

# **Parliamentary Submissions**

## **Consumer Protection Bill B - 2008**

As entered by

**National Automobile Dealers' Association**

**Introduction:**

The National Automobile Dealers' Association ["NADA"], a constituent association of the Retail Motor Industry Organisation ["RMI"] which is celebrating its Centenary during 2008, represents the interests of 8000 establishments in the retail and wholesale motor industry, which includes the interests of some 1600 new and pre-owned motor vehicle and motorcycle dealerships.

NADA is, a member owned and driven organisation, committed to maintaining high standards of business ethics and service delivery to the motoring public by members of the NADA.

NADA is actively involved in the development of their members, provides ongoing educational programs covering all aspects of their members business, and is recognised for being the industry effective mouthpiece addressing issues that affect sustainability of the symbiotic relationship between commerce and consumer.

The RMI's Consumer Services divisions are deployed countrywide, and professional intervention endures a proud record of high success rate in dispute resolution.

Accredited NADA members are party to the RMI Consumer Code of Conduct in terms of which the consumer is assured that an accredited member undertakes to:

- Sell quality products and services at a fair and reasonable price;
- Honour, both in letter and in spirit, any guarantees applicable to products and services sold by them;
- Acknowledges that, should there be a dispute between a consumer/customer and our member which could not be amicably settled at Management level, the consumer/customer has the right to refer such dispute to the RMI for investigation.

**Consumer Protection:**

NADA recognises that as our economy evolves, the issue of consumer protection is a priority. Just as South African consumers are diverse and differ in the nature and degree of consumption, so too are suppliers of goods and services. Research has indicated that the attitudes of teachers are often reflected in their students. If so, then what are the attitudes that community consumer educators may pass on to the people in their localities? Consumer protection is a non-negotiable but it needs to be concise and reasonable in its application, therefore knowledge, opinions and behaviours concerning consumer rights and responsibilities must be considered by legislators and consumer educators. Another important element in this equation is the consolidation of legislation, and terminology which is essential for the successful transition to a fair and balanced economic state of consumer rights, protection and sustainable business that meets governments' quest for accelerated economic growth, job creation and service delivery to redress the scourge of poverty and unemployment as the overall objective.

NADA through its association with the RMI is by implication a member of Business Unity South Africa (BUSA) which is preparing a detailed submission, on behalf of business, in response to the proposed Consumer Protection Legislation. NADA endorses BUSA's submission which has been sent to you under separate cover.

Before making comment on the Consumer Protection Bill [B19-2008], we respectfully wish to draw the Portfolio Committee's attention to the fact that the business and operational processes within motor vehicle dealerships are already highly regulated via other legislation:

1. All establishments operating in the retail motor industry are obligated to register with the Motor Industry Bargaining Council and operate in terms of the Main Agreement for the Motor Industry. This collective Agreement stipulates the minimum prescribed wages and working conditions in the industry which are to be adhered to by both the employers and employees alike;
2. In terms of the Financial Advisory & Intermediary Services Act No. 37 of 2002 dealerships that provide financial advice and / or sell insurance related products in respect of motor vehicle sales have to register with the Financial Services Board as financial service providers and meet various onerous compliance requirements. In addition, every employee within motor vehicle dealerships who interact with the consumer and provide financial advice and or sell the insurance related products in respect of motor vehicle sales have to comply with the very strict qualification criteria and operational requirements;
3. In terms of the Financial Intelligence Centre Act of 2001 motor vehicle and dealers are classified as "reporting institutions" and are obliged to report suspicious and / or unusual transactions to the Financial Intelligence Centre;
4. As recently, as 1 June 2007 the National Credit Act No 24 of 2005 became law and here again motor vehicle and motorcycle dealerships that have entered into agreements with the various financial institutions for the provision of finance for customers to purchase motor vehicles are obliged to comply with the requirements of the Act. The same employees as mentioned in paragraph 2, are required to pass a further examination before receiving accreditation by the financial institutions.
5. Motor vehicle dealerships are required to be registered and licensed in terms of the National Road Traffic Act of 1996 and the National Road Traffic Regulations of 1999 as amended. This all relates to the registration and licensing of vehicles in terms of the National Traffic Information System (eNaTIS). It is important to note that motor vehicles are all registered assets in terms of the Act. In addition, the following recent amendment ensures a more detailed audit trail via the eNaTIS of the sales and purchase history of a motor vehicle. Regulation 53A "No motor dealer shall display a motor vehicle for the purpose of sale on his or her premises unless such motor vehicle has been registered into his or her name as dealer stock".
6. Most dealers are registered as VAT vendors.
7. The Access to Information Act and the laws relating to Privacy of Information also has a bearing on the industry.
8. Dealers also have to comply with the provision of the Companies Act and meet all corporate governance and accounting standards.
9. Dealers comply with the current Secondhand Goods Act.
10. New motor vehicle dealers who also have pre-owned vehicle departments and or stand alone facilities operate under extremely onerous franchise agreements and operating standards as stipulated by the motor manufacturer and or distributor.

As can be seen from the aforementioned motor vehicle and motorcycle dealers' business activities are highly regulated.

NADA's submission in terms of its members is around the question of: Are there particular regulations that are unduly restrictive, either in establishing new companies / businesses or in everyday operational terms, by imposing undue costly compliance burdens? From NADA's perspective, the answer is yes, as insufficient consideration is given to the fact that business works hard and takes risks to provide consumers with the right goods and services at the right price, and by implication the financial, administrative and compliance burden is simply not quantifiable at this stage but estimations coming from the different sectors within the RMI run well in excess of R500 million.

