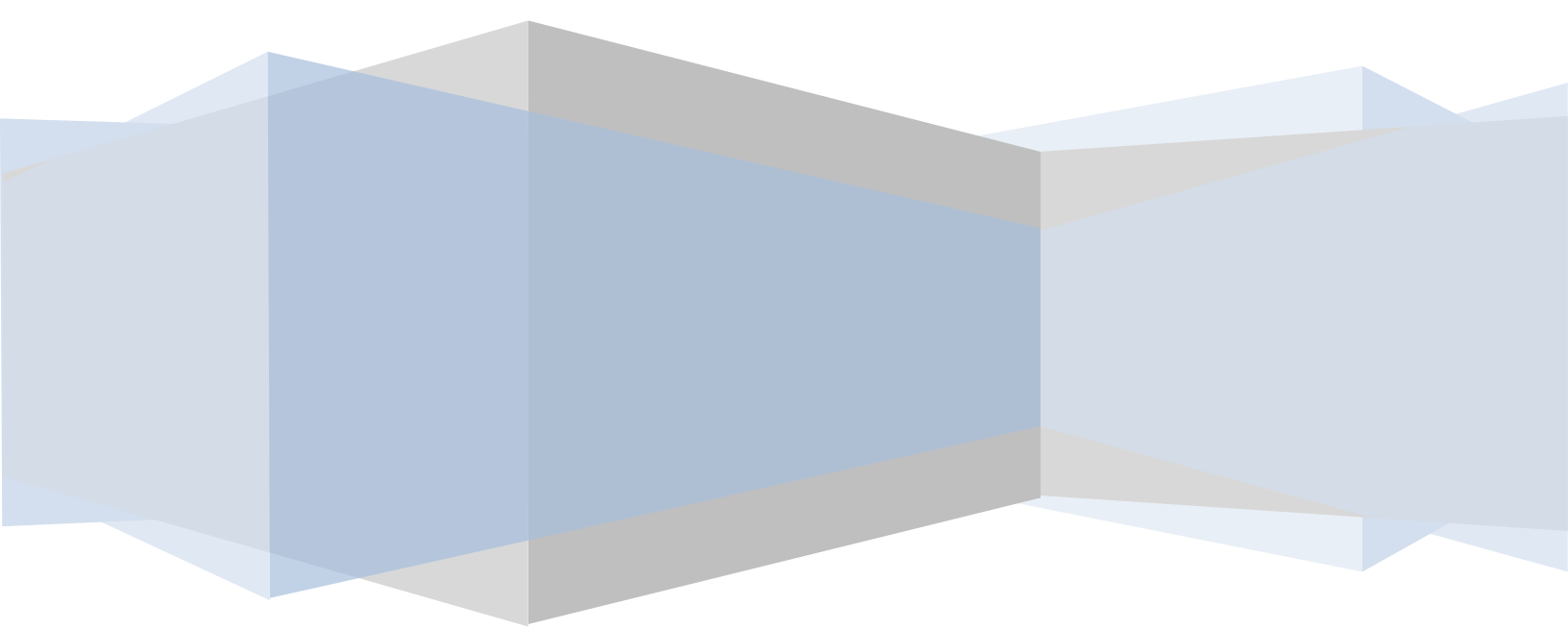


The Consumer Protection Act

Functional Readiness Report



Sunday, May 23, 2010

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This report was compiled for:

Client Name:

Client Email:

Client Contact Number:

Date: Sunday, May 23, 2010

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Consumer Protection Act Detailed Readiness Report

This is a detailed DipStick report with analysis of your degree of readiness for the Consumer Protection Act based on the questions answered. Each section has relevant interpretation of the Act to provide perspective and assist with the formulation of a strategy.

The report has been structured in such a way as to enable each Functional Area of the Organisation to take their section and understand how the Consumer Protection Act will impact them and evaluate what behavioral changes must take place.

This “stand alone” design has meant that some sections of interpretation have been repeated in the document.

About the Act

The Consumer Protection Act will fundamentally change the way business is done in South Africa. It requires businesses to *transform* the way in which they interact with consumers and to ensure that all their dealings with consumers are fair, reasonable and honest.

The challenge that the suppliers of goods or services will face is that it is not just a matter of simple compliance. Whilst many organisations may have the in-house skills to interpret the Act in the context of their business, they will find it difficult to implement, as it is cross-cutting and will require behaviour changes across the organisation.

