



NPOs AS SUPPLIERS AND CONSUMERS

By Ricardo Wyngaard

The Consumer Protection Act of 2008 (the Act) came into operation on 01 April 2011 and holds significant implications for non-profit organisations (NPOs) in South Africa. This article focuses on some of the practical implications of the Act on NPOs - to the extent that they fall within the definitions of *consumer* and *supplier* in terms of the Act.

NPOs as suppliers

A number of NPOs carry on business activities through the marketing of goods and services and would fall within the Act's definition of a *supplier*, being; 'a person who promotes, supplies or offers to supply any service. A service includes, for example, the provision of any education, information, or advice. NPOs that carry on business activities should, amongst other, take the following into account:

- **Business names** – No NPO must, in terms of the Act, carry on business, advertise, promote, offer to supply or supply goods or services or enter into an agreement with a consumer, unless its name is registered in terms of the Act or any other public regulation. This means that the practice of 'trading under an unregistered name, is outlawed in terms of the Act. However, Minister Rob Davies must first publish a six month notice before this requirement takes effect.
- **Unfair, unreasonable or unjust contracts** – NPOs must ensure that agreements entered into with consumers are compliant with the Act. NPOs must not enter into contracts with consumers that are unfair, unreasonable or unjust. Contracts that are, for example, excessively one-sided in favour of the NPO, are considered unfair, unreasonable or unjust. NPOs must also draw a consumer's attention to any clause in an agreement that limits the liability of the NPO, or impose an obligation on the consumer to indemnify the NPO.
- **Prohibited agreements** – NPOs must not enter into agreements that limit or exempt them for any loss because of the *gross* negligence of the NPO, or any person acting for the NPO.
- **Consumer's right to demand quality service** – Consumers have the right to timely performance and completion of services. The services should be performed in a manner and with the quality that persons are generally entitled to expect. This would include NPO membership agreements.
- **Implied warranty of quality** – Goods being supplied to consumers must comply with the standards listed in the Act. The standards include; good quality, good working order, free of defects, useable and durable for a reasonable period of time having regard to its use and surrounding circumstances. Goods failing these standards can be returned by the consumer without penalty to the NPO within six months of delivery for repair, replacement or refund.

ABOUT NPO LEGAL ISSUES:

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- **Direct Marketing** – NPOs, when approaching someone in person, by mail or electronic communication to request them to make a donation, will have to adhere to the onerous direct marketing provisions. This applies irrespective whether NPOs are carrying on trading activities. See article written by Peter Hendricks – [NPO Legal Issues: Volume 10](#).
- **Intermediaries** – Agents, who are selling services or products on behalf of NPOs to persons, will have to disclose to them prescribed information. This include, in terms of the draft regulations, the intermediary fee and the basis for calculating it.
- **Membership fees** – Membership fees paid by members to NPOs remain the property of the member until the NPO makes a charge against it in line with the Act. NPOs may make such charges once a month – in advance and on the pro-rata portion of the amount. NPOs must not treat membership fees as their own property and are liable for any loss resulting from a failure to do so.
- **Membership renewals** - The Act regards the supply of any goods or services by a NPO in the ordinary course of business to any of its members in exchange for membership, as a consumer transaction, even if no membership fee is involved. By implication, this means that NPO membership arrangements, involving individuals, may be subject to the maximum period prescribed by the Minister.

NPOs as consumers

NPOs, as juristic persons, may also qualify as 'consumers' in terms of the Act if their asset value or annual turnover, at the time of the relevant transaction, does not exceed the amount of **R2m**. The Minister has determined the method of calculating the assets and turnover of a juristic person. The consumer agreements entered into by many NPOs with suppliers may accordingly fall within the ambit of the Act. The implication is that many NPOs would be in a position to exercise the consumer rights captured in the Act.

This means that *Service-level Agreements* entered into with NPOs may fall within the provisions of the Act and must not, be unfair, unreasonable or unjust. As stated above, agreements that are, for example, excessively one-sided in favour of the supplier, are considered unfair, unreasonable or unjust. How this will translate in practice remains to be seen.

It is important to note that the provisions regulating the expiry and renewal of fix-term contracts do not apply to agreements between juristic persons, regardless of their annual turnover or asset value.

Issues to consider:

The Act cannot be disregarded by the non-profit sector because it holds significant implications for NPOs operating in South Africa. In light of the Act, they will have to:

1. Check that their funding practices are not in breach with the direct marketing provisions,
2. Review their contracts with consumers, members and suppliers,
3. Recruit suitable staff and board members when carrying on business activities,
4. Obtain advice and assistance, where applicable, to ensure compliance with the Act,
5. Consider and budget for the cost implications of compliance, and
6. Manage the risks and explore the opportunities presented by the Act.

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