

CONSUMER PROTECTION BILL

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PURPOSE OF THE ACT

To promote and advance the social and economic welfare of consumers in South Africa by -

- 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
- reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers
- promoting fair business practices
- protecting consumers from unfair, unreasonable or otherwise improper trade practices; and deceptive, misleading, unfair or fraudulent conduct
- Improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour

PURPOSE OF THE ACT (cont):

- Promoting consumer confidence and empowerment, and the development of a culture of consumer responsibility through individual and group education, vigilance, advocacy and activism;
- Providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
- Providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.

DTI'S VIEW:

- The CPB is:
 - A bill of rights for consumers
 - A form of compliance code for business
 - An enhanced enforcement tool of rights that have existed but have not been enforced
 - Codification of the common law
 - The CBP will give life to “consumerism” and introduce “effective consumers”

DTI'S VIEW (cont):

Participation by “effective consumers” will lead to, *inter alia*:

- Improved competitiveness
- Higher quality of goods and services
- Competitive prices and innovation
- Economic sustainability

FRANCHISING STATISTICS

- ± 520 Franchise Systems operating in South Africa
- ± 26 500 Franchise businesses
- ± 500 000 People employed in Franchise Systems
- The franchising industry contributes approximately ± 12% of South Africa's GDP
- Substantial contributor to the South African economy
- Acknowledged to be one of the most successful methods of developing small business which is a priority

FRANCHISING ASSOCIATION OF SOUTHERN AFRICA (“FASA”)

The Primary objectives and purposes of FASA include:

- To promote ethical franchising in South Africa
- To promote and develop best international practices
- To develop franchising in South Africa
- To develop and promote its BEE policies in Franchising

APPLICATION – SOME BASIC CONCEPTS :

Who is consumer?

- A person to whom goods and services are marketed in the ordinary course of business
- A user of such goods or a recipient or beneficiary of such services
- The person who has entered into an agreement or transaction with a supplier
- A franchisee in terms of the franchise agreement

APPLICATION – SOME BASIC CONCEPTS (Cont):

Who is a supplier?

- Any person who markets any goods or services (including a potential franchisor)

“Transaction” includes:

- Any agreement, in the ordinary course of business, between two or more persons for the supply or potential supply of any goods and services in exchange for consideration.
- The supply of goods or services in the ordinary course of business for consideration or otherwise,
- A solicitation of offers to enter into a franchise agreement
- An offer by a potential franchisor to enter into a franchise with a potential franchisee
- A franchise agreement or agreement supplementary to a franchise agreement

APPLICATION – SOME BASIC CONCEPTS (cont):

“Goods” include:

- any tangible object, including any medium on which anything is or may be written or encoded
- 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
- An interest in land or any other immovable property
- Gas, water and electricity

APPLICATION – SOME BASIC CONCEPTS (cont):

“Service” includes but is not limited to:

- Any work or undertaking performed by one person for the direct or indirect benefit of another
- Provision of any education, information, advice or consultation
- 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
- Provision of any entertainment or similar intangible product
- Provision of access to any electronic communication infrastructure
- Provision of access, or of a right of access, to any event, activity or facility
- Rights of a franchisee in terms of a franchise agreement

FRANCHISE AGREEMENT DEFINITION

- Franchise agreement means an agreement:
 - where a Franchisor grants to the Franchisee a right to carry out business under a system or marketing plan substantially determined or controlled by the Franchisor or its associate; and
 - the business will be substantially or materially associated with advertising, a trade mark, or commercial symbol or a logo type owned, used or licensed by the Franchisee or its associate.

REQUIREMENTS OF A FRANCHISE AGREEMENT

- A franchise agreement must:
 - (a) be in writing and signed by or on behalf of the franchisee
 - (b) include prescribed information (eg. disclosure) or address any prescribed categories of information (Regulations)
 - (c) must be stated in plain and understandable language

REQUIREMENTS OF A FRANCHISE AGREEMENT (contd):

Cancellation

- A franchisee may cancel a franchise agreement without cost or penalty within 10 business days after signing the agreement, by giving notice to the franchisor
- The Minister may make regulations with respect to information to be set out in the franchise agreement:
 - generally; or
 - within specific categories or industries
- Required disclosure will probably be fairly comprehensive and may vary between industries or categories (Regulations)

CERTAIN KEY PROVISIONS OF THE CONSUMER PROTECTION BILL

- Right to Equality
- Right to Privacy
- Right to Choose
- Right to Disclosure and Information
- Fair and Responsible Marketing
- Honest Dealing and Fair Agreements
- Fair Value, Good Quality and Safety
- Supplier's Accountability

RIGHT TO CHOOSE

Section 13 – Consumer’s right to select suppliers and products

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

Unless the supplier can show that bundling the goods and services outweighs the consumers limitation of choice; or that the bundling of these goods or services appears to result in economic benefit to consumers.

