



# The CHANGING BUSINESS LANDSCAPE

An Introduction to the **Consumer Protection Act**  
– and its affect on your **BUSINESS!**

**Presentation to: SAFM**

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*(PS: You will get a copy of this presentation)*

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# Some initial thoughts...

“I’ve been in this business for 36 years, I’ve learnt a lot -  
and most of it doesn’t apply anymore.”  
(Charles Exley)



# Pre-emptive Conclusion

- Where do I want to emphasise today?
  - There are some **significant** and **real** shifts (locally and internationally) in the business landscape;
  - We need to be thoroughly aware of **Risk** and **Liability** Issues – where is it created, where does it rest;
  - It is not only about **WHAT** you do but about **HOW** you do it (Robust Pro-Active Risk Management);
    - The **END** and the **MEANS** are both important;
  - It is no longer just “business as usual”;
  - **QUESTION EVERYTHING** (about your business)



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# (re)Positioning

- What do you do?... a perspective
- Create a “space”
  - Facilitate activities
    - Commerce, Retail, Communication, Connection, Transacting...
  - The value of the “space” is based on the values of the facilitated activities;
  - What happens in the space is more NB than the space itself;



# (re)Positioning

- The “space” is a part of the experience and offering consumers participate in;
- The “space” creates;
  - Opportunities (for leverage)
  - Challenges (and risks)
- Look at the Consumer Protection Act for the perspective of what elements your “space” adds the offering...



# Why a Consumer Protection Act?



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# VERY IMPORTANT TO REMEMBER

- The Consumer Protection Act is a **Consumer-Centric** piece of legislation formulated in a **Rights-Based** approach;
- It is built around a set of **CONSUMER RIGHTS**;
- Therefore it's focus is not primarily business and business operations but consumers and the **entrenchment and protection of consumer rights**



# Consumers “Bill of Rights”

Part A: Equality in the consumer market	Part B: Privacy	Part C: Choice	Part D: Disclosure and information
<p>8 - Discriminatory marketing</p> <p>9 - Differential treatment</p> <p>10 - Equality court</p>	<p>11 - Unwanted direct marketing</p> <p>12 - Regulation of contacting times</p>	<p>13 - Selection of suppliers</p> <p>14 - Fixed-term agreements</p> <p>16 - Cooling-off period</p> <p>19 - Supply of service</p> <p>21 - Unsolicited services</p>	<p>22 - Plain and understandable language</p> <p>23 - Disclosure of price</p> <p>24 - Labeling and trade descriptions</p> <p>26 - Sales records</p> <p>27 - Intermediaries</p>



# Consumers “Bill of Rights”

<b>Part E: Fair and responsible marketing</b>	<b>Part F: Fair and honest dealing</b>	<b>Part G: Fair, just and reasonable terms and conditions</b>	<b>Part H: Fair value, good quality and safety</b>
<p>29 – General standards</p> <p>30 – Bait marketing</p> <p>31 – Negative opinion marketing</p> <p>32 – Direct marketing</p> <p>37 – Alternative work schemes</p> <p>38 – Referral selling</p> <p>39 – Persons lacking legal capacity</p>	<p>40 – Unconscionable conduct</p> <p>41 – Misleading representations</p> <p>42 – Fraudulent schemes</p> <p>43 – Pyramid schemes</p> <p>44 – Assumption of entitlement</p> <p>46 – Changes, deferrals and waivers</p>	<p>48 – Contract terms</p> <p>49 – Notice required</p> <p>50 – Written agreements</p> <p>51 – Prohibited transactions</p> <p>52 – Powers of court</p>	<p>54 – Demand for service quality</p> <p>56 – Implied warranty</p> <p>58 – Warning of risks</p>



# Application of the Act is VERY Broad

- **Every** transaction in the *ordinary course of business* for *consideration* between a supplier and consumer;
- Every **advertisement** transmitted and published in the ordinary course of business to prospective consumers.



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# The consumer is defined as...

- Individuals and Legal Entities (BELOW THRESHOLD of R 2 million), to whom goods and services are **advertised, offered, supplied, performed or delivered** in the ordinary course of business;
- Somebody who has **entered into an agreement** or transaction with a supplier;
- *(if the context so requires or permits)* a **user of such goods** or recipient or beneficiary of the services, irrespective of whether that user recipient or beneficiary was a party to the purchasing transaction;
  - If you did not buy it you still benefit from the purchase agreement



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# A supplier is...