Effective risk management will require, firstly, that everyone across the organisation is attuned to how he or she could place the organisation at risk and, secondly, that a sustainable change to functional behaviour is instituted. The penalties are severe - a supplier who is found by the Tribunal to have contravened the Act may face:

- An administrative fine up to 10% of annual turnover or
- A fine of R1 Million, whichever is the greatest.

Most of the provisions of the Act come into effect on 25 October 2010, which is 18 months after the date on which the Act was signed. An important exception is the harsh **Section 61**, which holds suppliers liable for damages caused by defective goods even if the suppliers were not negligent. This section applies in respect of any goods that were first supplied to a consumer on or after 25 April 2010.

South Africa’s mercantile law has often in the past been criticised for favouring powerful businesses and organisations over the ‘little man’, with the general approach applied being ‘let the buyer beware.’ Previously, it was virtually impossible for consumers who

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had suffered losses as a result of defective goods purchased from merchants to sue those merchants for damages.

Under the new Consumer Protection Act, consumers enjoy an array of protections, which include the legal right to demand quality service and safe, good quality goods. Consumers are now entitled to cancel agreements and bookings under certain circumstances.

A consumer no longer needs to prove fault on the part of an importer, producer, importer, distributor or retailer of goods in order to succeed in a legal claim in connection with any harm or loss suffered by a consumer that was caused by a defect in the goods supplied to the consumer.

This has opened the way for massive American style liability suits. Apart from this exposure to civil liability, a business that fails to comply with the Act could face a fine of R1 000 000 or 10% of its annual turnover, whichever is the greater.

Tick box compliance with the provisions of the Act will not be sufficient– the organisations covered by the Act will need to change the way they do business.

PURPOSE AND POLICY

3. (1) The purposes of this Act 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; or

(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;

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(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;

(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.

FUNDAMENTAL CONSUMER RIGHTS

- **Right of equality in consumer market**
 - Protection against discriminatory marketing
 - Reasonable grounds for differential treatment in specific circumstances
 - Equality court jurisdiction over this Part

- **Consumer's right to privacy**
 - Right to restrict unwanted direct marketing
 - Regulation of time for contacting consumers

- **Consumer's right to choose**
 - Consumer's right to select suppliers
 - Expiry and renewal of fixed-term agreements
 - Pre-authorisation of repair or maintenance service
 - Consumer's right to cooling-off period after direct marketing
 - Consumer's right to cancel advance reservation, booking or order
 - Consumer's right to choose or examine goods
 - Consumer's rights with respect to delivery of goods or supply of service

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- Consumer's right to return goods
- Unsolicited goods or services

- **Right to disclosure and information**
 - Right to information in plain and understandable language
 - Disclosure of price of goods or services
 - Product labeling and trade descriptions
 - Disclosure of reconditioned or grey market goods
 - Sales records
 - Disclosure by intermediaries
 - Identification of deliverers, installers and others

- **Right to fair and responsible marketing**
 - General standards for marketing of goods or services
 - Bait marketing
 - Negative option marketing
 - Direct marketing to consumers
 - Catalogue marketing
 - Trade coupons and similar promotions
 - Customer loyalty programmes
 - Promotional competitions
 - Alternative work schemes
 - Referral selling
 - Agreements with persons lacking legal capacity

- **Right to fair and honest dealing**
 - Unconscionable conduct
 - False, misleading or deceptive representations
 - Fraudulent schemes and offers
 - Pyramid and related schemes
 - Consumer's right to assume supplier is entitled to sell goods
 - Auctions
 - Changes, deferrals, and waivers and substitution of goods
 - Over-selling and over-booking

- **Right to fair, just and reasonable terms and conditions**
 - Unfair, unreasonable or unjust contract terms
 - Notice required for certain terms and conditions
 - Written consumer agreements
 - Prohibited transactions, agreements, terms or conditions
 - Powers of court to ensure fair and just conduct, terms and conditions

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- **Right to fair value, good quality and safety**
 - Definitions applicable to this Part
 - Consumer's rights to demand quality service
 - Consumer's rights to safe, good quality goods
 - Implied warranty of quality
 - Warranty on repaired goods
 - Warning concerning fact and nature of risks
 - Recovery and safe disposal of designated products or components
 - Safety monitoring and recall
 - Liability for damage caused by goods

