

GUIDELINES ON COMPLIANCE TO THE CONSUMER PROTECTION ACT, ACT 68 OF 2008

COMPILED BY THE AFMA - LEGISLATIVE COMMITTEE,

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The purpose of the Consumer Protection Act (CPA) is to prevent unfair and unreasonable business practices and to give consumers an effective means of redress.

The Act and the regulations thereof should be interpreted in the spirit of the law, which implies that the Act will be interpreted in any given situation to give effect to the purpose thereof, which is to protect the rights of the consumer.

1. Section 6 – The threshold of the Act

- The Act applies to any juristic person with an annual turnover or asset value less than R 2 million per annum.

Note : The act applies to any private individual independent of income.

2. Section 8 - Discriminatory marketing

- A supplier may not discriminate unfairly against any consumer when providing goods or services.

3. Section 11 and Regulation 4 - Right to restrict direct marketing

- Consumers have the right to privacy and may place a pre-emptive block on any direct marketing.
- Suppliers are not allowed to contact consumers on:
 - o public holidays and Sundays
 - o Saturdays before 09h00 and after 13h00 and
 - o Weekdays between 20h00 and 08h00, unless the customers specifically agreed otherwise.

4. Section 13 – Consumer’s right to select suppliers

- The consumer should not be required to purchase any bundled products unless the product can be purchased individually and/or the supplier can prove economic benefit and convenience to the consumer.

5. Section 16 – Consumer’s right to cooling-off period after direct marketing

- Consumers have a right to return any product that was obtained via direct marketing within five business days and the supplier has to refund the consumer within fifteen working days after receiving the product.

Note: This section depends on which party initiated the transaction.

6. Section 17 – Consumer’s right to cancel an advance order

- The consumer has the right to cancel orders placed in advance, but the Act excludes any special ordered products.

7. Section 19 – Consumer’s rights with respect to delivery of goods or supply of services

- The supplier is responsible for the delivery of goods and services:
 - o at an agreed date and time,
 - o at an agreed place,
 - o and for the account of the supplier, unless otherwise expressly provided for or anticipated in an agreement.
- The product remains the responsibility and is supplied at the risk of the supplier until such time that the consumer has accepted delivery.

8. Section 20 – Consumer’s right to return goods

- Consumers have the right to return any goods that are unsafe, defective or unsuitable for the specific purpose they were sold for, within ten business days after delivery, unless it is contradictory to public health or the products have been disassembled.
- The supplier may charge a reasonable amount if the product is not in its original package or more than a reasonable amount of product has been used in determining the acceptability thereof to the client.

9. Section 21 – Unsolicited goods

- Any product or goods left at a customer via direct marketing without payment arrangements by the supplier are considered as unsolicited.
- Any product that differ materially from any goods or products supplied as agreed, are also considered unsolicited.
- If a supplier delivers a larger quantity of goods or products than agreed, the excess products or goods are unsolicited, except if the total load is rejected by the consumer.

Note: Supplier must inform the consumer within 10 business days after a delivery was made in error. Furthermore, the supplier has 20 business days to collect the

goods or products delivered in error to prevent the goods or products of becoming unsolicited.

10. Section 22 – Right to information in plain and understandable language

- All visual representations including documents, notices, and information must be in plain, understandable language.
- The consumer from the market segment for which the product is intended, with average literacy skills and minimal experience, should be able to clearly understand all information and the intention of the representation.

11. Section 23 – Disclosure of price of goods on services

- A supplier has to provide an estimate pertaining to the cost of a transaction, unless the customer has waived such estimate.
- A “Retailer” must not display any goods to the consumer without a price.

12. Section 24 – Product Labeling, trade descriptions and Regulation 7

- All products should be labeled in a manner that is in understandable language, clearly indicating the purpose and use of the product.
- Labels may not contain any false or misleading information.
- Any products (goods) that are manufactured or produced by using ingredients containing at least 5% Genetic Modified Organisms (GMO) should be labeled as “Contains Genetically Modified Organisms”.
- The words may not be changed and the notice must be displayed in an obvious and easily legible manner and size.
- This regulation will only come into effect from 30 September 2011.

13. Section 28 – Identification of deliverers, installers and other

- All employees delivering product, providing a service or engaged in direct marketing at the premises of the consumer should visibly wear or display the company logo and be in a position to provide suitable identification on request by the consumer.

14. Section 29 – General standards for marketing of goods or services

- No advertisement may contain false or misleading information or information in a manner in which it is likely to be interpreted as false and misleading.

15. Section 40 – Unconscionable conduct

- Suppliers may not use any physical force, pressure, any form of harassment, unfair tactics or take advantage of a consumer’s disability during any form of marketing activities.

Note: Interpretation of Disability.

16. Section 41 – False, misleading or deceptive representations

- A supplier or person acting on behalf of a supplier is not allowed to make any false, misleading or deceptive representation concerning material information to a consumer.
- No information may be exaggerated or fail to disclose any information that may lead to failure of the product.
- **Suppliers must also correct an apparent misapprehension on the part of the consumer, amounting to a false, misleading or deceptive representation.**

17. Section 48 – Unfair, unreasonable or unjust contract and Regulation 44

- The regulation (no. 44) of the CPA contains a list of unfair contract terms that are prohibited.

