

Consumer Protection Act

BHF SGM

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Consumer Protection Act



- Implementation
 - 24 April 2010: National Consumer Commission and Minister's powers to make regulations
 - 24 October 2010: Balance of the Act (i.e. all the rights)
- Primary purpose
 - Prevent exploitation or harm to consumers
 - Promote social well-being of consumers
- Extensive piece of legislation
- Draft Regulations to be published
- If other legislation (e.g. Medical Schemes Act & regulations, FSB...) also applicable:
 - All apply concurrently to extent possible...without contravening one
 - Otherwise, one offering greater protection to consumer applies

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Consumer Rights Protected

1. Right of Equality
2. Right to Privacy
3. Right to Choose
4. Right to Disclosure and 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 and
8. Right to Fair Value, Good Quality and Safety
9. Suppliers accountability (lay-byes, prepaid, etc)



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Application of Act

- Applicable to all transactions (agreements) in SA for and the actual supply of goods and performance of services
- Goods and services provided by trade unions, societies or associations (e.g. BHF) to members = regarded as a transaction between supplier and consumer
- Exemptions
 - Goods or services promoted/supplied to state
 - Services under employment agreement
 - When consumers are juristic persons and annual turnover exceeds threshold value to be determined by Minister (R1m?)
 - Transactions falling within industry-wide exemption



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Industry-Wide Exemptions



- **Regulatory authority** may apply to Minister for industry-wide exemption (E.g. Medical Schemes – CMS) from **one or more provisions** on grounds that they overlap or duplicate regulatory scheme (E.g. Medical Schemes Act) administered by that authority in terms of
 - Other national legislation
 - Treaty, international law, convention or protocol
- **Exemption only**
 - If regulatory scheme ensures achievement of purposes of CPA at least as well as provisions of CPA and
 - Subject to limits / conditions necessary to ensure achievement of purposes of CPA
- **Sections 60 and 61** relating to safety monitoring and recall and product liability will apply irrespective of industry-wide exemption

“Services”



- Include
 - Work or undertaking performed for direct/indirect benefit of another
 - Provision of education, information, advice or consultation
 - Banking and financial services
 - Undertaking, underwriting or assumption of risk by person on behalf of another (excl advice/intermediary services ito FAIS Act, Long-Term and Short-Term Insurance Acts)
 - Transportation of individual or goods
 - Provision of accommodation, entertainment, access to event, etc.
 - Right of occupancy
 - Rights of franchisee as provided for
- Application
 - Medical scheme cover
 - Medical scheme administration services
 - Medical services (consultations, procedures)
 - Services provided under risk-sharing arrangements

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“Goods”

- Include
 - Anything marketed for human consumption
 - Any tangible object, including any medium on which anything is written or encoded
 - Any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a license to use any such intangible product
 - Legal interest in land / other immovable property
 - Gas, water and electricity
- Application
 - Medicines
 - Scheduled substances
 - Devices, e.g. Prosthesis
 - Consumables

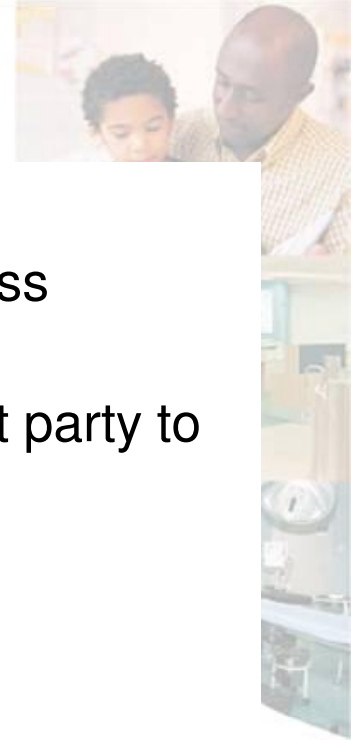


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“Consumer”