- **Supplier's accountability to consumers**
 - Lay-by's
 - Prepaid certificates, credits and vouchers
 - Prepaid services and access to service facilities
 - Supplier to hold and account for consumer's property
 - Deposits in respect of containers, pallets or similar objects
 - Return of parts and materials

PROTECTION OF CONSUMER RIGHTS AND CONSUMER'S VOICE

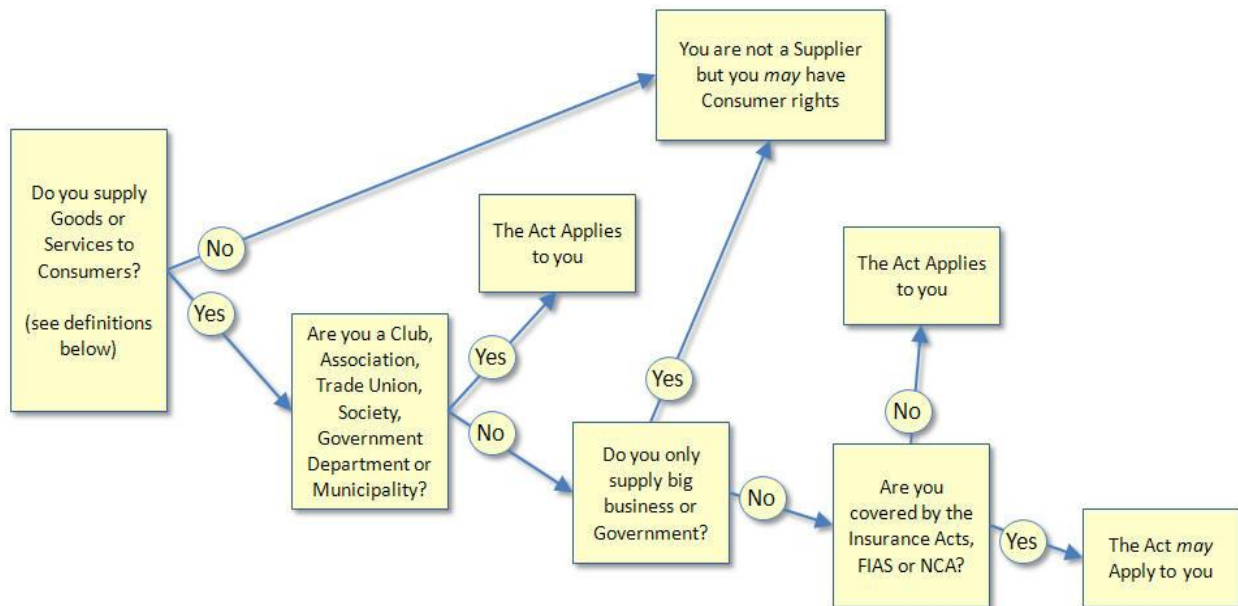
- **Consumer's rights**
 - Protection of consumer rights
 - Enforcement of rights by consumer
 - Alternative dispute resolution
 - Initiating complaint to Commission

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Does the Act apply to your Organisation?

The Act regulates the activities of suppliers and creates rights for consumers. It applies to virtually every entity supplying **goods** and **services** in South Africa and the **transactions** it enters into with consumers.



Definition of a Supplier:

A person or an entity who markets Goods and Services, irrespective of whether the supplier:

- Resides or has its principal office within or outside the Republic
- Operates on a for-profit basis or otherwise
- Is an individual, company, close corporation, 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 ... or is a public-private partnership
- Is required or licensed in terms of any public regulation to make the supply of the particular goods or services available.

Definition of a Consumer:

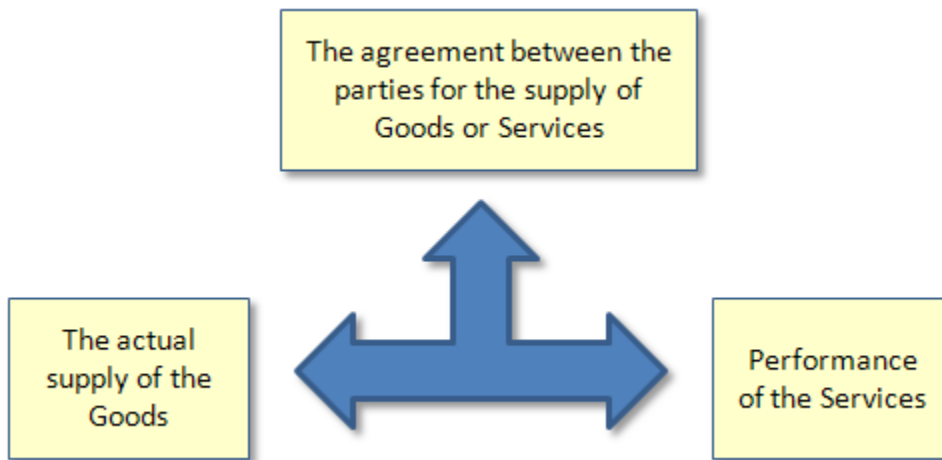
- A person to whom particular goods or services are marketed in the ordinary course of the supplier's business

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- A person who has entered into a transaction with a supplier in the ordinary course of the supplier's business
- A user of those particular goods or recipient or beneficiary of those particular services, irrespective whether that user, recipient or beneficiary was a party to a transaction ...
- A franchisee in terms of a franchise agreement

The definition of transaction given in the Act has three components:



Voluntary associations

Also included in the definition of a transaction is 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 voluntary association sharing a common purpose. This is true even if nothing is charged for the service or if there is no fee or economic contribution required to be a member (Section 5(6)).

Franchise transactions

The following transactions relating to a franchise relationship are specifically stated by Section 5(6) to be transactions covered by the Act:

- A solicitation of offers to enter into a franchise agreement
- An offer by a potential franchisor to enter into a franchise agreement with a potential franchisee
- A franchise agreement or an agreement supplementary to a franchise agreement
- The supply of any goods or services to a franchisee in terms of a franchise agreement.

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The Act applies to the above transactions relating to a franchise relationship irrespective of whether the size of the juristic person falls above or below the threshold determined by the Minister. The threshold is the dividing line, determined according to the size of a business in terms of assets or annual turnover, between companies that are eligible to be treated as consumers under the Act and those that are excluded (Section 5(7)). Franchises are considered more fully in Chapter 11.

The definition of the term **Market**:

To Promote:

- 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;
- 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
- 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

To Supply:

- In relation to **GOODS**: includes sell, rent, exchange and hire in the ordinary course of business for consideration;
- 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.

Consideration:

The **consideration** referred to in the definitions of **promote** and **supply** means anything of value given and accepted in exchange for goods or services, including:

- Money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object
- Labour, barter or other goods or services
- Loyalty credit or award, coupon or other right to assert a claim
- 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.

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The definition of **marketing** refers to **goods and services**. These concepts are explained in the blocks below.

GOODS:

- Anything marketed for human consumption;
- Any other 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 license to use any such intangible product;
- 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
- Gas, water and electricity

SERVICES:

- Any work or undertaking performed by one person for the direct or indirect benefit of another;
- 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**
- 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:
- Constitutes advice or intermediary services that is subject to regulation in terms of the **Financial Advisory and Intermediary Services Act**
- Is regulated in terms of the **Long-term Insurance Act, 1998** or the **Short-term Insurance Act, 1998**.
- The transportation of an individual or any goods.
- The provision of:
 - Any accommodation or sustenance
 - Any entertainment or similar intangible product or access to any such entertainment or intangible product;
 - Access to any electronic communication infrastructure
 - Access, or of a right of access, **to an event** or to any premises, activity or facility
 - Access to or use of **any premises** or other property in terms of a **rental**.
- 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
- Rights of a franchisee in terms of a franchise agreement... irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service.

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Not covered by the Act:

The Act does not apply to everyone and everything. Those entities and transactions that are not considered by the Act to be consumers are listed below. This means that the entities mentioned do not enjoy the benefits of being a consumer, although they may still be bound by the requirements that apply to suppliers.