We now wish to comment on the various clauses which either require further clarification and or are not practically implementable within the retail motor industry environment.

## SPECIFIC COMMENTS ON THE BILL

### Section 1 Definitions

"direct marketing" means to approach a person, either in person, or by mail or electronic communication, for the direct or indirect purpose of—

- (a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or
- (b) requesting the person to make a donation of any kind for any reason;

### Comments

#### SearchCRM.com

**Direct marketing** is a type of advertising campaign that seeks to elicit an action (such as an order, a visit to a store or Web site, or a request for further information) from a selected group of consumers in response to a communication from the marketer. The communication itself may be in any of a variety of formats including postal mail, telemarketing, direct e-mail marketing, and **point-of-sale (POS) interactions**. Customer response should be measurable: for example, the marketer should be able to determine whether or not a customer offered a discount for online shopping takes advantage of the offer.

#### Direct Marketing Channels - Wikipedia

Some direct marketers also use media such as door hangers, **package inserts**, magazines, newspapers, radio, television, email, internet **banner ads**, pay-per-click ads, billboards, transit ads. And according to Ad Age, "In 2005, U.S. agencies generated more revenue from marketing services (which include direct marketing) than from traditional advertising and media."

The application of direct marketing iro the Bill is considered to be too wide and as such would have unintended consequences as shown in the examples below:

**Example 1:** Client walks onto a showroom floor the sales executive approaches the client and asks "how can I help?"

**Example 2:** A dealer places advertising flyers into a magazine and that magazine is distributed to shops and to subscribers, those sent to subscribers could be deemed to be direct marketing since it was sent to the consumer by mail. This would also apply to the flyer placed in one's mail box by a retailer (eg : Makro, Pick'n Pay).

**In both cases, the cooling – off period of S16 would apply to any goods and services sold.**

If one looks at the last sentence under the heading: 'Direct Marketing Channels – Wikipedia', it clearly illustrates that not only will the RMI be a casualty if applied in its current context, but business will stop utilizing these mediums to curb unnecessary risk, which in turn will have an impact on the advertising and marketing industry, ultimately affecting the economy.

**“franchise agreement”** means an agreement between two parties, being the franchisor and franchisee, respectively —

*(a) in which, for consideration to be paid or to be paid by the franchisee to the franchisor, the franchisor grants the franchisee the right to carry on business within all or a specific part of the Republic under a system or marketing plan substantially determined or controlled by the franchisor or an associate of the franchisor;*

(b) under which the operation of the business of the franchisee will be substantially or materially associated with advertising schemes or programs or one or more trade marks, commercial symbols or a logos or any similar marketing, branding, labelling or devices, or any combination of such schemes, programs or devices, that are conducted, owned, used or licensed by the franchisor or an associate of the franchisor; and

(c) that governs the business relationship between the franchisor and the franchisee, including the relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisee by or at the direction of the franchisor, or an associate of the franchisor;

#### Comments

There is concern that clause (a) in the definition of Franchise Agreement, could be regarded as to exclude the typical motor dealer franchise agreements, as it contemplates a franchisee **paying** a consideration for taking on the franchise. It is deemed inequitable that motor dealers be excluded and it is requested that the clause relating to a consideration within the definition, namely “...to be paid or paid by the franchisee ...” be deleted, unless the definition of consideration clause (d) is considered as payment.

**“consideration”** means anything of value given and accepted in exchange for goods or services, including—

(a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip, or similar object;

(b) labour, barter or other goods or services;

(c) loyalty credit or award, coupon, or other right to assert a claim; or

*(d) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer, or other parties in addition to the supplier and consumer;*

“service” includes, but is not limited to—

- (a) any work or undertaking performed by one person for the direct or indirect benefit of another;
- (b) the provision of any education, information, advice or consultation, *except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002)*;
- (c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another *except to the extent that any such service—*
  - (i) constitutes advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); or*
  - (ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), or the Short-term Insurance Act, 1998 (Act No. 53 of 1998);*
- (d) the transportation of an individual or any goods;
- (e) the provision of—
  - (i) any accommodation or sustenance;
  - (ii) any entertainment or similar intangible product or access to any such entertainment or intangible product;
  - (iii) access to any electronic communication infrastructure;
  - (iv) access, or of a right of access, to an event or to any premises, activity or facility; or
  - (v) access to or use of any premises or other property in terms of a rental;
- (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and
- (g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6) (b) to (e), irrespective whether the person promoting, offering or providing the services participates in, supervises, or engages directly or indirectly in the service;

#### Comments

Confirmation is required that all insurance related products, regulated by FAIS, and the Long term and Short term Insurance Acts are excluded.

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“special-order goods” means goods that a supplier expressly or **implicitly** was required or expected to procure, create or alter specifically to satisfy the consumer’s requirements;

#### Comments

Is “implicitly” fair?

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## **SECTION 5 APPLICATION OF THE ACT**

(2) This Act does not apply to any transaction—

(a) in terms of which goods or services are promoted to the State, or are supplied to or at the direction of the State; or

(b) if—

(i) the value of the transaction exceeds the threshold value determined by the Minister in terms of section 6; and

(ii) the goods or services are supplied to a person in the supply chain who, in the ordinary course of business—

(aa) markets those goods for resale, irrespective whether to other persons in the supply chain or directly to consumers; or

(bb) applies or utilises those goods or services in the production of other goods or services, or in the marketing of any goods or services, irrespective whether to other persons in the supply chain or directly to consumers; or

(c) if the transaction falls within an exemption granted by the Minister in terms of subsections (3) and (4).

