



EVERSHEDS

Consumer Protection Act

A Guide to the Act and Consumer Rights



Simone Monty
Retail Sector Head
tel: +27 (011) 775-6335
email: simonemonty@eversheds.co.za

Disclaimer

This brochure is designed as an explanatory guide to the Consumer Protection Act No. 68 of 2008 ("CPA"). It is not intended as legal advice for the reader and is not an exhaustive legal reference manual or a substitute for the CPA.

While every attempt has been made to ensure that the information published in this brochure notes is accurate, the author of this material and EVERSHEDS take no responsibility for any loss or damage that may arise out of the reliance by any person upon any of the information contained herein. The contents of this brochure does not constitute legal advice

© Copyright

Please note that the brochure is under copyright of the author and EVERSHEDS. No part of the brochure may be reproduced in whole, or in part, used for a commercial gain or transmitted in any form whatsoever

CONTENTS

1. Introduction
2. What is the Consumer Protection Act
3. Who is a consumer
4. What are consumer rights
5. Right to Equality
6. Right to Privacy
7. Right to Choose
8. Right to Disclosure of Information
9. Right to Fair and Responsible Marketing
10. Promotions
11. Right to Fair and Honest Dealing
12. Right to Fair, Just and Reasonable Terms and Conditions
13. Right to Fair Value, Good Quality and Safety
14. Right to Accountability from Suppliers
15. Complaints
16. Failure to Comply and Recommendations
17. Regulatory Agencies

1. INTRODUCTION

This brochure is specifically designed for BNB Sure ("BNB") and is aimed at the customer of BNB. Therefore, this brochure does not deal with each and every section of the Consumer Protection Act 68 of 2008 the ("CPA") but only with the material provisions that may be relevant to the hospitality industry

The CPA applies to all documentation and agreements made available to consumers/suppliers as well as to all business processes, procedures and IT systems. All of these will need to be reviewed in terms of the provisions of the CPA in order to protect both the supplier and the consumer in the supply chain

2. WHAT IS THE CONSUMER PROTECTION ACT?

The Consumer Protection Act aims to:

- Promote a fair, accessible and sustainable market place for consumer products and services
- Establish national norms and stands to ensure consumer protection
- Make provision for improved standards of consumer information, to prohibit certain unfair marketing and business practices
- Promote responsible consumer behavior
- Promote a consistent legislative and enforcement framework, related to consumer transactions and agreements
- Establish the National Consumer Commission; and
- Replace, in a new and simplified Act, existing consumer legislation provisions

Scope of the CPA:

- Every transaction for the supply of goods and services in the ordinary course of business and to the goods and services themselves. This includes the State and franchises operating within South Africa
- The CPA applies to most

The CPA is not applicable in respect of:

- Goods or services promoted or supplied to the state
- Industry wide exemptions
- Credit agreements, in terms of the National Credit Act, but not goods or services
- Services under employment contracts; and
- Agreements giving effect to bargaining and collective bargaining agreements

The Consumer Protection Act was implemented in full on 31 March 2011

3. WHO IS A CONSUMER?

Consumers are persons to whom goods or services are marketed, who have entered into transactions with suppliers, users of particular goods or recipients/beneficiaries of goods or services.

4. WHAT ARE CONSUMER RIGHTS?

The CPA outlines key consumer rights, which all suppliers need to take into account in the conduct of their business.

These include:

1. Right to Equality
2. Right to Privacy
3. Right to Choose
4. Right to Disclosure of Information
5. Right to Fair and Responsible Marketing
6. Right to Fair and Honest Dealing
7. Right to Fair, Just and Reasonable Terms and Conditions
8. Right to Fair Value, Good Quality and Safety; and
9. Right to Accountability by Suppliers.

