

# **THE CONSUMER PROTECTION ACT**

## **Southern Africa Stainless Steel Development Association**

**presented by  
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20 October 2010**



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# Introduction and status of the Act

- Consumer Protection Act 68 of 2008 - signed into law on 24 April 2009.
- Draft regulations still to be finalised.
- Certain provisions of the Act came into effect on 24 April 2010, primarily:
  - the establishment of a National Consumer Commission; and
  - no-fault liability provisions.
- All other provisions will come into effect on 1 April 2011.

# Purpose of and philosophy behind the Act

- The purpose of the Act is to promote and advance the social and economic welfare of consumers in South Africa.
- In South African law a combination of the principle of courts holding a contracting party to his bargain and an inequality of bargaining power has in the past stacked the odds in favour of the supplier. The Act will turn the tables in favour of the consumer and for the immediate future will trade the commercial certainty of holding a contracting party to their bargain for new rights for consumers. Suppliers will face additional costs in order to comply with the Act.
- Do you really have to worry?

## Application of the Act

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- The Act applies (subject to some exemptions) to:
  - every transaction in South Africa concerning the supply of goods or services;
  - the promotion of goods and services; and
  - the goods and services themselves.

## Exemptions from application

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- The Act does not apply to transactions when:
  - The consumer is the State;
  - consumer is a juristic person with annual turnover or asset value over the threshold to be set by Minister (at R3m);
  - the transaction constitutes a credit agreement (the goods or services are still subject to the Act);
  - services supplied by an employee;

## Exemptions from application

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- a transaction giving effect to a collective bargaining agreement; or
- industry-wide exemption from one or more provisions of the Act.

However, the provisions on

- product recall (section 60); and
- product liability (section 61),

will apply to all goods, even if the transaction is exempt.

# What is a transaction

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- A transaction is:
  - in respect of a person acting in the ordinary course of business;
    - an agreement between a consumer and supplier for the supply (or potential supply) of goods or services, for consideration (consideration is widely defined in the Act and includes anything of value given and accepted in exchange for goods and services);
    - an actual supply of goods or services to or at the direction of consumer, for consideration; or
    - a supply of goods or services by a club, trade union, society etc. to its members, and
    - Franchise – related agreements.

## Who is a supplier

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- 'A person who markets (promotes or supplies) any goods or services'.
- Supply includes:
  - selling, renting, exchanging, hiring goods for consideration in ordinary course of business; or
  - performing services / arranging for them to be performed, granting access to premises or facilities in ordinary course of business for consideration.

## Who is a consumer

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- A person to whom goods or services are promoted or supplied in the ordinary course of the supplier's business;
- a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business;
- a user of goods or recipient or beneficiary of services (even when the user, recipient or beneficiary wasn't a party to the transaction); or
- a franchisee in terms of franchise agreement.

## Goods

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- Anything marketed for human consumption;
- any other tangible object, including any medium on which anything is 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 licence to use such intangible product;
- legal interest in land or other immovable property, except an interest within the definition of “service”;  
and
- gas, water and electricity.

## Services

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- Any work or undertaking performed by one person for the direct or indirect benefit of another;
- the provision of a right of occupancy of, or power or privilege in land;
- the provision of education, information, advice or consultation;
- banking services, related or similar financial services, or undertaking, underwriting or assumption of risk by a person on behalf of another
- provision of access, or a right of access to any premises; and
- accommodation, sustenance, entertainment, transport etc.

# Franchise Agreements

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- A Franchise Agreement must:
  - be in writing and signed by or on behalf of the franchisee;
  - include any prescribed information, or address any prescribed categories of information; and
  - comply with the written agreement and plain language provisions of the Act.
- 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.



## Your industry

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- The mill
- The distributors
- The fabricators
- The consumer

## Consumer's right to choose

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- **Consumer's right to cancel orders**
  - A consumer has the right to cancel any advance order for goods or services.
  - But a supplier who accepts an order to supply may require a reasonable deposit and impose a reasonable charge for cancellation



## Consumer's right to choose (cont)

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- **Consumer's right to choose and examine goods**
  - A consumer is not responsible for any loss or damage to any goods displayed by a supplier, unless the loss is occasioned by the consumer's gross negligence or recklessness, malicious behaviour or criminal conduct.
  - If the consumer has agreed to purchase goods solely on the basis of a description or sample, the goods delivered to the consumer must correspond in all material respects and characteristics 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.