### **Comments**

S5(2) (b) (ii), this section implies that the Act does not apply in the normal Business to Business transactions. This needs to be qualified

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**Section 8 Protection against discriminatory marketing**

**Section 9 Reasonable grounds for differential treatment in specific circumstances**

### **Comments**

Confirmation is required that business can continue to prioritise customers on a commercial basis.

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**Section 14 Expiry and renewal of fixed term agreements**

(1) If a consumer agreement is for a fixed term—

(a) that term must not exceed the maximum period, prescribed in terms of subsection (3) with respect to that category of consumer agreement; and

(b) despite any provision of the consumer agreement to the contrary—

(i) the consumer may cancel that agreement—

(aa) upon the expiry of its fixed term, without penalty or charge, but subject to subsection (2)(a); or

(bb) at any other time, by giving the supplier 20 business days notice in writing or other recorded manner and form, subject to subsection (2)(a) and (b); or



- (ii) the supplier may cancel the agreement 20 business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time;
- (c) not more than 80, nor less than 40, business days before the expiry date of the fixed term of the consumer agreement, the supplier must notify the consumer in writing of the impending expiry date, including a notice of—
  - (i) any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date; and
  - (ii) the options available to the consumer in terms of paragraph (d); and
- (d) on the expiry of the fixed term of the consumer agreement, it will be automatically continued on a month to month basis, subject to any material changes of which the supplier has given notice, as contemplated in paragraph (c), unless the consumer expressly—
  - (i) directs the supplier to terminate the agreement on the expiry date; or
  - (ii) agrees to a renewal of the agreement for a further fixed term.
- (2) Upon the cancellation of a consumer agreement as contemplated in subsection (1)(b)—
  - (a) the consumer remains liable to the supplier for any amounts owed to the supplier in terms of that agreement up to the date of cancellation; and
  - (b) the supplier—
    - (i) may impose a reasonable cancellation penalty with respect to any goods supplied, or discounts granted, to the consumer in contemplation of the agreement enduring for its intended fixed term, if any; and
    - (ii) must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation, as prescribed in terms of subsection (3).
- (3) The Minister may, by notice in the *Gazette*, prescribe—
  - (a) the maximum duration for fixed term consumer agreements, generally, or for specified categories of such agreements;
  - (b) the manner and form of providing notices to the consumer in terms of subsection (1)(c);
  - (c) the manner, form and basis for determining the reasonableness of credits and charges contemplated in subsection (2); and
  - (d) other incidental matters as required to provide for the proper administration of this section.

### Comments

The whole issue with regards to Fixed Term Agreements causes confusion and has an impact on Car Rental, Fleet Services and Property:

1. There is no definition provided, but as now worded, this is more of an open-ended contract than a fixed term contract. The reasoning is that the contract only ends at the so-called expiry date should the consumer so decide.

2. In common law however, a fixed term contract automatically comes to an end on the expiry date unless the parties have expressly or tacitly agreed to renew it. Surely if there is a written contract in place that explicitly defines the start and end date of the fixed term contract, then the supplier of goods and or services should have the right to terminate at the end of the fixed term as per the contract.
3. If point (1) above remains the *status quo* even where there is a consensual written contract in place between the consumer and the supplier, then the only option for the supplier is to make the renewal terms so unpalatable to the consumer that the consumer ends the contract. The last point is inimical to the supplier as he wishes to retain custom, not drive it away. It is contended that the supplier must have the right to terminate the contract on the agreed date.
4. Both parties should have the right to cancel the agreement at the expiry of its fixed term, without penalty or charge, based on the terms and conditions of the contract/agreement.
5. If there is a material failure by a consumer, 20 business days notification is too long. The supplier is exposed to undue risk in terms of its property, the costs of which more than likely will not be recoverable from the consumer. 20 days notice is fair if there is failure/breach, but surely on a material factor, the supplier should be able to have immediate remedy.
6. Why is there a need to send out written notifications of expiry if there is a consensual written contract in place between the consumer and business? This becomes an administrative burden, particularly as consumers generally do not notify the supplier of changes in their address, and the cost involved iro:
  - a. IT – changes to computer programs and even systems
  - b. Postage
7. Clarification is need whether or not insurance contracts are subject to this section i.e. warranty products.
8. Cannot comment on Sections 14(2)(b) & 14(3) due to the fact that the regulations are not yet available, however these clauses could have important ramifications and we cannot plan for the strategic impact thereof.

Examples of foreseeable problems are:

- Example 1: Fleet Contract: Consumer has leased a car from a fleet company on a fixed term contract and the company has secured a buyer and price for the vehicle at the end of the contract but the consumer does not return the vehicle and keeps it for another month, and in doing so breaches the contract iro terms and conditions relating to distance travelled. Consequences for Fleet Company:
- a. may lose the buyer – in terms of this Bill the buyer has the right to cancel as per Section 19 (6)
  - b. vehicle will have depreciated and will have more mileage therefore it is worth less
  - c. if the vehicle is not sold, the company has a depreciating asset on its books, which in turn has a knock-on effect iro interest on loans, and cash flow for the company to effectively operate.