5. **RIGHT TO EQUALITY**

The right to equal access to the consumer market:

- is linked to the Bill of Rights and Promotion of Equality
- it protects consumers from being unfairly discriminated against with regard to access to goods or services or a different quality or pricing
- general prohibition against unfair discrimination in a transaction
- recognises long standing and widely accepted commercial practices that allow differential treatment of consumers of a particular sex, age or gender if the conduct is reasonable

6. **RIGHT TO PRIVACY**

- Consumers have the right to protect their privacy and restrict direct marketing
- Consumers can accept, refuse or block sms's, telephone calls, letters or "spam" e-mail for direct marketing by registering on the opt out register
- Companies and suppliers are not permitted to continue any unsolicited direct marketing of goods and services, once consumers have opted out
- There are certain days, dates and times where it is prohibited to contact consumers
- This must be taken into account in all marketing and promotional campaigns to avoid contravention

7. **RIGHT TO CHOOSE**

- Consumers have the right to shop around for the best prices, goods and services on the basis of being allowed to examine the goods
- Suppliers are generally prohibited from bundling goods or services
- Suppliers generally cannot force consumers to enter into agreements with third parties for example that a consumer use a particular airline or shuttle service as a condition to their booking unless it was advertised as a package and all terms and conditions are explicitly stated
- Where the consumer is an individual this includes the right to cancel fixed term agreements, limits the rights of suppliers to impose cancellation charges and sets out rules governing expiry of such

agreements, upon expiry of the contract period, without penalty or charge for example a contract for holiday timeshare

- Consumers are obliged to provide suppliers within 20 business days' notice, in writing or other recorded means, of cancellation of fixed term agreements. Reasonable penalties may apply. Agreements with continuous supply sources for example for food or cleaning could be revisited in this regard
- Suppliers must extend fixed term agreements on a month to month basis, if the consumer fails to request the cancellation of such an agreement

Right to request pre-authorisation for repairs or maintenance services

- Consumers have the right to request written cost estimates/quotations from suppliers, prior to the suppliers executing any repairs or maintenance services
- Suppliers are not permitted to charge consumer's for drawing up any cost estimates/quotations
- Consumers are not liable to pay for repairs or maintenance services done without their prior approval
- Suppliers are not permitted to charge consumers for any diagnostic work/inspections required in compiling cost estimates/quotations unless the was prior agreement

Right to cancel direct marketing contracts within the cooling-off period

- Suppliers are required to include a "cooling-off period" in direct marketing transactions – generally 5 business days
- Consumers have the right to cancel agreements within the cooling-off period, without providing reasons or incurring penalties for doing so
- Suppliers are required to return payments received from consumers, within 15 business days of receiving the cancellation notice

Right to cancel advance reservations, bookings or orders

- Consumers have the right to cancel any advance reservations, bookings or orders
- Suppliers are entitled to request a reasonable, advance deposit for reservations, bookings or orders, depending on the nature of the business and specific circumstances

- Suppliers are entitled to impose a reasonable charge for the cancellation of reservations, bookings or orders, depending on the nature of the business and specific circumstances
- This becomes important to make provision for, particularly in light of circumstances which are unforeseeable and which may lead to a loss for the supplier

Right to choose or examine goods, even after purchase and delivery

- Consumers have the right to refuse display items or opened goods, and request unopened/new goods. For example, small tea and coffee capsules provided in the rooms must be in a sealed condition
- Consumers are entitled to reject goods if they do not correspond with pre-approved samples or descriptions. Suppliers must advertise existing facilities only. Where the facilities are being repaired or renovated, this must be clearly stated or where applicable a proviso should be inserted to the effect that the facilities are subject to availability
- Suppliers are required to provide consumers with a reasonable opportunity to inspect the facilities. This can be done through a photo gallery posted on the website
- If the consumer, in his inspection of the goods, damages or breaks any of the property, the supplier may, in certain circumstances have the right to charge consumers for loss or damage of property/goods, if this resulted from gross negligence, recklessness or deliberate actions, however suppliers will need to obtain appropriate insurance for instances where the total loss cannot be recovered from the consumer

