



## The Consumer Protection Act

### *Guide to Printers - Part 2*

In Part 1 of the Guide to Printers we discussed the establishment of your customer's status in terms of the Act's threshold, your agreements with your clients and the special place that brokers may have as consumers as well as suppliers.

This part will deal with Sections 60 and 61 which apply to all transactions including those with a juristic person over the threshold and to cover two of the rights that the act bestows on the consumer. These articles can only draw your attention to certain issues and personal opinions and should not be considered a legal opinion.

The Consumer Protection Act or CPA as it is called came into effect on the 31 March 2011. It is broad in its coverage and designed to protect the consumer, improve consumer awareness, and promote fair business practices. All Acts, Regulations and Government Notices referred to in this article and subsequent articles can be obtained from the Government Printer or on the South African Government Online website (<http://www.gov.za/>).

#### **1 Assess your risk in terms of Sections 60 and 61**

These are important sections as they are applicable to every transaction and deal with Safety Monitoring and Recall and Liability for damage caused by goods.

##### **Section 60 Safety Monitoring and Recall**

In terms of section 60 the Commission<sup>1</sup> (National Consumer Commission established by section 85 of the Act) must put into place an effective and efficient system to receive notices of consumer complaints, return of goods and report of any personal injury, illness or damage caused wholly or partially as a result of a product failure defect or hazard. The system must also monitor and analyse information to identify undetected risks, notify consumers of risks relating to product and must allow for the recall of unsafe or hazardous products.

The Commission has published draft guidelines<sup>2</sup> regarding the provisions of Section 82 for the development of industry codes of conduct.

##### **Section 61 Liability for damage caused by goods**

The producer or importer, distributor or retailer of any goods are liable for any harm caused wholly or partly as a consequence of the supply of unsafe goods, a product failure, defect or hazard in such goods, or inadequate instructions or warnings provided to a consumer about any hazard that may exist. Harm for which a person may be held liable is described in subsection (5) as death or injury to a natural person; illness of a natural person; loss or physical damage to any property, movable or immovable and any economic loss<sup>3</sup> resulting from any harm described above.

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<sup>1</sup> Ms Mampdupi Mohlala (Commissioner of the NCC)

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<sup>2</sup> Government Gazette 34087 dated 8 March 2011

<sup>3</sup> The economic loss that you will be liable for is based on death, illness or injury to a natural person. Remember that this section is purely about physical harm caused by your product and does not cover consequential income loss due to late delivery or the bad quality of your product. This is covered in Part H, Right to fair value, good quality and safety.

### **Perform a self assessment risk check.**

The chances that general printing will cause death, injury or illness to the general public are slim. This is not always the case when it comes to packaging or signage where the use of certain inks and substrates may be of concern, not to mention erection of signage.

Could any of your products cause injury because they are unsafe? Consider the chemicals and inks in use. Could there be cross contamination in packaged food products? Is the sign erection safe? Is there any chance of hazardous solvent emission from that wide format poster that might be put in a child's room? Know what might cause a problem and then correct it or ensure that clients are aware of the product's proper usage. What is good for outdoor signage may be not be suitable for an enclosed space. Containers suitable for packing chemicals are probably not a healthy option for foodstuffs.

As a printer you will probably not be held liable for any client provided artwork or copy that contains incorrect labelling, instructions or claims, but you will be responsible if any of the materials used by you are the cause of the complaint. The act has not yet been tested.

### **Advise your clients**

It might be a good idea to mention the act to those clients who purchase packaging and labelling from you. Advise them about their liability if faulty instructions lead to harm and the consumers' rights in respect of misleading claims. (This latter is dealt with in Part D, Sections 22 to 28 of the Act). If you produce food packaging, I assume most of your clients are up to date on packaging issues and health requirements. Make sure the rest also understand.

## **2 Consumer Rights**

I will start with those consumer rights that I think will be of most interest to printers.

The right to privacy – Part B Sections 11 and 12

The right to choose - Part C Sections 13 to 21

The others will follow in Part 3

### **The Right to Privacy (Part B)**

#### **Section 11 The right to restrict unwanted or direct marketing.**

The right to privacy includes refusal to accept an approach or communication primarily for the purpose of direct marketing. Many of these communications are in the form of printed matter, addressed to the consumer, popped into the post box or handed out at traffic lights. The Consumer Protection Regulations published on the 1 April 2011 include Annexure A relating to Regulation 4(2) a visual notice that can be displayed on a post-box to block any unwanted direct advertising. If this visual notice is used then the direct marketer may not place advertising material in the box, near the box, on a fence, or gate or other part of the consumer's premises. When a consumer informs a direct marketer that he does not want to receive and advertising either printed or electronic, the direct marketer must give written confirmation of receipt to the consumer.