- c. no allowance for penalties against consumer in this scenario

Example 2: Property Owner: Plans on developing a property at a point in the future as per the franchise agreement but until such time decides to let it. The lessee however chooses not to vacate in terms of the fixed agreement as he has not made alternative arrangements or it suits him to stay where he is. Consequences for Property Owner:

- a. The property owner may lose the franchise agreement if the development is not completed in time.
- b. More than likely the property owner will have concluded contracts with property developers and construction companies which have a knock-on effect, as these companies plan their work around their contracts; and employ people accordingly. If this work does not start timeously, it may result in:
  - i. penalties for the property owner (dependant on what the thresholds are)
  - ii. job loss for employees in the construction companies
- c. Loss of revenue for the property owner in terms of the mainstream business that was to go into the property due to the delay in opening. This in itself could cripple the business. Franchised Motor Developments cost anything from R20m to R150m and in order to recuperate of this investment it is imperative to meet deadlines.
- d. Possible penalties from the franchisor for breach.

Example 3: Car Rental: Consumer hires car during high tourist season, and does not return the vehicle timeously in accordance with the fixed term contract (may only be 2 days). Possible consequences for Car Rental Company:

- a. Loss of clients because the vehicle is not available for the person who is next in line. Section 19 (6) also applies for consumers who are next in line.
- b. No compliance for the company in terms of:
  - a. 20 days notification to consumer to remedy for breach
  - b. 40 days renewal notice

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## **Section 15 Pre-authorisation of repair or maintenance services**

- (1) This section applies only to a transaction or consumer agreement—
  - (a) with a price value above the threshold prescribed in terms of subsection (5); and
  - (b) if, in terms of that transaction or agreement, a service provider supplies a repair or maintenance service to, or supplies or installs any replacement parts or components in, any property belonging to or in the control of the consumer, and—
    - (i) the service provider has, or takes, possession of that property for the purpose contemplated in this paragraph; or

- (ii) in any other case, the consumer requests an estimate before any services or goods are supplied.
- (2) A service provider to whom this section applies must not charge a consumer for the supply of any goods or services contemplated in subsection (1) unless—
  - (a) the supplier or service provider has given the consumer an estimate that satisfies the prescribed requirements, and the consumer has subsequently authorised the work; or
  - (b) the consumer, in writing, or by another recorded manner or form, has—
    - (i) declined the offer of an estimate, and authorised the work; or
    - (ii) pre-authorised any charges up to a specified maximum, and the amount charged does not exceed that maximum.
- (3) A service provider to whom this section applies must not charge a consumer for preparing an estimate required in terms of subsection (2)(a), including—
  - (a) any cost of performing any diagnostic work, disassembly or re-assembly required in order to prepare an estimate; or
  - (b) any damage to or loss of material or parts in the course of preparing an estimate, unless, before preparing the estimate the service provider has disclosed the price for preparing that estimate, and the consumer has approved it.
- (4) If a supplier has provided an estimate for any service, or goods and services, the supplier may not charge the consumer a price for that service, or those goods and services, that exceeds the estimate, unless after providing the estimate—
  - (a) the service provider has informed the consumer of the additional estimated charges; and
  - (b) the consumer has authorised the work to continue.
- (5) The Minister may, by notice in the Gazette, prescribe a monetary threshold for the purpose of subsection (1)(a).

### Comments

We need confirmation of what falls into this category based on the threshold referred to in Section 15 (1) (a).

Foreseeable problems as indicated below which is read in conjunction with Section 54 - Consumers' rights to demand quality service:

#### 1. Workshops – service and maintenance workflow

1.1. Workshop hours are booked based on the consumer's requirements when the appointment is made.

1.1.1 These hours are based on the OEM's guidelines in respect of the time it takes to perform various processes in the repair and maintenance of vehicles.

1.2. On the day, a pre-printed job card is used to confirm the work required and invariably the consumer requests more work to be done, the maximum estimate for the cost of the work is agreed.

- 1.3. During the course of the day the customer is contacted with the cost of repairs following proper diagnosis of the work requested any other additional work that may be required as a result of the diagnosis (includes parts and labour). The customer then either gives the go-ahead to do the additional work or may decline to do so based on what is needed.
- 1.4. In this digital age the majority of vehicles/equipment now requires some form of electronic diagnostic intervention when vehicles are maintained and or repaired.
- 1.5. The diagnostic tools are sophisticated and extremely costly, and are not in abundance therefore it is not possible to put vehicle onto the machine when it is booked in for repairs to prepare an estimate.
- 1.6. When work on the vehicle/equipment commences, any additional work that is required is indentified and the customer will be contacted to advise thereof and also to confirm the cost of the repairs.
- 1.7. In many instances clients are not available at the time (in meetings, does not answer the phone) therefore the repairer will have to either:
  - 1.7.1 Stop the repair; because of the nature of the way in which repairs and maintenance have to be carried out, repairers are responsible to try and eliminate any undue risk and the resulting possible consequences affecting the life or property of another in connection with the work they carried out on the vehicle;
  - 1.7.2 Complete authorized repairs and have the consumer make another appointment to repair the new found repairs required, which could result in consequential loss if not repaired within a specified time frame, and appointments for repairs are dependant on availability of appointments;

## 2. Availability of parts

What about instances where an estimate is provided however, the final cost of the work to be carried out is dependant on parts coming from overseas, and is dependant on the value of currency. How does the supplier factor this into the equation, particularly if it is a special order part to ensure that the maximum estimate is not exceeded?

## 3. Consumers rights with respect to delivery of goods or supply of service

Besides the fact that the supplier is going to have a very unhappy consumer which in itself is a problem for future business opportunity, Does Section 19, 'Consumer's rights with respect to delivery of goods or supply of service' apply in terms of point 1.7.1?

## 4. Subsection (3)

S15(3) is problematic in the sense that Automotive engineers have to strip an engine, sometimes have to perform a pressure test in order to establish what needs to be fixed. All of this requires labour and sometimes material to get to a point at which you can give the consumer an estimate of the work that needs to be done. Surely the supplier must be allowed to charge the consumer for this service as there are actual costs attached to the process.