Right to return goods and seek redress for unsatisfactory services

- Consumers have the right to return unsafe or defective goods and request a full refund for such goods, provided this is done within a reasonable period
- Consumers have the right to request that services of a poor quality be remedied or to demand a refund
- Staff training, levels of service and customer satisfaction become more important since dissatisfaction can in fact result in a claim being made or non-compliance being alleged

Right to retain and not pay for unsolicited goods or services

- Consumers have the right to return unsolicited goods or services, at the risk and expense of the suppliers
- Consumers are entitled to retain unsolicited goods or services after 20 business days

8. RIGHT TO DISCLOSURE OF INFORMATION

Right to information in plain and understandable language

- Aims to ensure that consumers understand the terms and conditions of the transactions or agreements they enter into and are able to make informed choices about the products and services they consume
- Agreements must be easily understood and in plain language. All terms and conditions of the supply of the goods and/or services must be clearly stated

Right to disclosure of prices of goods and services

- It is compulsory to display the prices of goods and services
- Consumers have the right to request the unit cost of goods and services, so as to avoid any "hidden" costs
- Suppliers are required to specify the duration of any promotions in catalogues or brochures, failing which consumers have the right to purchase goods or services at the specified prices, for example suppliers must state whether a promotion is subject to a particular season or not
- Consumers have the right to demand paying the lower price for goods displaying two varying prices – suppliers are not permitted to charge consumers the higher price for the same goods
- All brochures and promotional documentation as well as forms within the establishment must be checked in order to ensure that all pricing is consistent. All agents must be trained accordingly

Product labelling and trade description

- Labelling and trade descriptions of products must be displayed and must not mislead consumers about the contents of the packaging or goods attached to the products

- Suppliers are not permitted to alter, amend, conceal, remove or deface trademarks and other product labelling, so as to mislead consumers
- Producers/importers of products or goods are required to display the country of origin and any other prescribed information, such as expiry dates

Receipts/Invoices

- Suppliers must give proof of purchases via receipts or invoices which should include:
 - Suppliers' full contact information, business names and Value-Added Tax (VAT) registration numbers
 - Name and description of goods
 - Date/s on which the transaction/s took place
 - Unit price of goods purchased
 - Quantity of goods purchased
 - Total price of transaction/s, including any applicable taxes; and
 - Full contact information, business names and addresses
- Systems to be checked to comply with the requirements of the CPA

Right to disclosure by intermediaries

Intermediaries, such as travel agents are required to disclose their associations or affiliations with the entities/persons they represent. This must be checked and confirmed

Right to identification of deliverers, installers and others

- Deliverers, installers and others are required to visibly display name badges or similar identification, to the satisfaction of consumers, when delivering or installing goods/products. For example, where guests are to be collected by a shuttle service, the driver must provide identification
- Consumers have the right to demand identification from the deliverers, drivers and others, prior to allowing delivery or installation of goods

- The business owner must ensure for the acts of any third party appointed by them to deal with their guests or alternatively require that such third parties obtain adequate insurance of their own in terms of the service level agreement with them

9. **RIGHT TO FAIR AND RESPONSIBLE MARKETING**

- The objective of the CPA is to restrain or correct the worst abuses in the area of marketing of goods or services.
- The CPA introduces or re-enacts a number of provisions to address standards for fair and responsible marketing and advertising and provides a general prohibition against marketing that is misleading, fraudulent or deceptive
- Accordingly, all of the advertising and marketing material used by a supplier needs to be carefully considered and the CPA sets out a number of facts which need to be contained in the advertising and marketing by a supplier
- The CPA specifically and particularly prohibits bait marketing, negative option marketing and referrals therein
- Therefore suppliers may not :
 - advertise goods or services in such a way which is misleading to consumers in respect of pricing, the nature thereof, properties, advantages or uses of the goods and services. For example, suppliers must not use illustrations that are not related to the facilities on offer
 - include limitations in respect of the availability of goods or services when advertising such items and honour the advert concerned
 - cannot provide for consumers to automatically have entered into agreements for the supply of goods or services
 - agreements arising out of direct marketing can be cancelled within a cooling off period of 5 business days by the consumer
- In addition, if you as a supplier use catalogues to market and promote your products or goods these are carefully governed by the CPA and a number of disclosures are required therein
- Advertising of goods by suppliers cannot mislead consumers in respect of pricing, the nature, properties, advantages or uses of goods or services

