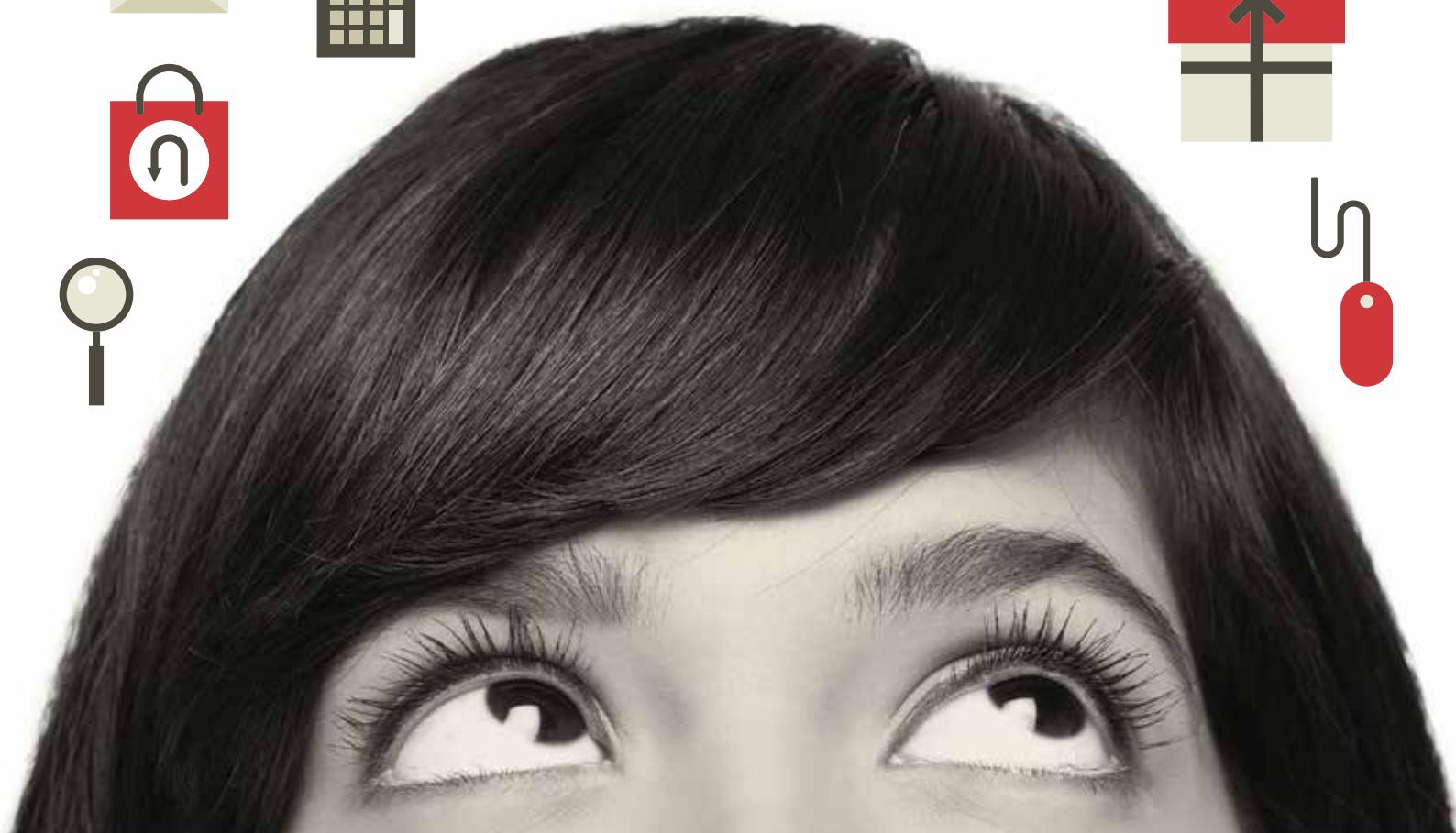




Camargue

Specialised Liability Management



LIABILITY UNDER THE **CONSUMER PROTECTION ACT**

Camargue. The power of knowledge

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WHAT ARE GOODS AND SERVICES?

Part 1

THE CONSUMER PROTECTION ACT EXPLAINED

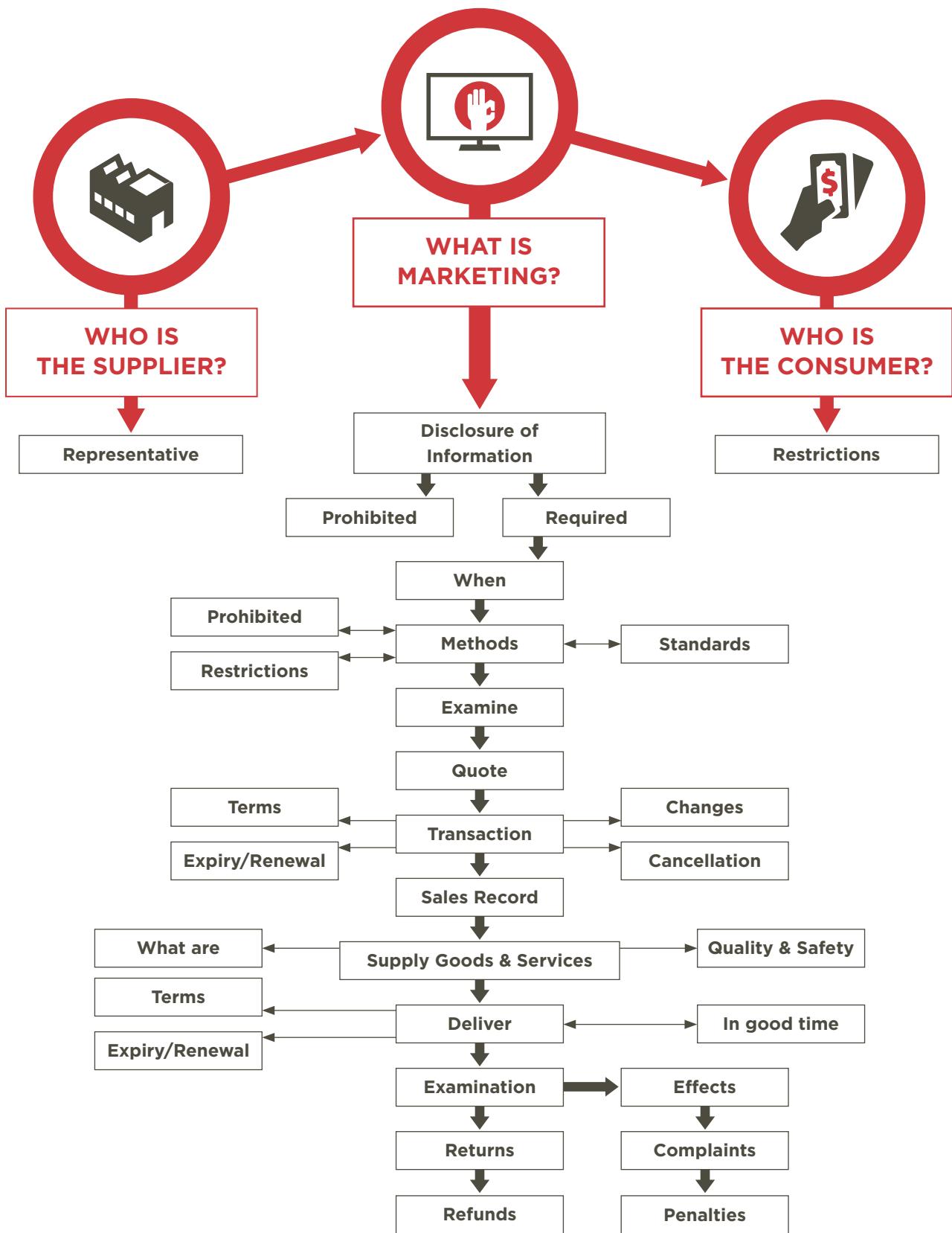
This part of the guide serves to provide a high-level view of the **Consumer Protection Act (“the Act”)** and serves as a basic introduction.

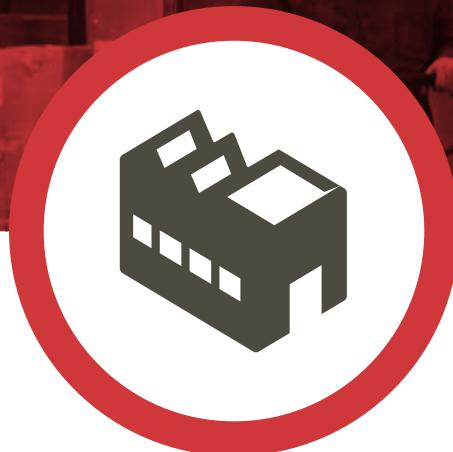
It is recommended that you download a copy of the Act, available [here](#), for your own convenience.

The **flow chart** below has been created to not only to simplify the Act, but also to act as a **navigation panel** for **Part 1**. Simply click on the heading of your choice to learn more about that topic. To return to the flow chart, click on any of the headings in boxes.

-  Bulleted lists with an “x” indicate actions that are **prohibited** under the Act
-  Bulleted lists with a **tick** indicate **supplier obligations** under the Act
-  A **red flag** has been used to indicates areas relating to **supplier liability**

FLOW CHART OF THE CONSUMER PROTECTION ACT





WHO IS THE SUPPLIER?

A supplier is any person who **markets** goods and services in the ordinary course of their business. This includes government and large municipalities, businesses (company, CC, sole proprietors etc), clubs, trade unions, associations and societies.



Representative

Section 27 (1)

Intermediaries (agents) in the sale of any property or services are required to disclose information regarding the parties to a transaction as set out in the Regulations. For example, an insurance intermediary would, at the request of the consumer, have to disclose the fee payable to them as well as the basis for calculating the fee. Regulation 10 lists documents that need to be retained by the intermediary for a period of three years.

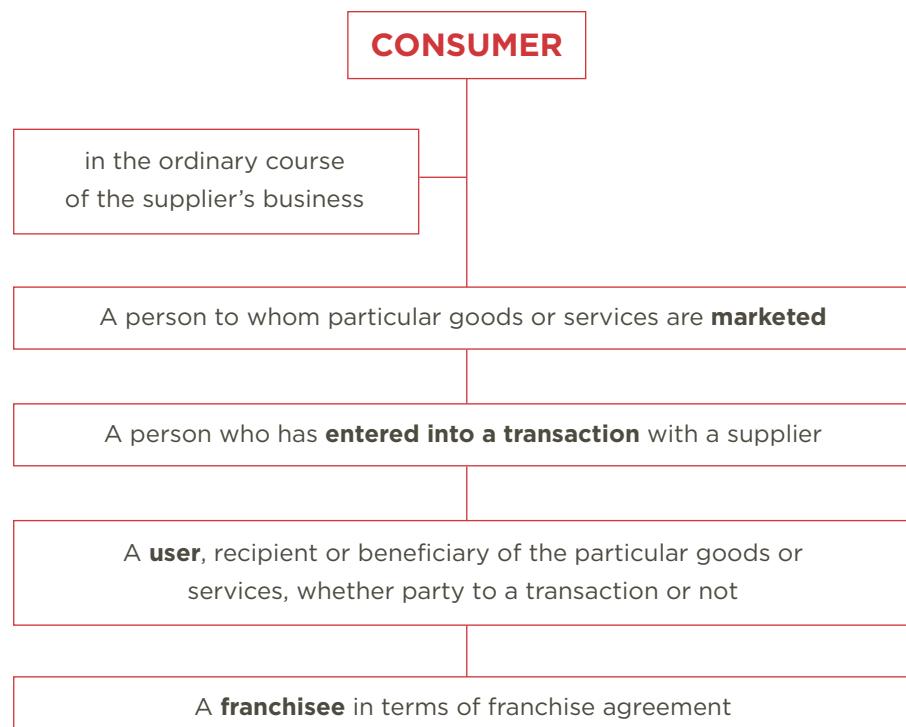


WHO IS THE CONSUMER?

The broad definition of who is considered to be a consumer ensures that the Act is all encompassing and that consumers who are injured by goods are protected, whether they purchased the defective goods or were merely users thereof.

A consumer is an individual, including a person trading in their own name (sole proprietor), a small business with an annual turnover or assets under R 2 million (threshold) and a franchisee in respect of the franchisor, but does not include the government as a user of goods and services.

Suppliers with assets or annual turnover of less than R2 million (threshold) are still deemed to be suppliers and are bound by the requirements of the Act in their dealings with consumers. However, they also receive consumer status and must be treated as such when dealing with fellow suppliers.



Supplier Restrictions

Section 8

This section of the Act prevents a supplier of **goods or services** from **unfairly discriminating against** any person or category of persons by

- **X** **excluding** them from **accessing** goods or services;
- **X** **granting** anyone exclusive access;
- **X** **assigning priority** of supply to anyone;
- **X** **supplying a different quality** of goods or services to anyone;
- **X** **charging** different prices to anyone;
- **X** **targeting** particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or
- **X** **excluding** a particular community, district, population or market segment from the **supply** of any goods or services offered by the supplier.

A supplier must also not directly or indirectly treat any person differently in a manner that constitutes unfair discrimination when

- ④ **assessing the ability** of the person **to pay** the cost, or otherwise meet the obligations, of a proposed transaction or agreement;
- ④ **deciding whether to enter into a transaction** or agreement, or to offer to enter into a transaction or agreement;
- ④ **determining any aspect of the cost** of a transaction or agreement to the consumer;
- ④ **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;
- ④ **selecting, preparing, packaging or delivering** any goods for or to the consumer, or **providing any services** to the consumer;
- ④ proposing or agreeing the **terms and conditions of a transaction or agreement**;
- ④ assessing or **requiring compliance** by the person with the terms of a transaction or agreement;
- ④ **exercising any right** of the supplier under a transaction or agreement in terms of the act or applicable provincial consumer legislation;
- ④ determining whether to continue, enforce, seek **judgment** in respect of **terminating a transaction** or agreement; or
- ④ determining whether to report, or **reporting, any personal information** of such person.

Grounds for unfair discrimination include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (Section 9 of the Constitution or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.)