- Person to whom goods and services are marketed
- Person who has entered into transaction with supplier (unless exempt)
- User of goods or recipient/beneficiary of services even if not party to transaction
- Franchisee....exemptions
- Members of club, trade union, society, etc.
- Consumers in essence = persons
 - To whom goods and services = marketed (patients, doctors, pharmacists)
 - Who entered into transactions / agreements with suppliers (patients, doctors, pharmacists)
 - Who are users or recipients of goods (patients, doctors, pharmacists)
 - Who are beneficiaries of services (children, medical scheme dependants)
- Exemption: Consumer = Juristic person whose asset value/annual turnover exceeds threshold



Consumers

- Application:
 - **Beneficiaries** of medical schemes
 - **Providers** of goods and services (e.g. doctors) could also qualify as consumers
 - Unlikely that medical schemes will qualify as consumers
 - = Juristic persons and
 - As a result of asset value threshold to be determined



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“Supplier”

- = Person marketing goods/services
- “Market”: Promote or **supply** goods or services
- Includes individuals, juristic persons, partnerships, trusts, organs of state, PPPs

“Supply”

- Goods: Includes sell, rent, exchange, hire for consideration
- Services: Sell, perform, cause them to be performed, grant access to facility or event for consideration
- Application
 - Medical schemes
 - Medical scheme administrators
 - Service providers, etc.



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Marketing Practices

- **All marketing activities** related to goods and services subject to Act
- **General standards** for marketing
 - No false or misleading representation
 - May not be misleading, fraudulent, deceptive e.g. in respect of nature, applicable conditions, advantages, uses of goods and services, price, any other material aspect
- Application:
 - medical scheme brochures, advertisements, information, etc.



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Marketing Practices

- No **discriminatory** marketing

- **Not unfairly**

- Excluding persons from accessing goods or services
- Granting person / category of persons exclusive access to goods / services
- Charging different prices for goods / services to any person / category of persons
- Supplying different quality of goods / services to person / category of person
- Targeting / Excluding specific communities, populations, market segments for exclusive / priority / preferential supply

on basis of **unfair discrimination grounds** in Constitution and Promotion of Equality and Prevention of Unfair Discrimination Act e.g. age, race, gender, disability...be aware of indirect discrimination!

- **Differential treatment** allowed in certain circumstances e.g. minors (facilities, requiring parental consent, etc.), disabled persons, elderly, genders (e.g. washrooms) - reasonable

The logo for Benguela Health, featuring the word "benguela" in a blue, lowercase, sans-serif font. The letter "e" is stylized with a yellow dot above it.

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Marketing Practices

- Not directly or indirectly treating person differently in manner that would constitute unfair discrimination on basis of any of listed grounds when:
 - Assessing ability of person to pay
 - Deciding whether to enter into agreement
 - Determining cost
 - Interacting with consumer
 - Providing services
 - Requiring compliance with term of agreement
 - Determining whether to terminate
 - Determining whether to report any personal information
- Also applies to consumer that is juristic person – prevent unfair discrimination on basis of characteristic of members, employees, customers, etc.



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Marketing Practices

- Application
 - DSPs
 - Low-income products
 - Target marketing
 - Different formularies in respect of different benefit options e.g. only generics on low cost option
 - Decision to accept person as member of scheme
 - Debt collection
 - All patients should receive same quality of services, no differentiation e.g. between FFS and managed care patients
 - Level of fees charged to different patients



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Marketing Practices

- Right to restrict **unwanted direct** marketing
 - Consumer indicates that no further marketing may occur
 - Register pre-emptive block on registry
 - Application
 - “Unsubscribe” or “opt out” function (note link to [POPIA](#))
 - Check Registry
- Regulation of **time** for contacting consumers
 - At homes
 - Minister to prescribe times and days
 - E.g. after hours, public holidays
- **Cooling-off** period after direct marketing
 - 5 days
 - No penalty
 - Application
 - Medical scheme membership contracts



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Marketing Practices

- Promotional Competitions
 - Competition, scheme, system, etc. for distributing prizes by lot / chance for promotional purposes
 - Prize exceeds threshold to be prescribed
 - Prize includes gift, free goods or services, etc.
 - Criteria including competition rules available to Commission
- Application



