

JCSA – CONSUMER PROTECTION ACT

GUIDELINES, CASE STUDIES AND INFORMATION REGARDING INDEMNITIES AND DISCLAIMERS

The Consumer Protection Act (CPA) has radically changed the way of conducting business, with specific reference to product liability and the weighing up of the obligations on the part of the supplier (e.g. Jeweller) as juxtaposed to the rights of the consumer.

This document does not propose to dissect the entire CPA as it is a complex piece of legislation. The CPA no doubt affects all of our members in one form or another.

Some salient points of importance are:

WHAT DOES THE ACT APPLY TO?

It applies to ALL transactions in the RSA between a supplier and a consumer, unless SPECIFICALLY exempted. Even services by an association or any other collective entity, whether corporate or incorporate, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution required in order to become or remain a member of that entity.

Some common exemptions are

- Providing of goods/ services to the STATE.
- The consumer is a juristic entity with an annual gross turnover exceeding R2million.
- Services supplied under an employment contract.
- Specific legislative exclusions, such as services under the FAIS Act. (financial services)
- Entities that enjoy exemption granted by the relevant Minister.

WHAT MAKES THE ACT SO IMPORTANT?

- Previously, a consumer could only claim damages against a supplier if there was an underlying contract and if there was negligence on the part of the supplier. In other words, liability was fault based.
- Since the inception of the CPA (2008) STRICT liability applies, which means no fault is required.
- Barring certain exceptions, ANY party in the supply chain may be sued jointly and severally by a consumer for any harm, whether economic or otherwise.

Some important sections:

Section 18 – CONSUMER’S RIGHT TO CHOOSE OR EXAMINE GOODS.

- In the absence of gross negligence or recklessness, malicious behaviour or criminal conduct, a consumer is not responsible of any loss or damage to goods DISPLAYED by the supplier, DESPITE any statement or notice to the contrary.

Section 20 - RETURN OF GOODS

- Goods may be returned within 10 days for a FULL refund in certain circumstances, such as when sold and delivered through direct marketing and rescission within a cooling off period, or where the consumer did not have an opportunity to inspect the goods.
- The Supplier may in certain circumstances charge a reasonable amount to the consumer.

Section 32 – DIRECT MARKETING

- A Supplier who direct markets any goods or services and who concludes a transaction with a consumer MUST inform the consumer in the prescribed manner and form, of the right to rescind the agreement.
- In terms of Section 16 a consumer may rescind a transaction resulting from direct marketing WITHOUT reason or penalty, by notice within 5 days the latest of the conclusion of the transaction or delivery of the goods.

Section 33 – CATALOGUE MARKETING

- This includes transactions other than in person, including when concluded telephonically if initiated by the consumer; and by postal order or fax or similar manner where the consumer does not have the opportunity to inspect goods prior to conclusion of the transaction.
- Comprehensive information in relation to the supplier's identity and trader details are required, in addition to other prescribed information.

Section 48 – UNFAIR, UNREASONABLE AND UNJUST TERMS

- A supplier must NOT
 - offer to supply or supply goods or services at an unfair price or terms that are unfair;
 - market any goods or services in a manner which is unfair, unreasonable or unjust;
 - require from a consumer to waive RIGHTS, assume OBLIGATIONS or waive any LIABILITY of the supplier on terms that are unfair, unreasonable or unjust; or impose any such term as a condition of entering into the transaction.

Section 49 – SPECIFIC NOTICE REQUIRED FOR CERTAIN TERMS OR CONDITIONS

- Any notice or provision of a consumer agreement which purports to:-
 - limit risk or liability of the supplier or other person;
 - constitute an assumption of risk or liability by the consumer;
 - impose on obligation on the consumer to indemnify the supplier or any other person for any cause, or
 - be an acknowledgement of a fact

MUST be drawn to the attention of the consumer in a manner and form that satisfy certain formal requirements, such as

- Use of simple language and clear verbal communication to an illiterate consumer.
- The fact, nature and potential effect of the provision or notice must be drawn to the attention of the consumer:-
 - In a conspicuous manner ;
 - Before the earlier of the time of that the consumer enters into the transaction, begins to engage in the activity or enters or gains access to the facility; or is required or expected to offer consideration for the transaction.
- Adequate opportunity should be given to the consumer to comprehend the provision or notice

Remember, one CANNOT divert liability to the consumer in the event of gross negligence or recklessness, internal theft or fraud on the part of the supplier or its staff.

Section 56 –IMPLIED WARRANTIES OF QUALITY

- This entitles the consumer the right to return goods WITHOUT PENALTY and at the supplier's risk and expense, within 6 months, should they fail to satisfy the requirements and standards set out in the Act.
- The consumer is entitled to demand repair, replacement or a refund of the price paid by the consumer.
- The implied warranty is in addition to any warranty imposed by common law, the Act or public regulation and any express warranty stipulated by the producer, importer, distributor or retailer, as the case may be.

