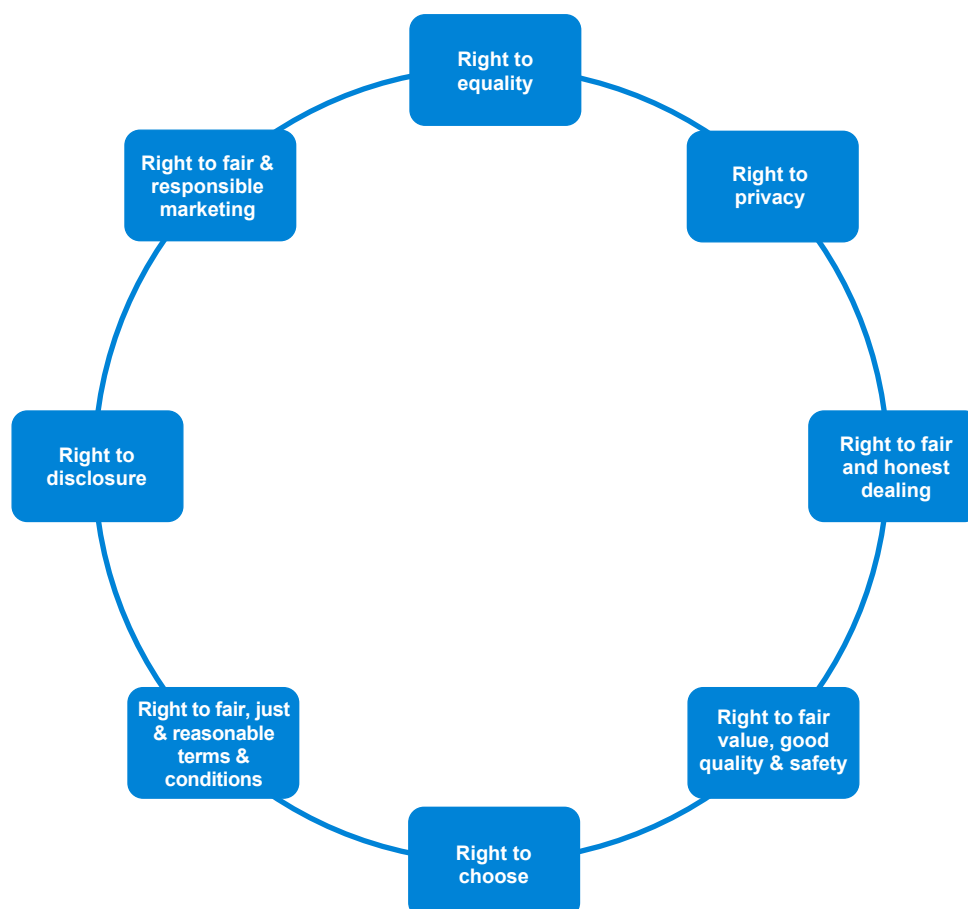


The Consumer Protection Act

The Consumer Protection Act which was signed into law on 24 April 2009 is expected to be effective from 1 April 2011, following a postponement of its effective date from the initial date of 1 October 2010. It is anticipated that the Act will have a far-reaching impact on the manner in which business is carried out, as it seeks to afford better protection to consumers than has been provided in the various pieces of legislation that have been in place in the past.

The Act was drafted mainly as a result of concerns raised by consumer lobbyists around the adequacy of the existing consumer protection legislation. In addition, legislation the world over has been transformed significantly over the years and the Act is South Africa's means of keeping with these developments. It is anticipated that the Act will help promote fair business practice while simultaneously providing protection from exploitation and harm for consumers. The Act comes in "hot on the heels" of the National Credit Act that revolutionised the manner in which the provision of credit facilities is undertaken. Many pundits argue that this may have inadvertently saved South Africa from the brunt of the mayhem that resulted from the global credit crisis. As such, there has been significant support to this modernisation of the legal framework by the legislature.

The fundamental consumer rights that are espoused in the Act are depicted in the diagram below:



So how will this legislation impact the manner in which companies conduct their business?

The Act will add to some of the common law provisions that have been applied over the years. The Act specifically addresses matters such as:

- The consumer's right to a cooling-off period after direct marketing: thus allowing the consumer time to go away and think about their purchase and, if necessary, rescind the transaction;
- The consumer's right to return goods: subject to certain conditions, the consumer may return goods to the supplier and receive a full refund from the supplier;
- Implied warranty of quality: the Act imposes additional obligations on the supplier in respect of warranties of quality of the products and services provided over and above the obligations that currently exist in terms of common law.

The Act will also repeal some of the common law provisions that have hitherto existed. Certain of the areas will be affected include:

- Product liability – In terms of common law, the party to a contract who places a claim on the counterparty has to prove that they had indeed suffered a loss and that the loss was as a result of the activities or action of the counterparty and that the counterparty was negligent or caused such loss intentionally. The Act no longer requires that such loss and negligence be proved in a claim for damages. It also goes on to extend the types of damages that are claimable beyond what common law provides for.
- Contract – Previously, one had to be very careful when entering into and signing contracts as the assumption was made that the parties to the contract were all fully conversant with the terms and conditions imposed by the contract entered into and its possible ramifications on their business. The fact that the contract may have been written to unfairly prejudice one of the parties was irrelevant and nor was it a concern if the counterparty did not understand its impact on them – whether as a result of a literacy challenge or any other handicap that the consumer may have faced. The Act now provides the courts with the power to set aside such contracts that have been entered into, and it also allows a party to a contract to get out of a signed agreement if:
 - o It arose out of a direct marketing exercise undertaken by the seller
 - o The consumer did not have the opportunity to examine the goods before delivery
 - o The goods received are unsuitable for the purpose for which they were intended
 - o The transaction is a booking, reservation or order placed in advance

In addition to this, the Act prohibits certain unfair business practices and imposes certain obligations on suppliers of goods and services. Some of the more pertinent restrictions imposed together with the sections of the Act in which they are addressed, are as follows:

PROHIBITION AND RESTRICTIONS	SECTION
Places a restriction on unwanted direct marketing and the times when consumers can be contacted	11, 12
Prohibits the conditional bundling of goods and services requiring a consumer to purchase other goods and services from that supplier or another nominated party	13
Prohibits the automatic renewal of fixed-term agreements	14
Requires a supplier to provide an estimate of costs and obtain pre-authorisation before repairs and maintenance work is carried out	15
Prohibits entering into contracts with mentally unfit persons and minors as well as taking advantage of physical or mental disability, illiteracy, ignorance or inability to understand the language used. All notices and documents are to be provided in plain and simple language	22, 39, 40
Requires that all goods that are put up for sale be accompanied by a notice displaying their price	23
Prohibits false, misleading or deceptive representations about the goods or services to be supplied	29
Prohibits promotional offers and customer loyalty programmes if there is no intention of delivering on promises made	34, 35
Prohibits the marketing of goods and services with the condition that benefits will accrue to the consumer if they refer other customers	38
Prohibits over-selling and over-booking	47
Disallows any requirements made on consumers to waive their rights or assume additional obligations in respect of the contract or waive liability of the supplier.	48
Disallows unfair, unreasonable or unjust price, marketing or negotiation	48
Permits the return of designated goods by customers without charging the customer for such return	59
Requires the delivery of goods to a consumer or, alternatively, refund the consumer for lay-bys	62

Where to from here?

It will, therefore, be incumbent on each entity to investigate and understand the impact that the Act will have on its operations and to incorporate this risk as part of the key issues that are managed on an on-going basis.

About the author

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