RIGHT TO CHOOSE (contd):

Section 13 – Consumer’s right to select suppliers and products

- It is a defense, in certain instances, to any contravention of this section, if the goods or services are reasonably related to the franchisors branded products or services

RIGHT TO CHOOSE (contd):

Section 14. - Expiry and renewal of fixed term contracts

- If a consumer agreement is for a fixed term:
 - the term must not exceed the maximum period prescribed (in the regulations) for the contract

Despite any provision of the consumer agreement to the contrary

RIGHT TO CHOOSE (contd):

Section 14. - Expiry and renewal of fixed term contracts

- The consumer may cancel the agreement:
 - Upon expiry of its fixed term without penalty, provided he pays all amounts up to date of cancellation
 - At any time by giving 20 business days notice (without any good reason)
 - Provided he pays all amounts up to date of cancellation; and
 - Pays any reasonable cancellation penalty imposed by the supplier, if any, and
 - The supplier credits the consumer for any property of the consumer
 - In accordance with the regulations prescribed by the Minister

RIGHT TO CHOOSE (contd):

SECTION 14. – EXPIRY AND RENEWAL OF FIXED TERM CONTRACTS:

- 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
- There are also provisions relating to renewal and notice (between 40 to 80 days) of any changes to the new contract

RIGHT TO CHOOSE (contd):

SECTION 14. – EXPIRY AND RENEWAL OF FIXED TERM CONTRACTS:

- The Minister will make regulations regarding:
 - Maximum duration for fixed term contracts
 - Manner and form of notice of renewal
 - Manner, form and basis of reasonable credits for early cancellation
 - Other incidental matters.

RIGHT TO HONEST AND FAIR DEALING

Unconscionable conduct

A person must not use physical force, coercion, undue influence, pressure or harassment, unfair tactics or any other similar tactics in connection with: -

- Marketing or supply of goods or services
- Registration, conclusion, execution or enforcement of any agreement
- Demand for, collection of, payment for goods or services
- Recovery of goods.

FALSE, MISLEADING OR DECEPTIVE REPRESENTATIONS

In the marketing of goods or services the supplier must not by words or conduct,-

- Express or imply a false, misleading or deceptive representation concerning a material fact
- Use exaggeration, innuendos or ambiguity or fail to disclose a material fact
- Fail to correct an apparent misapprehension

Or permit or require any person to do so on behalf of the supplier.

RIGHT TO FAIR, JUST AND REASONABLE TERMS AND CONDITIONS

A supplier must not –

- Market, offer or agree to supply goods or services at a manifestly unfair, unreasonable or unjust price or terms.
- Require a consumer to waive any rights including terms that are unjust, unfair or unreasonable

RIGHT TO FAIR, JUST AND REASONABLE TERMS AND CONDITIONS (contd):

A term or condition is unfair, unreasonable or unjust if it:

- is excessively one – sided
- So adverse it is inequitable
- The consumer relied on a false, misleading or deceptive representation
- Notice of an onerous or unusual clause was not given

RIGHT TO FAIR, JUST AND REASONABLE TERMS AND CONDITIONS (contd):

Notice required for certain terms and conditions

The attention of the consumer must be drawn to:-

- Any limitation of liability of the supplier
- Any assumption of risk by the consumer
- Any indemnity
- Any fact acknowledged by the consumer

RIGHT TO FAIR, JUST AND REASONABLE TERMS AND CONDITIONS (contd):

Notice required for Certain Terms and Conditions

In addition any provision of

- an unusual character or nature
- The presence of which is not reasonably to be expected

POWERS OF A COURT TO ENSURE FAIR AND JUST CONDUCT, TERMS AND CONDITIONS

If a court determines that a transaction or agreement was in whole or part, unconscionable, unreasonable or unjust, the court may:

- make a declaration to this effect
- Make an order it considers fair and reasonable in the circumstances including –
 - to restore money or property to the consumer
 - to compensate the consumer for losses or expenses relating to the transaction or court proceedings
 - ordering the supplier to cease any such practice

POWERS OF A COURT TO ENSURE FAIR AND JUST CONDUCT, TERMS AND CONDITIONS (contd):

- A Court can also make an order:
 - Severing any part of an agreement, provision or notice, or if it is reasonable to do, so alter it to render it lawful
 - Declare the entire agreement, provision or notice void as from the date it took effect
 - Make any further order that is just or reasonable in the circumstances

CONCERNS

- Discourage international Licensing and Franchising into South Africa
- Uncertainty if regulations delayed, not clear, not fair and not real for example penalties for early termination
- Abuse or “Theft” by Franchisees of successful business concepts and systems employing many people
- Possible damage, detrimental and prejudice to Franchise Industry and Franchising method of business expansion
- According to statistics 90% of problems in Franchising related to inadequate upfront disclosure. Hopefully this will be properly addressed in the regulations.

CONCERNS (contd:)

- Franchisor may cancel on material breach, whereas the Franchisee may cancel for no good reason → For a bill that introduces fairness and equity this is inconsistent
- 26 500 Franchise businesses could be cancelled for no good reason
- It would be a great pity if probably the best vehicle to develop small business is damaged or prejudiced, because of a few incompetent franchisors who are not dealt with appropriately

RECOMMENDATIONS TO FRANCHISORS

- Audit of Franchise Agreement and Disclosure Document for compliance regarding:
 - The general franchise provisions
 - Industry and activity specifics
- Ensure that the Franchise Agreement and Disclosure Document is accurate, sufficiently comprehensive, reasonable and fair (can use FASA code as a guideline)

RECOMMENDATIONS TO FRANCHISORS (contd):

- Check important provisions such as suppliers and regarding general principles such as fairness, equity, good quality products and services, value, reasonableness and clear and understandable language

THANK YOU

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