

THE CONSUMER PROTECTION BILL, 2011

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THE CONSUMER PROTECTION BILL, 2011

A Bill for

AN ACT of Parliament to provide for the protection of the consumer, prohibit unfair trade practices in consumer transactions, to promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to promote responsible consumer behavior, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements, to

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make consequential amendments to various other Acts; and to provide for matters connected with and incidental thereto

ENACTED by the Parliament of Kenya as follows—

PART I—PRELIMINARY

Short title and commencement.

1. This Act may be cited as the Consumer Protection Act, 2011 and shall come into operation on such date as the Cabinet Secretary may, by notice in the Gazette, appoint which date shall not exceed ninety days from the date of publication.

Definitions.

2. (1) In this Act, unless the context otherwise requires—

“**accredited consumer protection group**” means a consumer protection group that has been accredited by the Advisory Committee in terms of section 66 for the purposes contemplated in that section or elsewhere in this Act;

“**Advance**” means value, as prescribed, received by the borrower under a credit agreement;

“**advertisement**” means any direct or indirect visual or oral communication transmitted by any medium, or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to—

(a) bring to the attention of all or part of the public—

(i) the existence or identity of a supplier; or

(ii) the existence, nature, availability, properties, advantages or uses of any goods or services that are available for supply, or the conditions on, or prices at, which any goods or services are available for supply;

(b) promote the supply of any goods or services; or

(c) promote any cause;

“**agreement**” means an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them;

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“alternative dispute resolution agent” means a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes.

“Annual percentage rate” means the annual percentage rate in respect of a credit agreement that is determined in the prescribed manner;

“apply”, when used in relation to a trade description, price, notice or any similar form of information, means to emboss, impress, engrave, etch, print or weave into, work into or onto, annex or affix to, or incorporate within;

“borrower” means a consumer who is or may become a party to a credit agreement and who receives or may receive credit or a loan of money from the other party, but does not include a guarantor;

“brokerage fee” means the payment that a borrower makes or agrees to make to a loan broker who assists the borrower in arranging a credit agreement, and includes an amount deducted from an advance made to the borrower that is paid to the broker;

“business” means the continual marketing of any goods or services;

“business name” means a name under which a person carries on a business other than the person’s full name;

“clearly”, in relation to the quality of any text, notice or visual representation to be produced, published or displayed to a consumer, means in a form that satisfies the requirements of section 18;

“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;

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“Consumer” in respect of any particular goods or services, means otherwise than for the purpose of resale, production or manufacture of any goods or articles for sale;

- a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
- b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- c) if the context so requires or permits, a user of those particular goods or 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; and
- d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e);

“Consumer agreement” means an agreement between a supplier and a consumer in which the supplier agrees to supply any goods or services for payment;

“consumer protection group” means an entity promoting the interests or protection of consumers as contemplated in section 65;

“Consumer report” means a written, oral or other communication of credit information or personal information, or both, pertaining to a consumer;

“Consumer transaction” means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement;

“Cost of borrowing” means all amounts that a borrower is required to pay under or as a condition of entering into a credit agreement other than—

- (a) a payment or repayment of a portion of the principal under the agreement as prescribed; and
- (b) prescribed charges;

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“**Constitution**” means the Constitution of the Republic of Kenya, 2010;

“**Credit agreement**” means a consumer agreement under which a lender extends credit or lends money to a borrower and includes a supplier credit agreement and a prospective consumer agreement under which an extension of credit, loan of money or supplier credit agreement may occur in the future, but does not include an agreement under which a lender extends credit or lends money on the security of a mortgage of real property or consumer agreements of a prescribed type;

“**Credit card**” means a card or device under which a borrower can obtain advances under a credit agreement, as defined in Part VII, for open credit;

“**Credit information**” means any information about a consumer as to name, age, occupation, place of residence, previous places of residence, marital status, spouse’s name and age, number of dependants, particulars of education or professional qualifications, places of employment, previous places of employment, estimated income, paying habits, outstanding debt obligations, cost of living obligations and assets;

“**Credit repair**” means services or goods that are intended to improve a consumer report, credit information, file or personal information, including a credit record, credit history or credit rating;

“**Credit repairer**” means—

- (a) a supplier of credit repair; or
- (b) a person who holds himself out as a person described in clause (a);

“**Default charge**” means a charge imposed on a borrower who does not make a payment as it comes due under a credit agreement or who does not comply with any other obligation under a credit agreement, but does not include interest on an overdue payment;

“**Direct agreement**” means a consumer agreement that is negotiated or concluded in person at a place other than—

- (a) at the supplier’s place of business; or

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(b) at a market place, an auction, trade fair, agricultural fair or exhibition;

“**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;

“**display**”, when used—

(a) in relation to any goods, means placing, exhibiting or exposing those goods before the public in the ordinary course of business in a manner consistent with an open invitation to members of the public to inspect, and select, those or similar goods for supply to a consumer; or

(b) in relation to a price, mark, notice or other visual representation, means to place or publish anything in a manner that reasonably creates an association between that price, mark, notice or other visual representation and any particular goods or services;

“**distributor**”, in relation to any particular goods, means a person who, in the ordinary course of business—

(a) is supplied with those goods by a producer, importer or other distributor; and

(b) in turn, supplies those goods to either another distributor or to a retailer;

“**electronic communication**” means communication by means of electronic transmission, including by telephone, fax, sms, wireless computer access, email or any similar technology or device

“**estimate**” means a statement of the projected total price for any service to be provided by a supplier, including any goods or components to be supplied in connection with that service;;

“**facility**” means any premises, space or equipment set up to fulfil a particular function, or at, in, or on which a particular service is available;

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“**File**”, when used as a noun, means all of the information pertaining to a consumer that is recorded and retained by a person, regardless of the manner or form in which the information is stored;

“**Fixed credit**” means credit or a loan of money under a credit agreement that is not for open credit;

“**Floating rate**” means a rate that bears a specified mathematical relationship to a public index that meets the prescribed requirements;

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

- (a) in which, for consideration 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 Kenya 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 programmes or one or more trademarks, commercial symbols or logos or any similar marketing, branding, labelling or devices, or any combination of such schemes, programmes or services, 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 franchisor or an associate of the franchisor;

“**Future performance agreement**” means a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement;

“**Goods**” includes—

- a) anything marketed for human consumption;
- b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;

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- c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;
- d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of ‘service’ in this section; and
- e) gas, water and electricity;

“**importer**”, with respect to any particular goods, means a person who brings those goods, or causes them to be brought, from outside Kenya into the Kenya, with the intention of making them available for supply in the ordinary course of business;

“**initiation fee**” means a fee in addition to an annual membership fee;

“**intermediary**” means a person who, in the ordinary course of business and for remuneration or gain, engages in the business of—

(a) representing another person with respect to the actual or potential supply of any goods or services;

(b) accepting possession of any goods or other property from a person for the purpose of offering the property for sale; or

(c) offering to sell to a consumer, soliciting offers for or selling to a consumer any goods or property that belongs to a third person, or service to be supplied by a third person, but does not include a person whose activities as an intermediary are regulated in terms of any other national legislation;

“**Internet agreement**” means a consumer agreement formed by text-based internet communications;

“**Internet gaming site**” means an internet site that accepts or offers to accept wagers or bets over the internet—

(a) as part of the playing of or participation in any game of chance or mixed chance and skill that is to take place inside or outside Kenya, or

(b) on any contingency or on any event that may or is to take place inside or outside of Kenya, including, without restricting the

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generality of the foregoing, a casino game, card game, horse race, fight, match, sporting event or contest;

“Loan broker” means,

(a) a supplier of loan brokering, or

(b) a person who holds himself out to be a person described in clause (a);

“juristic person” includes—

(a) a body corporate;

(b) a partnership or association; or

(c) a trust as defined in the Trust Perpetual Succession Act

“licence”, depending on the context, means the authority, regardless of its specific title or form, issued to a person and in terms of which that person is either—

(a) authorised in terms of a public regulation to conduct business; or

(b) authorised by another person to—

(i) access any facility or use any goods; or

(ii) supply any goods or services;

“loyalty credit or award” means any—

(a) benefit accruing to a consumer;

(b) right to any goods, service or other benefit granted to a consumer; or

(c) point, credit, token, device or other tangible or intangible thing which, when accumulated in sufficient quantities, entitles the holder to seek, request or assert a claim for any goods, service or other benefit, allocated to a consumer, in terms of a loyalty programme, irrespective of the name, nature, form or characterisation assigned by that loyalty programme to any such goods, service or other benefit, right or thing;

“loyalty programme” means any arrangement or scheme in the ordinary course of business, in terms of which a supplier of goods or services, association of such suppliers, or other person on behalf of or in association with any such suppliers, offers or grants to a consumer any loyalty credit or award in connection with a transaction or an agreement;

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“**mark**”, when used as a noun, means any visual representation, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or other sign capable of being represented graphically, or any combination of those things, but does not include a trade mark;

“**market**”, when used as a verb, means to promote or supply any goods or services;

“**Lease**” means a consumer agreement for the lease of goods, other than a consumer agreement for the lease of goods in connection with a residential tenancy agreement, and “lessor” and “lessee” have a corresponding meaning;

“**Lease term**” means the period during which the lessee is entitled to retain possession of the leased goods;

“**lender**” means a supplier who is or may become a party to a credit agreement and who extends or may extend credit or lends or may lend money to the borrower and includes a credit card issuer;

“**loan brokering**” means services or goods that are intended to assist a consumer in obtaining credit or a loan of money, including obtaining credit or a loan of money from the loan broker who is providing the services or goods to the consumer;

“**Membership fee**” means the amount payable by a consumer for personal development services;

“**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for matters relating to trade;

“**Open credit**” means credit or a loan of money under a credit agreement, as defined in Part VII, that-

(a) anticipates multiple advances to be made as requested by the borrower in accordance with the agreement; and

(b) does not define the total amount to be advanced to the borrower under the agreement, although it may impose a credit limit;

“**Operator**” means—

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(a) a person who is a credit repairer or a loan broker; or

(b) a supplier who supplies such goods or services as may be prescribed or a person who holds himself out as a supplier of such goods or services.

