.
- (c) refer matters relating to alleged prohibited conduct in terms of the Act to the Tribunal.
- (d) refer matters relating to alleged offences in terms of the Act to the National Prosecuting Authority.

The courts are responsible for the adjudication of all matters relating to alleged offences in terms of the Act, interpretation of law, issuing of declaratory orders and consent orders.

The Bill makes provision for criminal and administrative sanctions. Criminal sanctions relate to offences and administrative sanctions relate to prohibited conduct.

## **10. MANAGED INCREMENTAL INTRODUCTION OF NEW LAW**

Item 2 of the second Schedule, which deals with transitional arrangements, provides a schedule to manage the coming into operation of the Act, so as to afford reasonable time for both suppliers and the regulators to adjust their practices and systems to accommodate the new requirements of the Act. In particular, a year is allowed from the time the Bill is signed and promulgated before the provisions establishing the new Commission will take effect. A further six months is provided for before the remaining provisions will take effect and the old laws will be repealed.

Recognising the extensive scope of this Bill on the consumer economy, and the difficulty of accurately predicting all of the particular administrative changes needed to accommodate it, the transition rules create flexibility by permitting the Minister to defer, for up to a further six months, the effect of any specific provision, if more time proves to be required to prepare for the efficient and effective implementation of the provision.

Finally, recognising that some municipalities may face resource and capacity impediments that could inhibit their ability to address their new obligations as suppliers of goods or services to consumers, the transitional provisions grant the Minister authority, on request by the Minister for Provincial and Local Government, to further defer the application of specific provisions of the Bill to those municipalities as may prove necessary.

## **11. ORGANISATIONAL AND PERSONNEL IMPLICATIONS**

The Commission is not a completely new institution, as it will entail the expansion of the mandate of the Office of Consumer Protection, which is currently being incubated within the dti. It is proposed that it be converted into a statutory body. The agency will require a staff complement of 94 people, 31 of whom will be transferred from the Consumer and Corporate Regulation Division. Therefore 63 positions will have to be filled in future.

## **12. FINANCIAL IMPLICATIONS FOR STATE**

It is envisaged that an amount of R51,3 million for the 2009/10 financial year will need to be budgeted for.

## **13. COMMUNICATION IMPLICATIONS**

The Bill was published in the *Gazette* for public comment, and further consultations were held with other government departments, sector regulators, industry associations, consumer groups, professional associations, trade unions and other interested persons.

#### **14. CONSTITUTIONAL IMPLICATIONS**

Given the fact that the national and provincial governments have concurrent legislative competence in respect of consumer protection, initial consultation was conducted with provinces to ensure that there was broad agreement on the Bill and that potential constitutional concerns have been dealt with.

#### **15. OTHER DEPARTMENTS AND BODIES CONSULTED**

The following departments were consulted on the Bill:

- Department of Social Development
- Department of Housing
- Department of Transport
- Department of Health
- All provincial departments of finance and economic affairs
- SA Law Commission

#### **16. PARLIAMENTARY PROCEDURE**

16.1 The State Law Advisers and the Department of Trade and Industry are of the opinion that the Bill must be dealt with in accordance with the procedure prescribed by section 76(1) or (2) of the Constitution since it falls within a functional area listed in Schedule 4 to the Constitution, namely “consumer protection”.

16.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.



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