Section 11(2) states that the commission may establish or recognise a registry where consumers can register either general or specific pre-emptive blocks on unwanted communications. There is no registry but in March the National Consumer Commission issued a Request for Expression of Intent (EOI) for purposes of establishing one. In terms of the regulations all direct marketers will be required to register as such with the administrator of the registry. A fee may or may not be payable.

#### **Section 12 Regulation of time for contacting consumers**

A notice is included at the end of the regulations in Gov Gazette 34180 of the 1 April 2011 stipulating the times when direct marketing is not allowed. Briefly these times are Sundays or Public Holidays, Saturdays before 09:00 or after 13:00, and any other days between the hours of 20:00 and 08:00 the following day.

## **The Right to Choose (Part C)**

### **Section 13 Consumers right to select suppliers.**

A supplier cannot require that the sale or provision of goods is subject to a further purchase from the supplier or a third party unless he can prove that the convenience or economic benefit to the customer outweighs the right to choose. Probably will not be of much interest to printers.

### **Section 14 Expiry and renewal of fixed term agreements**

This section does not apply to any agreements between juristic persons, whether they fall within the R2million threshold or not. In terms of Regulation 5 the maximum period for a fixed term contract The act itself covers cancellations periods. Another clause that will probably not affect printers.

### **Section 15 Pre-authorisation of repair or maintenance services.**

Any amount over R1.00<sup>4</sup> excluding value added tax must be pre-authorised by the customer unless provided for in another regulation or industry code. An estimate must give a breakdown, validity period of quote and period for collection of goods is quote is not accepted. The Act also states that a quote cannot be charged for unless the cost of preparing the quotation is disclosed beforehand.

Now this appears not to be an issue for printers but I suggest that you inform your client timeously if there are going to be any changes to price or if you want to pass on any additional costs to him not part of the original agreement.

### **Section 16 Cooling off Period after direct marketing**

A consumer can rescind without penalty within 5 days from date of agreement or receipt of goods and must return any payments already made, except in such cases where the goods have been used.<sup>5</sup> While most printers do not attract their clientele in this manner it is a good idea to be aware of the cooling off period.

### **Section 17 Right to cancel advance reservation, booking or order**

Excludes franchise agreements. A supplier can request prepayment for reservation or order of goods and can impose a reasonable charge for cancellation. The act refers to a “fair amount in the circumstances” so the nature of the goods and the length of notice provided must be taken into account. Any general practice of the relevant industry will also be considered. No charges can be made if the cancellation is due to the death or hospitalisation of the consumer.

Remember the consumer has the right to cancel and as a printer you will probably only be allowed to charge for whatever materials you have paid for that cannot be used for any other job.

### **Section 18 Consumers right to choose or examine goods**

The act states that the consumer is not responsible for any loss or damage to displayed goods unless due to gross negligence, recklessness, malicious or criminal behaviour. A consumer can select an item from open stock

Section 18(3) states that if the consumer has agreed to purchase goods solely on the basis of a description or sample, or both, provided by the supplier, the goods delivered to the consumer must in all material respects and characteristics correspond to that which an ordinary alert consumer would have been entitled to expect based on the description or on a reasonable examination of the sample, as the case may be.

If as a printer you are dealing with a “consumer” to whom the act applies then you might want to cover yourself by explaining that colours may differ from proof to printed job, based on paper choice and colour, and the actual printing process

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<sup>4</sup> Notice Gov Gazette 34180, dated 1 April 2011

<sup>5</sup> Section 20(6)

## **Section 19 Consumers rights with respect to delivery of goods or supply of service**

This section excludes franchise agreements or transactions covered by the Electronic Communications and Transactions Act.

Unless provided for in an agreement the supplier is responsible to deliver the goods or perform the service on the agreed date and time, to the agreed place of delivery if any, or within a reasonable time after completing the transaction. The agreed place of delivery is the supplier's premises. In Section 19(6) it is stated that if delivery is not made at the place, or on the date agreed, the consumer may treat the delivery as unsolicited goods and cancel the agreement without penalty. Keep your client informed of changes to delivery times and retain any documentation where a client changes the place of delivery.