“**Optional service**” means a service that is offered to a borrower in connection with a credit agreement and that the borrower does not have to accept in order to enter into the agreement;

“**person**” includes a juristic person

“**personal development services**” means—

(a) Services provided for—

(i) health, fitness, diet or matters of a similar nature;

(ii) modeling and talent, including photo shoots relating to modeling and talent, or matters of a similar nature;

(iii) martial arts, sports, dance or similar activities;

(iv) such other services as may be prescribed, and

(b) facilities provided for or instruction on the services referred to in clause (a) and any goods that are incidentally provided in addition to the provision of the services;

“**personal information**” means information other than credit information about a consumer’s character, reputation, health, physical or personal characteristics or mode of living or about any other matter concerning the consumer;

“**prescribed**” means determined, stipulated, required, authorised, permitted or otherwise regulated by a regulation made, or notice given, by the Cabinet Secretary in terms of this Act;

“**price**”, when used in relation to—

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(a) a representation required to be displayed by section 19, includes any mark, notice or visual representation that may reasonably be inferred to indicate or express an association between any goods or services and the value of the consideration for which the supplier is willing to sell or supply those goods or services; or

(b) the consideration for any transaction, means the total amount paid or payable by the consumer to the supplier in terms of that transaction or agreement, including any amount that the supplier is required to impose, charge or collect in terms of any public regulation;

“**producer**”, with respect to any particular goods, means a person who—
(a) grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business; or

(b) by applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that the person is a person contemplated in paragraph (a);

“**prohibited conduct**” means an act or omission in contravention of this Act;

“**promote**” means to—
(a) advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration;
(b) make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or
(c) engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction;

“**premises**” includes land, or any building, structure, vehicle, ship, boat, vessel, aircraft or container;

“**public regulation**” means any national, county government legislation or subordinate legislation, or any licence, tariff, directive or similar

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authorisation issued by a regulatory authority or pursuant to any statutory authority;

“**regulation**” means a regulation made under this Act;

“**regulatory authority**” means an organ of state or entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry;

“**Remote agreement**” means a consumer agreement entered into when the consumer and supplier are not present together;

“**Repairer**” means a supplier who works on or repairs vehicles or other prescribed goods;

“**residual obligation lease**” means a lease under which the lessor may require the lessee at the end of the lease term to pay the lessor an amount based in whole or in part on the difference, if any, between—

- (a) the estimated wholesale value of the leased goods at the end of the lease term; and
- (b) the realizable value of the leased goods at the end of the lease term.

“**Services**” includes, but is not limited to—

- a) any work or undertaking performed by one person for the direct or indirect benefit of another;
- b) 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,
- c) the transportation of an individual or any goods;
- d) 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;

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- e) a right of occupancy of, or power or privilege over or in connection with, any
- f) 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 of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service;

“service provider” means a person who promotes, supplies or offers to supply any service;

“sms” means a short message service provided through a telecommunication system;

“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;

“supplier” means a person who is in the business of selling, marketing, leasing or trading in any goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds himself out to be a supplier or an agent of the supplier;

“supplier credit agreement” means a consumer agreement, other than a consumer agreement involving leases to which Part VIII applies, under which a supplier or an associate of the supplier, extends fixed credit to a consumer to assist the consumer in obtaining goods or services, other than credit or a loan of money, from the supplier;

“Supplier creditor” means the supplier or an associate of a supplier in a supplier credit agreement;

“trade description” means—

(a) any description, statement or other direct or indirect indication, other than a trade mark, as to—

- (i) the number, quantity, measure, weight or gauge of any goods;
- (ii) the name of the producer or producer of any goods;
- (iii) the ingredients of which any goods consist, or material of which any goods are made;
- (iv) the place or country of origin of any goods;

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- (v) the mode of manufacturing or producing any goods; or
- (vi) any goods being the subject of any patent, privilege or copyright; or
- (b) any figure, work or mark, other than a trade mark, that, according to the custom of the trade, is commonly understood to be an indication of any matter contemplated in paragraph (a);

“trade mark” means—

- (a) a trade mark as defined in section 2(1) of the Trade Marks Act; or
- (b) a well-known trade mark as contemplated in section 15A of the Trade Marks Act, 1993;

“transaction” means—

- (a) in respect of a person acting in the ordinary course of business—
 - (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
 - (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
 - (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or
- (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a);

“Time share agreement” means a consumer agreement by which a consumer—

(a) acquires the right to use property as part of a plan that provides for the use of the property to circulate periodically among persons participating in the plan, whether or not the property is located in Kenya, or

(b) is provided with access to discounts or benefits for the future provision of transportation, accommodation or other goods or services related to travel.

“trade-in allowance” means the greater of—

(a) the price or value of the consumer’s goods or services as set out in a trade-in arrangement, and

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(b) the market value of the consumer's goods or services when taken in trade under a trade-in arrangement.

“unconscionable”, when used with reference to any conduct, means—

(a) having a character contemplated in section 35; or

(b) otherwise unethical or improper to a degree that would shock the conscience of a reasonable person;

“unit price” means a price for any goods or services expressed in relation to a well-known measure such as quantity, weight, volume, duration or other measurable unit by which the goods or services are allocated;

“used goods”, when used in respect of any goods being marketed, means goods that have been previously supplied to a consumer, but does not include goods that have been returned to the supplier in terms of any right of return contemplated in this Act; and

“visual representation” means any representation or illustration capable of being reproduced upon a surface, whether by printing or otherwise, but does not include a trade mark.

“Vehicle” means a motor vehicle as defined in the Traffic Act (Cap.403).

(2) Nothing in this Act shall be interpreted to limit any right or remedy that a consumer may have in law.

Interpretation

3. (1) This Act must be interpreted in a manner that gives effect to the purposes set out in section 4.

(2) When interpreting or applying this Act, a person, court or the Advisory Committee may consider—

a) appropriate foreign and international law; and

b) appropriate international conventions, declarations or protocols relating to consumer protection;

(3) If a provision of this Act requires a document to be signed or initialled by a party to a transaction, that signing or initialling may be effected in any manner recognized by law, including by use of an electronic signature, as defined in the - Kenya Information and Communications Act.

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(4) The supplier must take reasonable measures to prevent the use of a consumer's electronic signature for any purpose other than the signing or initialing of the particular document that the consumer intended to sign or initial.

(5) When a particular number of business days is provided for between the happening of one event and another, the number of days must be calculated by—

(a) excluding the day on which the first such event occurs;

(b) including the day on or by which the second event is to occur; and

(c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b), respectively.

(6) Unless the context indicates otherwise, any use of the word “includes” or “including” in relation to a defined or generic word or expression, on the one hand, and one or more enumerated examples or specific items, on the other, is not to be construed as limiting the defined or generic expression to the examples or items so enumerated.

(7) If there is an inconsistency between any provision of this Act and a provision of any other Act—

a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

b) to the extent that paragraph (a) cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision,

c) provided that in the case of hazardous chemical products only the provisions of this Act relating to consumer redress will apply.

(8) No provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.

Purpose and policy of Act

4. (1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in Kenya by—

a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;

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- b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—
 - (i) who are low-income persons or persons comprising low-income communities;
 - (ii) who live in remote, isolated or low-density population areas or communities;
 - (iii) who are minors, seniors or other similarly vulnerable consumers; or
 - (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;
 - c) promoting fair business practices;
 - d) protecting consumers from—
 - (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
 - (ii) deceptive, misleading, unfair or fraudulent conduct;
 - e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;
 - f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;
 - g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
 - h) providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers.