- Suppliers are obliged to include limitations in respect of the availability of goods or services when advertising such items, and honour such adverts
- Suppliers are not permitted to promote any goods or services or automatically enter consumers into agreements for the supply of goods or services i.e. if consumers receive unwanted or unsolicited goods or services, they are under no obligation to pay for these goods or services
- Catalogues are also governed and suppliers are required to disclose the following:

Supplier name and registration/licence number

- Address and contact details
- Sales records
- Currency for sales
- Delivery arrangements
- Cancellation, return, exchange and refund policy; and
- Instructions on lodging a complaint

10. PROMOTIONS

The CPA particularly governs promotions using trade coupons, promotional competitions and loyalty programmes. There are a number of very specific requirements that must be adhered to in each of these types of marketing. Accordingly if the supplier conducts promotions and advertising by any of these type of schemes, vouchers, trade coupons, loyalty points and so forth, that a supplier must carefully consider the provisions of the CPA in drafting such promotional material and in the implementation of such promotions.

11. RIGHT TO FAIR AND HONEST DEALING

The provisions of the CPA in relation to the right to honest and fair dealing:

- Prohibit unconscionable conduct, force, coercion, undue influence, pressure or harassment, unfair tactics or conduct
- A supplier is prohibited from making false, misleading or deceptive representations of whatsoever nature in relation to the goods and services provided by him

- Deals with fraudulent schemes and offers, pyramid schemes and other related schemes. It further deals with the principle of fairness in relation to auctions
- Accordingly, a supplier cannot use exaggeration, innuendo or ambiguity when referring to goods or services or the benefits thereof
- Over selling and over booking are dealt with in this clause and are subject to a number of terms and conditions
- Suppliers are required to honour the supply of goods or services on specified dates, times and other particulars if committing to such arrangements in reservations or bookings. Consumers have the right to demand refunds for full amounts paid in respect of commitments or reservations, together with interest at prescribed rates from the dates of payment until the dates of reimbursement. Booking policies and reservation policies need to be put in place and made clear contractually

Right to protection against over-selling and over-booking

- Suppliers are not permitted to accept payment or other consideration for any goods or services, if:
 - They have no intention of supplying those goods or providing those services; and
 - They intend to supply goods that are materially different from the goods or services, for which payment was accepted
- Suppliers are required to honour the supply of goods or services on specified dates, times and other particulars, if committing to such arrangements in reservations or bookings
- Consumers have the right to demand refunds for full amounts paid in respect of commitments or reservations, together **with interest** at prescribed rates, from the dates of payment until the dates of reimbursement. Suppliers will need to obtain adequate insurance in this regard

12. RIGHT TO FAIR, JUST AND REASONABLE TERMS AND CONDITIONS

- The CPA codifies and improves on common law by addressing unfair contract terms and provides consumers with remedies in the event of a breach
- Suppliers are not permitted to market, supply or enter into an agreement to supply goods or services at prices that unfair, unreasonable and unjust. Accordingly in the supply of ones services one needs to consider the reasonableness of the prices charged