## Consumer's right to choose (cont)

- **Consumer's rights with respect to delivery of goods or supply of services**
  - It is an implied condition of every transaction for the supply of goods or services that the supplier will deliver the goods or perform the services at the agreed date and time and at the agreed place of delivery or performance, at supplier's cost, or if not agreed within a reasonable time.
  - 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.



## Consumer's right to choose (cont)

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- 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:
  - accept the delivery or performance at that location, date and time;
  - require the delivery or performance at the agreed location, date and time, if that date and time have not yet passed; or
  - cancel the agreement without penalty, treating any delivered goods or performed services as unsolicited goods or services.

# Consumer's right to choose (cont)

- **Consumer's right to return goods**
  - A consumer may return goods to a supplier, and receive a full refund of any consideration paid for those goods, if the supplier has delivered goods that the consumer did not have an opportunity to examine before delivery, and the consumer has rejected delivery of those goods because they were not of a type and quality reasonably contemplated in the agreement;
  - Upon return of any goods, the supplier must refund to the consumer the price paid for the goods, less any amount that may be charged to restore good to their original condition.

# Right to disclosure and information

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- **Right to information in plain and understandable language**
  - 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 in plain language, if no form has been prescribed for that notice, document or visual representation;

# Right to disclosure and information (cont)

- **Product labelling and trade descriptions**
  - A retailer of goods must:
    - not offer to supply, display or supply any particular goods if the retailer knows, reasonably could determine or has reason to suspect that:
      - 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
      - a trade description or trade mark applied to those goods has been altered.

# Right to disclosure and information (cont)

- **Sales records**
  - 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;
  - The record contemplated above must include at least the following information:
    - the supplier's full name, or registered business name, and VAT registration number, if any;
    - the address of the premises at which, or from which, the goods or services were supplied;

# Right to disclosure and information (cont)

- the date on which the transaction occurred;
- a name or description of any goods or services supplied or to be supplied;
- the unit price of any particular goods or services supplied or to be
- the quantity of any particular goods or services supplied or to be supplied;
- the total price of the transaction, before any applicable taxes;
- the amount of any applicable taxes; and
- the total price of the transaction, including any applicable taxes.

# Right to fair and responsible marketing

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- **General standards for marketing of goods or services**
  - A producer, importer, distributor, retailer or service provider must not market any goods or services:
    - in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services; or
    - in a manner that is misleading, fraudulent or deceptive in any way.

# Right to fair and responsible marketing (cont)

- **Bait marketing**

- 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.
- 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.

# Right to fair and honest dealing

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- **Unconscionable conduct**
  - It is unconscionable for a supplier knowingly to take advantage of the fact that a 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.



## Right to fair and honest dealing (cont)

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- **False, misleading or deceptive representations**
  - In relation to the marketing of any goods or services, the supplier must not, by words or conduct-
    - directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;
    - 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
    - fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation



## Right to fair and honest dealing (cont)

- 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:
  - the supplier of any goods or services has any particular status, affiliation, connection, sponsorship or approval that they do not have;
  - any goods or services:
    - have ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship or approval that they do not have;
    - are of a particular standard, quality, grade, style or model;
    - are new or unused, if they are not or if they are reconditioned;



## Right to fair and honest dealing (cont)

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- have been used for a period to an extent or in a manner that is materially different from the facts;
- have been supplied in accordance with a previous representation; or
- are available or can be delivered or performed within a specified time.

# Right to fair, just and reasonable terms and conditions

- **Unfair, unreasonable or unjust contact terms**
  - A supplier must not:
    - offer to supply, supply, or enter into an agreement to supply, any goods or services:
      - at a price that is unfair, unreasonable or unjust; or
      - on terms that are unfair, unreasonable or unjust;
    - 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

# Right to fair, just and reasonable terms and conditions (cont)

- require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer:
  - to waive any rights;
  - assume any obligation; or
  - 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.

# Right to fair, just and reasonable terms and conditions (cont)

- 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-
  - it is excessively one-sided;
  - so adverse as to be inequitable;
  - the consumer relied upon a false, misleading or deceptive representation, to the detriment of the consumer; or
  - the transaction or agreement was subject to a term that was unfair, unreasonable, unjust or unconscionable or 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.

# Right to fair, just and reasonable terms and conditions (cont)

- **Notice required for certain terms and conditions**
  - Any notice to consumers or provision of a consumer agreement that purports to:
    - limit in any way the risk or liability of the supplier or any other person;
    - constitute an assumption of risk or liability by the consumer;
    - impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
    - 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 certain requirements.