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Unconscionable Conduct

- Use of physical force, coercion, **undue influence**, **pressure**, duress, harassment or **unfair tactics** prohibited when
 - Marketing / **supplying goods / services**
 - Negotiating, concluding, executing or enforcing agreement to supply goods / services
 - Collecting payment for goods / services
 - Recovering goods from consumer
- Unconscionable for supplier to knowingly take advantage of fact that **consumer is substantially unable to protect his/her own interests because of**
 - Physical, mental disability; illiteracy; ignorance; inability to understand language of agreement; any similar factor
- Application
 - Care to be exercised in respect of **vulnerable patients**
 - Debt collection
 - **PMBs** – Pay from savings accounts or apply benefit limit?



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Loyalty Programmes

- Criteria
- Goods and services must be available to accommodate all reasonably anticipated demands
- No administration costs if consumer pays e.g. membership fee
- No inferior quality
- Consumers may not be required to purchase any *other* goods and services in connection with transaction
- Application
 - Vitality, Multiply, Others



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Bundling of Goods and Services

- Right to **select suppliers**
 - **Bundling** of goods and services...must purchase any goods / services from supplier, enter into further agreement to purchase from supplier / designated 3rd party
 - Unless:
 - Convenience outweighs right to choice
 - Economic benefit or
 - Offer at individual prices
- Application
 - To become member of scheme, person must also purchase membership of loyalty programme from scheme / 3rd party

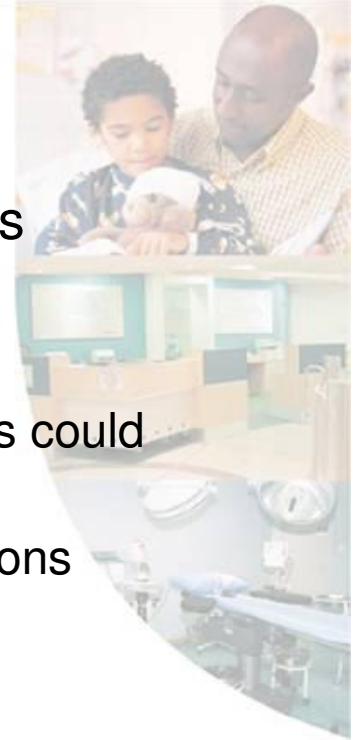


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Goods and Services

- Rights with respect to **delivery** of goods or supply of services
 - Agreed date, time (otherwise reasonable time) and place
 - **Timely** performance and completion
 - Performance of services in such **manner and of such quality** as could generally be expected
 - Examine goods – type, quality, conform to material specifications
 - Risk of supplier
- Right to demand **quality service**
 - Service does not meet standards (e.g. timely performance, quality generally expected): **Remedy** defect / **Refund** reasonable proportion of price
- Application
 - Client services
 - **Pre-authorisation**
 - **Treatment & procedures**
 - **Medicines dispensed / delivered by Courier Pharmacy**



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Information, Records and Disclosures

- Notices, documents or visual representations provided / displayed to consumers in terms of CPA or *any other law* (e.g. Medical Schemes Act)
 - Form prescribed to CPA / other legislation
 - Plain language
 - Reasonable to conclude that
 - Consumer of class of persons to whom intended
 - With average literacy skills and
 - Minimal experience as consumer
 - Could be expected to understand content, significance and import of notices / documents
 - Form, style, vocabulary, illustrations, etc.
 - Guidelines to be issued
 - Official language?
- Application
 - Membership application forms
 - Medical scheme rules
 - Brochures, consent forms, etc



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Sales Records

- Written records of every transaction in terms of which goods / services supplied, must be provided to consumers
- Following info must be included as minimum
 - Supplier's full name / registered business name and VAT nr
 - Address at which goods / services supplied
 - Date of transaction
 - Name or description of goods / services
 - Unit price
 - Quantity of goods / services
 - Total price with and without applicable taxes
- Minister may exempt categories of goods / services / circumstances of trade
- Application:
 - If not exempted, align [remittance advices](#)



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False, Misleading or Deceptive Representations