Section 39

The mentally unfit

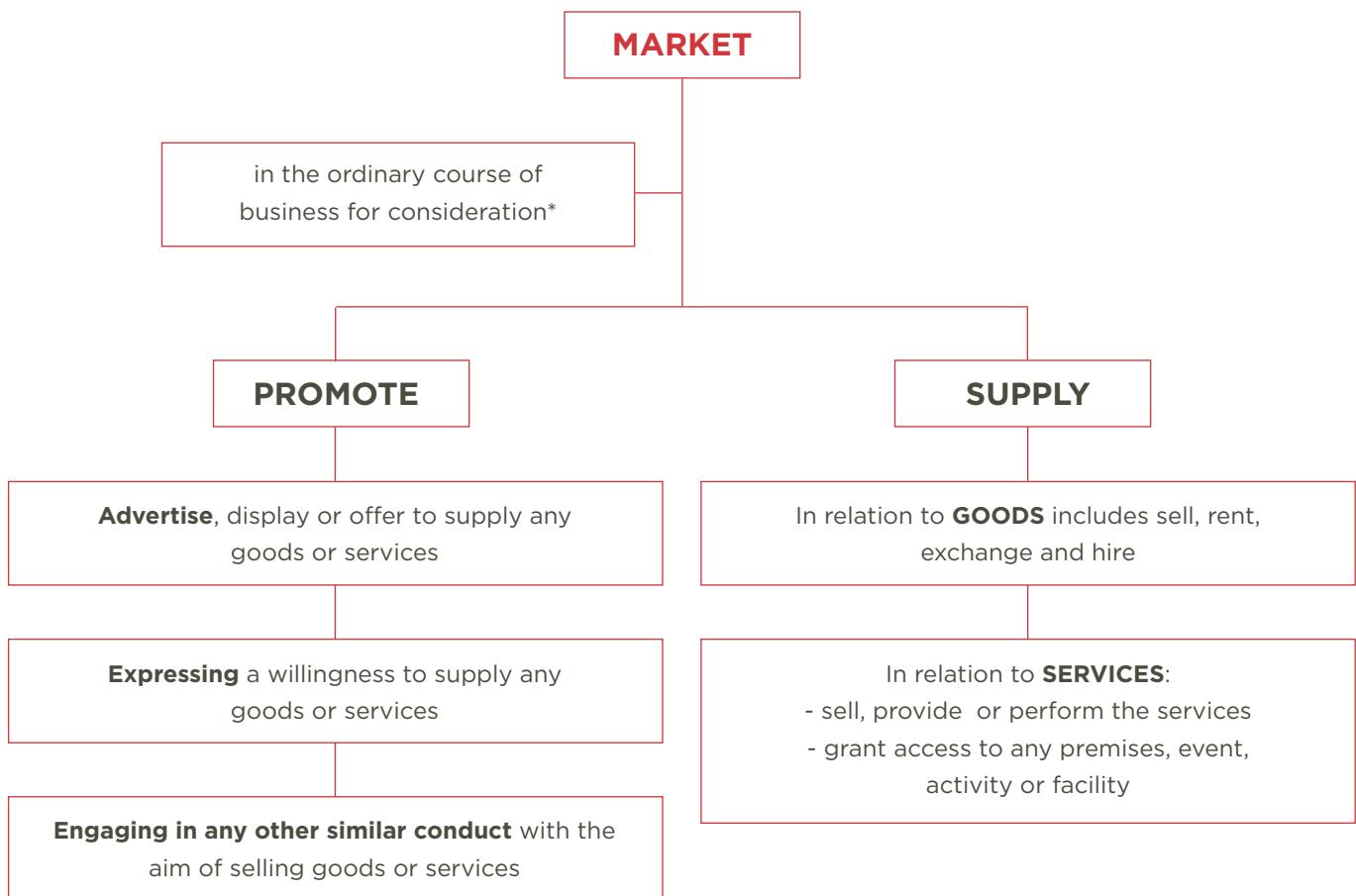
An agreement entered into with a consumer who has been declared mentally unfit when the supplier knew or could easily have established the person had been so declared is void (legally unenforceable).

Minors

If a contract is entered into with an unemancipated minor, without the consent of his or her guardian, it is voidable (valid until cancelled) at the option of the minor. The age of majority was lowered from 21 to 18 years by Section 17 of the Children's Act (38 of 2005).



WHAT IS MARKETING?



* Anything of value given and accepted in exchange for goods or services such as cash, cheque labour or even bartering.

Disclosure of Information

Required

Obligations	Section/s
Documents in plain and understandable language	22
Disclosure of price of goods or services	23
Product labelling and trade descriptions	24
Disclose reconditioned or grey market goods	25 (1)
Intermediary in the sale of any property or services must disclose prescribed information See <u>REPRESENTATIVE</u>	27 (1)
Wear or display identification device or provide Identification when calling on the consumer See DELIVERER ID	28
Inform the consumer of the right to cancel direct marketing agreement See DIRECT MARKETING	32 (1)
Disclose the prescribed information to a consumer if catalogue marketing See CATALOGUE MARKETING	33 (3)
Draw limitation of risk or liability of the supplier or an assumption of risk or liability by the consumer to the attention of the consumer See QUALITY & SAFETY*	49 (1)
Draw potential risks of an unusual character or those of which a consumer could not reasonably be expected to be aware or that could result in serious injury or death to the attention of the consumer See QUALITY & SAFETY*	58 (1)

* Discussed in detail in Part 2.

Documents in plain and understandable language	22
---	----

Section 22

The language used in notices, documents or visual representations 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.

Section 23

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 on 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.

A supplier is bound by any displayed price or reduction in price.

Section 24

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.

Section 25

Suppliers are also required to warn consumers, with a conspicuous notice, that branded goods have been reconditioned or that they have been imported without the approval or license of the registered owner of the trade market, as the case may be.

Section 33

Information to be provided:

- The supplier's name and licence or registration number, if any
- The address of the supplier's physical business premises and related contact details
- The sales record information required by Section 26
- The currency in which amounts under the agreement are payable
- The supplier's delivery arrangements, including:
 - The identity of the shipper
 - The mode of transportation
 - The place of delivery to the consumer
- The supplier's cancellation, return, exchange and refund policies, if any
- The manner and form in which a complaint may be lodged

Prohibited

False, misleading or deceptive representations

The supplier must not, either by words or conduct

- (X) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer (material means significant; relating to the heart of the contract);
- (X) 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
- (X) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation, or permit or require any other person (e.g. an employee or agent) to do so on behalf of the supplier.

A representative of a supplier of any goods or services must not

- (X) falsely represent that the person has any sponsorship, approval or affiliation or
- (X) engage in any conduct that the supplier is prohibited from engaging in under Subsection (1).

Section 41 gives an extensive, but not exhaustive, list of examples of what amounts to 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

- (X) the supplier of any goods or services has any particular status, affiliation, connection, sponsorship or approval that they do not have;
- (X) 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, if they are not;
 - are new or unused, if they are not or if they are reconditioned or reclaimed (see exception below);
 - 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 which is not possible;
- (X) any land or other immovable property
 - has characteristics that it does not have;
 - may lawfully be used, or is capable of being used, for a purpose that is in fact unlawful or impractical; or
 - has or is proximate to any facilities, amenities or natural features that it does not have, or that are not available or proximate to it;
- (X) the necessary service, maintenance or repair facilities or parts are readily available for or within a reasonable period and are not;
- (X) any service, part, replacement, maintenance or repair is needed or advisable which is not;
- (X) a specific price advantage exists, and does not;
- (X) a charge or proposed charge is for a specific purpose, and is not;
- (X) an employee, salesperson, representative or agent has the necessary authority to negotiate the terms of, or conclude, an agreement, and does not;

- the transaction affects, or does not affect, any rights, remedies or obligations of a consumer, and does not;
- a particular solicitation of, or communication with, the consumer is for a particular purpose and is not; or
- the consumer will derive a particular benefit if they assist the supplier in obtaining a new or potential customer, and will not.

Exception

It is permissible to refer to goods as new if they have been used only by or on behalf of the producer, importer, distributor or retailer for the purposes of reasonable testing, service, preparation or delivery.

Section 24 (2)

Misleading trade description

The intentional use of a misleading trade description, or the alteration, defacement, covering, removal or obscuring of a trade description or trade mark is prohibited.

When Direct Marketing may take place

Section 12

Time at which marketing must take place

Direct Marketers may not contact a consumer at home at all during periods and on days set out in the regulations, unless the consumer has expressly in writing agreed to be contacted.

The regulations specify:

Direct marketing **may not** take place between **20h00** and **08h00** on **work days**, before **09h00** and after **13h00** on **Saturdays** and at all on Sundays or public holidays.

Methods of Marketing

Marketing Standards

Section 29

General Marketing Standards

A producer, importer, distributor, retailer or service provider must not market any goods or services in a manner that is

- (X) reasonably likely to imply a false or misleading representation concerning those goods or services (this aspect is dealt with more fully in [Section 41](#)); or
- (X) misleading, fraudulent or deceptive in any way, about
 - the nature, properties, advantages or uses of the goods or services;
 - the manner in or conditions on which those goods or services may be supplied;
 - 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;
 - the sponsoring of any event; or
 - any other material aspect of the goods or services.

Section 40

Unconscionable conduct

For the purposes of the Act, unconscionable conduct consists of the use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any

- (X) marketing of any goods or services;
- (X) supply of goods or services to a consumer;
- (X) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
- (X) demand for, or collection of, payment for goods or services; or
- (X) recovery of goods from a consumer.

It is also unconscionable for a supplier to take advantage of a consumer's inability to protect their own interests owing to physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.

Prohibited Marketing Methods

Dishonest Practices	Section/s
False, misleading or deceptive representations about a supplier or any goods or services unless the person has reasonable grounds for believing that the representation is true	4 (5)(b) & (c), § 41
Misleading trade description	24 (2)
False, misleading or deceptive representations about the nature, properties, advantages or uses of the goods or services	29
Misleading or deceiving regarding the actual availability or price of goods or services (Bait marketing)	30 (1)
False representations regarding the availability, profitability or risk of work or business (Alternative work schemes)	37 (1)
Fraudulent or pyramid schemes and offers	42 (1), 43 (1)

Restrictions on Marketing

Direct marketing	11, 12, 28 & 32
Unsolicited goods	21
Negative option marketing	31 (1)
Trade coupons and similar promotions	34 (3)
Customer loyalty programmes	35 (2)
Promotional competitions	36 (2)
Referral selling	38 (1)
Over-selling and over-booking	47 (1)
Bait marketing	30
Unfair, unreasonable or unjust price, marketing or negotiation	48 (1) & (2)
Direct marketing	11, 12, 28 & 32

Section 11

A person has the right to refuse to accept any marketing approach or communication or pre-emptively block such contact. People may record their desire not to be contacted for the purposes of direct marketing in a register. This will only come into effect on a date to be declared by the Minister.

The direct marketer must have procedures in place to process demands that a person not be contacted and ensure that the person is not contacted again.

Section 12

Direct Marketers may not contact a consumer at home at all during periods and on days set out in the regulations.
See When direct marketing may take place

Section 28

Persons calling in person at the premises of a consumer to engage in direct marketing with a consumer must visibly wear or display a badge or similar identification device or provide suitable identification when requested to do so by the consumer.

Section 32 read with Section 16

A supplier who concludes a transaction or agreement with a consumer after directly marketing any goods or services to them must inform the consumer of the right to cancel that agreement within 5 business days.

Unsolicited goods	21
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Section 21

A consumer cannot be forced to pay for unsolicited goods and the cost of their delivery, or for unsolicited services when

- goods are left with, or any service performed for, a consumer by a supplier, during any direct marketing of goods or services, without requiring or arranging payment for them;
- goods or services are materially different from the goods or services previously supplied, to an extent not reasonably contemplated in an agreement for the periodic delivery of goods;
- goods are delivered after the termination of an agreement;
- goods are delivered or services performed at a location, date or time other than as agreed;
- goods are delivered in excess of the quantity the consumer agreed to buy, unless the consumer rejects the entire delivery; or
- goods are delivered to, or any services is performed for, a consumer by a supplier without the consumer having expressly or implicitly requested that delivery or performance.

Negative option marketing	31 (1)
---------------------------	--------

Section 31

Negative option marketing consists of informing a consumer that a sale agreement will come into being or an agreement will be modified unless the consumer informs the supplier that the consumer does not wish to proceed with it. Where a supplier has resorted to negative option marketing, the resulting agreement or modification is void.

Trade coupons and similar promotions	34 (3)
--------------------------------------	--------

Section 34

A person making a promotional offer must be able to fulfil it and meet the reasonably anticipated demands resulting from the offer. The document containing the promotional offer must clearly describe the prize or similar gift and how the consumer can claim it.

Section 35

A person offering participation in a loyalty programme must be able to supply sufficient quantities of the particular goods or services of the quality promised to accommodate all reasonably anticipated demand.

Section 36

Restrictions have been placed promotional competitions, games and other similar arrangements, irrespective of whether a participant is required to demonstrate any skill or ability before being awarded a prize. A prize includes a reward, gift, free good or service, price reduction or other free benefit.

One **may not inform** another person that they have **won a competition** or a prize, if

- (X) no competition has in fact been conducted,
- (X) the person has not in fact won the competition or prize,
- (X) the prize was made generally available,
- (X) the prize for a competition is subject to a previously undisclosed condition, or
- (X) the person is required to buy something or pay something for the prize (usually an 'administrative fee').

The promoter of a competition may, however, require the payment of the reasonable costs of posting or otherwise transmitting an entry form.

The promoter of the competition must

- (✓) prepare competition rules before the beginning of the competition,
- (✓) make the competition rules available to the Commission and to any participant, on request and without cost, and
- (✓) keep a copy of the competition rules.

The offer to participate in the promotional competition must clearly state the benefit or competition to which the offer relates and provide details of

- what a person must do to enter (e.g. sms name and ID),
- how the results will be decided (e.g. random draw),
- closing date for competition,
- how results will be made known (e.g. telephonically), and
- how prize can be collected (e.g. it will be couriered).

Regulation 14

Competition must be conducted by

- a chartered accountant,
- registered auditor,
- admitted attorney, or
- commissioner of oaths.

Competition must be reported on through the promoter's internal audit reporting procedures. Promoters cannot force a prize winner to permit the use of his/her image in marketing material or to participate in any marketing activity.

A promoter must, **for a period of at least 3 years**, retain

- full details of the promoter (Reg No., address, contact no.);
- the rules of the competition;
- a copy of the offer to participate in the promotional competition;
- names and identity numbers of persons responsible for conducting the promotional competition;
- a full list of all the prizes offered;
- a list of all instances when the promotional competition was marketed – including details on the dates, mediums used and places where marketing took place;
- the names and ID numbers of the persons responsible for the selection of prize winners;
- an acknowledgement of receipt of the prize signed by the prize and his/her ID number and date of receipt; and
- a copy of the report.

A promoter must compile a full report on the conduct and outcome of a promotional competition, detailing as a minimum

- the basis on which prize winners were determined;
- a summary describing the proceedings to determine winners;
- whether an independent person oversaw determination of prize winners (if yes, their ID number);
- the means by which prize winners were announced and frequency thereof;
- a list of names and ID numbers of winners; and
- if a prize winner could not be contacted, steps that were taken to contact winner.