## **Section 16 Consumer's right to cooling off period after direct marketing**

### Comments

There is confusion regarding direct marketing to consumers versus marketing to consumers at home (Section 32 Direct Marketing to Consumers at Home). Clear direction is required iro the context of application of direct marketing i.e. instances where a consumer initiates an approach, the assumption is that this would not be covered by the provisions of direct marketing, and also where goods are sold as result of advertisements placed in newspapers, journals, magazines and the like which are sent to subscribers

See query on Direct Marketing definition

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## **Section 17.5 Consumer's right to cancel advance reservation, booking or order**

(5) A supplier may not impose any cancellation fee in respect of a booking, reservation or order if the consumer is unable to honour the booking, reservation or order because of the death or hospitalisation of the person for whom, or for whose benefit the booking, reservation or order was made.

### Comments

It is felt that the words: "because of the death or hospitalization" should be amended to "circumstances beyond his control", which covers both death and hospitalisation i.e.

Example 1. What if the consumer is hospitalised for a toe operation and has fair advanced warning but fails to notify the supplier? or

Example 2. The consumer misses the appointment because he is delayed as a result of a delayed flight.

As illustrated in example 1 above – the consumer has control over the situation and should be accountable for his actions, and in example 2, misses the appointment due to circumstances beyond his control, yet the consumer in example 2 is penalised.

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## **Section 18 Consumer's right to choose or examine goods**

(1) Despite any statement or notice to the contrary, a consumer or potential consumer is not responsible for any loss or damage to any goods displayed by a supplier, unless the loss or damage results from action by the consumer amounting to gross negligence or recklessness, malicious behaviour or criminal conduct.

### Comments

This clause is very open ended as it puts small goods (i.e. glass ware and high ticket value items like vehicles) into the same category yet the conditions of displaying and examining are polarised which is illustrated in the examples of a motor dealer:

Example 1: Consumer comes into vehicle showroom with children, and whilst looking at a vehicle, the children intentionally damage a vehicle by taking a sharp object and scratching it against the paintwork.

Example 2: A consumer has an accident whilst taking a vehicle on a demonstration ride where he caused the accident. Over and above damage to the dealerships' vehicle, he incurs 3<sup>rd</sup> party liability.

We need confirmation that the examples above fall within "gross negligence" being compared with "willful and wanton misconduct," and understood to involve an act or omission in reckless disregard of the consequences affecting the life or property of another, and that it is not seen as just negligence.

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### **Section 19 (2) Consumer's rights with respect to delivery of goods or supply of service**

- (2) Unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods or services that—
- (a) the supplier is responsible to deliver the goods or perform the services—
    - (i) on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement;
    - (ii) at the agreed place of delivery or performance; and
    - (iii) at the cost of the supplier, in the case of delivery of goods; or
  - (b) the agreed place of delivery of goods or performance of services is the supplier's place of business, if the supplier has one, and if not, the supplier's residence; and
  - (c) goods to be delivered remain at the supplier's risk until the consumer has accepted delivery of them, in accordance with this section.

### **Comments**

This section presently states that should a supplier have agreed with the consumer to deliver an item at a specified time and place, and, for whatever reason, the supplier is unable to do so, the consumer may cancel the contract. Foreseeable problems:

1. There are always delays with ships bringing in vehicles or carriers arriving from the OEM, and as such delivery dates are constantly moved, and communicated with the consumer.
2. Point (1) above applies to parts as well, and results in delays when vehicles come in for repairs or maintenance.
3. This delay would theoretically allow the consumer to cancel the contract.
4. The consequence of the consumer cancelling the contract severely prejudices the supplier:
  - 4.1. The supplier now has stock that is not required, and is subject to depreciation, interest charges in terms of the business loan, and depletes the cash flow of the business.
  - 4.2. There is a registration process involved when vehicles are sold which further exacerbates point 4.1. above:

4.2.1 Additional registration costs;

4.2.2 Once a new vehicle has been registered, the next time it is registered it becomes a used vehicle even if it has not been used.

Whilst S19 (2) is only an implied term and thus can be altered by agreement, it is suggested that that the protection of S47 (5), namely that the supplier would be protected if the failure was due to circumstances beyond his control, should apply.

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## **Section 20 Consumer's right to return goods**

### **Comments**

Concerns and Commercial Risks:

1. What is a reasonable time to inspect a vehicle before delivery: Section 2(b) read in conjunction with Section 19 (5). Cars and even bikes are emotional buys and often become a remorse buy with consumers looking for an exit (like the looming 2% interest rate hike) and will use the exit clauses in this bill iro, direct marketing, advice, repairs etc.
2. Section 20(2)(d) - reference to "the goods have been found to be unsuitable" must be objectively worded. This Section is deemed as extremely onerous and one-sided i.e. 10 days is very long for a person to realize the vehicle is not suitable for their needs whilst utilising it:
  - 2.1. Dealers already experience consumers abusing loan vehicles (when consumers vehicles are in for repair) by putting 20000kms on the clock in two weeks and do not bother to service these vehicles within manufacturer's specifications. The result is that vehicle loses the manufacturer warranty and therefore depreciation can be in excess of 50% depending on the make and model of the vehicle. In these circumstances the dealership has a lien over the consumer, and yet these abuses occur.
  - 2.2. Where it is a pre-owned vehicle, and perhaps even in the case of a new vehicle – the condition of the returned vehicle (interior and body) can be another area of dispute, as will issues like tyres etc, where the consumer could remove new ones and replace with old ones – the same goes for engines and gearboxes. Therefore dealers are going to have to incur additional costs to do a thorough check on the vehicles as part of the refund calculation. Once again what recourse will be permissible?
3. Section 20 (4) (b) - At the very least it is our contention that goods must be returned to the supplier at the customers risk (but at the suppliers expense) otherwise the consumer has no incentive to ensure that, for example, the suppliers vehicle is looked after.
4. Section 20 (6) (b) allows for the supplier to charge the consumer a reasonable amount for usage:
  - 4.1. who determines what is reasonable and what about?
    - 4.1.1 depreciation i.e. new vehicle is now a used vehicle and loses up to 20% of its value;
    - 4.1.2 the costs for licensing and registration