- Includes words and conduct!
- False, misleading or deceptive representations concerning material facts of goods / services prohibited
- Exaggeration, innuendo or ambiguity iro material fact prohibited
- Fail to correct apparent misapprehension of consumer
 - Regarding ingredients, performance characteristics, quality, etc. of goods / services
 - Specific price advantage exists
 - Sponsorship / approval
- Application:
 - What do we cover, and under which conditions do we cover it?
 - If a “no”, describe (and may relate to medical schemes legislation)
 - Most pertinent risk factors / side-effects to be discussed with patient
 - Off-label prescription of products

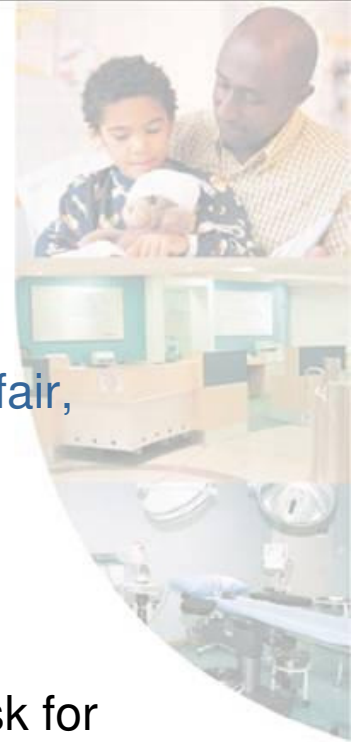


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Contracts

- Impermissible:
 - Supply of goods / services at **prices** or on **terms** that are **unfair, unjust, unconscionable**
 - Market goods / services / enter into agreement for supply in **unfair, unreasonable or unjust manner**
 - Require consumer to **waive rights**, liability - supplier
 - Assumption of risk / liability by consumer - gross negligence of supplier
 - Impose obligation on consumer to pay for damage / assume risk for handling goods displayed by supplier
- Unfair, unreasonable and unjust contract terms = e.g.
 - Excessively one-sided in favour of another person (not consumer)
 - So adverse to consumer that inequitable
 - Consumer relied upon false, misleading or deceptive representation
- Application
 - Membership contracts / medical scheme rules
 - Agree with consumer not to provide rules in plain language



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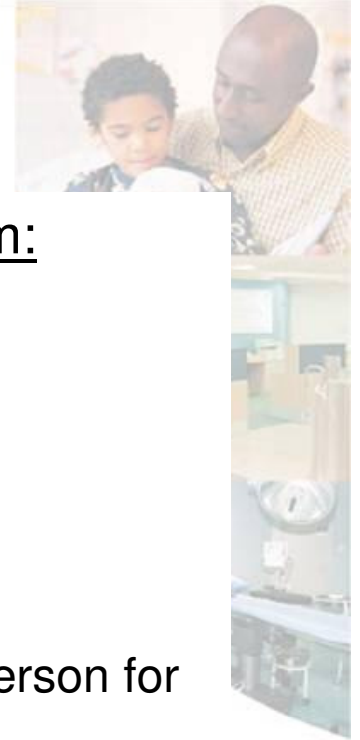
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Contracts

- Bring specifically to attention of consumer in prescribed form:

Notice / provision in agreement that

- Limit risk / liability of supplier / another person
- Constitute assumption of risk / liability by consumer
- Impose obligation on consumer to indemnify supplier / other person for any cause
- Is **acknowledgement of any fact by consumer**
- Concern any activity or facility of **unusual nature** that consumer could not reasonably be expected to be aware of and could result in serious injury / death
- *fact, nature and potential effect of risk must be brought to attention of consumer in prescribed form and consumer must assent to this e.g. through signature or acting in manner consistent with acknowledgement of notice*



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Contracts

- How?
 - Notice / provision / condition = Written in **plain language**
 - Fact, nature and effect of provision **drawn to attention of consumer** in conspicuous way before concluding agreement / accepting payment
 - Consumer must have adequate opportunity to receive and **comprehend** notice
 - Failure to do, results in term = unfair, unreasonable or unjust
- Application
 - Indemnifications
 - Access to confidential medical information upon application for membership
 - Hospital admission forms