(2) To better ensure the realization of the purposes of this Act, and the enjoyment of the consumer rights recognized or conferred by this Act, the Advisory Committee, in addition to its responsibilities set out elsewhere in this Act, is responsible to—

- a) take reasonable and practical measures to promote the purposes of this Act and to protect and advance the interests of all consumers, and in particular those consumers contemplated in subsection (1)(b);
- b) monitor and report each year to the Cabinet Secretary on the following matters:

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- (i) The availability of goods and services to persons contemplated in subsection (1)(b), including price and market conditions, conduct and trends affecting their consumer rights;
- (ii) access to the supply of goods and services by small businesses and persons contemplated in subsection (1)(b); and
- (iii) any other matter relating to the supply of goods and services; and
 - c) conduct research and propose policies to the Cabinet Secretary in relation to any matter affecting the supply of goods and services, including proposals for legislative, regulatory or policy initiatives that would improve the realisation and full enjoyment of their consumer rights by persons contemplated in subsection (1)(b).

Realization of consumer rights

5. (1) Any of the following persons may, in the manner provided for in this Act, approach a competent court, alleging that a consumer's rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:

- a) A person acting on his or her own behalf;
- b) an authorized person acting on behalf of another person who cannot act in his or her own name;
- c) a person acting as a member of, or in the interest of, a group or class of affected persons;
- d) a person acting in the public interest, with leave of the competent court, and
- e) an association acting in the interest of its members.

(2) In any matter brought before the competent court in terms of this Act—

- (a) the court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 4(1)(b); and
- (b) the competent court, must—

- (i) promote the spirit and purposes of this Act; and
- (ii) make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not limited to—

- (a) any order provided for in this Act; and

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- (b) any innovative order that better advances, protects, promotes and assures the realization by consumers of their rights in terms of this Act.
- (3) If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realization and enjoyment of consumer rights generally, and in particular by persons contemplated in section 4(1)(b).
- (4) To the extent consistent with advancing the purposes and policies of this Act, the court must interpret any standard form contract or other document prepared or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the consumer—
 - a) so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer; and
 - b) so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to—
 - (i) the content of the document;
 - (ii) the manner and form in which the document was prepared and presented; and
 - (iii) the circumstances of the transaction or agreement.
- (5) In any dealings with a consumer in the ordinary course of business, a person must not—
 - (a) engage in any conduct contrary to, or calculated to frustrate or defeat the purposes and policy of, this Act;
 - (b) engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead or deceive; or
 - (c) make any representation about a supplier or any goods or services, or a related matter, unless the person has reasonable grounds for believing that the representation is true.

Application of Act

- 6.** (1) This Act applies to—
- a) every transaction occurring within Kenya between a consumer and any public body or private entity, unless it is exempted by subsection (2), or in terms of subsections (3) and (4);

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- b) the promotion of any goods or services, or of the supplier of any goods or services, within Kenya, unless—
 - (i) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph (a); or
 - (ii) the promotion of those goods or services has been exempted in terms of subsections (3) and (4);
 - c) goods or services that are supplied or performed in terms of a transaction to which this Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or
 - d) separate from any other goods or services; and
 - e) goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided for in subsection (5).
- (2) This Act does not apply to any transaction;
- a) in terms of which goods or services are promoted or supplied to the State;
 - b) if the transaction falls within an exemption granted by the Cabinet Secretary in terms of subsections (3) and (4);
 - c) pertaining to services to be supplied under an employment contract;
 - d) giving effect to a collective bargaining agreement within the meaning of the Constitution and the Labour Relations Act;
- (3) A regulatory authority may apply to the Cabinet Secretary for an industry-wide exemption from one or more provisions of this Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of—
- (a) any other national legislation; or
 - (b) any treaty, international law, convention or protocol.
- (4) The Cabinet Secretary, by notice in the *Gazette* after receiving the advice of the Advisory Committee, may grant an exemption contemplated in subsection (3)—
- a) only to the extent that the relevant regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and

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- b) subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act.

(5) If any goods are supplied within Kenya to any person in terms of a transaction that is exempt from the application of this Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 53 and 54 of this Act.

(6) For greater certainty, the following arrangements must be regarded as a transaction between a supplier and consumer, within the meaning of this Act:

- a) 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;
- b) a solicitation of offers to enter into a franchise agreement;
- c) an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;
- d) a franchise agreement or an agreement supplementary to a franchise agreement; and
- e) the supply of any goods or services to a franchisee in terms of a franchise agreement.

(7) The application of this Act in terms of subsections (1) to (6) extends to a matter irrespective of whether the supplier—

- a) resides or has its principal office within or outside Kenya;
- b) operates on a for-profit basis or otherwise; or
- b) is an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services, or is a public-private partnership; or
- c) is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public.

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(8) Unless otherwise stated, this Act shall not apply to those agreements made before the coming into force of this Act.

Requirements of franchise agreements

7. (1) A franchise agreement must—

- a) be in writing and signed by or on behalf of the franchisee;
- b) include any prescribed information, or address any prescribed categories of information; and
- c) Comply with the requirements of section 18 of this Act.

(2) A franchisee may cancel a franchise agreement without cost or penalty within 10 business days after signing such agreement, by giving written notice to the franchisor.

(3) The cabinet secretary may prescribe information to be set out in franchise agreements, generally, or within specific categories or industries.

PART II—FUNDAMENTAL CONSUMER RIGHTS

RIGHT OF EQUALITY IN CONSUMER MARKET

Protection against discriminatory marketing

8. (1) Subject to section 9, a supplier of goods or services must not unfairly—

- a) exclude any person or category of persons from accessing any goods or services offered by the supplier;
 - b) grant any person or category of persons exclusive access to any goods or services offered by the supplier;
 - c) assign priority of supply of any goods or services offered by the supplier to any person or category of persons;
 - d) supply a different quality of goods or services to any person or category of persons;
 - e) charge different prices for any goods or services to any persons or category of persons;
 - f) target particular communities, populations or market segments for exclusive, priority or preferential supply of any goods or services;
- or

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- g) exclude a particular community, district, population or market segment from the supply of any goods or services offered by the supplier

(2) Subject to section 9, a supplier must not directly or indirectly treat any person differently than any other, in a manner that constitutes unfair discrimination on one or more grounds set out in the Constitution, when—

- a) assessing the ability of the person to pay the cost, or otherwise meet the obligations, of a proposed transaction or agreement;
- b) deciding whether to enter into a transaction or agreement, or to offer to enter into a transaction or agreement;
- c) determining any aspect of the cost of a transaction or agreement to the consumer;
- d) interacting with the consumer—

(i) in the supplier's place of business, or

(ii) in the course of displaying or demonstrating any goods, testing or fitting any goods, or negotiating the terms of a transaction or agreement;

- e) selecting, preparing, packaging or delivering any goods for or to the consumer, or providing any services to the consumer;
- f) proposing or agreeing the terms and conditions of a transaction or agreement;
- g) assessing or requiring compliance by the person with the terms of a transaction or agreement;
- h) exercising any right of the supplier under a transaction or agreement in terms of this Act;
- i) determining whether to continue, enforce, seek judgment in respect of, or terminate a transaction or agreement; or
- j) determining whether to report, or reporting, any personal information of such person.

(3) Subsections (1) and (2) also apply in respect of a consumer that is an association or juristic person, to prohibit unfair discrimination against that association or juristic person based on the characteristics of any natural person who is a member, associate, owner, manager, employee, client or customer of that association or juristic person.

(4) Nothing in this section is intended to limit the authority of a court to—

(a) consider any conduct between a supplier and a consumer that is not contemplated in this section; or

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(b) find that any such conduct constitutes unfair discrimination within the meaning of the Constitution.

Reasonable grounds for differential treatment in specific circumstances

9. (1) It is not a contravention of section 8 for a supplier to—

a) refuse to supply or provide access to any particular goods or services to a minor, or to require the consent of a parent, guardian or other responsible adult before supplying or providing access to any particular goods or services to an unemancipated minor—

(i) in accordance with any public regulation; or

(ii) as a reasonable precaution to protect the health, welfare or safety of a minor;

b) refuse on reasonable grounds to—

(i) enter into an agreement with a minor for the supply of any goods or services; or

(ii) continue, or renew, an agreement contemplated in subparagraph (i), unless the supplier has reason to believe that the minor is emancipated;

c) reasonably designate any facility or service, permanently, or from time to time, for the exclusive use of—

(i) minors generally;

(ii) minors who are above or below a specified age, or between specified ages; or

(iii) adults who have attained a specified age of at least 60 years; or

d) advertise, offer or agree to supply, or supply, any goods or services at a discounted price solely on the basis that the consumer—

(i) is a minor who has not yet attained a specified age; or

(ii) is an adult who has attained a specified age of at least 60 years.

(2) It is not a contravention of section 8 for a supplier to reasonably—

a) provide and designate separate but substantially equivalent facilities for the exclusive use of persons of each gender; or

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- b) offer to supply or provide access to a facility exclusively to persons of one gender.