4.1.3 the consumer requested dealer fitted extra's such a "smash and grab", tracking etc (Who is liable to the subscription of the tracking if a vehicle is returned and the tracking device is not faulty?)

4.1.4 floorplan costs,

4.1.5 points (2) and (3) above

5. It is our contention that where the right to rescind is applicable, the same terms and conditions as per the National Credit Act is applied: Section 121 Consumer's right to rescind credit agreement.

## **NATIONAL CREDIT ACT**

### **Consumer's right to rescind credit agreement**

#### **121.**

- (1) This section applies only in respect of a lease or an instalment agreement entered into at any location other than the registered business premises of the credit provider.
- (2) A consumer may terminate a credit agreement within five business days after the date on which the agreement was signed by the consumer, by-
  - (a) delivering a notice in the prescribed manner to the credit provider; and
  - (b) tendering the return of any money or goods, or paying in full for any services, received by the consumer in respect of the agreement.
- (3) When a credit agreement is terminated in terms of this section, the credit
  - (a) must refund any money the consumer has paid under the agreement within seven business days after the delivery of the notice to terminate; and
  - (b) may require payment from the consumer for-
    - (i) the reasonable cost of having any goods returned to the credit provider and restored to saleable condition; and
    - (ii) a reasonable rent for the use of those goods for the time that the goods were in the consumer's possession, unless those goods are in their original packaging and it is apparent that they have remained unused.
- (4) A credit provider to whom property has been returned in terms of this section, and who has unsuccessfully attempted to resolve any dispute over depreciation of that property directly with the consumer and through alternative dispute resolution under Part A of Chapter 7, may apply to a court for an order in terms of subsection (5).
- (5) If, on an application in terms of subsection (4), a court concludes that the actual fair market value of the goods depreciated during the time that they were in the consumer's possession, a court may order the consumer to pay to the credit provider a further amount not greater than the difference between-
  - (a) the depreciation in actual fair market value, as determined by the court; and
  - (b) the amount that the credit provider is entitled to charge the consumer in terms of subsection (3)(b).

#### **Section 23(4) Disclosure of price of goods or services**

(4) A retailer is not required to display a price for any goods that are displayed predominantly as a form of advertisement of the supplier, or of goods or services, in an area within the supplier's premises to which the public does not ordinarily have access.

##### Comments

The second "of" in the 2<sup>nd</sup> line of this Section should read "for"?

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#### **Section 40 Unconscionable conduct**

##### Comments

From a practical point of view, it is very difficult to understand when one is utilising undue influence etc. and not complying with this Section. Perhaps a definition which ties into the Debt Collectors Act, 1998 (Act 114 of 1998) code of conduct, can be added?

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#### **Section 48 Unfair, unreasonable or unjust contract terms**

##### Comments

What is the impact on the dealer where the waivers form part of a credit agreement and the agent (F&I) signs the customer up – who is responsible as the F&I is an intermediary in this instance (an agent on behalf of the bank)? FAIS prohibits waivers so there is no risk elsewhere. Needs clarification.

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#### **Section 52 Powers of a court to ensure fair and just conduct, terms and conditions**

##### Comments

It is feared that the granting to courts of powers to rectify / alter contracts to render them lawful, i.e. allowing the courts to make the contract for the parties, whilst a laudable concept, will introduce too great a level of uncertainty into the market place and certainty of contract is a vital component to a thriving market.

Other areas of great concern:

- Open ended damages awards???
- Implied punitive costs orders against suppliers ???

International companies considering investment will certainly not react well to something like this – high risk and very probable low return.

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## Part H

### Right to fair value, good quality and safety

#### Section 53 Definitions applicable to this Part

(1) In this Part, when used with respect to any goods, component of any goods, or services –

(a) **"defect"** means—

(i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or

(ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances;

(b) **"failure"** means the inability of the goods to perform in the intended manner or to the intended effect;

(c) **"hazard"** means a design characteristic that—

(i) has been identified as, or declared to be, a hazard by or in terms of any applicable public regulation; or

(ii) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilized; and

(d) **"unsafe"** means that, due to a design characteristic, failure, defect, or hazard particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.

