

April 2011

CONSUMER PROTECTION ACT REGULATIONS – DRAFT VS FINAL

The final regulations to the Consumer Protection Act 68 of 2008 (**Consumer Protection Act**), published on 1 April 2011 (**Final Regulations**), have changed the scope of some of the consumer rights which were regulated in the draft regulations published on 28 October 2010 (**Draft Regulations**). Whilst a full-scale comparison of old against new is beyond the scope of this note, a few of the key changes are highlighted below.

DIRECT MARKETING

In terms of the Consumer Protection Act, “*direct marketing*” means to approach a person, either in person or by mail or electronic communication (including fax, sms, email and telephone), for the direct or indirect purpose of:

- promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or
- requesting the person to make a donation of any kind for any reason.

The Draft Regulations contemplated the establishment of a registry which South African consumers could use as a means to block direct marketing (**Registry**). It was envisaged that consumers could register pre-emptive blocks against direct marketing, using particular contact details such as email addresses or cell phone numbers as triggers for the pre-emptive block. Anyone seeking to engage in direct marketing using a database of contact details would have to:

- register as a direct marketer;
- assume that a pre-emptive block had been registered against every contact in their database; and
- in respect of each address, number or other contact to which direct marketing material was to be sent, obtain confirmation from the administrator of the Registry that no pre-emptive block had been registered against that contact.

In the Final Regulations, whilst the provisions providing for the establishment of a Registry remain, suppliers

will be able to engage in direct marketing with **existing customers** without having to obtain confirmation from the administrator of the Registry of an absence of a pre-emptive block, provided:

- **the customer has expressly consented to receiving direct marketing material from the supplier;**
- **the consent was given after 1 April 2011; and**
- **the supplier has proof of the express consent.**

This is a welcome change.

The Final Regulations contain a new obligation for suppliers engaging in direct marketing. The Consumer Protection Act confirms consumers' rights to stop the communication of direct marketing to them. In terms of the Final Regulations, if a consumer informs a supplier that they do not want to receive direct marketing material from the supplier, the supplier must, apart from refraining from sending such material to that consumer, provide the consumer with written confirmation of the receipt of the consumer's request.

FIXED TERM AGREEMENTS

The Draft Regulations, as read with the Consumer Protection Act, provided that fixed term agreements (other than those between juristic persons) could, as a general rule, have a maximum term of 24 months. If a consumer exercised their right to cancel the fixed term contract on 20 business days' notice to the supplier, the supplier could only charge a cancellation fee of up to 10% of the amount which would have been paid by the consumer for the rest of the fixed term, excluding interest, had it not been cancelled.

In terms of the Final Regulations, the maximum term of 24 months may be extended in certain instances, most notably if:

- the customer expressly agrees to it; and
- the supplier can show a demonstrable financial benefit to the consumer.

Also in terms of the Final Regulations, the 10% cancellation fee "ceiling" is out. Now, cancellation fees may not exceed a **reasonable amount**, taking into account a number of factors, including the:

- amount which the consumer is still liable to the supplier for up to the date of cancellation;
- value of the goods which will remain in the possession of the consumer after cancellation;
- length of notice of cancellation given by the consumer; and
- duration of the agreement as initially agreed.

PROMOTIONAL COMPETITIONS

In terms of the Consumer Protection Act, as read with the Final Regulations, a promotional competition is, amongst other things, a competition for distributing prizes (valued at more than R1) by lot or chance, conducted in the ordinary course of business for the purpose of promoting:

- a producer, distributor, supplier or association of producers, distributors and/or suppliers; or
- the sale of any goods or services,

irrespective of whether a participant is required to demonstrate any skill or ability before being awarded a prize.

The Draft Regulations prescribed that a promoter of a promotional competition could not require participants to pay more than normal rates for entering competitions by way of sms or mms. The Final Regulations set the maximum cost of electronic transmission of an entry at R1.50.

The Draft Regulations required that promotional competitions had to be conducted by a chartered accountant, registered auditor, admitted attorney or commissioner of oaths, a requirement which led to some confusion as to the actual role of these independent persons in managing and conducting promotional competitions. The Final Regulations offer some clarity. In terms of the Final Regulations, it would appear that the determination of the prize winner(s) must be done by an "independent person" and the involvement of an independent (as opposed to "chartered") accountant, registered auditor, admitted attorney or advocate ("advocate" has replaced "commissioner of oaths") is limited to overseeing and certifying the conducting of the competition. As such, it appears that a competition must be run by the following persons:

- promotion and organisation of the competition : promoter's personnel
- oversight of the promotion and organisation of the competition : admitted attorney, advocate, registered auditor or independent accountant
- determination of prize winner(s) : any person independent of the promoter

The Draft Regulations set out restrictions on the contents of competition rules. The same restrictions remain in the Final Regulations, subject to one addition: any provision in the rules of a promotional competition requiring a prize winner to be present when the draw is taking place or the winners are announced, without affording him or her the opportunity to decline an invitation to do so or informing him or her of the right to decline such an invitation, is null and void. The drafting of this provision is not altogether clear, but its result could be that a prize winner who is not present at the time of a draw or announcement of prize winners, will still be entitled to their prize, regardless of what the competition rules may say.

DISCLOSURE OF THE PRESENCE OF GENETICALLY MODIFIED ORGANISMS

The Draft Regulations detailed suppliers' obligations to disclose the presence of genetically modified organisms in maize, soya bean and imported canola oil. The Final Regulations expressly apply to goods approved for commercialisation by the Executive Council for Genetically Modified Organisms, which are **cotton, soya bean and maize**.

A few further alterations to the text of the Draft Regulations appear in the Final Regulations, but what is most interesting to note is that goods may not be labelled as being free of genetically modified organisms, unless they contain less than 1% genetically modified organisms.

FRANCHISE AGREEMENTS

The Draft Regulations provided that franchise agreements in place as at the date of commencement of the Draft Regulations, would have to be revised to comply with the requirements of the Draft Regulations in respect of franchise agreements, within 6 months of the commencement of the Draft Regulations.

The Final Regulations do not affect franchise agreements in place as at 1 April 2011, unless they are renewed after this date, in which case the renewed franchise agreement will have to comply with the Final Regulations. To ensure compliance with the Final Regulations, franchisors will need to include in their standard franchise agreements a number of provisions designed to protect franchisees.

FURTHER ADVICE

Should you require further advice or assistance on the Consumer Protection Act or the Final Regulations, please contact Keren Oliver on 031 536 8518 or koliver@coxyeats.co.za