# Right to fair, just and reasonable terms and conditions (cont)

- A provision, condition or notice must be written in plain language.
- The fact, nature and effect of the provision or notice must be drawn to the attention of the consumer-
  - in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and
  - before the earlier of the time at which the consumer:
    - enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or
    - is required or expected to offer consideration for the transaction or agreement.

# Right to fair, just and reasonable terms and conditions (cont)

- **Prohibited transactions, agreements, terms or conditions**
  - A supplier must not make a transaction or agreement subject to any term or condition if:
    - its general purpose or effect is to defeat the purposes and the Act, mislead or deceive the consumer or subject the consumer to fraudulent conduct;
    - it directly or indirectly purports to
      - deprive a consumer of a right, avoid a supplier's obligation or duty in terms of this Act, set aside or override the effect of any provision of this Act;

# Right to fair, just and reasonable terms and conditions (cont)

- it purports to:
  - 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;
  - constitute an assumption of risk or liability by the consumer for such a loss;
  - impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier.

# Right to fair value, good quality and safety

- **Consumer's right to demand quality service**
  - When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to:
    - the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;
    - performance of the services in a manner and quality that persons are generally entitled to expect;
    - 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

# Right to fair value, good quality and safety (cont)

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- 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.

# Right to fair value, good quality and safety (cont)

- If a supplier fails to perform a service to the standards contemplated above, the consumer may require the supplier to either:
  - remedy any defect in the quality of the services performed or goods supplied; or
  - 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.

# Right to fair value, good quality and safety (cont)

- **Consumer's rights to safe, good quality goods**
  - Except otherwise advised or agreed to, every consumer has a right to receive goods that:
    - are reasonably suitable for the purposes for which they are generally intended;
    - are of good quality, in good working order and free of any defects;
    - 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
    - comply with any applicable standards or any other public regulation.

# Right to fair value, good quality and safety (cont)

- The above do not apply to a transaction if the consumer:
  - has been expressly informed that particular goods were offered in a specific condition; and
  - has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.

# Right to fair value, good quality and safety (cont)

- **Implied Warranty of quality**

- 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 (consumer's right to safe, good quality goods), 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.

# Right to fair value, good quality and safety (cont)

- 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 (consumer's rights to safe, good quality goods), and the supplier must, at the direction of the consumer, either:
  - repair or replace the failed, unsafe or defective goods; or
  - refund to the consumer the price paid by the consumer, for the goods.

# Right to fair value, good quality and safety (cont)

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- If a supplier repairs 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:
  - replace the goods; or
  - refund to the consumer the price paid by the consumer for the goods.

# Right to fair value, good quality and safety

- **Safety, monitoring and recall**
  - 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, the Commission, by written notice, may require that producer to:
    - conduct an investigation; or
    - carry out a recall programme on any terms required by the Commission.

# Right to fair value, good quality and safety (cont)

- **Liability for damage caused by goods**
  - The producer or importer, distributor or retailer of any goods is liable for any harm caused wholly or partly as a consequence of:
    - supplying any unsafe goods;
    - a product failure, defect or hazard in any goods; or
    - 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.

# Right to fair value, good quality and safety (cont)

- Liability of a particular person in terms of this section does not arise if:
  - the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;
  - the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time it was supplied by that person to another person alleged to be liable (unless wholly attributable to compliance by the person to whom the goods were supplied with instructions provided by the person who supplied the goods);

# Right to fair value, good quality and safety (cont)

- it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers.
- harm for which a person may be held liable in terms of this section includes:
  - the death of, or injury to, any natural person;
  - an illness of any natural person;
  - any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and
  - any economic loss flowing from the above.

# Consumer protection institutions

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- National Consumer Commission ("**NCC**") – enforces the Act.
- Powers given to ombuds, industry ombuds, alternative dispute resolution agents – resolve disputes.
- National Consumer Tribunal – adjudicates on applications or allegations of prohibited conduct.

## Enforcement of the Act

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- Enforcement by NCC
  - issues compliance notices;
  - if non-compliance, Commissioner may either:
    - apply to Tribunal to impose administrative fine; or
    - refer the matter to the NPA for prosecution as an offence,
  - there is a risk of invalidity of an offending provision, notice or agreement;
  - cease order and/or;
  - damages; and
  - substantial disruption of supplier's business.

# Penalties

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- Fine or prison (up to 12 months) or both.
- Tribunal may impose an administrative fine:  
maximum
  - **10% of the respondent's turnover during last financial year, or**
  - R1 million, whichever is the greater.

**The end**



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