Referral selling	38 (1)
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Section 38

A person must not market goods or services to a consumer on the basis that the consumer will receive a rebate, commission or other benefit if the consumer subsequently helps the supplier to do business with other consumers, by giving the supplier their names or assisting in other ways.

Over-selling and over-booking	47 (1)
-------------------------------	--------

Section 47

A supplier must not accept payment for any goods or services unless the supplier has a reasonable basis for saying they will be able to supply those goods or provide those services. The supplier may also not supply goods or services that are materially different to the goods or services paid for.

Bait marketing	30
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Section 30

Bait marketing occurs when a supplier advertises goods or services as being available at a particular price to attract consumers to the store. Of course, the supplier does so in the hope that, once the consumer is at the premises and discovers that the goods or services are not available, he or she will buy something else, preferably something more expensive.

Section 48 (1)

A supplier must not offer to 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.

A supplier must not 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.

The practice of using waiver and exemption clauses has now been curtailed and certain terms are not permitted.

A supplier must not, in terms of **Section 48 (1)(c)**, require a 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.

Examine

Section 18 (2)

Customer's right to examine goods

A customer has the right to pick and choose from goods openly displayed. The customer cannot, however, be held liable for the loss or damage to goods displayed by a supplier unless it was caused by the gross negligence, recklessness, malicious behaviour or criminal conduct of the consumer. Any statement or notice the supplier may put up to the contrary would be of no effect.

Quote

Section 15

A supplier must give a consumer an estimate in respect of agreements with a value of over the amount determined in the regulations (presently R 1.00 – One Rand – excluding value added tax).

The estimate must be provided in respect of agreements for

- the provision of a repair or maintenance service,
- the supply or the installation of replacement parts or components, and
- cases where the service provider takes possession of the property or where a consumer requests an estimate.

The supplier may not charge the consumer for doing any work or supplying any goods unless the consumer authorised the work after declining the offer of an estimate or pre-authorised a specific maximum charge and the amount charged is less than that.

The supplier may not charge the consumer for the estimate, including the cost of performing diagnostic work and disassembly or reassembly or for damages to or loss of parts in the course of preparing the estimate, unless the customer gave prior approval for those costs.

Where an estimate has been given, the cost stated may not be exceeded unless the consumer authorised the additional cost beforehand.

Transaction or Agreement

No agreements with persons lacking legal contractual capacity	39
Consumer's right to assume supplier is entitled to sell goods	44
Pre-contractual requirements	
Right to information in plain and understandable language (to the extent that it applies to the contract)	22 (1)(b)
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Written consumer agreements	50 (1)
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Signing or initialling in any recognised manner including an electronic signature	2 (1)(3)

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Notice required for certain terms and conditions	49 (1)
Unfair, unreasonable or unjust agreement terms	48
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Consumer's right to cooling-off period after direct marketing	16
Consumer's right to cancel advance reservation, booking or order	17
Consumer's right to return goods	20 (2)
Agreements with persons lacking legal capacity can be cancelled	39
Written notice of the intention to close a service facility	64 (3)



Sales Record

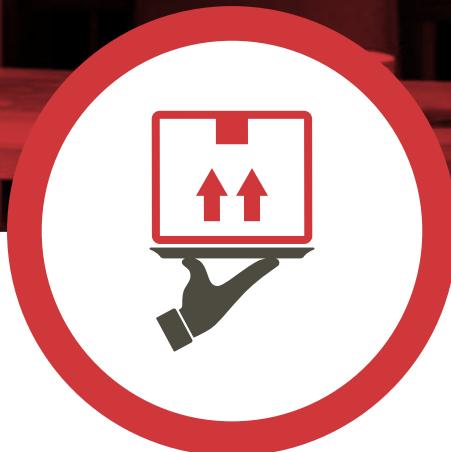
Section 26 (2)

Sales records

Even if the terms and conditions of an agreement are not in writing, a supplier of goods or services must provide a written record of every transaction.

The record must contain 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
- 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 supplied
- 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
- The total price of the transaction, including any applicable taxes



WHAT ARE GOODS AND SERVICES?

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 licence 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

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

- (i) constitutes advice or intermediary services subject to regulation in terms of the **Financial Advisory and Intermediary Services Act**, or
- (ii) 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

- (i) **any accommodation** or sustenance;
- (ii) **any entertainment** or similar intangible product or access to any such entertainment or intangible product;
- (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**

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

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

Quality and Safety

Quality goods and services	Section/s
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Safety	
Warning concerning fact and nature of risks	58 (1)
Safe disposal of certain goods	59
Safety monitoring and recall	60 (1)
Liability for damage caused by goods	61 (1)

Section 54

Quality Services

The Act requires that services be performed in **a manner and quality that persons are generally entitled to expect.**

Where any particular goods are required to be used, delivered or installed in the performance of the service, they must be free of defect and of the quality that persons are generally entitled to expect.

Remedy: If the supplier fails to perform the service to the necessary standards or as agreed, the consumer can require the supplier to make good any defect or shortcoming or insist on a refund of a portion of the price agreed upon that is consistent with the degree of the shortcoming.

Section 55

Quality Goods

This section does not apply to goods bought at an auction - these are covered by **Section 45**. The Act sets out rules for the holding of auctions. More detailed requirements are contained in the Regulations.

All other goods must be reasonably suitable for the purposes for which they are generally intended.

The goods must be of good (not reasonable) quality, in good working order and free of defects, and be capable of being used for a reasonable period of time, depending upon the circumstances.

Goods must also comply with any applicable statute, including the Standards Act of 1995.

Goods must be reasonably suitable for the **specific purpose** for which a consumer wishes to use them, if the consumer has specifically informed the supplier of that purpose and the supplier ordinarily supplies such goods or holds itself out as being knowledgeable about the use of such goods.

Implied warranty of quality

See DEFECTS

Section 57

Warranty on repaired goods

All new or reconditioned parts installed during repairs or maintenance work, as well as the labour involved, is automatically warrantied for three months after installation. This does not apply to goods that have been abused or to ordinary wear and tear from usage.

Voetstoets clauses

The supplier cannot, in terms of [Section 48 \(1\)\(c\)](#), require a consumer to waive any rights, so the use of voetstoets clauses will not be permitted in business contracts covered by the Act.

Section 58 (1)

Safety of Services



Warning concerning fact and nature of risks

The supplier of any activity or facility with which certain types of risk are associated must specifically draw the fact, nature and potential effect of that risk to the attention of consumers in accordance with the requirements of [Section 49](#).

The types of risk that must be pointed out are

- those risks of an unusual character or nature,
- those risks of which a consumer could not reasonably be expected to be aware or anticipate, and
- those risks that could result in serious injury or death.

Packages containing any hazardous or unsafe goods must have instructions advising the consumer on the safe handling and use of those goods. Warnings of this kind already appear on items such as ant spray.

If a person installs any hazardous or unsafe goods for a consumer, that person must give the consumer the original copy of any warning that applies to those goods in terms of any regulation.

Failure to comply with this provision may lead not only to the imposition of an administrative fine under [Section 112 \(1\)](#), but also to liability for damages under [Section 61](#).

It must further be borne in mind that the consumer is not necessarily the person with whom the supplier had dealings; the definition includes a user of the goods or recipient of the services, irrespective of whether they were a party to the transaction or not.

Section 59

Safe disposal of certain goods

If the disposal of any type of goods is prohibited by any national legislation, the supplier of that kind of goods must accept the return of them, without charge to the consumer, from any consumer. The supplier can, in turn, return them to the importer or manufacturer.

Section 60 (1)

Safety monitoring and recall



The Commission has a role in developing industry-wide codes of practice regarding and in investigating product failures, defects or hazards. It can warn the public of hazards and have goods recalled. Recalls will be covered in-depth in Part 2 and Part 3 of this guide as well as Appendix I.

Liability for damage caused by goods



See DEFECTS

This section of the Act will be dealt with in-depth in Part 2 of this guide.

Deliver - In Good Time

Section 54

Services must be performed and completed in good time, or the supplier must give the consumer timely notice of any unavoidable delay.

Section 19

Delivery of goods and supply of service

The parties are free to expressly agree upon whether the goods will be delivered and the details of the delivery or how the services will be performed. If they do not so agree, it becomes an implied condition of every transaction that the supplier is responsible to deliver the goods or perform the services either

- on the agreed date and at the agreed time, if any, or otherwise
- within a reasonable time after the conclusion of the transaction or agreement at
- the agreed place of delivery or performance as stated to be **the supplier's** place of business, if any, or
- the supplier's residence.

If no date or time has been specified for delivery of goods or performance of services, this must not be done at an unreasonable time.

Section 19 (6)

Changes to place or time and date of delivery of goods or performance of services

If the supplier wants to change the agreed arrangements for delivery or performance, the customer has the option to agree to the change, insist on the delivery, or insist on performance as agreed or cancel the agreement.

Acceptance of delivery

The supplier remains liable for the risk of the goods being damaged or destroyed until they have been delivered to the customer. It is therefore important to be able to establish when this takes place. The Act sets out three possibilities. The acceptance of delivery is deemed (considered) to have occurred when

- the customer expressly (actually) or implicitly (by conduct) communicates that the consumer has accepted the delivery;
- the consumer does anything in relation to the goods that is inconsistent with the supplier's ownership of them; or
- the consumer keeps the goods for longer than is reasonable without telling the supplier that he or she does not want them.

Deliverer ID

Section 28

Anyone calling in person at the premises of a consumer must visibly wear or display a badge or similar identification device or provide suitable identification when requested to do so by the consumer when

- engaging in direct marketing to the consumer,
- delivering any goods to them,
- installing any goods for them, or
- performing any services for them.

CARE

Section 65

A supplier must exercise reasonable care and diligence in looking after property, including deposits of fees held on behalf of a consumer. The supplier would be liable for any loss arising from its failure to take reasonable care.

Section 67

The supplier must return any goods removed during the course of repair and maintenance work and return them to the consumer in a reasonably clean container.



EXAMINATION

Section 18 (1)

Customer's right to examine goods

A supplier may not require a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier (unless the consumer caused the damage maliciously).

Section 18 (2)

If the customer buys the goods solely on the basis of a description or sample, or both, provided by the supplier, the supplier must deliver goods that correspond 'in all material respect and characteristics to what an ordinary alert consumer would have been entitled to expect based on the description or on a reasonable examination of the sample'. Goods sold by sample and description must correspond with both.

Section 19 (5)

Before accepting delivery of goods, the consumer is entitled to examine them to make sure they are of the type and quality agreed upon or reasonably match the material (important) specifications, if a special order was placed.

RETURNS

RIGHT TO RETURN GOODS

Scenario	Covered	5 Days	10 Days	6 Months
Direct marketing	X	X		
No opportunity to examine - e.g. catalogue			X	
You change your mind (only if store policy)	X			
Not fit for particular purpose communicated by the consumer	X		X	
Mixed goods - only some as per order	X		X	
Not fit for purpose generally intended	X			X
Not good quality or working order and not free from defects		X		X
Not usable and durable for a reasonable period of time	X			X
Goods do not comply with standards	X			X

Section 19 (7)

Delivery of large quantities of goods

If the supplier delivers more of the goods than were ordered, the consumer can refuse to accept the goods at all or accept and pay for only the agreed quantity of goods and treat the rest as unsolicited goods.

Section 19 (8)

Delivery of mixed goods

If some of the goods delivered are as agreed upon but others are not, the consumer can accept those that are as agreed and reject the rest or reject all of them.

Section 20 (2)

Consumer's right to return goods

A consumer can cancel a sale and return the goods to the supplier and receive a full refund if the consumer did not have an opportunity to examine the goods before delivery and the consumer is not satisfied that the goods are of a type and quality that were agreed upon.

If the goods were supplied following a **special order**, they can be returned if they do not reasonably conform to the material specifications of the special order **Section 19 (5)**.

A consumer may return goods intended to satisfy a particular purpose communicated to the supplier (as per **Section 55 (3)**) within 10 business days after delivery to the consumer, if the goods have been found to be unsuitable for that particular purpose.

REFUNDS

Upon receiving the returned goods, the supplier must refund to the consumer the price paid for the goods, less any amount that may be charged. The permissible charges are explained in the table below.

State of Goods	Permissible Charge
Original unopened packaging	No charge
In their original condition and repackaged in their original packaging	<p>A reasonable amount for:</p> <ul style="list-style-type: none">• 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• 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
Any other case	<p>For necessary restoration costs to make the goods fit for re-stocking unless, considering the nature of the goods and the manner in which they were packaged, it was necessary for the consumer to destroy the packaging to determine whether the goods were:</p> <ul style="list-style-type: none">• The same as the description or sample provided, in the case of goods that had not been examined by the consumer before delivery• Fit for the intended purpose Section 55(3)

DEFECTS

Section 54

SERVICE

If the supplier fails to perform the service to the necessary standards or as agreed, the consumer can require the supplier to make good any defect or shortcoming or insist on a refund of a portion of the price agreed upon that is consistent with the degree of the shortcoming.



Section 56

GOODS

If the goods are not suitable for the purposes for which they are intended or otherwise fail to comply with the requirements listed in [Section 55](#), the consumer is entitled to return them, at the supplier's risk and expense and without penalty and obtain a refund or have the item(s) repaired or get a refund of the price paid. The choice is the consumer's.

The consumer can claim against any of the entities in the supply chain, namely the producer, importer, distributor or retailer of the goods.