- In addition, suppliers are particularly not permitted to require consumer to waive any rights, assume any obligations, waive any liability of suppliers on terms that unfair, unreasonable or unjust. Accordingly, any disclaimers in agreements or notices need to be evaluated in order to ascertain whether they are voidable or whether they can be seen or justified as being reasonable, for example signs such as "*enter at own risk*" will no longer be adequate for purposes of mitigating potential claims for harm suffered by guests on your premises
- If there are certain terms and conditions in agreements, the suppliers are required to give prior notice of those clauses to potential consumers as well as to specifically draw the fact, nature and potential effects of risks to the attention of consumers in a conspicuous manner or form to which the consumers accordingly accept responsibility. Accordingly, where there are any onerous terms or waivers or acknowledgments in agreements with consumers, these need to be specifically drawn to the consumer's attention. In other words, a provision which has the potential of detrimentally affecting the consumer should not be in small print
- A supplier must give consumers the right to obtain free copies of agreements or contracts or have electronic access thereto whether or not those consumers have entered into such agreements
- Agreements must include an itemised breakdown of financial obligations thereunder, if any
- The supplier is now required to keep records of transactions entered into over telephone or other recordable forms in the event of the consumer supply agreement not being in writing. Accordingly, it may be preferable in this particular industry to ensure that each agreement is in writing
- A number of prohibited transactions agreements and terms or conditions are set out in the CPA. If consumers are not satisfied, they are entitled to approach the National Consumer Commission to investigate the matter who will in turn refer the matter to the National Consumer Tribunal where necessary and if not satisfied therewith they may approach the court for its further consideration of these matters

13. RIGHT TO FAIR VALUE, GOOD QUALITY AND SAFETY

Quality service

- Consumers are entitled to the following, when entering into agreements/contracts with suppliers:
 - Timely performance and completion of those services
 - Timely notice of any unavoidable delays in the performance of the services
 - High quality services, which consumers are entitled to expect; and

- Use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services
- Suppliers are required to remedy any defects in the quality of services performed or goods supplied, or refund the consumers a reasonable portion of the price paid for the services performed and goods supplied, in the event of these being sub-standard
- The training and appointment of staff becomes material

Safe and good quality goods

Consumers are entitled to receive goods or services that are of good quality, in good working order and free of any defects, and that comply with any applicable standards set under the Standards Act, No 29 of 1993, or any other public regulation. Sources of supply must be checked. Suppliers must obtain the necessary insurance to protect against any public liability

Implied warranty of quality

- In any transaction or agreement pertaining to the supply of goods to consumers, it is an implied provision that the producer or importer, distributor and retailer each warrant that the goods comply with the requirements and standards of being safe, of good quality and durable. It is essential that one ascertains whether their supplier has adequate insurance in this regard for purposes of joint and several liability
- Consumers are permitted to return goods to suppliers, without penalty and at the suppliers' risk and expense, within a period of 6 months, after delivery of such goods, if the goods are of inferior quality, unsafe or defective
- Suppliers are obliged to refund, repair or replace the failed, unsafe and defective goods
- Suppliers are obliged to replace goods or refund the consumer the price for the goods within a period of 3 months after repairs have been done, if the repaired goods are found to be defective, have failed or are considered unsafe
- Sources of supply become extremely important and supplier agreements must be put in place to ensure that the parties within the supply chain have appropriate back to back protection and recourse
- Consumers also have the right to demand quality service and where such service falls short, to request that it be remedied or that the consumer receives a refund

Right to a warranty on repaired goods

- Suppliers are obliged to warrant every new or reconditioned part installed during any repair or maintenance work, and the labour required to install it, for a period of 3 months after the date of installation or a longer period as the supplier may specify in writing
- Warranties are null and void if consumers are found to be misusing or abusing goods or property, while under warranty
- Where the services or package provided was incorrect and subsequently remedied by the package provider, such package provider will have to take responsibility for the remedies provided

Right to receive warnings on the fact and nature of risks

- Suppliers are obliged to make consumers aware of any risks of an unusual character or nature, risks of which consumers could not reasonably be expected to be aware, or which ordinarily alert consumers could not reasonably be expected to contemplate, depending on the specific circumstances or risk that could result in serious injury or death
- Suppliers are obliged to bring to the consumers' attention notice/labelling of any hazardous or unsafe goods, and provide the consumers with adequate instructions for the safe handling and use of those goods
- This becomes important in the use of gadgets etc.
- It is essential that suppliers obtain insurance for instances where the instructions or warnings provided were insufficient for purposes of the harm suffered by a particular consumer