(3) It is not a contravention of section 8 for a supplier to market any goods or services in a manner that implies or expresses a preference for a particular group of consumers who are distinguishable from the general population on the basis of a ground of discrimination allowed under the Constitution, if the particular goods or services are reasonably intended or designed to satisfy any specific needs or interests that are common to, or uniquely characteristic of, that particular group of consumers.

(4) Nothing in this section is intended to limit the authority of a court to;

- a) assess the reasonableness of any conduct, to the extent contemplated in subsections (1)(b) or (c), (2) or (3), and determine whether any conduct not reasonably justified, as contemplated in those subsections, constitutes unfair discrimination within the meaning of the Constitution; or
- b) determine whether any conduct contemplated in section 8 was fair in the circumstances of a particular transaction or the marketing of any particular goods or services, as the case may be.

Competent court jurisdiction over this Part

10. (1) In respect of an alleged contravention of this Part, an accredited consumer protection group, or any person may institute proceedings before a competent court;

(2) In any proceedings contemplated in this Part—

(a) there is a presumption that any differential treatment contemplated in section 8 is unfair discrimination, unless it is established that the discrimination is fair; and

(b) a court may draw an inference that a supplier has discriminated unfairly if—

(i) the supplier has done anything contemplated in section 8 with respect to a consumer in a manner that constituted differential treatment compared to that accorded to another consumer;

(ii) in the circumstances, the differential treatment appears to be based on a prohibited ground of discrimination; and

(iii) the supplier, when called upon to do so, has refused or failed to offer an alternative reasonable and justifiable explanation for the difference in treatment.

CONSUMER'S RIGHT TO PRIVACY

Right to restrict unwanted direct marketing

- 11.** (1) 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.
- (2) To facilitate the realization of each consumer's right to privacy, and to enable consumers to efficiently protect themselves against the activities contemplated in subsection (1), a person who has been approached for the purpose of direct marketing may demand during or within a reasonable time after that communication that the person responsible for initiating the communication desist from initiating any further communication.
- (3) A person authorising, directing or conducting any direct marketing—
- a) must implement appropriate procedures to facilitate the receipt of demands contemplated in subsection (2); and
 - b) must not direct or permit any person associated with that activity to direct or deliver any communication for the purpose of direct marketing to a person who has made a demand contemplated in subsection (2);
- (5) No person may charge a consumer a fee for making a demand in terms of subsection (2)

Regulation of time for contacting consumers

- 12.** (1) A supplier must not engage in any direct marketing directed to a consumer at home for any promotional purpose during a prohibited period prescribed in terms of this section, except to the extent that the consumer has expressly or implicitly requested or agreed otherwise.
- (2) In order to protect the privacy of consumers, the Cabinet Secretary, by notice in the *Gazette*, may prescribe specific days, dates, public holidays or times of days for the purpose of subsection (1).

CONSUMER'S RIGHT TO CHOOSE

Consumer's right to select suppliers

13. (1) A supplier must not require, as a condition of offering to supply or supplying any goods or services, or as a condition of entering into an agreement or transaction, that the consumer must—

- a) purchase any other particular goods or services from that supplier;
- b) enter into an additional agreement or transaction with the same supplier or a designated third party; or
- c) agree to purchase any particular goods or services from a designated third party, unless the supplier—
 - (i) 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;
 - (ii) can show that the bundling of those goods or services results in economic benefit for consumers; or
 - (iii) offers bundled goods or services separately and at individual prices.

(2) Except to the extent that any other law provides otherwise, in any transaction between a franchisee and franchisor in terms of their franchise agreement, it is a defence to an allegation that the franchisor, as supplier to the franchisee, has contravened this section if any goods or services that the franchisee was required to purchase from or at the direction of the franchisor are reasonably related to the branded products or services that are the subject of the franchise agreement.

Consumer's right to choose or examine goods

14. (1) Despite any statement or notice to the contrary, a 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.

(2) If any goods are displayed in or sold from open stock, the consumer has the right to select or reject any particular item from that stock before completing the transaction.

(3) If the consumer has agreed to purchase goods solely on the basis of a description or sample, or both, provided by the supplier, the goods

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delivered to the consumer must in all material respects and characteristics correspond to that which an ordinary alert consumer would have been entitled to expect based on the description or on a reasonable examination of the sample, as the case may be.

(4) If a supply of goods is by sample, as well as by description, it is not sufficient that any of the goods correspond with the sample if the goods do not also correspond with the description.

Consumer's rights with respect to delivery of goods or supply of service

15. (1) This section does not apply to the supply of goods or services to a franchisee in terms of a franchise agreement;

(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.

(3) If an agreement does not provide a specific date or time for delivery of any goods or performance of any services, the supplier must not require that the consumer accept delivery or performance of the services at an unreasonable time.

(4) The consumer is regarded to have accepted delivery of any goods on the earliest of the following circumstances:

(a) When the consumer expressly or implicitly communicates to the supplier that the consumer has accepted delivery of such goods; or

(b) when the goods have been delivered to the consumer, and—

(i) the consumer does anything in relation to the goods that would be inconsistent with the supplier's ownership of them; or

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(ii) after the lapse of a reasonable time, the consumer retains the goods without intimating to the supplier that the consumer has rejected delivery of them, subject to subsection (5).

(5) When a supplier tenders delivery to a consumer of any goods, the supplier must, on request, allow the consumer a reasonable opportunity to examine those goods for the purpose of ascertaining whether the consumer is satisfied that the goods—

- (a) are of a type and quality reasonably contemplated in the agreement, and meet the tests set out in section 14(3) and (4); and
- (b) in the case of a special-order agreement, reasonably conform to the material specifications of the special order.

(6) If the supplier tenders the delivery of goods or the performance of any services at a location, on a date or at a time other than as agreed with the consumer, the consumer may either—

- a) accept the delivery or performance at that location, date and time;
- b) require the delivery or performance at the agreed location, date and time, if that date and time have not yet passed; or
- c) cancel the agreement without penalty, treating any delivered goods or performed services as unsolicited goods or services in accordance with section 17.

(7) If the supplier delivers to the consumer a larger quantity of goods than the consumer agreed to buy, the consumer may either—

- (a) reject all of the delivered goods; or
- (b) accept delivery of the goods, and—
 - (i) pay for the agreed quantity at the agreed rate; and
 - (ii) treat the excess quantity as unsolicited goods in accordance with section 17.

(8) If the supplier delivers to the consumer some of the goods the supplier agreed to supply mixed with goods of a different description not contemplated in the agreement, the consumer may—

- (a) accept delivery of the goods that are in accordance with the agreement and reject the rest; or
- (b) reject all of the delivered goods.

Consumer's right to return goods

16. (1) This section is in addition to and not in substitution for—

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- (a) the right to return unsafe or defective goods, contemplated in section 50; or
- (b) any other right in law between a supplier and consumer to return goods and receive a refund.

(2) Subject to subsections (3) to (6), the consumer may return goods to the supplier, and receive a full refund of any consideration paid for those goods, if the supplier has delivered—

- a) goods to the consumer in terms of an agreement arising out of direct marketing, and the consumer has rescinded that agreement during the period, in accordance with section 29;.
- b) goods that the consumer did not have an opportunity to examine before delivery, and the consumer has rejected delivery of those goods.
- c) a mixture of goods, and the consumer has refused delivery of any of those goods; or
- d) goods intended to satisfy a particular purpose communicated to the supplier as contemplated in section 49, and within 10 business days after delivery to the consumer, the goods have been found to be unsuitable for that particular purpose.

(3) Subsection (2) does not apply with respect to any goods if—

- a) for reasons of public health or otherwise, a public regulation prohibits the return of those goods to a supplier once they have been supplied to, or at the direction of, a consumer; or
- b) after having been supplied to, or at the direction of, the consumer, the goods have been partially or entirely disassembled, physically altered, permanently installed, affixed, attached, joined or added to, blended or combined with, or embedded within, other goods or property.

(4) Goods returnable in terms of—

- (a) subsection (2)(a) must be returned to the supplier at the consumer's risk and expense; or
- (b) subsection (2)(b) to (d) must be returned to the supplier at the supplier's risk and expense, within 10 business days after delivery to the consumer.

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(5) Upon return of any goods in terms of this section, the supplier must refund to the consumer the price paid for the goods, less any amount that may be charged in terms of subsection (6).