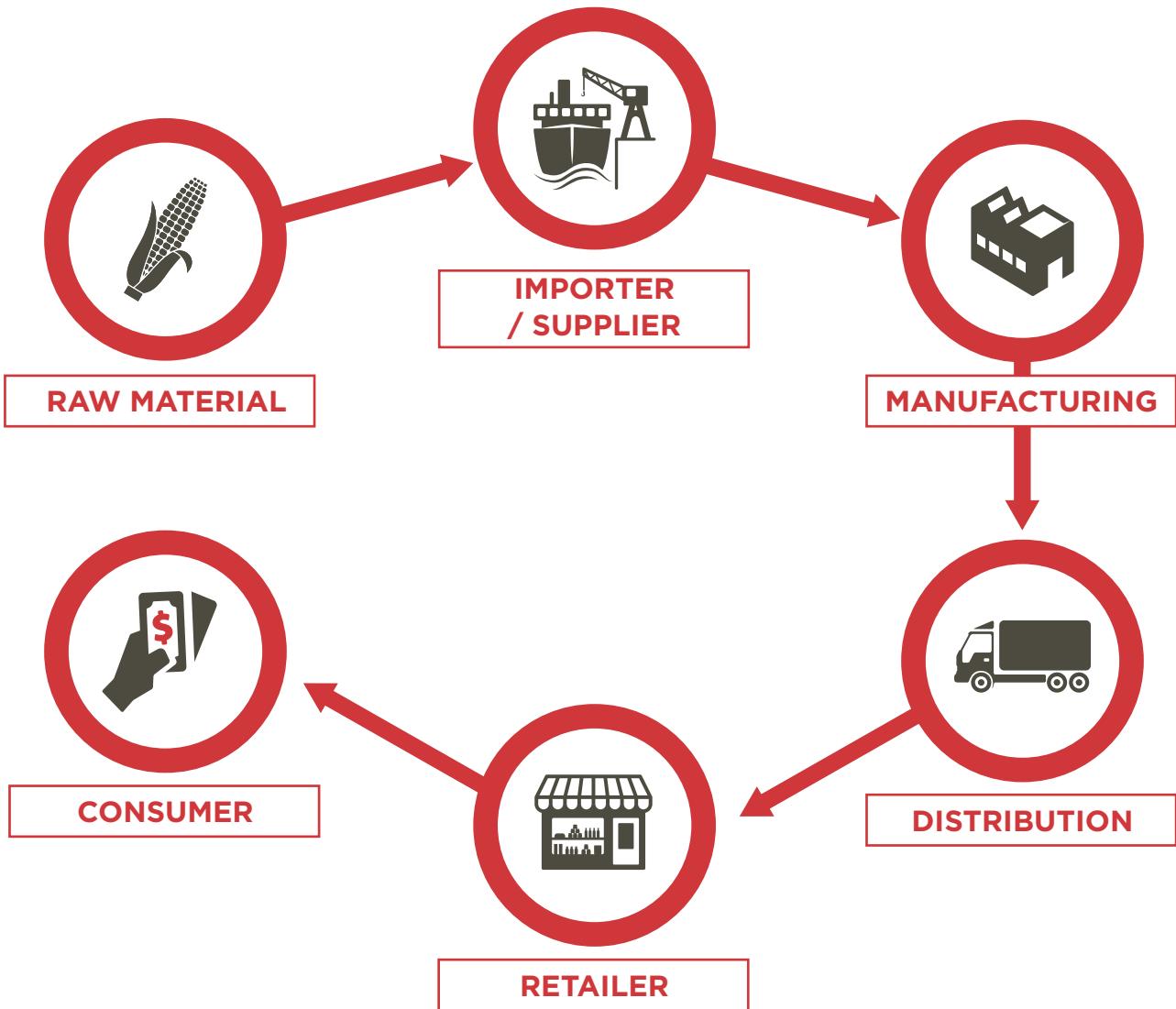
The section does not apply if the goods fail to meet the necessary standard because they were tampered with in some way after leaving of the control of the entity claimed against.

If the customer opts, however, to have the goods repaired, the supplier has only one opportunity to attempt to repair the goods. If the problem with the goods reoccurs, they must be replaced or a refund made.

Section 61 (1)

Liability for damage caused by goods

-  A producer, importer, distributor or retailer of any goods is liable, without proof of negligence on the part of the supplier of the goods, for any harm caused by the goods. The same applies to a supplier of services who applies, supplies, installs or provides access to goods.



Section 5 (5) of the Act further states:

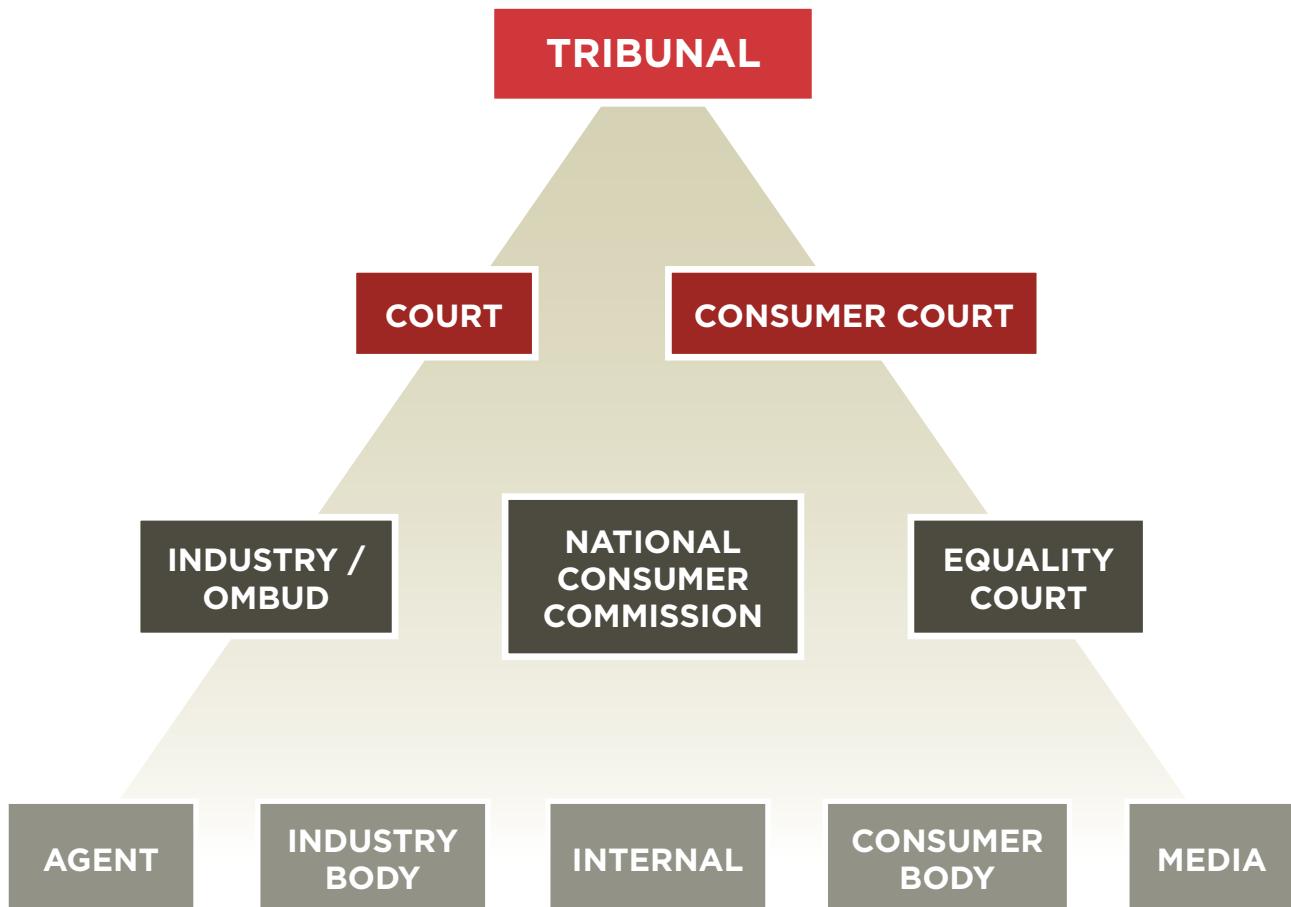
If any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of this Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 60 and 61.

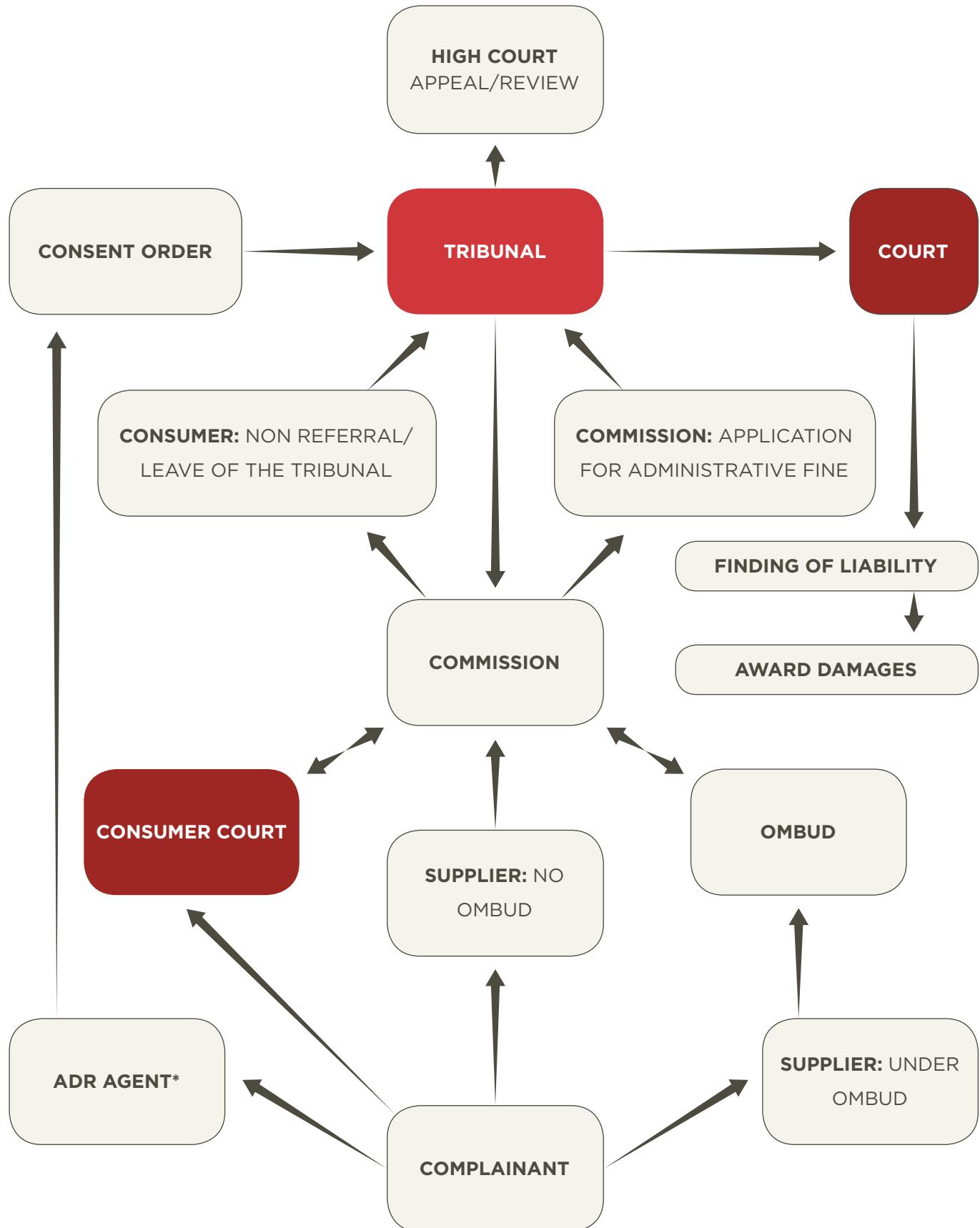
The harm for which a supplier is liable may arise from a product failure, defect or hazard or inadequate instructions or warnings regarding any hazard arising from or associated with the use of any goods. It is sufficient to show that the damages were suffered only partly as a consequence of these shortcomings.

Product liability will be discussed in detail in Part 2 of this guide and you can find case studies in Part 3.

COMPLAINTS

Consumers have a wide range of options available to them if they have a complaint, as is demonstrated in the **figure below**. The top three levels of the pyramid plus alternative dispute resolution agents (Agent) and consumer bodies are options created by the Act.





Consumers are not required to approach the supplier against whom they have the complaint before going elsewhere, but it makes sense for them to do so. It is also to the advantage of the supplier for the consumer to approach its **help desk** or **call centre** before escalating a complaint to the formal mechanisms.

* alternative dispute resolution



PENALTIES

Offences and penalties

Section 112 (2) 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 000 000, whichever is the greater.

Section 110 (1) It is a criminal offence for any person to alter, obscure, falsify, remove or omit a displayed price, labelling or trade description without authority; or

Section 110 (2) to fail to act in accordance with a compliance notice.

The penalty for these offences is a fine or imprisonment for up to 12 months, or both.

Section 113 (1) The employer of an employee or the principal of an agent will be held jointly and severally liable for anything done by that person in the course of that person's employment or agency activities. This means that a claimant can sue either the employer or the employee/agent for the entire loss or sue both of them together.

An important consideration not spelled out in the Act is the danger of reputational damage from an infringement being published in the media.

Part 2

LIABILITY UNDER THE CPA AND THE IMPLICATIONS ON THE SUPPLY CHAIN

While Part 1 of this guide broadly looked at the Consumer Protection Act, Part 2 will look specifically at supplier liability and what the implications will be on current and future businesses operating within South Africa. By understanding the types of risks and liabilities that your business faces, you will be in a better position to assess your insurance needs, as well as determine any changes that will need to be implemented in your business. Ignorance of the Act – and the requirements the Act imposes – is not a valid defence in a product liability lawsuit.

Background to the Act

As with any piece of legislation, the Act was drafted with specific objectives in mind. Some of the changes that the Act aims to bring about include

- promote and protect the economic interest of consumers;
- protect consumers from exploitation and safety hazards;
- improve access to information so that consumers can make informed decisions; and
- developing effective means of redress.

In order to achieve these goals, certain requirements have now been placed on suppliers in an attempt to create a market that is fair, responsible and accessible. The various sections of the Act outline how suppliers must conduct their businesses, with harsh penalties for non-compliance. Suppliers will now be held accountable (liable) for damages caused by defective goods supplied by them which in turn will not only protect consumers from safety hazards, but also financially as they are able to sue for damages.

Existing Insurance Acts

Before the Consumer Protection Act came into effect, there were already two pieces of legislation to which insurance companies had to adhere in their dealings with consumers, namely Long Term Insurance Act No 52 of 1998 and the Short Term Insurance Act No 53 of 1998. These Acts, however, do not extend the same level of protection to consumers as does the Consumer Protection Act. In order to remedy this, the two insurance Acts were initially excluded from the CPA's ambit.

Eighteen months were given to align these with the Consumer Protection Act's measures. This period lapsed on 30 September 2012. The Insurance Laws Amendment Bill (B16-2013) has been tabled in the National Assembly by the Minister of Finance as a means of strengthening the insurance Acts in terms of consumer protection as well as to address certain shortcomings in the insurance sector. Until this bill is passed, the Consumer Protection Act will still apply to the insurance industry.

This means that not only do insurance companies have to comply with the Act, but some will also act as risk carriers for other suppliers who are also subject to the terms of the Act. An example of this would be an insurer who offers public liability cover to businesses.

Then and now

While the majority of the Act's sections came into play on 1 April 2011, section 61 (liability for damage caused by goods) actually came into effect nearly a year before this on 25 April 2010. This means that goods sold on or after 25 April 2010 are covered by the Act despite the fact that the Act's implementation was delayed.

In order to fully understand the implications of the supplier liability ushered in by the Consumer Protection Act, we first need to take a look at the position before the Act came into effect.