- Somebody who
  - Promotes;
  - Makes available;
  - Agrees to supply; or
  - Supplies any goods and services.



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# A transaction is...

- Any **offer** between two or more people for the supply of any goods and services in exchange for a consideration of payment (value);
- The **agreement** between the parties for the supply of the goods and services;
- The **actual supply** of the goods and/or the **performance** of services.



# A Consideration...

- **Anything** of value **given** and **accepted** in exchange for goods and services;
- Includes;
  - **Money**, property, cheque, other negotiable instrument, token, ticket, EFT, credit, debit, electronic chip or similar object;
  - Labour, **barter** or other goods or services;
  - **Loyalty credit** or award, coupon or other right to assert a claim;
  - **Any other thing**, undertaking, award, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer



# To Market

## 1. Promote

- **Advertise, display, offer to supply...** to all or part of the public for consideration;
- Make **any representation...** that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration;
- Engage in **any other conduct...** that may reasonably be an inducement or attempted inducement to a person to engage in a transaction



# To Market

## 2. Supply (covers both)

- **Goods:** Any tangible object, including but not limited to literature, music, software, electricity;
  - includes sell, rent, exchange and hire;
- **Services:** Any work of undertaking performed
  - examples – clinical, education or consulting services;
  - to sell, or to perform, or cause them to be performed or provided, or to **grant access to any premises**, event, activity or facility...



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# The Consumer Protection Act and how it affects your business

Some Key Challenges...

- Supply Chain/Liability
- Safety, Quality and Purpose
- Communication



## Dreams

They're broken by the  
Consumer Protection Act

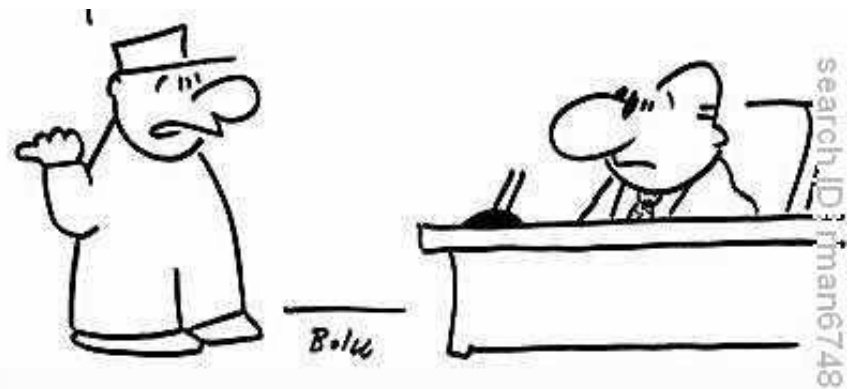
# STRICT (Supply Chain) Liability!

- S 61 creates **STRICT LIABILITY** on the **ENTIRE SUPPLY CHAIN** (joint and severable);
  - There is “no requirement” for fault or negligence to be proved, also extends the type of damages claimable;
- This means that the producer AND importer AND distributor AND retailer is liable for any harm caused by;
  - The supply of unsafe goods;
  - Product failure or defects;
  - Hazards associated with any goods or their use;
  - Inadequate instructions or warnings provided with goods and services.



# Safety...

- Warnings
  - Specifically draw attention to the **fact, nature** and **potential effect (consequence)** of risks, especially;
    - Unusual
    - Unexpected
    - Leading to injury or death
  - Advisable to “over-warn”
    - PS applies to users...



"Finnegan's hurt bad, sir — a crate of warning labels fell on him!"

# Quality – the new norm...

- No longer a differentiating factor – expected
- Difficulty
  - Defining Quality
  - Based on Expectations... (whose?!)
  - Goods and Services
- Elements of Good Quality,
  - Reasonable Expectation of Use
    - (for reasonable period – 6-month warranty);
  - Free of Defects;
  - On Time...



# Suited to purpose...

- All goods must be reasonably suited to the **purposes** for which they were generally intended...
- Consider (what is communicated by):
  - The manner in which and the purposes for which the goods were marketed, packaged and displayed;
  - Use of any trade description or mark;
  - Instructions, warnings;
  - Reasonable expectation of uses.