#### Comments

As a result of the onerous penalties that could be imposed on a supplier, more especially a motor dealer, for “defects” and failure” in a vehicle in terms of the Act, it is requested that:

1. S53(1) (a) (ii) be modified, to read:

“(ii) any characteristic of the goods or components that renders the goods or components **materially** less useful, practicable or safe than persons generally ... “

2. S53(1) (b) be modified to read:

**"failure"** means the inability of the goods to **materially** perform in the intended manner or to the intended effect;

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#### Section 55 Consumer’s Rights to Safe, Good Quality Goods;

#### Comments

1. The definitions of defect and failure are the 1<sup>st</sup> point of entry as indicated above.

2. This section places an extremely onerous burden on a supplier by making him liable for latent defects or defects he simply could not have known about [S55 (5) (a)]. This despite the fact that he made a detailed examination of the vehicle prior to sale. It would expose,

for example, the seller of a second-hand vehicle, whether a private individual or dealer, to potentially large exposure. The effect would be to virtually kill the entire second-hand car market. The potential links in the chain iro a sale:

- 2.1. **the customer** who trades a vehicle in (is he/she seen as a retailer?), does the dealer have recourse against the consumer, and if so how will this be implemented – are people who sell goods “privately” going to have to take out liability insurance?
  - 2.2. **traders** (the distributor?)
  - 2.3. **used car market** (what about selling and buying vehicles voets toets “as is”?)
  - 2.4. **rebuild companies** (Hillbank etc who sell code 3 cars – voets toets “as is” )
3. Does S55 (6) relieve the seller if he states that the vehicle is being sold “as is” or “voetstoots” since he cannot vouch for its history, i.e. the consumer “... has been expressly informed that (the) particular goods were offered in a particular condition; ... “? If not, is it the intention of the Legislature to remove the concept of voetstoots from our law of sale? As indicated, this would have dire consequences to the motor industry.
  4. All dealers are going to have to purchase extensive liability insurance particularly for consequential loss – very costly and all increased costs are carried over to the end user ultimately.
  5. People are very emotional about their vehicles particularly as it is often the vehicle to earning an income, and also that there is no reliable public transport system, not to mention the condition of the roads which will have a direct impact on this section and section 56. Who is going to measure where liability arises when it is as a result of poor road conditions?
- It is noted that this clause does not apply to auctions and as such it is discriminatory against the motor dealers or the private individual wishing to sell his vehicle.
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## **Section 56      Implied warranty of quality**

### **Comments**

1. Current market practice iro the repair of goods.
  - 1.1. Right now repairing dealers often pick up costs in terms of labour, poor CSI which impacts manufacturer rebates and allocation of “premium” stock, once again for issues beyond their control.
  - 1.2. Even when there is a problem on the vehicle, the dealer/s (often including the repairing dealer where there is a failure, and **it cannot be repaired**) has to contribute towards the take back i.e. replacement vehicle. The OEM may contribute, but they often manage to cut their losses to the bone, and the customer pays usage (AA rates are generally used but this may vary depending on the nature of the deal).
  - 1.3. The cost to the dealer is high because:
    - 1.3.1 the costs of the initial repairs if the vehicle:
      - 1.3.1.1. is out of manufacturer warranty and maintenance; or

- 1.3.1.2. is subject to a stepped plan (where the consumer is responsible for a portion of the costs)
- 1.3.2 the dealer now has “defective stock” and has to sell it with little or no potential of recovering costs,
- 1.3.3 obsolescence – having to pay interest (if the dealership has a floorplan), and depreciation on the vehicle;
- 1.3.4 a very unhappy client because the process is generally a long one, and the client mostly sees the dealer and OEM as one, therefore future lost opportunity;
- 1.3.5 profits on the replacement vehicle are often used to subsidise the replacement deal because of the contribution spread as indicated above, and also because of pressure from the OEM.

In terms of the Bill this situation becomes substantially worse for the dealer and the conditions set out in clauses 55 and 56, will impact on the sustainability of the dealership through no fault of the dealership. This point is argued on the basis of:

1. The dealer has no control over the manufacturing or design of the vehicle, and should be protected by the franchise agreement of having to be liable as the franchisor should be guaranteeing that their products meet the standard as set out in legislation.
  - 1.1. Who is the responsible body to check that franchisors comply with these standards particularly when an entrepreneur/businessman takes on a franchise but is not a manufacturing expert?
  - 1.2. A distributor and retailer of franchised operations should be covered in terms of their franchise agreements that the franchisor would only supply goods that meet the required standards.
2. The repairing dealer is more often than not, NOT the selling dealer as generally people purchase vehicles close to their place of residence, and repairs and maintenance are done at dealerships close to their place of work (convenience), therefore the repairing dealer becomes liable for issues beyond their control i.e. promises from the selling dealer or even worse: a manufacturing problem.
3. When customers bring their vehicles in for repair and the vehicle is not useable because parts are on back order or it is a time consuming job, the client is provided with a loan vehicle at the cost of the dealer.
4. Full refunds of purchase price, therefore the consumer gets to use the vehicle free of charge for the period he has it, and the “defect”, failure may actually not have any impact on the safety or quality of the goods:
  - 4.1. Example 1: electronics on the dash are often controlled by fuses, and when there is a failure/defect, a light on the dash comes up. The fix is, to connect the vehicle to a very expensive diagnostic machine (the dealer has had to buy in order to retain the franchise). Generally the vehicle is reset by the diagnostic machine, and off the customer goes, only for the light to reappear shortly (sometimes the same day even) and the car computer tells the customer to take the vehicle back to the dealer.