Recovery and safe disposal of designated products or components

Suppliers are responsible for accepting and disposing of goods returned by the consumer in terms of the relevant national legislation

Right to claim damages for injuries caused by unsafe/defective goods

Producers, importers, distributors or retailers of any goods are each liable for any harm caused wholly or in part, as a consequence of the following:

- Supplying of any unsafe goods
- Product failure, defect or hazard in any goods; or
- Inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producers, importers, distributors or retailers, as the case may be
- Must have back to back warranties and indemnities along the supply chain in respect of goods/products guests may use eg. hairdryer. Notwithstanding, suppliers will need to insure appropriately

Right to protection with regard to prepaid certificates, credits and vouchers, and access to prepaid services and service facilities

If vouchers are given they cannot expire and must be redeemable

14. RIGHT TO ACCOUNTABILITY FROM SUPPLIERS

The CPA:

- Extends the strict liability of all the parties in the supply chain to liability for illness, injury, damage to property and death as a result (wholly or partly) of:
 - a) supplying the services in an unsafe manner
 - b) supplier services or goods which are defective or hazardous in nature
 - c) not providing adequate instructions or warnings regarding the facilities to the consumer
- Creates vicarious liability and states that, if an employee or agent of a person is liable in terms of the CPA for anything done or omitted in the course of that persons employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person
- Extends liability vicariously to the suppliers' employees who acted on the suppliers behalf, where the consumers have suffered a loss
- Provides that the principle of strict liability is extended in terms of Section 61 of the CPA and is no longer limited to the main supplier or manufacturer
- Provides that any party in the supply chain (including persons who install, etc) can be jointly and severally joined to an action in respect of the products offered for sale by them, irrespective of

whether the harm resulted from negligence on the part of the producer, importer, distributor or retailer

- Creates obligation to comply with environmental legislation
- Provides that a supplier who is in possession of a prepaid service or service facility belonging to a consumer must:
 - a) Not treat the service or facility as their own
 - b) Exercise due care, diligence and skill when handling the service or facility
 - c) Assume liability for any loss suffered by the consumer regarding the service or facility
- Due to the strict liability, the supplier should not only ensure that they have appropriate insurance for any public liability but should insist that all other suppliers in the relevant supply chain are also adequately insured

15. COMPLAINTS

The CPA established the National Consumer Commission to investigate consumer complaints, and as well as the National Consumer Tribunal which is also responsible for the adjudication of violations and transgressions of the National Credit Act

16. FAILURE TO COMPLY AND RECOMMENDATIONS

Non-compliance

Failure to comply with the CPA may result in:

- An offence
- The Consumer Tribunal may impose an administrative fine in respect of non-compliance or prohibited conduct which may not exceed the greater of 10% of the respondent's annual turnover during the preceding financial year or R1 million
- Reputational risk
- The supply agreement being void

Recommendations

Small business owners in the hospitality industry should:

- Ensure that the consumer is well aware the conditions of all goods and services provided to him and accepts them as such prior to effecting the transaction
- Make sure goods and services are not defective
- Ensure strict quality controls and inspections
- Obtain adequate warranties and indemnities from their suppliers
- Set up adequate complaints procedures
- Obtain adequate insurance
- Revise contracts and agreement terms, conditions, warranties and indemnities
- Implement training for employees

17. REGULATORY AGENCIES

(For any further queries or to lodge a complaint in terms of the CPA)

- National Consumer Commission (currently the office of consumer protection within the DTI)
0860 266 786/0861 843 384
- The DTI office of Consumer Protection
012 394 1436/ 1558/ 1076
- National Consumer Tribunal (established in the National Credit Act)
www.nct.co.za/ 012 663 5615
- The DTI website
www.thedti.gov.za