(6) In determining the right of a supplier to impose a charge contemplated in subsection (5), if any goods returned to the supplier in terms of this section are—

(a) in the original unopened packaging, the supplier may not charge the consumer any amount in respect of the goods;

(b) in their original condition and repackaged in their original packaging, the supplier may charge the consumer a reasonable amount for—

(i) use of the goods during the time they were in the consumer's possession, unless they are goods that are ordinarily consumed or depleted by use, and no such consumption or depletion has occurred; or

(ii) any consumption or depletion of the goods, unless that consumption or depletion is limited to a reasonable amount necessary to determine whether the goods were acceptable to the consumer; or

(c) in any other case, the supplier may charge the consumer a reasonable amount—

(i) as contemplated in paragraph (b); and

(ii) for necessary restoration costs to render the goods fit for re-stocking, unless, having regard to the nature of the goods, and the manner in which they were packaged, it was necessary for the consumer to destroy the packaging in order to determine whether the goods—

a) conformed to the description or sample provided, in the case of goods that had not been examined by the consumer before delivery, as contemplated in subsection (2)(b); or

b) were fit for the intended purpose, in a case contemplated in subsection (2)(d).

Unsolicited goods or services

17. (1) For the purpose of this Act, goods or services are unsolicited in any of the following circumstances, subject to subsection (2):

a) If, during any direct marketing of goods or services, a supplier or person acting on behalf of a supplier has left any goods with, or performed any service for, a consumer without requiring or arranging payment for them, those goods or services, as the case may be, are unsolicited;

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b) if a consumer is a party to an agreement contemplating the periodic delivery of goods during the life of the agreement, and—

(i) during the course of that agreement, the supplier introduces goods or services that are materially different from the goods or services previously supplied to an extent not reasonably contemplated in the agreement, the new goods or services are unsolicited, unless the consumer expressly consented to the material change; or

(ii) after the termination of that agreement, the supplier delivers any further goods to the consumer, other than in terms of a different agreement or transaction, those further goods are unsolicited goods;

c) if a supplier delivers goods or performs services at a location, date or time other than as agreed, and the consumer has rejected that delivery or performance of services, as contemplated in section 15(6), those goods or services are unsolicited;

d) if a supplier delivers a larger quantity of goods than the consumer agreed to buy, the excess goods are unsolicited unless the consumer has rejected the entire delivery, as contemplated in section 15(7)(a); or

e) if any goods have been delivered to, or any services performed for, a consumer by or on behalf of a supplier without the consumer having expressly or implicitly requested that delivery or performance, the goods or services, as the case may be, are unsolicited goods.

(2) Despite subsection (1), if—

(a) within 10 business days after delivery of any goods to a consumer, the supplier informs the consumer that the goods were delivered in error, those goods become unsolicited only if the supplier fails to recover them within 20 business days after so informing the consumer; or

(b) any goods are delivered to a consumer and—

(i) those goods are clearly addressed to another person, and have obviously been misdelivered; or

(ii) having regard to the circumstances of the delivery, it would be apparent to the ordinary alert consumer that the goods were intended to be delivered to another person, the goods become unsolicited goods only if the recipient informs the apparent supplier or the deliverer that the goods were misdelivered, and the goods are not recovered within the following 20 business days.

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(3) If a person is in possession of goods contemplated in this section, the person—

(a) must not frustrate or impede any reasonable action by the supplier or deliverer to recover the goods within the time allowed in subsection (2);

(b) is not responsible for any cost pertaining to the recovery of the goods or further delivery of them to another person; and

(c) is not liable for any loss or damage to the goods during the time they are in the person's possession or control, other than loss caused by the person's intentional interference with the goods, if any.

(4) A person who fails to comply with subsection (3)(a) is liable to the supplier or deliverer, as the case may be, for any additional costs for recovery of, or damage to, the goods arising as a result of anything done to frustrate or impede the lawful recovery of those goods.

(5) If a person is in possession of any unsolicited goods, the person may—

(a) retain the goods; or

(b) return the goods to the apparent supplier or deliverer at the risk and expense of the supplier or deliverer, as the case may be.

(6) If a person lawfully retains any unsolicited goods—

(a) the property in those goods passes unconditionally to the person, subject only to any right or valid claim that an uninvolved third party may have with respect to those goods; and

(b) the person who supplied or delivered those goods is liable to any other person in respect of any right or valid claim relating to such goods.

(7) A person has no obligation to pay a supplier for unsolicited goods or services, or a deliverer for the cost of delivery of any unsolicited goods.

(8) A supplier must not demand or assert any right to, or attempt to collect, any payment from a consumer in respect of any charge relating to unsolicited goods left in the possession of a consumer, or the delivery of any such goods, or unsolicited services supplied to or for the benefit of, a consumer, except as contemplated in subsection (4).

(9) If a consumer has made any payment to a supplier or deliverer in respect of any charge relating to unsolicited goods or services, or the

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delivery of any such goods, the consumer is entitled to recover that amount, with interest from the date on which it was paid to the supplier,

RIGHT TO DISCLOSURE AND INFORMATION

Right to information in plain and understandable language

18. (1) The producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation—

- a) in the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation; or
- b) in plain language, if no form has been prescribed for that notice, document or visual representation.

(2) For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to—

- a) the context, comprehensiveness and consistency of the notice, document or visual representation;
- b) the organisation, form and style of the notice, document or visual representation;
- c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
- d) the use of any illustrations, examples, headings or other aids to reading and understanding.

(3) The Cabinet Secretary may publish guidelines for methods of assessing whether a notice, document or visual representation satisfies the requirements of subsection (1)(b).

(4) Guidelines published in terms of subsection (3) may be published for public comment.

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Disclosure of price of goods or services

19. (1) This section does not apply to a transaction if a supplier has provided an estimate pertaining to that transaction, or the consumer has waived such an estimate.

(2) In this section, “price” includes a unit price.

(3) Subject to subsection (4), a retailer must not display any goods for sale without displaying to the consumer a price in relation to those goods.

(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.

(5) A price is adequately displayed to a consumer if, in relation to any particular goods, a written indication of the price, expressed in the currency of Kenya, is—

(a) annexed or affixed to, written, printed, stamped or located upon, or otherwise applied to the goods or to any band, ticket, covering, label, package, reel, shelf or other thing used in connection with the goods or on which the goods are mounted for display or exposed for sale;

(b) in any way represented in a manner from which it may reasonably be inferred that the price represented is a price applicable to the goods or services in question; or

(c) published in relation to the goods in a catalogue, brochure, circular or similar form of publication available to that consumer, or to the public generally, if—

(i) a time is specified in the catalogue, brochure, circular or similar form of publication as the time after which the goods may not be sold at that price, and that time has not yet passed; or

(ii) in any other case, the catalogue, brochure, circular or similar form of publication is dated, and in the circumstances may reasonably be regarded as not out of date.

(6) Subject to subsections (7) to (10), a supplier must not require a consumer to pay a price for any goods or services—

(a) higher than the displayed price for those goods or services; or

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(b) if more than one price is concurrently displayed, higher than the lower or lowest of the prices so displayed.

(7) Subsection (6) does not apply in respect of the price of any goods or services if the price of those goods or services is determined by or in terms of any public regulation.

(8) If a price that was once displayed has been fully covered and obscured by a second displayed price, that second price must be regarded as the displayed price.

(9) If a price as displayed contains an inadvertent and obvious error, the supplier is not bound by it after—

(a) correcting the error in the displayed price; and

(b) taking reasonable steps in the circumstances to inform consumers to whom the erroneous price may have been displayed of the error and the correct price.

(10) A supplier is not bound by a price displayed in relationship to any goods or services if an unauthorised person has altered, defaced, covered, removed or obscured the price displayed or authorised by the supplier.

(11) If, in addition to displaying a price in relation to any goods or services, a supplier has advertised or displayed a placard or similar device announcing that prices are, will be or have been reduced by—

(a) a monetary value, generally or in relationship to any particular goods or services, the displayed price for the purpose of subsection (6) must be regarded as being the price immediately displayed in relationship to the goods or services, minus the announced monetary reduction; or

(b) a percentage value, generally or in relationship to any particular goods or services, the displayed price for the purpose of subsection (6) must be regarded as being the price immediately displayed in relationship to the goods or services, minus an amount determined by multiplying that price by the percentage shown, unless the supplier has applied two or more prices immediately to the goods or services concerned, and the difference between the highest and lower or lowest of those applied prices is equivalent to the advertised or placarded reduction in price.

Product labelling and trade descriptions

19A. (1) For the purposes of this section, a trade description is applied to goods if it is—

(a) applied to the goods, or to any covering, label or reel in or on which the goods are packaged, or attached to the goods;

(b) displayed together with, or in proximity to, the goods in a manner that is likely to lead to the belief that the goods are designated or described by that description; or

(c) is contained in any sign, advertisement, catalogue, brochure, circular, wine list, invoice, business letter, business paper or other commercial communication on the basis of which a consumer may request or order the goods.

(2) A person must not—

(a) knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description; or

(b) alter, deface, cover, remove or obscure a trade description or trade mark applied to any goods in a manner calculated to mislead consumers.

(3) A retailer of goods must—

(a) not offer to supply, display or supply any particular goods if the retailer knows, reasonably could determine or has reason to suspect that—

(i) a trade description applied to those goods is likely to mislead the consumer as to any matter implied or expressed in that trade description; or

(ii) a trade description or trade mark applied to those goods has been altered as contemplated in subsection (2)(b); and

(b) with respect to any goods within the retailer's control, take reasonable steps to prevent any other person from doing anything contemplated in paragraph (a) or subsection (2)(b).