Goods remain the supplier's risk until such time as they have been accepted by the consumer either. Acceptance of goods is tricky in the act. Express communication of acceptance will probably be in the form of a signed delivery note. However if the consumer does anything in relation to the goods inconsistent with the supplier's ownership, that may also be construed as acceptance of the goods. If the consumer retains the goods without intimating rejection then he is also deemed to have accepted the goods.

The supplier must on delivery allow the consumer a reasonable amount of time to examine the goods for type, quality or in the case of special order products reasonably conform to the material specifications of the order. **Special order products** form the bulk of a printer's trade so be sure that where specifications are given on an order they are followed as closely as possible. Advise you client if you have to change from one paper to another in the same grammage range especially if your client has ordered a special brand. The same will apply to any other substrate.

**Oversupply of goods** is also covered in this section. It allows the consumer to reject all the delivered goods, pay for the agreed quantity at the agreed rate, or treat the excess as unsolicited goods (Section 21). Now most printers work on the principle of an allowed percentage of overs and unders, usually 10%. This forms part of most printers' terms and conditions with their clients and as it differs from what is contained in the Act, it must be pointed out to clients. The reason for the 10% clause for over and under supply is because of the very nature of producing special order products and the range of process that may be used in the production process. Ensure that your clients are just as aware of the charge for overs as they are to the accepted 10% undersupply. Do not simply expect clients to acknowledge this peculiarity to our industry, explain it to them.

## **Section 20 Right to return goods**

There are a number of reasons where a consumer is entitled to return goods. Printers should be aware of the following: consumer did not have an opportunity to examine the goods and subsequently rejects the job; goods that are found to be unsatisfactory for a particular purpose communicated to the supplier or unsuitable within 10 business days after delivery. Again if this differs with your terms and conditions please point it out to your clients.

The right to return goods does not apply if after having been supplied or at the direction of the consumer the goods have been partially or entirely disassembled, physically altered, permanently installed, affixed, attached, joined or added to, blended or combined with, or embedded within other goods or property

It is interesting to note that if goods are returned to a supplier within a cooling off period the delivery charges are for the account of the consumer. If the return is because of insufficient time to examine the goods within then the delivery charges are for the supplier's account.

## **Section 21 Unsolicited goods or services**

Printers do not usually send unsolicited goods to client but remember a consumer can consider goods unsolicited if they are delivered early or late, or if they are over or under quantity. Consumers are also not allowed to frustrate or impede the collection or recovery of such goods by the supplier.

## **In following articles we will deal with the balance of Consumer Rights**

Prepared by Louise Moralee, Commercial and Technical, Printing Industries Federation of South Africa, 29 July 2011

### **Definitions**

The following definitions are provided for your information

#### **Consumer (in respect of any particular goods or services):**

- (a) a person to whom goods or services are marketed in the ordinary course of the suppliers business
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of the act
- (c) if the context so requires or permits, a user of those particular goods, or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services and
- (d) a franchise in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e). (Section dealing with application of the Act to include clubs, trade unions, associations, societies – voluntary association paid for or otherwise – and franchise offers, agreements and supply of goods and services.)

As you can see the consumer may be an individual not actually party to the transaction and this must be considered for Sections 60 and 61

#### **Goods includes:**

- (a) anything marketed for human consumption
- (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
- (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, of a licence to use any such intangible product;
- (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of "service" in this section; and
- (e) gas, water and electricity.

#### **Transaction**

- (a) in respect of a person acting in the ordinary course of business-
  - (i) an agreement between or among that person and one or more other persons for the supply of potential supply of any goods or services in exchange for consideration; or
  - (ii) the supply by that person of any goods to or at the direction of a consumer for consideration
  - (iii) the performance by, or at the direction of that person of any services for or at the direction of a consumer for consideration or
- (b) an interaction contemplated in section 5(6) irrespective of whether it falls within paragraph (a). (It is not clear whether paragraph (a) of the definition or paragraph (a) of Section (5) is meant.)

You will also notice that “ordinary course of business” occurs in the definitions of consumer and transaction. The sale of a motor vehicle by your supplier of printing chemicals and plates would probably be considered a transaction to which the act applies.

### **References**

Consumer Protection Act 68/2008, Government Gazette 32186, 29 April 2009

Notice to defer the effective date of the Consumer Protection Act 2008, Notice 917, Government Gazette 33581, 23 September 2010 (Department of Trade and Industry)

The Consumer Protection Act 2008, Regulations, Notice 293, Government Gazette 34180, 1 April 2011 (Department of Trade and Industry)

Determination of Threshold in terms of the Consumer Protection Act, Notice 294, Government Gazette 34181, 1 April 2011 (Department of Trade and Industry)