Prior to the Act, damages for harm caused by goods could be claimed under the common law, or law of delict to be specific. However, it was the responsibility of the plaintiff (the person who is instituting the legal proceedings, i.e. the injured party) to prove fault on the part of the producer of the goods. In order to prove fault, one would need to prove that the producer of those goods was negligent in some way and that this negligence had resulted in harm. Only once this was proved, could the plaintiff be awarded consequential damages. Consequential damages are where the danger really lies for the supplier as these are damages that are not a direct result of the action that caused harm.

Proving negligence when one does not have access to information relating to the manufacturing process of goods was a heavy burden for consumers. The case of *Wagener v Pharmacare*, which will be discussed in Part 3, highlights just how difficult it was to prove negligence prior to the Act. Under the common law, in order for negligence to arise, two conditions had to be met. These were that

- (i) Loss or harm (that could be quantified) was suffered; and
- (ii) This loss or harm was as a result of the conduct (the action or failure to act when there was a duty to act) of the defendant (manufacturer or supplier).

According to Phil Knight, who drafted the Act, one of the main principles underlying the Act is that of risk distribution. Provisions in the Act such as section 61, liability for damage caused by goods, now firmly place the risk on the entire supply chain and not on the consumer. By doing so, this should help achieve the first two

Joint and several liability

objectives of the Act in that consumers are protected from unsafe or hazardous goods and are able to claim for damages suffered should harm occur. These provisions force the supply chain to take responsibility for the goods that they sell and ensure that they are safe and adhere to standards.

As mentioned previously, the entire supply chain is now jointly and severally liable for product liability. The Act defines a supply chain as “the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to the consumer, whether as a producer, importer, distributor or retailer of goods, or as a service provider”. By giving the supply chain joint and several liability, the Act has ensured that any risk has been distributed between those who are best able to bear it. This means that we have moved out of the age of “the loss lies where it falls” to an age of supplier responsibility and accountability.

Joint and several liability arises when two or more parties are responsible for the same liability. Under the Act, a consumer that suffers harm as a result of a product failure or defect may sue for damages in court (after first having received a certificate from the Tribunal stating that the supplier was engaged in prohibited conduct). It is the duty of the court to assess whether harm has been proven and adequately mitigated as well as determine the extent and monetary value of any damages such as economic loss. The courts are also able to apportion liability among persons who are found to be jointly and severally liable.

An example of joint and several liability:

A motorist buys four new tyres for his vehicle from a reputable tyre dealer, XYZ Tyres. Unbeknownst to the motorist, one of the tyres has a tread separation defect and bursts, causing the motorist to crash. Upon investigation, the defect is found and the motorist decides to sue for damages. Who would be liable? XYZ Tyres would obviously try to distance themselves from blame and would claim that they merely sold and fitted the tyres and are, therefore, not responsible for something that was clearly a manufacturing defect. The manufacturer, on the other hand, argues that while every care is taken to avoid manufacturing defects, they rely on the dealers to look out for obvious defects when fitting tyres: their contract with XYZ Tyres requires XYZ's mechanics to complete regular tyre fitment training with the manufacturer.

The plaintiff (in this instance the motorist) would be able to sue the party of his choosing within the supply chain i.e. the manufacturer. This party would then, in turn, be able to sue any party with whom they have joint liability in order to recoup some of the costs.

As mentioned previously, before the Act came into effect a consumer was required to prove fault: that the manufacturer was negligent in some way. This would have required that the consumer have an extensive knowledge of the product's manufacturing process. According to Newsome Melton, a firm specialising in product defect lawsuits, as many as 200 different materials are used to create the average tyre. These materials are combined in different amounts and mixed until the desired consistency is reached. However, under the Act, a consumer would no longer be required to prove that some of the materials used during production were substandard or that the cooking temperature was incorrect. Instead, it would be sufficient to show that harm was suffered and that it was as a result of a defect in the tyre. In Part 3 we will look at the case of *Wagener v Pharmacare* to see the position prior to the implementation of the Consumer Protection Act.

Warnings and Instructions

Section 58 is another section which places liability firmly on the shoulders of suppliers. Not only must goods be safe and free from defects, but they must come with adequate warnings and instructions. If it is found that harm arose as a result of a lack of proper operational instructions or warnings, then the whole supply chain could be liable for damages in terms of s61(1)(c). As you will recall, protecting consumers from exploitation and safety hazards is one of the objectives of the Act and these requirements will ensure achievement of this goal.

Risks of an **unusual character or nature** must be brought to the attention of consumers. For example:



WARNING

THESE ANIMALS BITE



WARNING

FALLING ROCKS



WARNING

ELECTRIC FENCE

The **owner** of a zoo would do well to warn visitors by way of sign not to place their hands in the enclosures as the animals may bite.

Similarly, any risk that a consumer could not reasonably contemplate or be expected to know, such as the risk of falling cows and coconuts, needs to be brought to the consumer's attention.

Consumers also need to be made aware of risks that could result in serious injury or death.

Packages containing any hazardous or unsafe goods must have **instructions** advising the consumer on the safe handling and use of those goods.



Furthermore, if any hazardous or unsafe goods are installed for a consumer, the installer must ensure that the consumer receives the original copy of the warning as relating to the goods.

As Adv. Melville says in his book , “In view of the severity of the possible consequences of failing to warn a consumer of a potential hazard, it would be advisable to err on the side of caution and warn consumers even of hazards that seem self-evident.”

Any sign displayed claiming that consumers are liable for damage to goods on display is null and void (s18) as consumers have the right to choose or examine goods that are on display. However, if a consumer was grossly negligent, reckless, and malicious or involved in criminal conduct, a supplier would be able to require that they pay for any damage that they had caused to the goods.

Notice required for certain terms and conditions

Another objective of the Act is improving consumers' access to information so that they are better able to make informed decisions. The Act goes about achieving this goal with requirements such as section 49 which imposes the obligation on suppliers to draw a consumer's attention to clauses in an agreement that

- limits the risk or liability of the supplier in any way,
- constitute as an acceptance of risk or liability by the consumer, or
- impose an obligation on the consumer to indemnify the supplier.

If any such terms are used in a contract or agreement, the supplier needs to draw them to the consumer's attention. A supplier also needs to ensure that the consumer is given adequate time to read and comprehend these terms: this must happen before the transaction is concluded or finalised and consideration (money) is offered. This is especially true if the provision or term concerns anything that could result in serious injury or death. The agreement on the following page, taken from www.bungee.com, is a great example of what is required under the Act. By having a space where the consumer must initial after every clause, this ensures that the consumer must read that for which they are giving permission. Should any dispute arise, in the event that a consumer was injured bungee jumping, the supplier has an agreement that clearly states that the consumer accepted the liability and indemnified the supplier. While the Act does not require this, it does state that the consumer must act in a way that is consistent with the consumer acknowledging that they have been informed of any risk and have accepted the provision. At the top of the agreement there is a cautionary statement warning consumers to read the agreement carefully as, by signing it, they are voluntarily giving up any legal right to sue. There is also a warning concerning the dangers of bungee diving that is not only in capitals but has also been underlined for additional emphasis. The clauses that limit the supplier's liability and constitute an assumption of risk (by the consumer) are also placed at the top of the document to ensure that they are read first.

The Act requires that any such contract terms or conditions be drawn to the attention of the consumer in a manner that is obvious and will attract the attention of an ordinary alert consumer. The Act suggests the following methods:

- Bolding or underlining text
- Use of bold colours
- Headings
- Arrows
- Symbols

Upon reading through the bungee agreement, however, you will notice that in clause 3, exemption from liability, states, "Exemption from liability includes loss, liability, claims, expenses, damages or injury resulting from the negligence of Bungee Masters or from any other cause or causes." While this might seem like a great way for a supplier to protect itself in theory, under the Act a supplier is no longer able to exempt itself from gross negligence. Section 51 (1) states that a supplier must not make a transaction to an agreement subject to any term or condition if

(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.

Any such clause would be voidable to the extent that it fell afoul of the Act. The full list of prohibited terms and conditions can be found in s51. As to what constitutes gross negligence, this will be for the courts to decide based on the circumstances.

A supplier is not able to opt out of liability for gross negligence under the Act.

BUNGEE MASTERS, INC. d.b.a. BUNGEE.COM, LLC
PARTICIPATION AND RELEASE FROM LIABILITY AGREEMENT

CAUTION: Please read this agreement carefully. By signing this agreement, you are voluntarily giving up certain valuable legal rights to sue Bungee Masters, Inc. for any personal injuries or death you may suffer as a result of the training, equipment or supervision provided in connection with BUNGEE JUMPING or ZIP-LINE activities. **WARNING: THE ACTIVITY/SPORT OF BUNGEE JUMPING COULD CAUSE: SERIOUS INJURY OR EVEN DEATH**

Please read and fully understand each provision of this agreement and so indicate by initialing each provision in the space provided. Additionally, please sign, initial and date this form in all designated spaces.

In consideration of Bungee Masters, Inc. allowing me _____(Please print your name) to utilize the facilities and equipment and to participate in bungee jumping, zip-line and any related activities, I agree with Bungee Masters, Inc. that:

1. **PARTIES INCLUDED.** I understand that this agreement includes Bungee Masters, Inc., its employees, instructors, agents, the owners of the bridge, land, property and adjacent property owners, or other facilities used for bungee jumping activities (hereinafter referred to in this agreement as Bungee Masters). _____(Initials)

2. **ASSUMPTION OF RISK.** I am fully aware that bungee jumping, zip-line tours and its related activities, is a dangerous sport and contains inherent risks and dangers (including, but not limited to, serious injury or death), that no amount of care, caution, instruction or expertise can eliminate. I understand the scope, nature and extent of the risks involved and voluntarily and freely choose to assume any and all such risks. _____(Initials)

3. **EXEMPTION FROM LIABILITY.** I hereby fully and forever waive, release and discharge Bungee Masters from any and all loss, liability, claims, expenses, demands, actions, and causes of action whatsoever arising out of any damages, both in law and in equity, in any way resulting from personal injuries, conscious suffering, death or property damage sustained by me arising out of training, bridge walking, climbing, falling, ascending, bungee jumping, zip-line tours or any other related activities. Exemption from liability includes loss, liability, claims, expenses, damages or injury resulting from the negligence of Bungee Masters or from any other cause or causes. _____(Initials)

4. **COVENANT NOT TO SUE.** I agree for myself and my heirs, executors, administrators and assigns, not to institute any suit or action at law, or otherwise, against Bungee Masters, nor to initiate or assist the prosecution of any claim for damages, or cause of action which I, my heirs, executors, administrators or assigns may have by reason of injury to myself or my property arising from bungee jumping, zip-line tours or any related activities. _____(Initials)

5. **INDEMNITY & LEGAL PROCEEDINGS.** I agree for myself and my heirs, executors, administrators and assigns to indemnify and hold harmless Bungee Masters from any and all losses, liabilities, claims, expenses, actions or proceedings of any kind which may be initiated by myself or any other person or organization. This includes and entitles Bungee Masters to recover and reimbursement for all reasonable legal court cost, attorney's fees and related expenses incurred by Bungee Masters and other indemnified parties, for the defense of any such legal actions or appeal thereof, which may arise directly or indirectly from bungee jumping/zip line tour or any related activities. _____(Initials)

6. **CONTINUATION OF OBLIGATIONS.** I agree and acknowledge that the terms and conditions of this agreement shall continue in full force and effect at all times, and shall be binding upon my heirs, executors, administrators and assigns or my estate. the agreement shall be effective not only for my first bungee jump or zip-line tours, but also for any subsequent bungee jumps or any related activities in any way associated with Bungee Masters. _____(Initials)

7. **INSURANCE DISCLAIMER.** I understand that Bungee Masters does not provide any insurance, either medical or liability, for any incident which may arise as a result of my participation in bungee jumping, zip-line tours or any related activities, and if I want insurance of any kind, I must furnish my own. _____(Initials)

8. **MEDICAL EXPENSES.** I will pay my own medical emergency expenses and all subsequent medical expenses in the event of any incident/accident, illness or incapacity, regardless of whether I have otherwise authorized such expenses. _____(Initials)

9. **SEVERABILITY.** If any provision of this agreement is held to be invalid or unenforceable, all other provisions shall nevertheless continue in full force and effect. _____(Initials)

10. **PHOTO & IMAGE RELEASE.** I hear-by grant and release to Bungee.com, LLC all rights, privileges & ownership of any images of me or my likeness captured on film, digitally or electronically while on the bungee bridge, zip-line tour, adjacent property or any other locations where my image or photo might have been captured by bungee.com or any other person(s). I grant & release any claim myself or claims by any of my heirs or agents that the use of my images might allow. These rights are granted for perpetuity from the date of this release forever both here in the United States of America or any other place or legal jurisdiction on planet Earth. I understand my image may be used in print, broadcast, Internet or any other format at the sole discretion of Bungee.com, LLC or any of its agents or licensees. _____(Initials)

I testify that I am physically fit, and am not under the influence of drugs, alcohol or medication of any kind. I hereby expressly recognize that this agreement is a contract pursuant to which I have released any and all claims against Bungee Masters, Inc., its employees, instructors, agents, the owners of the bridges, land or other facilities, resulting from my participation in bungee jumping or any related activities, including any claims caused by the negligence of Bungee Masters, Inc.

I HAVE READ THIS AGREEMENT CAREFULLY AND FULLY UNDERSTAND ITS CONTENT AND SIGN IT VOLUNTARILY OF MY OWN FREE WILL. I FURTHER CERTIFY THAT I AM 18 YEARS OF AGE OR OLDER. (IF YOU ARE UNDER THE AGE OF 18, A PARENT OR LEGAL GUARDIAN MUST SIGN AND DATE THIS SECTION.)

DATE: _____ / _____ / _____

Signature of Participant

Signature of Parent/Guardian
If participant is under 18 years old

If under 18 years old please print the name of your parents or guardians: _____

To view this agreement online, please click here.

Vicarious Liability

This lesser known section of the Act, section 113, holds a supplier liable for the actions of their employees “for anything done or omitted in the course of that person’s employment activities” on behalf of the supplier. This liability is joint and several but does not apply in respect of criminal liability. An example of this can be seen in the recent Dischem damages case where a Dischem patron was injured by a store employee and sought R850 000 in damages. Another example would be if a supplier sends an employee to collect an outstanding payment from a consumer and the employee assaults the consumer. The supplier could be liable for unconscionable conduct (section 40) but not for the criminal assault charges. It is, therefore, vital that suppliers educate their employees as to the requirements of the Act.

Supplier’s Accountability

Not only are suppliers liable to consumers for any harm that they may suffer as a result of a defective product or lack of safety instructions, but they are also responsible for consumers’ property. Section 65 holds suppliers accountable for any property belonging to a consumer that they have in their care. If a supplier is in possession of a consumer’s property, they must handle and safeguard the goods carefully and diligently as they will be liable to the consumer (owner of the property) for any loss.