Government - Transactions including supply of goods and services to the State - Section 5 (2)(a)

Big business - Transactions involving supply of goods and services to juristic persons (companies, closed corporations etc.) whose asset value or annual income is over the threshold value (Likely to be R 5 million initially) - Section 5 (2)(b)

Credit agreement - Any credit agreement under the National Credit Act (but the goods and services themselves are covered) - Section 5 (2)(d)

Employment services - Services supplied under an employment contract - Section 5 (2)(e)

Collective bargaining agreements - Collective agreements & Collective bargaining agreements in terms of the Constitution and Labour Relations Act - Section 5 (2)(f)

Exempted - If exempted by the Minister - Section 5 (2)(c), Section 5 (3)(a) & Section 5 (4)

Government

It is important to be aware that while the government, its agencies and municipalities (together 'the State') are considered to be suppliers under the Act and are bound by its requirements regarding the way they must deal with consumers, they are not entitled to be treated as consumers under it. In other words, those businesses that supply the State are not bound by the requirements of the Act in their dealings with the State.

National Credit Act agreements

The Act does not apply to any transaction that constitutes a credit agreement under the NCA, but it applies to the goods or services that are the subject of the credit agreement.

ANALYSIS OF THE FUNCTIONAL MATURITY OF THE VARIOUS BUSINESS COMPONENTS

Executive Management

Strategy

Policy



>> **Ensure that company Marketing policy specifies that certain groups are not unfairly targeted or excluded**

Your answer: Policy fully implemented

Your answers to the questions would indicate that your Functional Readiness in this area is good.

DISCRIMINATION

Protection against discriminatory marketing (section 8)

Section 8 prevents a supplier of **goods or services** from unfairly **discriminating against** any person or category of persons by

- **excluding** them from **accessing** goods or services;
- **granting** them **exclusive access**;
- **assigning priority** of supply to anyone;
- **supply a different quality** of goods or services to anyone;
- **charging** different prices to anyone;
- **targeting** particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or
- **excluding** a particular community, district, population or market segment from the **supply** of any goods or services offered by the supplier, on the basis of one or more grounds of unfair discrimination contemplated in section 9 of the Constitution (race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth) or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.

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A supplier must also not directly or indirectly treat any person differently in a manner that constitutes unfair discrimination on one or on the grounds referred to in the last paragraph above when—

- **assessing the ability** of the person **to pay** the cost, or otherwise meet the obligations, of a proposed transaction or agreement;
- **deciding whether to enter into a transaction** or agreement, or to offer to enter into a transaction or agreement;
- **determining any aspect of the cost** of a transaction or agreement to the consumer;
- **interacting with the consumer** in the supplier's place of business, or in the course of displaying or demonstrating any goods, testing or fitting any goods, or negotiating the terms of a transaction or agreement; or
- **selecting, preparing, packaging or delivering** any goods for or to the consumer, or **providing any services** to the consumer;
- proposing or agreeing the **terms and conditions of a transaction or agreement**;

assessing or **requiring compliance** by the person with the terms of a transaction or agreement;

exercising any right of the supplier under a transaction or agreement in terms of the Act or applicable provincial consumer legislation;

determining whether to continue, enforce, seek **judgment** in respect of, or

terminate a transaction or agreement; or

determining whether to report, or **reporting, any personal information** of such person.

The protection is also extended to associations or juristic persons, to prohibit unfair discrimination based on the characteristics of any natural person who is associated with that organisation.

Reasonable grounds for differential treatment (section 8)

It is not considered unfair to discriminate by refusing to supply or provide access to any particular goods or services to an unemancipated minor, or to require the consent of a parent, guardian or other responsible adult before doing so, in accordance with the law or to protect the health, welfare or safety of the minor;

It is also permissible to offer any facility or service for the exclusive use of minors generally or of a specified age group, or between specified ages or for adults older than 60 years; or to advertise or offer or any goods or services at a discounted price to members of these two groups.

Special Needs

A supplier may, in a reasonable manner, provide and designate separate but substantially equivalent facilities for the exclusive use of persons of each gender; or for persons of one gender.

A supplier may also, in a reasonable manner, target the marketing of any goods or service at a particular group of consumers 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.

Legal consequences of unfair discrimination

The Equity court set up by the promotion of Equity and the Prevention of Unfair Discrimination Act deals with alleged unfair discrimination. A case can be brought before it by an accredited consumer protection group or by:

- a person acting in their own interest
- a person acting on behalf of another person who cannot act in their own name
- a person acting as a member of or in the interests of a group or class of persons
- a person acting in the public interest
- an association acting in the interests of its members
- the South African Human Rights Commission or the Commission for Gender Equality

COURT APPROACH (s 10)

Presumption of unfair discrimination

If the party bringing the case proves that the supplier has treated one customer differently to another on the basis of the group (race, gender etc) the customer belongs to, the court may draw the inference (or conclusion) that the supplier has discriminated unfairly, unless the supplier is able to provide an alternative reasonable and justifiable explanation for the difference in treatment.

