

If we open a quarrel between the past and the present, we shall find we have lost the future - Winston Churchill

Franchising and the new Consumer Protection Act 68 of 2008

The Consumer Protection Act 68 of 2008 ("Act"), which is set to become of full force and effect on or about 24 October 2010 ("Effective Date"), will apply to both franchise agreements concluded after the Effective Date and pre-existing franchise agreements renewed thereafter.

Section 13(1) of the Act provides that a supplier (i.e. the franchisor) must not require, as a condition of supplying any goods or services or as a condition of entering into an agreement or transaction, of the consumer (i.e. the franchisee) to -

1. purchase any other particular goods or services from that supplier;
2. enter into an additional agreement or transaction with the same supplier or a designated third party;
3. agree to purchase any particular goods or services from a designated third party,
unless the supplier -
4. can show that the convenience to the consumer in having those goods or services bundled outweighs the limitation of the consumer's right to choice;
5. can show that the bundling of those goods or services results in economic benefit for consumers; or
6. offers bundled goods or services separately and at individual prices.

The provisions listed in points 1 through 3 above are common in franchise agreements and hence most franchise agreements may be in contravention of the Act. The Act does however, by way of section 13(2), provide for certain defences to an allegation that a franchisor has contravened the provisions of section 13(1).

Section 7 of the Act also finds application, in as far as it provides that franchise agreements -

1. must be in writing and signed by or on behalf of the franchisee,
2. must include any prescribed information or address any prescribed categories of information,
3. must comply with the requirements of section 22 of the Act, and
4. may be cancelled by the franchisee (without cost or penalty) within 10 business days after signing such agreement, by giving written notice to the franchisor.

It is evident that the provisions of the Act, along with other legislation such as the Competition Act 89 of 1998 (the impact of which will be addressed in a later release of De Novo), may have far reaching implications for both franchisors and franchisees. Current franchise relationships should be evaluated timeously, before the Effective Date, so as to ensure that same complies with current and anticipated legislative requirements.

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The NHBRC and the "Owner Builder"

The National Home Builders Registration Council (NHBRC) was established in terms of the Housing Consumer Protection Measures Act, 1998 (Act No. 95 of 1998) (the Act). The Council is mainly established to protect the interest of housing consumers, and to regulate the home building industry.

In terms of the definitions in the Act, a "home builder" means:-

- (a) *a person who carries on the business of a home builder;*
- or
- (b) *an **owner builder** who has not applied for exemption in terms of section 10A;*

It appears that any person (excluding a person who has obtained exemption under the Act) who constructs a home is a "home builder" who has to register in terms of the Act, enroll the home with the NHBRC and pay the prescribed fees.

An owner builder who has successfully applied for exemption under the Act, may however proceed with building his home without registration in terms of the Act, enrollment of the home with the NHBRC or payment of the prescribed fees.

The sale of this home from the owner builder to a purchaser will however present a problem, should the purchaser not be a cash purchaser, but rather has to make use of a bond at a financial institution. The reason is that Section 18(1) of the Act contains a blanket prohibition (with no exceptions) to financial institutions affording mortgage bonds to consumers purchasing a home from a home builder UNLESS the home builder is registered in terms of the Act, the home enrolled and the prescribed fees paid.

Unless that Act is amended the current situation is that owner builders, who chose not to register, enroll and pay the NHBRC, will be in a position of only being able to sell their homes to cash buyers.

Contact van Huyssteens

T +27 12 349 2306

F +086 6151 183

Address:

De Haviland Crescent Nr. 5,
III Villaggio Nr.12, Torino Suite
Persequor Park
Pretoria, South Africa

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