An example of this would be a mechanic who is responsible for the safe-keeping of vehicles that he is repairing until the owners takes back possession upon completion of repairs. If the mechanic were grossly negligent and did not take reasonable care of the property in his care, then he would be liable to the consumer for any loss. This is true even if there are disclaimer or indemnity signs up in the workshop stating that the mechanic is not responsible for any theft or damage to vehicles left in his care or a clause in an agreement that the consumer was made to sign. Once again reasonable care is a subjective term and will be situation dependent. If a car was to get stolen overnight from the workshop and it transpired that the mechanic had left the keys in the unlocked car, the mechanic would be liable for the cost of replacing the car. However, if the same mechanic had ensured that all cars in the workshop were locked, with their keys stored in a safe inside the locked, alarmed, workshop, it would be more difficult to sue on the grounds of failure to take reasonable care.

Product Liability

The section that has brought with it the greatest change to the law and has the most serious implications on the entire supply chain is section 61, liability for damage caused by goods. Under this section of the Act consumers are able to sue (the producer or importer, distributor or retailer of any goods as well as an installer) for harm suffered wholly or partly as a consequence of

- the supply of 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 out of associated use of any goods).

Definitions

Defect:

- 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
- 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.

Failure:

- the inability of the goods to perform in the intended manner or to the intended effect.



Hazard:

- a characteristic that has been identified as, or declared to be, a hazard in terms of any other law; or
- a characteristic that **presents a significant risk of personal injury** to any person, **or damage to property**, when the goods are utilised.

Unsafe:

- due to a characteristic, failure, defect or hazard, particular goods present an **extreme risk of personal injury or property damage** to the consumer or to other persons.

Harm

Harm for which a supplier may be held accountable

- the death of, or injury to, any natural person;
- an illness of any natural person;
- physical damage to any property (whether movable or immovable) or loss thereof; or
- any economic loss that results from the harm.

A product liability claim for damages must be brought within three years of

- the death or injury of a person;
- the earliest time at which a person became aware of an illness;
- the earliest time at which a person became aware of a loss or damage to property; or
- the latest date on which a person suffered any economic loss.

The following example shows just how costly liability could potentially be (as well as the importance of making sure that you are insured).

John Doe is an accountant with a wife and two young children. He is the breadwinner of the family although his wife also earns an income. On his way to work one morning, the brakes in his new car fail, causing him to crash. The accident is devastating and leaves poor John paralysed from the neck down. As a result, John can no longer work and requires a full-time caregiver. Aside from the physical harm suffered, John has also developed an anxiety disorder which will require therapy to overcome. During the course of the investigation it is found that the brakes were in fact faulty and that several other similar cases had been reported involving the same make and model car. What costs would the vehicle manufacturer be liable for?

- All of John Doe's hospital and medical bills
- Replacement of vehicle (if a write-off) or repairs
- Wheel chair and making the house wheel-chair accessible
- Full-time caregiver
- Loss of earnings (consequential damages)
- Financial support for John's dependents* (consequential damages)
- If John had his own accounting firm, then he would be entitled to loss of profits (consequential damages)

**Dependents include spouse, children under the age of 27 (who cannot support themselves) and elderly parents in your care.*

The fact that numerous similar cases involving the same vehicle model were reported indicates that there could be a design or manufacturing defect. The vehicle manufacturer, therefore, has a responsibility to launch a private investigation (at their own expense) into the braking systems of that model of vehicle.

Furthermore, if the investigation finds that there is in fact a defect in the vehicle's braking system, the vehicle manufacturer will be liable for the cost of initiating and carrying out a recall as well as possibly compensating any other claims that may arise.

Five years after John's accident, technology has advanced to such a degree that there is now a procedure available that may reverse some of the damage done to John's spine and give him the use of his legs again. The operation is very costly and will require that John undergo months of rehabilitation. Is the vehicle manufacturer still liable?

As you will recall, a claim for damages must be brought within three years of the injury. However, a claim for economic loss (any economic loss that results from the harm) can be brought against the defendant within three years of the date that it is suffered. In this example, an economic loss resulting from the harm would be the new procedure and subsequent rehabilitation. This means that as a new complication arises or new needs emerge as a result of the initial car accident, John is able to keep suing the vehicle manufacturer to cover these expenses. Before the Act, a consumer would have been awarded a lump-sum pay-out that would have been calculated by an actuary to cover projected loss of income and medical expenditure. Any additional costs incurred after the settlement would be the responsibility of the consumer.

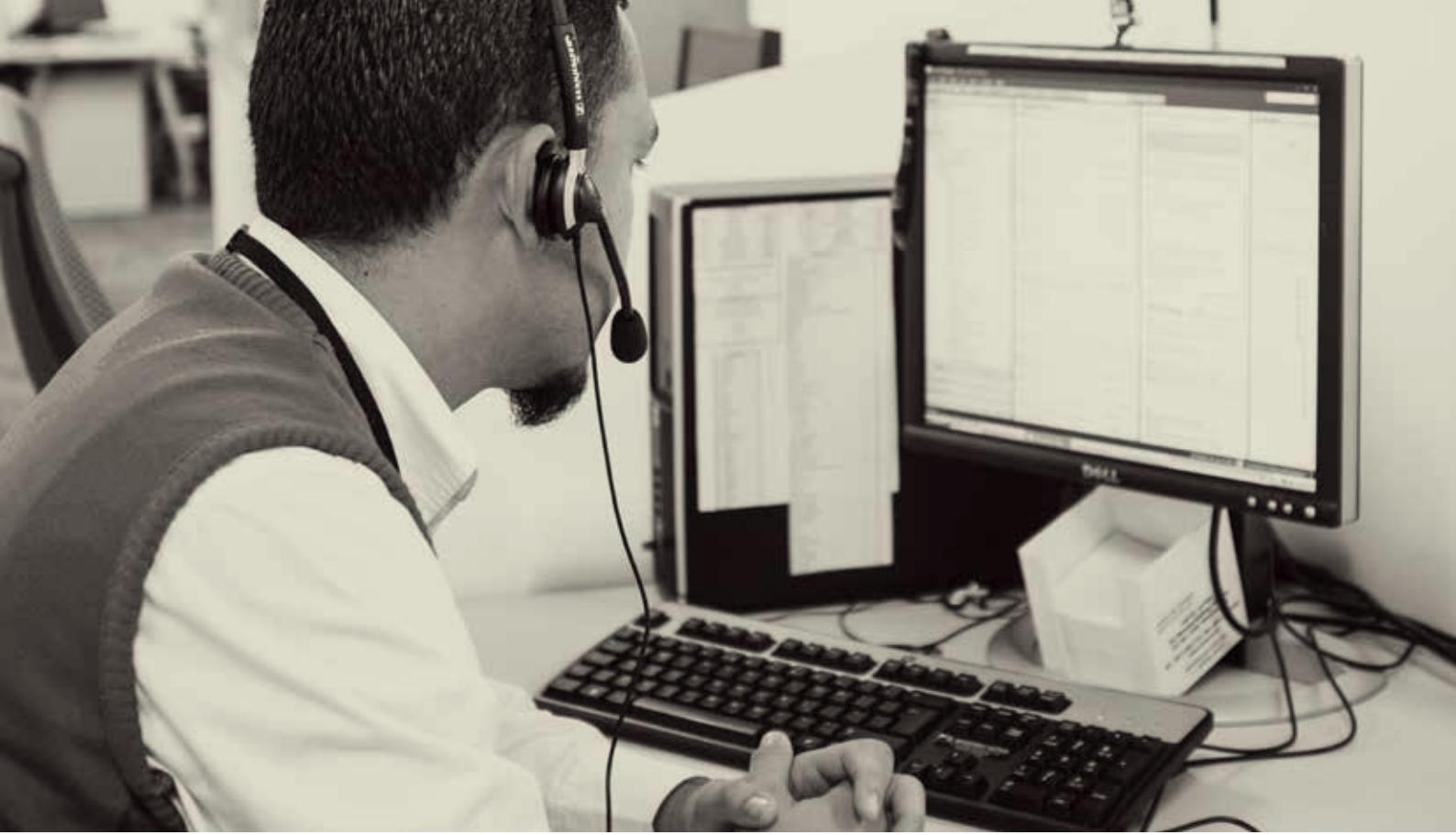
As you can see by this exaggerated scenario, a product liability claim could potentially cost a supplier millions of rands in damages and there is no limitation to the amount that they may be liable to pay.

Defences

There are certain instances in which liability does not arise. For example, a supplier can argue that the unsafe product characteristic, defect, failure or hazard did not exist in the goods at the time they were supplied, or that such defects were wholly attributable to compliance with instructions provided by their supplier. If the vehicle manufacturer could prove that the fault in the brakes developed as a result of following the brake manufacturer's installation instructions, then liability would pass on to the manufacturer of the brakes. Similarly the vehicle manufacturer would not be held liable if they could prove that the defect resulted from compliance with an applicable standard.

Retailers and distributors can argue that it is unreasonable to expect them to have discovered any failure or hazard in the product having regard to their role in marketing the goods. However, if the retailer had received frequent returns of said goods it would be hard to argue that they were not aware that there was a problem.* It will also be easier for a cash-strapped Mom and Pop type establishment to use this defence (as opposed to a supermarket chain) as they would not have the funds available to perform tests and checks on the goods that they sell.

* In the now infamous "hot coffee" case of Liebeck v McDonalds, Liebeck was awarded nearly \$3 million (reduced by the judge to \$640 000) for third degree burns caused by spilling McDonalds coffee on her lap. During the trial it was revealed that McDonalds had received numerous complaints that their coffee was too hot but had failed to act on these as the number of injuries was insufficient to cause the company to evaluate its practices. This case will be discussed in full in Part 3.



Safety Monitoring and Recall

The National Consumer Commission is responsible for receiving any complaints or reports from consumers regarding product defects, failures or hazards as well as complaints relating to injury, illness or damage to property resulting therefrom. The Commission is also responsible for monitoring and analysing this information in order to detect any potential risk to the public, for example, a pattern may emerge if there are multiple complaints relating to the same goods or manufacturer. It is also the Commission's job to investigate the nature, cause, extent and degree of risk posed to the public, and to notify the public where a danger exists. Upon finding that goods are unsafe, the Commission must institute a recall, deciding whether consumers are to be refunded or whether goods should be repaired or replaced.

The Commission has the power to issue a notice to the producer or importer of goods requiring that they either conduct an investigation or carry out a recall programme.

This in no way subtracts from a manufacturer or importer instituting a voluntary recall of its own volition. Regardless of whether a recall is voluntary or mandated by the Commission, the distribution network/chains **MUST** remove the recalled products from the market place.

The Commission must be notified in writing within two days of a supplier initiating a recall. In this notice, a supplier must state that the goods are subject to a recall and set out the nature of the defect or dangerous characteristic of the goods. **Failure to notify the commission may result in a supplier being found guilty of an offence under s110 (2) of the Act.**

In Part 3 we will examine the wide-spread product recalls instituted by Toyota as well as take a look at a well-executed product recall campaign spearheaded by Woolworths.

Limiting liability

While suppliers are not able to indemnify themselves from gross negligence, they are, however, still able to limit some of the liability to which they are potentially exposed. As supply chains are now jointly and severally liable for harm caused by unsafe or defective goods, it is very important that they have supplier agreements in place that ensure that all members of the chain have adequate protection and recourse (i.e. public or product liability cover). Every member of the supply chain must be familiar with and adhere to the requirements of the Consumer Protection Act. Supplier agreements provide some level of protection and should also include information such as who will be responsible for warranty claims or repairs.

Businesses are still able to contract out of some liability using disclaimers and indemnities; however, the requirements around this have become much stricter. Under section 51 of the Act, a supplier is prohibited from making a transaction or agreement subject to any term or condition that would waive or deprive a consumer of a right (in terms of the Act). Any term or condition that purports to limit or exempt a supplier from liability for any loss resulting from gross negligence would be void. As would any term or condition that acted as an assumption of risk or liability by the consumer for a loss that resulted from a supplier's gross negligence. In addition to this, Regulation 43 (3) prohibits contract terms that exclude or limit the liability of a supplier for death or personal injury caused to a consumer through an act or omission of that supplier.

A supplier must not, in terms of **Section 48 (1)(c)**, require a 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

The importance of liability insurance

By now you should be fully aware of the additional risks to which suppliers operating within the Republic are exposed. With the somewhat harsh requirements of **section 61** holding the entire supply chain liable for harm, irrespective of which party was negligent, it is vital that suppliers have adequate liability cover. As important as insurance cover is, only about 50% of the exposures in the Act can be dealt with using liability insurance. The remaining portion must be managed with legal risk management. Many of the commercial liability policies that are available do not cater for the Consumer Protection Act.

Some areas in which standard liability insurance policies are deficient:

- Fines and penalties excluded
- Product replacement excluded
- Refunds excluded
- Indemnity clauses with suppliers excluded
- Government recall excluded

Camargue Underwriting Managers have partnered with Mutual & Federal to offer three Liability Insurance Solutions – General Liability Cover, Directors and Officers Liability Cover and Employment Practice Liability Cover. These solutions combine conventional Liability Insurance cover and value added Risk Management Tools to protect you and your business from such risks - offering you complete cover and peace of mind.

General Liability Cover

The General Liability Cover will protect your company from a wide range of civil liability claims brought by third parties. It is much wider than the standard public liability cover, with extensions that include cover for pure financial loss, custody and control, and negligent advice.

Cover includes:

- Injury to third party
- Damage to third party property, including loss of use
- Pollution
- Negligent advice claims

Value-Added Services:

- Advice on limiting liability risks and structuring of standard trading conditions
- Free telephonic legal advice (including matters not covered by the policy)
- CPA website that addresses specific industry concerns about the CPA

Directors and Officers Liability Cover will protect you against claims brought against you, in your personal capacity, by shareholders or stakeholders.

Directors and Officers Liability Cover

Cover includes:

- Cover for alleged breach of contract, breach of duty, breach of trust, misleading statements, negligence and breach of warranty of authority
- Cover for the company where the company reimburses the legal defence costs of the directors and officers
- Access to corporate governance surveys
- Membership to professional bodies that offer advice and regular updates on directors' regulatory and industry challenges
- Access to private arbitration services that attempt to resolve disputes before they get to court

Employment Practice Liability Cover

Employment Practice Liability Cover will protect your company against the risk of unfair labour practice claims such as unfair dismissal, harassment, discrimination, inaccurate job references and failure to promote or employ.