(4) The Cabinet secretary may prescribe—

a) categories of goods that are required to have a trade description applied to them, as contemplated in subsection (5);

b) the rules to be used in accordance with any international agreement for the purpose of determining the country of origin of any goods or components of any goods; and

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b) the information that is required to be included in any trade description, from among the categories of information contemplated in the definition of “trade description” in section 2.

(5) The producer or importer of any goods that have been prescribed in terms of subsection (4) must apply a trade description to those goods, disclosing—

- (a) the country of origin of the goods; and
- (b) any other prescribed information.

(6) Any person who produces, supplies, imports or packages any prescribed goods must display on, or in association with the packaging of those goods, a notice in the prescribed manner and form that discloses the presence of any genetically modified ingredients or components of those goods in accordance with the Biosafety Act.

Disclosure of reconditioned or gray market goods

20. (1) A person who offers or agrees to supply, or supplies, any goods that—

- (a) have been reconditioned, rebuilt or remade; and
- (b) that bear the trade mark of the original producer or supplier, must apply a conspicuous notice to those goods stating clearly that they have been reconditioned, rebuilt or remade, as the case may be.

(2) A person who markets any goods that bear a trade mark, but have been imported without the approval or licence of the registered owner of that trade mark, must apply a conspicuous notice to those goods in the prescribed manner and form.

Sales records

21. (1) This section does not apply to a transaction if the transaction has been exempted in terms of subsection (3).

(2) subject to the provisions of the Contract Act Cap 23 laws of Kenya, a supplier of goods or services must provide a written record of each transaction to the consumer to whom any goods or services are supplied.

(3) The record contemplated in subsection (2) must include at least the following information;

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- a) The supplier's full name, or registered business name, and VAT registration number, if any;
- b) the address of the premises at which, or from which, the goods or services were supplied;
- c) the date on which the transaction occurred;
- d) a name or description of any goods or services supplied or to be supplied;
- e) the unit price of any particular goods or services supplied or to be supplied;
- f) the quantity of any particular goods or services supplied or to be supplied;
- g) the total price of the transaction, before any applicable taxes;
- h) the amount of any applicable taxes; and
- i) the total price of the transaction, including any applicable taxes.

(4) The Cabinet Secretary may, by notice in the *Gazette*, exempt categories of goods or services, or circumstances of trade, from the application of subsections (2) and (3).

Disclosure by intermediaries

22. (1) An intermediary must—

(a) disclose prescribed information to—

(i) any person whom the intermediary solicits or agrees to represent with respect to the sale of any property or services, or from whom the intermediary accepts any property for the purpose of offering it for sale; and

(ii) any person from whom the intermediary solicits an offer, or to whom the intermediary offers to supply or supplies—

(aa) any service to be performed by a third person; or

(bb) any goods or property belonging to a third person; and

(b) keep the prescribed records of all relationships and transactions contemplated in this section.

(2) Subsection (1) does not apply to an intermediary who is—

(a) the executor or other administrator of a deceased's estate, in respect of any property of that estate;

(b) the liquidator of an insolvent estate, in respect of any property of that estate; or

(c) a trustee in respect of any trust property.

(3) The Cabinet Secretary may prescribe—

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(a) the information, including the manner and form of delivery of any such information, that an intermediary, or different categories of intermediary, must provide in terms of this section; and

(b) any records, including the form and content of any such records, that an intermediary, or different categories of intermediary, must keep in terms of this section.

Identification of deliverers, installers and others

23. Whenever a person is engaged in direct marketing in person at the premises of a consumer, or performing any services for a consumer at any such premises, or delivering any goods to, or installing any goods for, a consumer, at any such premises, that person must—

(a) visibly wear or display a badge or similar identification device that satisfies any prescribed standards; or

(b) provide suitable identification on request by the consumer.

RIGHT TO FAIR AND RESPONSIBLE MARKETING

General standards for marketing of goods or services

24. A producer, importer, distributor, retailer or service provider must not market any goods or services—

(a) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 30; or

(b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of—

(i) the nature, properties, advantages or uses of the goods or services;

(ii) the manner in or conditions on which those goods or services may be supplied;

(iii) the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor's price for comparable or similar goods or services;

(iv) the sponsoring of any event; or

(v) any other material aspect of the goods or services.

Bait marketing

25. (1) A supplier must not advertise any particular goods or services as being available at a specified price in a manner that may result in consumers being misled or deceived in any respect relating to the actual

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availability of those goods or services from that supplier, at that advertised price.

(2) If a supplier advertises particular goods or services as being available at a specified price, and the advertisement expressly states a limitation in respect of the availability of those goods or services from that supplier at that price, the supplier must make those goods or services available at that price, to the extent of the expressed limits.

(3) It is a defence to an alleged failure to comply with subsection (1) or (2) if—

(a) the supplier offered to supply or procure another person to supply a consumer with the same or equivalent goods or services of the kind advertised within a reasonable time, in a reasonable quantity, and at the advertised price; and

(b) the consumer—

(i) unreasonably refused that offer; or

(ii) accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted.

Negative option marketing

26. (1) A supplier must not—

(a) promote any goods or services;

(b) offer to enter into or modify an agreement for the supply of any goods or services; or

(c) induce a person to accept any goods or services or to enter into or modify such an agreement, on the basis that the goods or services are to be supplied, or the agreement or modification will automatically come into existence, unless the consumer declines such offer or inducement.

(2) An agreement purportedly entered into as a result of an offer or inducement contemplated in subsection (1) is void.

(3) A modification of an agreement purportedly agreed to as a result of an offer or inducement contemplated in subsection (1) is void.

Direct marketing to consumers

27. (1) A person who is directly marketing any goods or services, and who concludes a transaction or agreement with a consumer, must inform the consumer, in the prescribed manner and form, of the right to rescind that agreement.

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(2) If a person who has marketed any goods as contemplated in subsection (1) left any goods with the consumer without requiring or arranging payment for them, those goods are unsolicited goods, to which section 17 applies.

Catalogue marketing

28. (1) This section does not apply to a franchise agreement;

(2) This section applies to an agreement for the supply of goods or services that is not entered into in person, including an agreement concluded—

(a) telephonically, if the contact is initiated by the consumer; or

(b) by postal order or fax, or in any similar manner in which, with respect to goods, the consumer does not have the opportunity to inspect the goods that are the subject of the transaction before concluding the agreement.

(3) Before concluding an agreement or transaction, a supplier must disclose the following information to a consumer, in an appropriate manner, having regard to the manner in which the supplier and consumer communicate in concluding the transaction:

a) The supplier's name and licence or registration number, if any;

b) the address of the supplier's physical business premises and related contact details;

c) the sales record information required by section 21;

d) the currency in which amounts under the agreement are payable;

e) the supplier's delivery arrangements, including—

(i) the identity of the shipper;

(ii) the mode of transportation; and

(iii) the place of delivery to the consumer;

b) the supplier's cancellation, return, exchange and refund policies, if any;

c) the manner and form in which a complaint may be lodged; and any other prescribed information.

Trade coupons and similar promotions

29. (1) This section does not apply to—

(a) a franchise agreement;

(b) a loyalty programme, loyalty credit or award regulated in terms of section 35; or

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(c) a promotional competition, as defined and regulated in terms of section 36.

(2) In this section, “**promotional offer**” means an offer or promise, expressed in any manner, of any prize, reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, irrespective of whether or not acceptance of the offer is conditional on the offeree entering into any other transaction.

(3) A person must not make a promotional offer with the intention of—

- (a) not fulfilling it; or
- (b) fulfilling it other than as offered.

(4) Any document setting out a promotional offer must clearly state—

- a) the nature of the prize, reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, or other discounted or free thing being offered;
- b) the goods or services to which the offer relates;
- b) the steps required by a consumer to accept the offer or to receive the benefit of the offer; and
- c) the particulars of any person from whom, any place where, and any date and time on or at which, the consumer may receive the prize, reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services or other discounted or free thing.

(5) Subject to subsection (6), a person who makes or sponsors a promotional offer must—

(a) ensure that the supply of the particular prize, reward, gift, free or reduced price good, or the capacity to provide enhanced quality or services, is sufficient to accommodate all reasonably anticipated demands resulting from the offer;

(b) not limit or restrict capacity to supply any such goods or services in response to the acceptance of the offer, on any basis other than that it applies to such a supply in exchange for any other form of consideration;

(c) not require the consumer to accept an inferior quality of any such goods or services than those generally available to any other consumer on the same date who tenders a different form of consideration; and

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(d) not impose any monetary charge for the administration, processing or handling of a transaction in respect of which the consumer tenders a trade coupon.