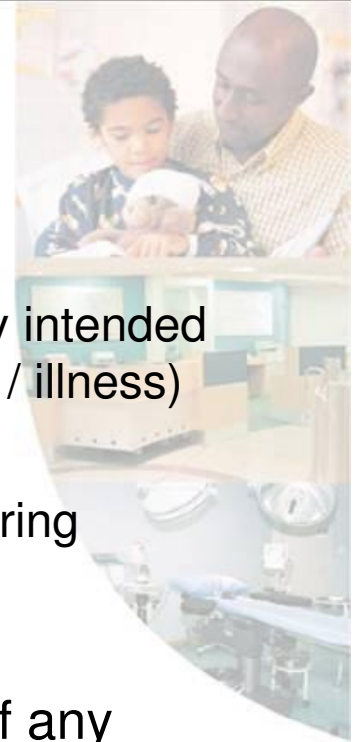
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Risk and Liability (S 61)

- Consumer has general right to expect that
 - Goods are **reasonably suitable for purposes** for which generally intended (E.g. medication prescribed for treatment of specific symptoms / illness)
 - Are in good working order
 - **Free from defects** (E.g. medicine meets appropriate manufacturing standards)
 - Usable and durable for **reasonable period of time**
- Producer, importer, distributor or retailer liable irrespective of any negligence on their side for harm caused wholly or partly as consequence of
 - Supplying unsafe (E.g. extreme risk of personal injury) goods
 - Product **failure, defect or hazard** in goods or
 - **Inadequate instructions / warnings** to consumer to hazard associated with goods

→ “Product liability” / “Strict liability”

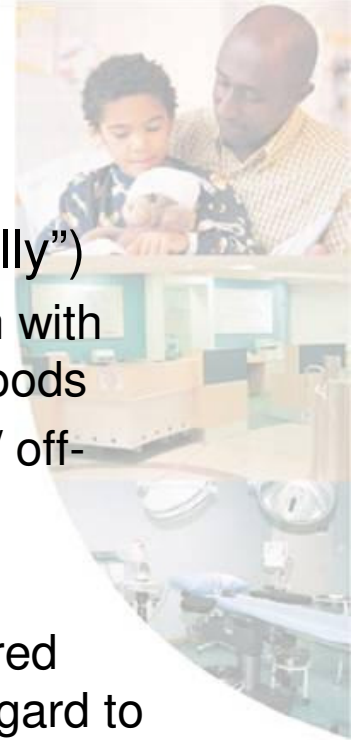


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Risk and Liability

- Entire supply chain could be held liable (“jointly and severally”)
 - Service provider who provides access to goods in conjunction with performance of services also regarded as supplier of those goods
 - Medical scheme through enforcement of restricted formulary / off-label use / enforcement of generic substitution?
- Exceptions in respect of liability, e.g.
 - Unreasonable to expect distributor or retailer to have discovered unsafe product characteristic, failure, defect or hazard with regard to person’s role in marketing of goods to consumer
 - Did not exist at time that goods were supplied
 - Attributable to **compliance with instructions**
 - Claim for damages brought 3 years after death / injury / last date on which economic loss suffered



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Enforcement

- Individuals, class actions, associations, person acting in public interest, etc. can enforce consumer rights
- Mechanisms...in addition to CMS, etc.
 - National Consumer Commission
 - National Consumer Tribunal
 - Ombud
 - Consumer/Equality/Other Court
 - Alternative Dispute Resolution
- Various offences
- Penalties:
 - Administrative fines
 - Tribunal may impose for prohibited or required conduct
 - Maximum = Greater of 10% of annual turnover or R1m
 - Fine and/or imprisonment of 12 months



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In conclusion...

- Check all agreements, forms, brochures, scripts / standard responses for call centres, etc:
 - Terms & conditions
 - Plain language
- Address CPA issues with others in supply chain (administrators, managed care) – due to shared liability
- Ensure that providers and others also comply
- Check limitations, differentiations – are we clear, complete and consistent?
- Check all marketing projects, advertisements
- Check loyalty programmes, etc
- Check contracts with DSPs
- ?



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Questions?

THANK YOU !

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