Cover includes:

- Settlement of legal fees
- Settlement of damages and awards that follow an unsuccessful defence

Value-Added Services:

- Access to private arbitration services
- Access to over 250 Labour Consultants
- Access to in-depth Labour Risk Analysis
- Access to CCMA's case management technology

Products Inefficacy and Products Liability Cover

Products Inefficacy provides cover for the financial loss that a third party sustains when a product supplied by the Insured does not fulfil its intended function. This extension to the general liability policy would pay the difference between the financial value of what the third party's tangible property should have been and what it was as a result of the Insured's defective product. It does not cover the repair, replacement or recall of the product itself but it does cover the reasonable costs of avoiding or mitigating the effects of such failure.

For example, a fertilizer supplied by the Insured is missing an important ingredient. As a result the farmer's crops only produce 10% of their expected yield. The Products Inefficacy extension would cover the financial value of the missing 90%. The cost of supplying the missing ingredient is not covered – that would be the subject of a Products Guarantee claim.

The difference between Products Inefficacy and Products Liability

Many brokers find the distinction between Products Inefficacy and Products Liability quite confusing. The simplest way to determine the difference is to ask “what would have happened if the Insured’s product had not been applied at all?” If the answer resembles the preceding claim scenario then it may well be a Products Inefficacy claim.

Products Inefficacy and Products Liability both provide for losses arising out of the Insured’s Products.

The differences between Products Inefficacy and Products Liability

Products Inefficacy	Products Liability
Covers liability arising when the Insured’s products do not perform as promised	Covers liability arising when the harmful nature of the Insured’s Products cause Injury or Damage
Only covers liability arising out of a pure economic loss (no Injury or Damage)	Only covers liability arising out of Injury or Damage (no pure economic loss cover)

Illustrating the difference by example

The Insured provides anti-microbials which are included in its customer’s dairy products. Without the anti-microbials the product will spoil in 24 hours, but with the anti-microbials the product will last for 7 days. The claim arises when defective anti-microbials are added to the dairy products.

If the claim arises because the dairy products spoil in 48 hours – then this is a Products Inefficacy claim. The dairy product was not actually damaged, but it was rendered of less value because of its reduced shelf life.

If the claim arises because the milk immediately acquires a curry spice flavour then this would be a Products Liability claim. The product was damaged when it was contaminated with an unsuitable flavour.

Part 3

CASE STUDIES EXAMPLES

Select real world examples from around the world, including likes of McDonalds, Toyota, Pharmacare Ltd and Woolworths.

In Part 3 of this guide we will examine real world case studies from around the world relating to the Consumer Protection Act.

We will look at a summary of the case, the facts, the argument presented by the company / defendant as well as the final verdict



Product Liability, Consumer Safety and Warnings

Liebeck v McDonalds

Summary

Many people have heard of the now infamous “hot coffee” lawsuit against McDonalds. While people branded it as the poster-child for frivolous American lawsuits, what they failed to realise is the seriousness of the injury that lead to the lawsuit and the callous attitude in which McDonalds responded.

In 1992 79-year-old Stella Liebeck suffered third degree burns to her pelvic region as a result of accidentally spilling hot McDonald's coffee on her lap. Liebeck was being chauffeured by her grandson, Chris, on 27 February when they stopped at a local McDonalds (New Mexico) to purchase a cup of coffee (at a cost of 49 cents). The grandson parked the car after receiving the coffee so that Liebeck could add sugar and cream to the coffee. However, in the process of removing the lid (with the cup placed between her knees), the entire cup of coffee spilled over her lap. Liebeck happened to be wearing cotton sweatpants which absorbed the coffee and held it against her skin scalding her thighs, buttocks and groin.

The injuries Liebeck suffered include third-degree burns to six per cent of her body including her inner thighs, buttocks, and genital and groin area. She also suffered lesser burns that covered over sixteen per cent of her skin.

Liebeck was hospitalized for eight days, in which time she underwent skin grafting. This was followed by two years of medical treatment.

Liebeck sought to settle with McDonald's for \$20 000 to cover actual and anticipated medical expenses including: \$10 500 for past medical expenses; \$2 500 for future medical expenses; \$5 000 for loss of income. McDonalds refused, offering instead a paltry \$800 which is when Liebeck took her fight to court.

The facts

The temperature at which McDonalds' coffee was served was a central point of focus of the trial. During discovery, it was revealed that in a span of 10 years (1982 – 1992) McDonalds had received more than 700 claims from people burned by its coffee (some substantially similar to Liebeck's and involving third-degree burns). Claims arising from coffee-scalding injuries were settled at a combined cost of more than \$500 000. This proved that McDonalds had previous knowledge about the extent and nature of the hazard. Despite this, McDonald's quality control manager testified that “this number of injuries was insufficient to cause the company to evaluate its practices” and “restaurants had more pressing dangers to warn about”.

McDonalds further admitted that they were advised by consultants to keep coffee at between 180 and 190 degrees Fahrenheit (~ 82 – 88 °C) to maintain optimum taste. However, they had not evaluated the safety ramifications at this temperature. McDonald's quality assurance manager testified that it was actively enforced that coffee be served at this temperature. He also testified that coffee served at home is usually 135 to 140 degrees (~ 57 – 60 °C) and that burn hazard exists when food substances are served at 140 degrees or above.

McDonalds' defences

In their defence, McDonalds argued that customers bought coffee [from them] on their way to work or home and did not intend to consume it immediately. It is interesting to note that the research conducted by McDonalds was contrary to this and revealed that most customers intended to consume the coffee immediately while driving.

McDonalds' second defence was that consumers know that coffee is hot and that is the way that they want it. They did, however, acknowledge that their customers were unaware that the coffee was hot enough to cause third-degree burns. They also acknowledged that a statement on the side of the cup was not a warning but a reminder since the location of the writing would not warn customers of the hazard.



Verdict

The jury found in favour of Liebeck, awarding her \$200 000 in compensatory damages (which is ten times more than she was originally prepared to settle for). This amount, however, was reduced by 20% as the jury found Liebeck partially responsible (McDonalds was found to be 80% responsible – apportionment of blame). Punitive damages were set at \$2.7 million but later reduced to \$480 000. The parties settled out of court for an undisclosed amount.

The above case study serves as a valuable reminder to suppliers to take complaints received from consumers in a serious manner. Once a complaint escalates past a supplier's internal complaint handling unit a supplier can no longer control the outcome. If a supplier periodically receives similar complaints, then that is a clear indication that there are issues that need to be investigated and addressed. Failure to Act, when there is a duty to do so, is negligent behaviour.

The case study also shows how the principle of apportionment of blame works in practice. As you will recall, a court may apportion blame where more than one party is found to be liable for damages.

Suppliers must ensure that goods be reasonably suitable for the purposes for which they are generally intended. This is true also of consumable goods such as coffee. As the plaintiff pointed out, McDonald's was serving coffee at a temperature of up to 28 °C higher than it is safe to consume.

Safety Monitoring and Recall, Product Liability and Class Action lawsuits

Allegations, investigations and lawsuits - the great Toyota recall crisis

Founded in 1937 in Japan, Toyota fast grew to become the one of the world's most beloved vehicle manufacturers. In 2011 Toyota was the third largest automobile manufacturer globally. Trusted world-wide for their sturdy, reliable motor vehicles, their reputation has taken a huge knock in recent years as a result of several wide-spread product recalls.

In this case study we will examine the events leading up to the recalls as well as assess Toyota's response to the crisis.

Crisis timeline

Toyota's recall woes started in the United States in September 2007 when the company announced a recall of 55 000 Camry and ES 350 cars as a result of unsecured "all weather" floor mats that posed the risk of moving forward and trapping the gas pedal.

Two years later, a devastating accident that claimed the lives of four people propelled Toyota back into the headlines. Mark Saylor, a California Highway Patrol officer, and his family were travelling down a highway in San Diego on 28 August 2009 when the Lexus that they were in started to accelerate out of control in excess of 100 mph (160 km/h). In a frantic 911 call (which has since been made public) made by one of Saylor's passengers the caller is recorded as saying:

We're in a Lexus... and we're going north on 125 and our accelerator is stuck... there's no brakes... we're approaching the intersection Hold on ... hold on and pray...pray.

On 14 September 2009 preliminary reports from an investigation into the crash revealed that the vehicle (which was on loan from Lexus while Saylor's vehicle was being serviced) may have been incorrectly fitted with rubber floor mats intended for another model. This was later confirmed as the accelerator pedal was found "bonded" to the floor mat. Fifteen days later (29 September 2009) Toyota announced that they are recalling the floor mats on 4.2 million Toyota and Lexus Vehicles as they may interfere with the gas (accelerator) pedal.

On 2 October 2009 Toyota breaks their silence by publicly apologising to the Saylor family members and expressing their grief at the fatal crash. They also apologise for the current and future recalls.

At the end of October, Toyota sends letters to owners notifying them of an upcoming recall to fix the unintended acceleration issue stating "no defect exists". Three days later the National Highway Traffic Safety Administrator publicly rebukes Toyota for making statements that were "inaccurate" and "misleading" as the floor mat recall was an interim measure and would not "correct the underlying defect".

The Los Angeles Times claims on 8 November 2009 that Toyota had ignored over 1 200 complaints of unintended acceleration over the past eight years.

By the end of November Toyota has instructed dealers to remove the gas pedal in order to shorten it so that it could not interfere with the floor mats. As an extra measure of confidence, Toyota also directs dealers to update the on-board computers on the Camry and Avalon and certain Lexus models with a new programme that will override the electronic gas pedal when the brake pedal is pressed.

Four days later the Los Angeles Times runs a story in which they claim that the unintended acceleration complaints on Lexus increased sharply in 2002 when the company began using their drive-by-wire system. The story also claimed that Toyota drivers who had removed the floor mats were still experiencing unintended acceleration. Days later Toyota reiterates that the floor mats are the root cause of most unintentional acceleration claims. However on 26 December another four lives are tragically lost when a Toyota Avalon crashes into a Texas Lake after accelerating out of control. This time the floor mats are found in the boot of the car.

In January the following year Toyota issued a further recall for 2.3 million vehicles because of a problem with the gas pedal stating:

"a rare set of conditions which may cause the accelerator pedal to become harder to depress, slower to return or, in the worst case, stuck in a partially depressed position."

A full list of Toyota's 2009 - 2011 recalls can be found [here](#).

Toyota's initial reaction to the crisis has been criticised by media world-wide. Instead of tackling the crisis head-on and reassuring consumers as to the reliability and quality of their vehicles and assuring them that they would investigate, Toyota opted to keep quiet. After safety concerns were raised in the media with the Saylor tragedy, Toyota waited more than two weeks to make an announcement. Toyota also attempted to shift blame elsewhere and deny that there was a serious defect with the design of their vehicles.

In December 2012 Toyota announced that they had agreed to a \$1.1 billion settlement in a class action lawsuit by U.S. car owners who were affected by the company's mass recalls over issues of unintended acceleration. This settlement will resolve the economic-loss portion of Toyota's lawsuit and will cover the cost of the vehicle owner's fees for installing new brake override systems, as well as any other economic losses incurred. Toyota was also fined \$66.2 million by the National Highway Traffic Safety Administration for the manner in which some of the recalls were conducted.

Under the Consumer Protection Act, the National Consumer Commission is the body that is responsible for safety monitoring and instituting recalls. Like the United States' National Highway Traffic Safety Administration, the Commission also has the authority to fine suppliers.

While a manufacturer is free to institute a recall of their own volition, the Commission must be informed within two days, and their guidelines (see Appendix I) must be followed. The Commission may furnish the supplier with a notice to conduct an investigation or carry out a recall. A supplier, however, is entitled to apply to the Tribunal to have such a notice set aside.

If a manufacturer suspects that a product may contain a previously undetected safety hazard or defect, it is their duty to conduct a thorough investigation as they are responsible for the safety of their consumers.

Suppliers would do well to learn from Toyota's mistakes with regards to their secretiveness. Addressing concerns head-on and clearly informing consumers of the nature of the defect and level of safety threat will garner support from even the most difficult of consumers. This case study also serves to demonstrate just how costly a product liability lawsuit can be for a supplier, especially with the additional harm that consumers are able to sue for under section 61. It is no wonder that airlines joke, rather callously, that it is cheaper to kill a passenger than injure them.

Most expensive product recalls

Other expensive product recalls have included:

- Tylenol - \$100 million
- Dell and Sony - \$400 million
- Bridgestone/ Firestone - \$440 million
- Ford - \$3 billion
- Merek (Pharmaceuticals) - \$4.85 billion

Contractual link and proving fault

Wagener v Pharmacare Ltd

The following case study provides valuable insight into the area of product liability pre Consumer Protection Act. The verdict, handed down by the Supreme Court of Appeal in March 2003, highlights just how difficult it was for a plaintiff to prove fault prior to the implementation of the Act as well as the issue of a contractual link in a strict liability claim.

Summary

Ann Wagener, the appellant, underwent surgery in which Regibloc Injection, a local anaesthetic manufactured by Pharmacare Limited (the defendant), was administered. As a result of the surgery Wagener's right arm became paralysed. Wagener argued that the paralysis was a direct result of the Regibloc. Rita Cuttings, the second appellant, likewise underwent a surgery in which Regibloc was administered, and, as a result, she too became paralysed in the arm.

At the centre of the case was the question of whether a manufacturer can be held strictly liable for harm caused by defective manufacture of a product where there is no contractual privity between the manufacturer and the injured person.

Argument

As the Consumer Protection Act was not in existence, the appellants had to rely on the Constitution and the Common Law. The main claim before the court was that the Regibloc injection that was administered was unsafe for use as a local anaesthetic because it resulted in necrosis and paralysis. The appellants argued that the manufacturer had a duty to produce goods that would not cause harm. The secondary argument was that the Regibloc injections administered were defective as a result of negligent manufacturer.

As you should recall from Part 2 of this guide, in order for a product liability claim to succeed under the Common Law, fault needs to be proved. The appellants argued that fault should not be a requirement in this matter as a plaintiff has no knowledge of, or access to, the manufacturing process, either to determine its workings generally, or to establish negligence in relation to the making of the item or substance which has apparently caused the injury complained of. The court, however, rejected this stating that proof of fault is a requirement if strict liability is to be imposed.

Verdict

As there was no contractual link between the appellants and the defendant, the court found that the appellants' remedy was confined to the Aquilian Action, where proof of fault is a requirement and that if strict liability is to be imposed, it was the legislature that had to do it. The appeal was thus dismissed with costs.

If the same case had ended up before the Supreme Court of Appeal just 8 years later, however, the verdict would have been very different. Under section 61 of the Act, a consumer is no longer required to prove fault in a claim for damages arising from a faulty product. The Act also extends the type of damages claimable beyond what is normally the case in the common law. Had Wagener and Cutting's case been successful, at most they would have been entitled to directly incidental costs. However, under the new legislation, they would have been able to claim for consequential damages such as loss of income. Now it is only necessary to prove a causal link between the harm suffered and the unsafe product characteristic, failure, defect or hazard.