>> **Ensure Policy to treat all customers the same**

Your answer: Policy fully implemented

Your answers to the questions would indicate that your Functional Readiness in this area is good.

8(2) A supplier must also not directly or indirectly treat any person differently in a manner that constitutes unfair discrimination on one or on the grounds referred to in the last paragraph above when—

- **assessing the ability** of the person **to pay** the cost, or otherwise meet the obligations, of a proposed transaction or agreement;
- **deciding whether to enter into a transaction** or agreement, or to offer to enter into a transaction or agreement;
- **determining any aspect of the cost** of a transaction or agreement to the consumer;
- **interacting with the consumer** in the supplier's place of business, or in the course of displaying or demonstrating any goods, testing or fitting any goods, or negotiating the terms of a transaction or agreement; or
- **selecting, preparing, packaging or delivering** any goods for or to the consumer, or **providing any services** to the consumer;
- proposing or agreeing the **terms and conditions of a transaction**

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or agreement;

- assessing or **requiring compliance** by the person with the terms of a transaction or agreement;
- **exercising any right** of the supplier under a transaction or agreement in terms of the Act or applicable provincial consumer legislation;
- determining whether to continue, enforce, seek **judgment** in respect of, or
- **terminate a transaction** or agreement; or
- determining whether to report, or **reporting, any personal information** of such person.

>> Company Policy must ensure all information and documents are in plain and understandable language

Your answer: Policy fully implemented

Your answers to the questions would indicate that your Functional Readiness in this area is good.

Plain language (s 22)

In order to comply with the plain language requirement, the language must be such that an ordinary consumer of the class of persons for whom the agreement is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand its content and significance without undue effort.

In deciding whether the consumer could do so, the following factors must be taken into consideration:

- the context, comprehensiveness and consistency of the document;
- its organisation, form and style;
- its vocabulary, usage and sentence structure; and

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- the use of any illustrations, examples, headings or other aids to reading and understanding.

>> **Ensure Policy for the disclosure of price of goods or services complies with the Act**

Your answer: Policy fully implemented

Your answers to the questions would indicate that your Functional Readiness in this area is good.

Price of goods and services (s23)

Suppliers must inform consumers of the price of goods and services offered by them. In the case of goods, a retailer must show the price for any goods on display, by marking it or attaching it to the item in some way or representing it in a way in which the consumer would be able to understand what it was. This does not apply to goods in advertising displays. A supplier is also bound by any displayed reduction in price.

A supplier may not charge a price higher than the displayed price or the lowest displayed price if more than one price is displayed. It is permissible to cover an earlier price, so long as it is fully covered.

If there is an **obvious error** in the price, a supplier will not be bound by the price if the supplier has corrected the error and or taken steps to inform customers of the wrong price is displayed as a result of an unauthorized person tampering with the price in some way.

>> **Ensure Policy regarding labeling and trade descriptions on products and displays complies with the Act**

Your answer: Policy fully implemented

Your answers to the questions would indicate that your Functional Readiness in this area is good.

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Label or trade description (s24)

Any label or trade description that is attached to goods, displayed alongside them or is contained in any advertising material from which a consumer can place an order must not be such that it is likely to mislead a consumer. An existing trade description must not be tampered with in any way that would lead to consumers being misled.

Suppliers of goods that contain genetically modified components must label the goods in accordance with applicable regulations.

etc, etc, etc

The report deals in the manner shown above for all of the generic business areas in the questionnaire.

This provides a focused interpretation of the Act regarding each area which can be disassembled and circulated to the champion or manager for each functional area to review their state of readiness.

The implementation of the behavioral transformation could be quite daunting for larger organisations but we have a team of experts and technology solutions that support the process for you.

Contact us at the contact details provided on the website or at admin@madeasy.co.za and we will be happy to assist you in any way we can.

The Madeasy Team

PS *If you are a professional organisation currently offering advisory services concerning the CPA please feel free to contact us as we have an agency arrangement for the IP, Training Materials and Transformation Management Technology (Software)*