44 (1) For purposes of section 120 (d) of the Act, a term of consumer agreement between a supplier operating on a for-profit basis and acting wholly or mainly for purposes related to his or her business or profession and an individual consumer or individual consumers who entered into it for purposes wholly or mainly unrelated to his or her business or profession is presumed to be unfair if it –

- (a) has the purpose or effect of a term listed in subregulation (3), and
 - (b) does not fall within the ambit of subregulation (4).
- (2) (a) The list in sub regulation (3) is indicative only, so that a term listed therein may be fair in view of the particular circumstances of the case.
- (b) The list in sub regulation (3) is non-exhaustive, so that other terms may also be unfair to purposes of section 48 of the Act.
- (c) A term which falls within the ambit of sub regulation (4) remains subject to sections 48 to 52 of the Act.
- (d) This regulation does not derogate from provisions in the Act or other law in terms of or in respect of which a term of an agreement is prohibited.
- (3) A term of a consumer agreement subject to the provisions of sub regulation (1) is presumed to be unfair if it has the purpose or effect of –
- (a) excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier subject to section 61 (1) of the Act;
 - (b) excluding or restricting the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement, including the right of the consumer to set off a debt owed to the supplier against any claim which the consumer which the consumer may have against the supplier;
 - (c) limiting the supplier's obligation to respect commitments undertaken by his or her agents or making his or her commitments subject to compliance with a particular condition which depends exclusively on the supplier;
 - (d) limiting, or having the effect of limiting, the supplier's vicarious liability incurred by it to third parties;
 - (e) forcing the consumer to indemnify the supplier against liability incurred by it to third parties;

- (f) excluding or restricting the consumer's right to rely on the statutory defence of prescription;
- (g) modifying the normal rules regarding the distribution of risk to the detriment of the consumer;
- (h) allowing the supplier to increase the price agreed with the consumer when the agreement was concluded without giving the consumer the right to terminate the agreement;
- (i) enabling the supplier to unilaterally alter the terms of the agreement including the characteristics of the product or service;
- (j) giving the supplier the right to determine whether the goods or services supplied are in conformity with the agreement or giving the supplier the exclusive right to interpret any term of the agreement;
- (k) allowing the supplier to terminate the agreement at will where the same right is not granted to the consumer;
- (l) enabling the supplier to terminate an open-ended agreement without reasonable notice except where the consumer has committed a material breach of contract;
- (m) obliging the consumer to fulfil all his or her obligations where the supplier has failed to fulfil all his or her obligations;
- (n) permitting the supplier, but not the consumer, to avoid or limit performance of the agreement;
- (o) permitting the supplier, but not the consumer, to renew or not renew the agreement;
- (p) allowing the supplier an unreasonably long time to perform;
- (q) allowing the supplier to retain a payment by the consumer where the latter fails to conclude or perform the agreement (without depriving the consumer of the right to claim damages as an alternative);
- (r) requiring a consumer who fails to fulfil his or her obligation to pay damages which significantly exceed the harm suffered by the supplier;
- (s) permitting the supplier, upon termination of the agreement by either party, to demand unreasonably high remuneration for the use of a thing or right, or for performance made, or to demand unreasonably high reimbursement of expenditure;
- (t) giving the supplier the possibility of transferring his or her obligations under the agreement to the detriment of the consumer, without the consumer's agreement;
- (u) restricting the consumer's right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the supplier;
- (v) providing that the consumer must be deemed to have made or not made a statement or acknowledgment to his or her detriment, unless –
 - (i) a suitable period of time is granted to him or her for the making of an express declaration in respect thereof; and
 - (ii) at the commencement of the period the supplier draws the attention of the consumer to the meaning that will be attached to his or her conduct;
- (w) providing that a statement made by the supplier which is of particular interest to the consumer is deemed to have reached the consumer, unless such statement has been sent by prepaid registered post to the chosen address of the consumer;
- (x) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, including by requiring the consumer to take disputes exclusively to arbitration not covered by the Act or other legislation;
- (y) restricting the evidence available to the consumer or imposing on him or her a burden of proof which, according to the applicable law, should lie with the supplier;
- (z) imposing a limitation period that is shorter than otherwise applicable under the common law or legislation for legal steps to be taken by the consumer (including for the making of a written demand and the institution of legal proceedings);

- (aa) entitling the supplier to claim legal or other costs on a higher scale than usual, where there is not also a term entitling the consumer to claim such costs on the same scale;
- (bb) providing that a law other than that of the Republic applies to a consumer agreement concluded and implemented in the Republic, where the consumer was residing in the Republic at the time when the agreement was concluded.

18. Section 51 – Prohibited transaction, agreements, terms or condition

- Section 51 of the Act contains a list of prohibited transactions, agreements and 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;
 - (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;
 - (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 –
 - (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
 - (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 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 –
 - (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 –
 - (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 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 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 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 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 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 is purported to be subject, is void to the extent that it contravenes this section.
- (4) This section does not preclude a supplier to require a personal identification code or number in order to facilitate a transaction that in the normal course of business necessitates the provision of such code or number.

19. Section 56 – Implied warranty of quality

- The Act imposes a six month warranty of quality on all products and services and does not distinguish between fungibles and non- fungible goods. Therefore, the consumer may return any products at the expense of the supplier within six months of delivery.
- All products must contain a “use by” date, e.g. 6 weeks after production date (if production date is clearly visible).

20. Section 61 – Liability for damages caused by goods

- This section of the Act allows for action by any natural person and not only a consumer of the product or goods for harm caused by unsafe goods, product failure, defective or hazards in goods, inadequate instruction or warnings against any producer in the supply chain. The “harm” includes compensation for death, injury or illness, physical loss or damage to movable or immovable property and economical losses to the abovementioned.
- More than one supplier in the supply chain is liable and the court may allocate the liability between different suppliers.
- The claimant has three years to institute a claim.