- 4.2. Example 2: sometimes the complaint cannot be “repaired” (like a diff whine on certain vehicles because they were not designed to operate under the South African conditions), are neither unsafe or inferior, but will now fall within the standards contemplated in Section 55 – refer 55(2)(b) and the definitions of defect, and failure.
5. It is felt that, with regard to S 56 (3), the words “...or a failure, defect or unsafe feature is discovered ...” be deleted. The reasoning is that if for example, a dealer has repaired an unsafe item on 2 occasions on a particular vehicle and shortly thereafter there is a failure of a relatively minor part, the consumer can call for the vehicle either to be replaced or for it to be returned to the dealer subject to a full refund as indicated in the examples (4.1 & 4.2) above. “Failure” has not been adequately defined and as such aids the interpretation put forward.
  6. In addition to the refund, the dealership then has ownership of vehicles that may or may not be repairable i.e. the consumer gets refunded money originally paid regardless of the vehicles’ depreciated value. In current market conditions, there are vehicles whose resale (trade-in) price can drop by up to R200 000 within a year. This means that the dealer will carry that loss, and the consumer is put into a better position. The principle of insurance does not even do that – you are put back into the position you were before – not worse, not better. (Legal maxim of unjustifiable enrichment also comes into play)
  7. The dealer then has to claim from their principal, which further exacerbates the financial situation, as the principal literally controls the future of the dealership.
  8. The dealer trades in a vehicle as part of the transaction, and in terms of his right under this legislation the dealer wants to rescind the agreement, how is there recourse and protection for the dealer? The reality is that, in all probability, there is going to be litigation, and the fact that the dealer will be in possession of an “asset” that is in fact a liability which is not saleable and incurs interest and depreciation.
  9. Disbursements and other incidental costs which accumulate as part of the transaction are for the dealers account (licensing, and re-licensing, cost of checking returned vehicle and the need to “recondition” it, the list goes on).
  10. It is felt that where the goods are returned it must be at the consumers’ risk, particularly as the consumer has potentially had usage for six months. What if the consumer has an accident on the way to the dealership, and causes 3<sup>rd</sup> party liability and the cause of the accident has nothing to do with the “fault”? This is not at all reasonable and the consequences for dealers are dire!
  11. Groups may be able to sustain themselves based on the above examples, but an independent dealer will not survive and more than likely be liquidated, which in itself becomes a greater problem, job loss etc.

### **Warranty periods**

S 56 envisages a 6 month warranty for new items. However, S 57 envisages only 3 months for new parts fitted as repairs. An anomaly arises here. Consider the following situation: a consumer buys 2 headlights for his vehicle from a supplier and asks the supplier to fit the one so that he, the consumer, can see how it is done. This the supplier does. The consumer travels home and

fits the second one himself. In terms of these 2 sections, the one fitted by the supplier would carry a 3 month warranty whilst that fitted by the consumer would have a 6 month warranty. Or, put differently, if the second lamp is not fitted to the car by the consumer but to a tree to be used as an outside light, it would have a 6 month warranty as opposed to the 3 month of the one fitted to the vehicle. Clearly this is not the intention but is the unfortunate result of the present wording.

S57 should be expanded to remove liability from the dealer in the case where the consumer requests the dealer to fit a part supplied by the consumer and not the dealer. The dealer cannot be held liable where he has no knowledge or control over the source of the part or, indeed, of the part itself.

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## **Section 61 liability for damage caused by goods**

### **Comments**

1. The amount of people involved in the used good sale and purchase is extensive as indicated in previous comments, and reference iro liability insurance, and how distributors and retailers become responsible for manufacturing flaws? This seems illogical
2. Who is responsible if the consumer fits aftermarket products to a vehicle by an alternative supplier, and the last repairer does not work on that item, but is the last service supplier before an incident occurs, how is liability going to be proved?
3. What is going to be defined as inadequate instructions? All vehicles come with owners manuals yet most people do not read them, particularly as most vehicles direct (computerized alerts) their owner to service bookings etc, and as commented earlier, when purchasing a vehicle the consumer is so excited (vehicles are emotional buys) that they pay little attention to what is being demonstrated, and there is also a vast amount of information that has to be absorbed?

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## **Section 112 “Administrative Fines” Read in Conjunction with Section 100(6) “Compliance Notices”**

### **Comments**

There is a lack of understanding the scope and intent of the imposition of an administrative fine “only in circumstances expressly provided for in this Act.”

Clarity is required whether this is intended to refer to any contravention, even relatively minor ones as a result of oversight, of the Act, and the relevant clauses be identified.

As currently worded the provision is unclear and does not comply with the principle of predictable rules for suppliers.

In conclusion...

***“Among our most important tasks is to ensure that we begin to create the conditions in which our people can prosper, and not only dream about a better life, but can enact our dreams through creativity, through innovation, through actively finding appropriate solutions to problems that arise in the course of our work.”***

In order to achieve this it is important to ensure that whatever is to be entrenched in legislation is realistic and practical given that South Africa is not North America or Europe, yet the legislation which is being written for our country is more sophisticated, yet many of our entrepreneurs are hawkers and who is going to regulate them? What recourse and redress will there be for their consumers? Surely the application of the intent “consumer protection and redress” must be applied across the full spectrum of business and society.

The retail motor vehicle dealer environment is somewhat different from many other retailers, in that we trade in 2<sup>nd</sup> hand goods from consumers and in doing so become a consumer, and then on sell these vehicles where liability once again shifts to the dealer. Technically the rights in the Bill are extended to us, however it is going to be almost impossible to seek redress from “our supplier – the man on the street” when there are liability suits against us, which could cripple the business.

We sincerely trust that the Portfolio Committee will take our comments into account when reviewing the Consumer Protection Bill [B – 2008] and should the Committee require any additional information please feel free to contact the writer at any time who will address your requests accordingly.

In closing, we would also appeal to the Portfolio Committee to extend an invitation to the NADA to make oral representation as there are certain issues we believe would be better explained in person.

We await your positive response.

Yours faithfully

Gary McCraw

Director: NADA

Tel: 011 789 2542

Cell: 082 560 6613

Email: gary.mccraw@rmi.org.za