# Plain Language!

- Is an obligation not a “nice to have” (you cannot contract out of it);
  - *“the Act will ensure that consumers are able to make **well-informed buying decisions** and access a wide range of products and services based on honest and fair marketing”*
- Plain Language concept;
  - Determined by “target of communication”
    - Ordinary consumer
    - Minimal experience as a consumer of the relevant goods and services
  - Courts will interpret to benefit of consumer



# Plain language

- About more than just the clear words and sentences – it is about the document being understood by its intended reader, includes elements of;
  - Relevance
  - Content
  - Styling
  - Design
  - Pictures and Words... (the whole package)



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LOOK CAREFULLY!!



**S**UBLIMINAL ADVERTISING**G**

Squeezed in Brazil

# Documentation - Impact

- The following categories of documents are included;
  - All Sales (pre-sale and post-sale);
  - Warning and Signage;
  - All Marketing and Advertising;
  - Customer Service documents;
  - Contracts (new Companies Act)

*(pretty much everything has to be looked at)*



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# The Advertising Challenge

- Part 1: What you do say
  - Advertising may **not be false** or **misleading**, it must not directly or indirectly express or **imply a false, misleading** or **deceptive** representation concerning a material fact (S 41);
  - Must **not** “use **exaggeration, innuendo** or **ambiguity** as to a material fact”;
    - Isn't this what advertiser do??



# The Advertising Challenge

- Part 2: What you don't say
  - **Leaving out key information** is also not allowed – advertising cannot “fail to disclose a material fact if that failure amounts to a deception”;
  - The onus is placed on advertisers/suppliers to **address** and **set right** any “**incorrect assumptions**” a consumer may already hold. They “must not fail to correct an apparent misapprehension on the part of a consumer or prospective consumer amounting to something false, misleading or deceptive (S 41)





# DECEPTION

"Hang on... I think it might be a trap..."



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# There is No Escape

- Anti Avoidance
  - If a provision in an agreement does not comply with the Act that specific provision (or perhaps the entire agreement) can be rendered VOID;
- No escape liability clauses
  - Any attempt by a supplier to waive, vary or disentitle the consumer from their various rights must be **explicitly highlighted** in plain language notices



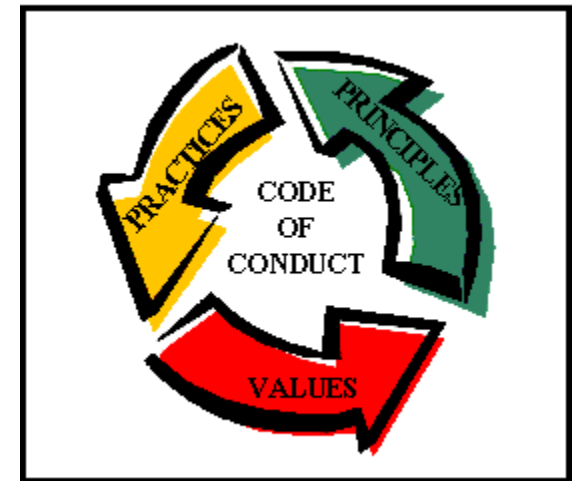
# Enforcement

- Both Administrative and Criminal Sanction provided for (offences and prohibited conduct);
- Administrative Fines
  - Can be imposed by National Consumer Commission
  - Not exceeding the greater of 10% (of the respondents annual turnover during the preceding year) or R 1 million
- Contraventions that result in a conviction, could resulting in a fine (as above) and/or imprisonment (12 months)



# Vital Role of Industry/Business Associations

- Informed, pro-active and representative Industry Associations are critical;
- Robust, compliant Codes of Conduct are essential;
- Adherence to these Codes and active membership of representative Associations is highly recommended.



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# Remember

- The Act will always be interpreted in a manner that gives effect to the purpose for which it was promulgated
  - To protect the consumer
  - To improve consumer awareness
  - To promote fair business practice
- If there is a conflict with other legislation these must be dealt with concurrently BUT the law that provides the greater protection to the consumer must prevail





# ADVERTISING

It's all in the presentation



# Prepare yourself by asking lots of QUESTIONS...

The best form of defence is ATTACK...  
None of us can simply sit and wait for  
this to happen!



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# Thank you

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