The biggest challenge that Wagener and Cuttings faced was the fact that there was no contractual link between either appellant and Pharmacare Ltd. While both appellants likely had been made to sign agreements with the hospitals that performed the operations, they did not enter into contracts with the hospitals' medical suppliers. The Act has drastically changed this position, holding an entire supply chain liable for harm caused by goods - whether there is a contractual link or not.

Furthermore, supply chains' liability is now joint and several, meaning a consumer can institute an action for recovery of damages against any or all the members of the supply chain who supplied the defective product.

Safety Monitoring and Recall

Woolworths raises the bar on recalls

The next case study is on a much smaller scale than the Toyota recall but provides valuable insight into how a recall should be conducted.

In September 2011, Woolworths instituted a recall on all hot water bottles sold by them since April 2011 due to safety concerns. The knit and fleece covered water bottles were identified as having a potential leak along the seam. Woolworths was made aware of the problem after receiving several complaints, including one from a customer who had suffered scalding to the leg.

To alert the public of the recall, Woolworths made use of several methods including in-store signs displayed at till points. Woolworths also issued press releases and took to social media sites such as Facebook and Twitter to warn consumers. Account holders who purchased the water bottles were notified directly via sms.

The following May Woolworths issued a reminder to customers who hadn't yet returned their water bottles to do so and receive a full refund. The reminder stated:

"Last September Woolworths recalled hot water bottles sold since April 2011 due to safety concerns.

With winter fast approaching, we're reminding customers who bought hot water bottles last year to return the bottles to their nearest Woolworths clothing store for a full refund.

The recall applies to hot water bottles with style numbers 501120262, 501120270 and 501120254, barcodes 600910139792, 6009101397440, and 6009101147731.

"The safety of our customers is of utmost importance. This is simply a reminder to customers to return their bottles. We know that South Africans trust Woolworths for quality and would like to apologise to our customers for any inconvenience caused," says Woolworths Director of Clothing and General Merchandise, Brett Kaplan.

Throughout the process, Woolworths was transparent with consumers about the nature, cause, extent and degree of risk pertaining to the affected goods. They also took the opportunity to reassure customers of their commitment to quality and safety, ensuring that the recall didn't negatively impact consumer perception about the brand.

If a supplier becomes aware of a product defect or characteristic, it is their duty to conduct an investigation into the nature and extent of harm this defect or characteristic poses to the safety of the public, in particular to the user of those goods. If the decision is made to institute a product recall, a supplier is obligated under s60 (1) to inform the National Consumer Commission in writing (preferably before commencing the recall) and no later than two days after the recall has commenced. Failure to do so may result in the supplier being found guilty of an offence under s110 (2).

It can be argued that there is a responsibility on the entire supply chain to inform the manufacturer or importer of goods if any unsafe defects or characteristics have been detected or reported so that an investigation can be launched. Failure to act when there is a duty to do so amounts to negligence

Appendix | Consumer Product Safety Recall Guidelines

Section B

1.2 Supplier responsibilities

1.2.1 Responsibility for the supply of safe products

A supplier is the entity who has the primary responsibility for the supply of safe consumer products in South Africa. ‘Suppliers’ include manufacturers, importers, distributors and retailers. There will often be more than one supplier responsible for a particular product.

Individual suppliers are responsible for the investigation and rectification of safety related hazards in products that they supply.

A safety hazard may be identified by many means, including

- detection by the supplier undertaking the recall or another supplier within the supply chain;
- complaint by a consumer;
- detection by an industry body or consumer organisation; and
- detection by the Commission, another Regulator or a State entity.

An unsafe product may result from a manufacturing or production error; that is, where the manufacturer of the product departed from its design or material specifications during production.

An unsafe product may also result from a design defect; that is, a product may be unsafe even if the product is manufactured exactly in accordance with its design and specifications. A defect in design may also be the cause of risk or injury as a result of the operation or use of the product, the reasonably foreseeable use of the product, or the failure of the product to operate as intended.

Where the Commission detects or becomes aware of a safety related hazard it will attempt to identify the supplier at the highest level in the supply chain in order to assist the supplier to ensure all relevant suppliers from within the supply chain, including international recipients, are identified and advised of the safety related hazard relating to the product.

1.2.2. Supplier Recall Responsibilities.

A supplier has the following general responsibilities in relation to a recall:

- conduct a comprehensive risk analysis of the safety hazard;
- stop distribution of a product that has been identified for recall;
- cease production or modify the manufacturing process for a product that has been identified for recall;
- remove the unsafe product from the marketplace;
- notify the relevant regulator(s);
- notify the public;
- notify international product recipients;
- notify others in the domestic supply chain;

- facilitate the return of recalled products from consumers;
- store and dispose of recalled products safely;
- have a written recall strategy/plan;
- maintain records and establish procedures that will facilitate a recall (records should be in a form that can be quickly retrieved); and
- provide progress reports on the conduct of the recall to the Commission and relevant regulators.

Where the risk analysis determined that it is not necessary to retrieve products from consumers, however to mitigate the safety risk some other action by the supplier is required. These other actions may include a trade level recall or issuing a safety alert.

Where a supplier initiates a trade level recall, the same general responsibilities would apply except that the supplier would not be required to notify the public. Likewise, when issuing a safety alert, a supplier would have the same general responsibilities, however, it would not be required that the unsafe product be removed from the marketplace.

Section C

1. Mitigating a Product Safety Risk.

1.1. Identifying a Consumer Product Safety Hazard.

Where a supplier becomes aware of a possible safety hazard in a consumer product that may cause injury to a person, the supplier should immediately conduct the following assessment:

- gather and assess the reliability of all available information about the potential hazard;
- identify how the problem occurred;
- conduct a comprehensive risk analysis; and
- look at all possible ways to address the safety related hazard and decide whether the product can be repaired or modified.

The Commission requires a supplier to contact it when commencing such an assessment. This will enable the Commission to work with the supplier to determine what action (if any) is required to mitigate a safety related hazard with the product.

1.2. Determining an Appropriate Course of Action.

Depending on the outcome of the risk analysis there are a number of possible actions a supplier may choose to take to mitigate a safety related hazard.

These include

- calling back or withdrawing of products from the market or distribution chain;
- requesting consumers or other suppliers to
 - (i) return products for refund, replacement or modification; or
 - (ii) contact the supplier to arrange for a replacement product or part to be sent to the consumer; or
- sending a service agent to a person's home or place of business to repair or modify a product; or
- requesting a service agent repair or modify a product when it is next presented for servicing.

The decision about the most appropriate action to reduce the risk to consumers will depend on a number of factors, including the nature of the risk, and distribution and lifecycle of the product. The supplier should consult with the Commission about the most appropriate strategy.

The complete Consumer Product and Safety Recall Guidelines can be viewed online here.

Part 4

FLOW CHART PRINTABLE



WHO IS THE SUPPLIER?

Person or entity that

- markets goods and services;
- in the ordinary course of business

where “market” means to promote (to advertise or to offer for sale) and to supply.

Example: An individual who is, for example, privately selling their vehicle would not be considered a supplier and would therefore not have to adhere to the requirements of the Act. However, if someone regularly bought and sold vehicles in order to make a profit, they would be deemed a supplier.

Representative

Intermediaries are also deemed to be suppliers and must adhere to the requirements of the Act in their dealings with consumers.

WHO IS THE CONSUMER?

An individual

- to whom goods are marketed;
- who is the purchaser of the goods or services; or
- who is a user of goods or services, regardless if they were the one who purchased them.

An entity

- Franchisees and sole proprietors;
- Small businesses (turnover and assets under R2 million).

Supplier Restrictions

Suppliers may not unfairly discriminate against consumers in their dealings with them, in marketing to them or accessing their ability to pay.

WHAT IS MARKETING?

To promote

- advertise, display or offer to supply;
- expressing a willingness to supply; or
- any similar conduct with the aim of selling the goods.

To supply

- sell, rent, exchange or hire goods; or
- sell or perform service or grant access to a premises.

Disclosure of Information

Required

The Act regulates what information must be disclosed to consumers in terms of

- price;
- label and trade description;
- direct marketing; or
- risks

Prohibited

A supplier must not make false, misleading or deceptive representations regarding any material (important) facts relating to the goods. Suppliers are also prohibited from

- using exaggeration, innuendo or ambiguity relating to a material fact;
- failing to disclose a material fact; or
- failing to correct an apparent misunderstanding on the part of the consumer.

When Direct Marketing may take place

Direct marketing may not take place on

- Sundays or public holidays;
- before 09h00 and after 13h00 on Saturdays; or
- between 20h00 and 08h00 on work days.

Methods

Marketing Standards

Goods may not be marketed in a manner that is price;

- likely to imply a false or misleading representation; or
- misleading, fraudulent or deceptive.

Prohibited Marketing Methods

Some of the marketing practices that the Act prohibits include misleading consumers regarding the

- price and availability of goods and services;
- nature, properties and advantages of goods; or
- profitability, availability and risk of any work or business (alternative work schemes).

Restrictions

With regards to direct marketing, a supplier must

- cease marketing communications with the consumer upon their request;
- not contact a consumer during prohibited times;
- wear or display a badge when calling on the consumer in person at the consumer's premises; and
- inform a consumer that they have 5 working days in which to cancel the agreement.

Examine

Suppliers are liable for damage to goods caused by consumer unless the consumer acted in a manner that was

- reckless;
- grossly negligent;
- malicious; or
- illegal/criminal.

Quote

Estimates must be provided to the consumer free of charge for

- the provision of a repair or maintenance service;
- the supply or installation of replacement parts/components;
- where a consumer requests an estimate; or
- where a service provider takes possession of the property.

Transaction

A supplier must not ask a consumer to sign an agreement that contains terms and conditions that are

- unfair, unreasonable, or unjust; or
- are prohibited in terms of the Act.

Any clause in an agreement that

- limits the liability or risk of the supplier, or
- constitutes an acceptance of risk or liability (by the consumer)

must be brought to the attention of the consumer.

Sales Record

A supplier must provide a consumer with a record of the transaction in the form of a till slip. This slip must contain

- date, quantity and price (with and without tax as well as the total taxable amount); and
- supplier's business name, address, and VAT registration number.

WHAT ARE GOODS AND SERVICES?

Goods include

- anything marketed for human consumption (e.g. food);
- tangible objects on which something may be written or encoded (e.g. DVD);
- literature, photos, music etc.;
- a legal interest in land or moveable property; and
- gas, water and electricity.

Services include

- any work performed by one person for the direct benefit of another;
- the provision of any education, advice, or consultation etc. and;
- transportation and accommodation.

Quality and Safety

A supplier must perform a service in a manner and quality that persons are generally entitled to expect.

Where a supplier fails to do so, a consumer is entitled to require (insist upon) that the supplier

- make good any defect or shortcoming; or
- refund a portion of the price agreed upon.

Quality Goods

Goods must be

- good quality, in working order and free from defects;
- suitable for the purposes for which they are intended;
- in compliance with any applicable standards; and
- suitable for a specific purpose (as stipulated by the consumer).

Delivery

Delivery must be

- performed and completed in good time;
- on the agreed date and at agreed time, if any;
- punctual, failing which, timely notice to be given of unavoidable delay;
- made by someone in possession of an identification badge; and
- performed in a careful manner as suppliers are liable for loss or damage.

Examine

Consumers are entitled to examine goods

- and may not be charged for goods that weren't broken in a reckless or grossly negligent way;
- to determine whether they match the catalogue description (catalogue marketing); and
- to determine if they are the type and quality that was agreed.

Defects

Services – if a supplier failed to perform a service as agreed, a consumer may insist

- that the supplier make good any defect or shortcoming; or
- on a refund of a portion of the price.

Goods – if goods do not match their description, are defective or are not in working order etc., a consumer is entitled to a

- repair;
- replacement; or
- refund.

Complaints

Consumers who have a complaint against a supplier have a wide range of options available including

- The National Consumer Tribunal;
- The Consumer Commission; or
- Courts, Ombud schemes.

Penalties

A supplier who is found to have contravened the Act may receive an administrative fine of The National Consumer Tribunal;

- up to 10% of annual turnover; or
- R1 million – whichever is greater.

Tampering with a price, label or trade description or hampering an investigation by the Commission or Tribunal is punishable by up to 12 months imprisonment.

Returns

A consumer may return goods in the following instances

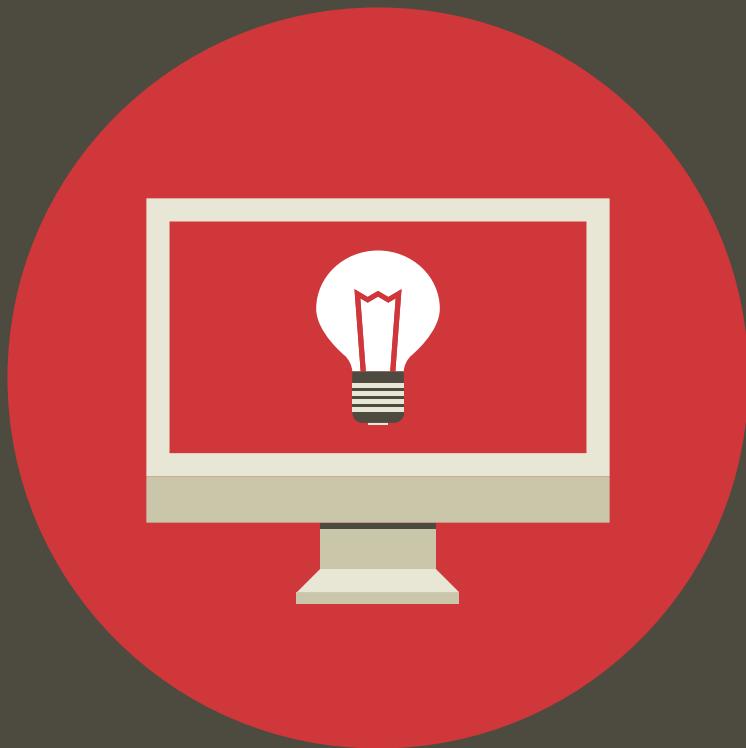
- goods are bought as a result of direct marketing (5 days*);
- there was no opportunity to examine goods before purchase (catalogue marketing, 10 days*);
- goods are not suitable for the purpose communicated by the consumer (10 days*);
- mixed goods were received where some were ordered and some were unsolicited (10 days*);
- goods are not of good quality, in working order or free of defect (6 months); or
- goods are not useable or durable for a reasonable period of time (6 months).

**business days: calculated from the day after purchase/delivery (whichever is later) and excluding Saturdays, Sundays or public holidays.*

Refunds

Where a supplier is obligated to receive returned goods, the consumer has the choice of a return, repair or replacement of goods. A supplier, however, may insist on a reasonable fee for re-packaging or restoration.

A supplier is not obligated to accept a return if the consumer simply changed their mind.



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