(6) It is a defence to an alleged failure to comply with subsection (5)(a) if the supplier offered to supply or procure another person to supply a consumer with comparable goods or services of the relevant kind to satisfy the consumer's acceptance of the promotional offer, and the consumer—
(a) accepted the supplier's offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted; or
(b) unreasonably refused the supplier's offer.

Customer loyalty programmes

30. (1) Despite any provision in any law, agreement or notice to the contrary, for all purposes of this Act, loyalty credits or awards are a legal medium of exchange when offered or tendered as consideration for any goods or services offered, or transaction contemplated, in terms of that loyalty programme.

(2) A person must not offer participation in a loyalty programme, or offer any loyalty credit or award with the intention of—
(a) not providing it; or
(b) providing it in a manner other than as offered.

(3) Any document setting out an offer contemplated in subsection (2) must clearly state—
(a) the nature of the programme, credit or award being offered;
(b) the goods or services to which the offer relates;
(c) the steps required by a consumer to participate in the programme or to receive any benefit in terms of the programme; and
(d) any person from whom, any place where, and any date and time on or at which, the consumer may gain access to the programme, or to any loyalty credit or awards in terms of the programme.

(4) Subject to subsections (5) and (6), the sponsor of a loyalty programme, or a supplier who offers or holds out a willingness, to accept any loyalty credits or awards as consideration or in exchange for any particular goods or services, must—

a) ensure that the supply of those particular goods or services available at any time is sufficient to accommodate all reasonably anticipated

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demands for those goods or services in exchange for loyalty credits or awards;

- b) not limit or restrict capacity to supply those particular goods or services in exchange for such credits or awards on any basis other than that it applies to such a supply in exchange for any other form of consideration;
- c) accept any tender of sufficient loyalty credits or awards as adequate consideration for the price of those particular goods or services if, at that time, it has capacity available for supply in exchange for any other form of consideration;
- d) not require the consumer to accept an inferior quality of those particular goods or services than those generally available to any other consumer on the same date who tenders a different form of consideration;
- e) not impose any monetary charge in respect of the administration, processing or handling of such a transaction if the consumer is required to pay a periodic fee to remain a member of the programme; and
- f) not demand that the consumer purchase any other goods or services in connection with that transaction.

(5) A sponsor of a loyalty programme, or a supplier of goods or services who accepts loyalty credits or awards as consideration for any particular goods or services, may impose a partial or complete restriction on the availability of any such goods or services in exchange for loyalty credits or awards during any specific period, if the programme sponsor has directly or indirectly given notice in writing to the members of that programme at least 20 business days before the beginning of that period, but the total of all such periods within a calendar year must not exceed 90 days.

(6) It is a defence to an alleged failure to comply with subsection (4)(a) if the supplier offered to supply or procure another person to supply a consumer with comparable goods or services of the relevant kind to satisfy the consumer's request, for no consideration beyond the advertised price expressed in loyalty awards, and the consumer—

- (a) accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted; or
- (b) unreasonably refused that offer.

Promotional competitions

31. (1) In this section—

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(a) “**participant**” means a person who enters, competes in or is otherwise eligible to win a promotional competition;

(b) “**prize**” includes a reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, or other discounted or free thing;

(c) “**promoter**” means a person who directly or indirectly promotes, sponsors, organises or conducts a promotional competition, or for whose benefit such a competition is promoted, sponsored, organised or conducted; and

(d) “**promotional competition**” means any competition, game, scheme, arrangement, system, plan or device for distributing prizes by lot or chance if—

(i) it is conducted in the ordinary course of business for the purpose of promoting a producer, distributor, supplier, or association of any such persons, or the sale of any goods or services; and

(ii) any prize offered exceeds the threshold prescribed in terms of subsection (11), irrespective of whether a participant is required to demonstrate any skill or ability before being awarded a prize.

(2) A person must not directly or indirectly inform another person that a participant has—

(a) won a competition, if—

(i) no competition has in fact been conducted;

(ii) the person has not in fact won the competition;

(iii) the prize for that competition is subject to a previously undisclosed condition; or

(iv) the person is required to offer further consideration for the prize, after the results of the competition have been announced; or

(b) a right to a prize—

(i) to which the person does not in fact have a right;

(ii) if the prize was generally available or offered to all similarly situated persons or class of persons; or

(iii) if, before becoming eligible to receive the prize, the person is required to offer further consideration for the prize or to purchase any particular goods or services.

(3) The promoter of a promotional competition—

(a) must not require any consideration to be paid by or on behalf of any participant in the promotional competition, other than the reasonable costs of posting or otherwise transmitting an entry form or device;

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(b) must not award a prize in a competition to—

(i) a winner of the competition if it is unlawful to supply those goods or services to that prize winner, but this subparagraph does not preclude awarding a prize to a person merely because that person's right to possess or use the prize is or may be restricted or regulated by, or is otherwise subject to, any public regulation; or

(ii) any person who is—

(aa) a director, member, partner, employee or agent of, or consultant to the promoter or any other person who directly or indirectly controls or is controlled by, the promoter; or

(bb) a supplier of goods or services in connection with that competition; and

(c) must—

(i) prepare competition rules before the beginning of the competition;

(ii) make the competition rules available to any participant, on request and without cost; and

(iii) retain a copy of the competition rules for the prescribed period after the end of the competition.

(4) For greater certainty in applying subsection (3)(a), but without limiting the generality of that paragraph, a promoter must be regarded as having required or received consideration in respect of a promotional competition if—

(a) a participant is required to pay any consideration, directly or indirectly, for the opportunity to participate in the promotional competition, for access to the competition or for any device by which a person may participate in the competition; or

(b) participation in the promotional competition requires the purchase of any goods or services, and the price charged for those goods or services is more than the price, excluding discounts, ordinarily charged for those or similar goods or services without the opportunity of taking part in a promotional competition.

(5) An offer to participate in a promotional competition must clearly state—

a) the benefit or competition to which the offer relates;

b) the steps required by a person to accept the offer or to participate in the competition;

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- a) the basis on which the results of the competition will be determined;
 - b) the closing date for the competition;
 - c) the medium through or by which the results of the competition will be made known; and
 - d) any person from whom, any place where, and any date and time on or at which—
 - (i) a person may obtain a copy of the competition rules; and
 - (ii) a successful participant may receive any prize.
- (6) The requirements of subsection (5) may be satisfied either—
- (a) directly on any medium through which a person participates in a promotional competition;
 - (b) on a document accompanying any medium contemplated in paragraph (a); or
 - (c) in any advertisement that—
 - (i) is published during the time and throughout the area in which the promotional competition is conducted; and
 - (ii) draws attention to and is clearly associated with the promotional competition.
- (7) The right to participate in a promotional competition is fully vested in a person immediately upon—
- (a) complying with any conditions that are required to earn that right; and
 - (b) acquiring possession or control of the medium, if any, through which a person may participate in that promotional competition.
- (8) The right to any benefit or right conferred on a person as a result of that person's participation in a promotional competition is fully vested immediately upon the determination of the results of the competition.
- (9) A right contemplated in subsection (7) or (8) must not be—
- (a) made subject to any further condition; or
 - (b) contingent upon a person—
 - (i) paying any consideration to the promoter for the prize; or
 - (ii) satisfying any further requirements other than those stipulated in terms of subsection (5).
- (10) Section 35(5), read with the changes required by the context, applies equally in respect of any prize or right to a prize conferred on a person as a result of that person's participation in a promotional competition.

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(11) The Cabinet Secretary may prescribe—

(a) a monetary threshold for the purpose of excluding competitions with low value prizes from the definition of “**promotional competition**”;

(b) minimum standards and forms for keeping records associated with promotional competitions; and

(c) audit and reporting requirements in respect of promotional competitions.

Alternative work schemes

32. (1) A person must not make a false representation with respect to the availability, or extent of availability, actual or potential profitability, risk or other material aspect of the work, business or activity involved in any arrangement of an activity for gain in terms of which one person—

(a) invites, solicits or requires other persons to conduct the work, business or activity from their homes;

(b) represents to others as being practicable, to a considerable extent, to conduct the work, business or activity from their homes; or

(c) invites, solicits or requires other persons to perform any work, business or activity, invest money, or perform any work, business or activity in association with the investment of money.

(2) An advertisement promoting any matter contemplated in subsection (1) must—

(a) be accompanied by a cautionary statement in the prescribed wording and form, disclosing the uncertainty of the extent of—

(i) work, business or activity available; and

(ii) income or other benefit to be derived;

(b) disclose at least the following information:

(i) The full name, or registered business name, of the person promoting the matter, and the address and contact numbers of that person’s primary place of conducting the business; and

(ii) the nature of the work, business, activity or investment.

(3) A person must not place an advertisement contemplated in subsection

(4) otherwise than in accordance with the requirements of this section.

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(5) A person who does anything contemplated in subsection (1)(a) to (c) must not charge any person a fee in respect of the promotion or conduct of any such work, business, activity or investment, except to the extent that the person charged has been assigned and performed the contemplated work, business, activity, or made or received the contemplated investment.

