



THE CONSUMER PROTECTION ACT

ABOUT NPO LEGAL ISSUES:

This is an electronic newsletter published by:
RICARDO WYNGAARD ATTORNEYS which is aimed at updating the non-profit sector on relevant legal issues.

IN THIS EDITION:

- The Consumer Protection Act
By: **Peter SA Hendricks**

RICARDO WYNGAARD ATTORNEYS is a law practice that specialises in rendering advice and assistance on non-profit law and governance.

SUBSCRIBE:

To subscribe free of charge send an email with NEWSLETTER typed in the subject-line to:
meagon@nonprofitlawyer.co.za

DETAILS:

P.O. Box 214, Eerste River, 7103

Somerset West

Tel: +27 21 843 3588

Fax: +27 86 538 8435

ricardo@nonprofitlawyer.co.za

www.nonprofitlawyer.co.za



By Peter SA Hendricks
Attorneys & Administrators of Estates | Tel No.: 021 911 3497 | Fax No.: 086 654 4322 |
Email: psahendricks@telkomsa.net

The Consumer Protection Act 68 of 2008 (The Act) will come into operation in April 2011. A question that needs speedy answering is, whether the non-profit sector in South Africa are aware of and ready for the broader implications of the Act? Many leaders in the non-profit sector are seemingly oblivious to what the Act will mean to the financial sustainability of non-profit entities. After all, it is enacted "to promote and advance the social economic welfare of consumers in South Africa...", and, certainly the term "consumer" has to do with business relationships between parties that are involved in trading of some sorts.

What very few realise is that the Act, very deliberately, do not distinguish between commercial business and social interventions. A slight analysis will soon reveal that the Act in fact also regulates the relationship between non-profit entities, its members, beneficiaries and potential donors. Insofar as it concerns applicability to non-profit entities, the Act imposes itself on the non-profit sector through the following:

Wide ambit of the term 'transactions'

The relationship between a member and an organisation that it belongs to, is deemed a transaction for purposes of the Act. Membership-based organisations are typified by trade unions, umbrella bodies, medical aid schemes, churches, sports club, etc. In this regard, section 1 is very clear in its definition of the term transaction by asserting that it includes an interaction that section 5(6)(a) describes as:

"The supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity"

The only time the Act would not apply to the transaction is if that transaction would specifically excluded in terms of the Act.

Defining a 'deemed consumer'

According to section 1 a consumer not only means a person to whom goods and services were marketed or supplied, but could in certain circumstances also include: *"...a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services..."* In other words, although a non-profit organisation contracts with an institution such as a government department, a CSI foundation or other funder, it is important to be aware that the beneficiaries could be deemed a consumer for purposes of the Act. This is so unless the transaction has been exempted from the application of the Act as mentioned above.

This definition alone should put any responsible leader of a non-profit entity on alert as to the potential implications that the Act holds to the organisation that they steward and to ensure that the organisation remain legally compliant.



The Consumer Protection Act/

● From page 1

Strictly regulating promotional communications

Considering this aspect of the Act, it will undoubtedly have serious implications to non profit entities that rely on funding to fuel its mission and operations. More so, when one considers the impact that the proposed regulations will have, unless it is changed. Section 11(1) provides that:

“The right of every person to privacy includes the right to—

(a) refuse to accept;

(b) require another person to discontinue; or

(c) in the case of an approach other than in person, to pre-emptively block, any approach or communication to that person, if the approach or communication is primarily for the purpose of direct marketing.”

The definition of the term “direct marketing” is pivotal to the implications of section 11(1)(c) on non-profit entities. This is so, as section 1 defines the term to include “*requesting the person to make a donation of any kind for any reason.*” The consequence is that non-profit entities, communicating request for funding can be blocked from sending out such requests. Further, given the wide construction of this definition, they could arguably also be blocked from requesting support in its efforts to advocate or lobby for social and/or legislative change. According to sub-section 11(3), therefore a consumer (which could include a juristic person such as another non-profit entity, close-corporation, company and trust) can prohibit unwanted communications and approaches of non-profit organisations (deemed direct marketing) by registering a pre-emptive block, on a registry. The consequence to non-profit organisations is that they will be prohibited from communications forming part of their fundraising activities to such person.

The Regulations

Most concerning, is that the proposed Regulations set out in particular detail the manner in which the pre-emptive block will operate. As mentioned before, non-profit organisations that request funding or other support in this manner would be deemed direct marketers. In such a case sub-regulation 4(3)(h) makes it compulsory on the non-profit organisation whose communications falls within the scope of the definition of direct marketing, to register as a direct marketer with the administrator tasked to oversee the mentioned registry. It is not a given that the application as a direct marketer will be a success, as the administrator are also given authority in terms of sub-regulation 4(3)(o) to put in place screening and validation processes.

The regulations provides that organisations “*must without exception assume that a comprehensive*” prohibition has been registered in respect of its communications for purposes of direct marketing. Only on application to the said administrator, will the organisation receive written confirmation as to whether it has been blocked, and, when blocked the extent thereof. An organisation may only then proceed to communicate to the person, if not blocked, and, unless comprehensively blocked in relation to the extent thereof.

Where to for Non-profit Organisations?

South African consumers have reason to be excited about this much needed legislation. It is however unfortunate that the Act in all respects treats commercial and social entities similarly, despite being situated in the South African society dissimilarly. As a result it holds some seriously dire consequences for non-profit entities. The Act has the potential to resurrect the draconic provisions experienced under the Fundraising Act of 1978. It is already challenging to raise funds, especially considering the withdrawal of major donors and the recent recession.

© RICARDO WYNGAARD ATTORNEYS

Important Note: The information contained in this newsletter is general in nature and should not be interpreted or relied upon as legal advice. The information may not be applicable to specific circumstances. Professional assistance should be obtained before acting on any of the information provided in this newsletter.