Section 57 – WARRANTY ON REPAIRED GOODS

- Generally a three month warranty period after repair or maintenance work.

Section 58 –WARNING CONCERNING FACT AND NATURE OF RISKS

- The supplier is obliged, in the event of any potential risk which the consumer could not reasonably expect to be aware of or contemplate , to specifically draw the fact, nature and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49

Section 65 – SUPPLIER TO HOLD AND ACCOUNT FOR CONSUMER'S PROPERTY

- Where a supplier has possession of any prepayment, deposit, money or property belonging to or ordinarily under the control of a consumer, the supplier MUST:-
 - not treat the property as being the property of the supplier;
 - exercise the degree of care, diligence and skill reasonably expected; and
 - assume liability to the owner of the property for any loss resulting from a failure to comply with the above.

Section 68 – PROTECTION OF CONSUMER RIGHTS

- When a consumer has exercised, asserted or sought to uphold any right set out in this Act or in an agreement or transaction with a supplier, the supplier must not, in response—
 - discriminate directly or indirectly against that consumer, compared to the supplier's treatment of any other consumer who has not exercised, asserted or sought to uphold such a right;
 - penalise the consumer;
 - alter, or propose to alter, the terms or conditions of a transaction or agreement with the consumer, to the detriment of the consumer; or
 - take any action to accelerate, enforce, suspend or terminate an agreement with the consumer.

Section 44 OF THE ELECTRONIC COMMUNICATIONS ACT

- Deals with a seven day cooling off period incorporating the right to cancel a transaction free of penalty and without prejudice to the rights of a consumer provided for in any other law, such as the CPA.

Below are some specific case studies that some of our members enquired about:

• **RISK AND INSURANCE – WHO CARRIES THE RISK OF DAMAGE OR LOSS?**

- There is a perception that the onus is automatically on the consumer to insure his goods (jewellery items) against damage or loss when handed to the supplier. This appears to be ill-founded.
- As set out, where a consumer has to assume risk (that may not be that obvious to the ordinary person) this has to be expressly brought to the attention of the consumer as to the fact, nature and potential risk.
- The supplier thus has the onus to make the consumer aware of this real risk in no uncertain and comprehensive terms.
- It may be prudent for the supplier to hold sufficient indemnity cover to deal with unforeseen eventualities of risk.

• **DEFRAYING OF COSTS**

- Again, the CPA sets out stringent obligations on the part of the supplier when being in possession of goods that belong to the consumer.
- Where a consumer fails to pay for, or collect goods in possession of the supplier, the consumer should be made specifically aware, BEFORE entering into the transaction that the supplier reserves the right to sell goods to defray costs.
- It is proposed that proper prior notice addressed to the consumer at all available contact details (physical and postal address, email, facsimile and cell phone) of the supplier's intention to sell or dispose of goods to defray costs should be directed to the consumer, whilst allowing sufficient and ample opportunity for the consumer to respond to such notice to prevent the sale of the goods.
- Any excess funds raised through the sale of goods should be retained and due attempts to return the same to the consumer should be made.

• **CERTIFICATION OF JEWELLERY ITEMS**

- It is likely that a consumer will rely on or attach certain commercial value to facts or opinions stated in certification or appraisal of jewellery items.
- Due to nature of joint and several (no-fault) liability created in the CPA, it may be prudent to deal with this issue in the form of an appropriate disclaimer.

• **DISCLAIMERS AND INDEMNITY CLAUSES:**

- It is suggested that due to the issue of strict (no-fault) liability contained in the CPA, our members as suppliers should expressly deal with any and all issues (that are not ordinarily contemplated or assumed by the consumer) which may pose a risk to their operations or expose them to claims for loss or damages suffered on the part of consumers, through the appropriate use of clearly displayed or printed indemnity and disclaimer provisions.
- Members are encouraged to seek expert legal counsel to ensure that they are adequately protected against potential claims pursuant to the provisions of the CPA and in general. It is not possible to foresee and deal with each and every type of risk in this document.

Typical issues that should be prominently displayed alternatively included in the terms of sale or service are:

- Risk of possession, damage or loss of whatever nature and howsoever arising to be on the consumer and which includes damage (whether direct or consequential) due to any act or omission on the part of the supplier and its employees or agents, included but not limited to it being caused as a result of negligence or otherwise.
- Insurance against damage or loss and who assumes responsibility therefor;
- Indemnity regarding perceived identity, characteristics or quality of items accepted by the supplier for appraisal or repair;
- Right to sell goods to defray expenses and terms and conditions relating thereto;
- Indemnity against damages or loss incurred as a consequence of any factual inaccuracy or error in opinions expressed at the instance of the consumer;
- Any risks that may be unique to a particular supplier; and
- Any other elements of risks not expressly considered herein.