Referral selling

33. (1) A person must not promote, offer, supply, agree to supply, or induce a consumer to accept any goods or services on the representation that the consumer will receive a rebate, Advisory Committee or other benefit if—

(a) the consumer subsequently—

(i) gives the supplier the names of consumers; or

(ii) otherwise assists the supplier to supply goods or services to other consumers; and

(b) that rebate, Advisory Committee or other benefit is contingent upon an event occurring after the consumer agrees to the transaction.

(2) A statement by a consumer, whether in an agreement or otherwise, to the effect that the consumer was motivated to enter into a transaction contemplated in subsection (1) predominately for the value of the goods or services, rather than for the rebate, Advisory Committee or benefit, is not a defence to an allegation that a person has contravened subsection (1).

(3) This section does not apply to a franchise agreement.

Agreements with persons lacking legal capacity

34. (1) An agreement to enter into a transaction, or for the supply of any goods or services, to or at the direction of a consumer—

(a) is void if the consumer is subject to an order of a competent court holding that person to be mentally unfit and the supplier knew, or could reasonably have determined, that the consumer was the subject of such an order; or

(b) is voidable at the option of the consumer, if—

(i) at the time the agreement was made the consumer was an unemancipated minor;

(ii) the agreement was made without the consent of an adult responsible for that minor; and

(iii) the agreement has not been ratified by either—

(aa) an adult responsible for that minor; or

(bb) the consumer after being emancipated or becoming an adult.

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(2) Subsection (1) does not apply to an agreement if the consumer, or any person acting on behalf of the consumer, directly or indirectly, by act or omission—

(a) induced the supplier to believe that the consumer had an unfettered legal capacity to contract; or

(b) attempted to obscure or suppress the fact that the consumer did not have an unfettered legal capacity to contract.

RIGHT TO FAIR AND HONEST DEALING.

Unconscionable conduct

35. (1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any—

- a) marketing of any goods or services;
- b) supply of goods or services to a consumer;
- c) negotiation, conclusion, execution or enforcement of an agreement to supply
- b) any goods or services to a consumer;
- c) demand for, or collection of, payment for goods or services by a consumer; or
- d) recovery of goods from a consumer.

(2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.

(3) Section 51 applies to any court proceedings concerning this section.

False, misleading or deceptive representations

35A. (1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct—

(a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;

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(b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or

(c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation, or permit or require any other person to do so on behalf of the supplier.

(2) A person acting on behalf of a supplier of any goods or services must not—

(a) falsely represent that the person has any sponsorship, approval or affiliation; or

(b) engage in any conduct that the supplier is prohibited from engaging in under subsection (1).

(3) Without limiting the generality of subsections (1) and (2), it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect, that—

a) the supplier of any goods or services has any particular status, affiliation, connection, sponsorship or approval that they do not have;

b) any goods or services—

(i) have ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship or approval that they do not have;

(ii) are of a particular standard, quality, grade, style or model;

(iii) are new or unused, if they are not or if they are reconditioned or reclaimed, subject to subsection (4);

(iv) have been used for a period to an extent or in a manner that is materially different from the facts;

(v) have been supplied in accordance with a previous representation; or

(vi) are available or can be delivered or performed within a specified time;

c) any land or other immovable property—

(i) has characteristics that it does not have;

(ii) may lawfully be used, or is capable of being used, for a purpose that is in fact unlawful or impracticable; or

(iii) has or is proximate to any facilities, amenities or natural features that it does not have, or that are not available or proximate to it;

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- a) the necessary service, maintenance or repair facilities or parts are readily available for or within a reasonable period;
- b) any service, part, replacement, maintenance or repair is needed or advisable;
- c) a specific price advantage exists;
- d) a charge or proposed charge is for a specific purpose;
- e) an employee, salesperson, representative or agent has the necessary authority to negotiate the terms of, or conclude, an agreement;
- f) the transaction affects, or does not affect, any rights, remedies or obligations of a consumer;
- g) a particular solicitation of, or communication with, the consumer is for a particular purpose; or
- h) the consumer will derive a particular benefit if they assist the supplier in obtaining a new or potential customer.

(4) A representation contemplated in subsection (3)(b)(iii) to the effect that any goods are new is not false, misleading or deceptive if those goods have been used only—

(a) by or on behalf of the producer, importer, distributor or retailer; and

(b) for the purposes of reasonable testing, service, preparation or delivery.

(5) Section 45 applies to any court proceedings concerning this section.

Fraudulent schemes and offers

36. (1) A person must not initiate, sponsor, promote or knowingly participate in the distribution of any communication that—

(a) offers to supply, or enter into an agreement to supply, any goods or services, or offers to enter into a transaction, or invites offers to enter into a transaction; and

(b) falsely states, implies or represents that—

(i) the communication is authorised by another person; or

(ii) the author of the communication represents another person.

(2) A person must not directly or indirectly promote, or knowingly join, enter or participate in—

(a) a fraudulent currency scheme, as described in subsection (3);

(b) a fraudulent financial transaction, as described in subsection (4);

(c) a fraudulent transfer of property or legal rights, as described in subsection (5); or

(d) any other scheme declared by the Cabinet Secretary in terms of subsection (8), or cause another person to do so.

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(3) An arrangement, agreement, practice or scheme is a fraudulent currency scheme if it involves a person—

(a) with the intent to defraud another person, representing that the first person is capable of—

(i) producing currency by washing, dipping or otherwise treating any substance that is not currency with a chemical substance, or exposing it to an electrical charge, or to radiation of any kind; or

(ii) producing currency, or increasing a sum of money, through scientific means, invocation of any juju or use of other invisible medium; or

(b) making or issuing any currency, or making representations as being capable of doing so, unless the person is an authorised producer of that currency.

(4) An arrangement, agreement, practice or scheme is a fraudulent financial transaction if it involves any proceeds of a specified unlawful activity—

(a) with intent to promote the carrying on of a specified unlawful activity; and

(b) is designed in whole or in part to—

(i) conceal or disguise the nature, location, source of ownership or control of the proceeds of a specified unlawful activity; or

(ii) avoid a lawful transaction.

(5) An arrangement, agreement, practice or scheme is a fraudulent transfer of property or legal rights if it involves a person, by false pretence and with the intent to defraud another person—

(a) obtaining any property from that person or any third person, as the case may be; or

(b) inducing that person or any third person to—

(i) deliver property at the direction of the first person; or

(ii) confer a benefit of any kind on any person at the direction of the first person on the understanding that the benefit has or will be paid for.

(6) A person must not directly or indirectly represent, by false pretence or with the intent to defraud, another person to the effect that the first person is in possession of—

(a) any property;

(b) information relating to the whereabouts of any property or relating to any legal rights or potential legal claims; or

(c) has the ability to effect the transfer of any property or to locate or determine the whereabouts of an individual.

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(7) A person must not—

(a) invite another person to participate for a fee in assisting to effect a transfer of any property that the first person is not authorised to transfer; or
(b) seek, demand or accept any consideration from another person in connection with any unlawful activity contemplated in this section.

(8) The Cabinet Secretary, by regulation made in accordance with section 93, may declare any arrangement, agreement, practice or scheme to be a scheme contemplated in subsection (2)(d), if it is similar in purpose or effect to a scheme contemplated in that subsection.

Pyramid and related schemes

37. (1) In this section—

(a) “**consideration**” has the meaning set out in section 1, except that it does not include—

(i) the purchase of any goods at cost to be used in making sales, or not for resale;

(ii) the purchase of any goods in exchange for which the seller of those goods offers to repurchase the participant’s products under reasonable commercial terms; or

(iii) the participant’s time and effort in pursuit of sales or recruiting activities; and

(b) “**participant**” means a person who is admitted to a scheme for consideration.

(2) A person must not directly or indirectly promote, or knowingly join, enter or participate in—

(a) a multiplication scheme, as described in subsection (3);

(b) a pyramid scheme, as described in subsection (4);

(c) a chain letter scheme, as described in subsection (5); or

(d) any other scheme declared by the Cabinet Secretary in terms of subsection (6), or cause any other person to do so.

(3) A multiplication scheme exists when a person offers, promises or guarantees to any consumer, investor or participant an effective annual interest rate, as calculated in the prescribed manner, that is at least 20 per cent above the Rate determined by the Central Bank of Kenya as at the date of investment or commencement of participation, irrespective of whether the consumer, investor or participant becomes a member of the lending party.

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(4) An arrangement, agreement, practice or scheme is a pyramid scheme if—

(a) participants in the scheme receive compensation derived primarily from their respective recruitment of other persons as participants, rather than from the sale of any goods or services; or

(b) the emphasis in the promotion of the scheme indicates an arrangement or practice contemplated in paragraph (a).

(5) An arrangement, agreement, practice or scheme is a chain letter scheme if—

a) it has various levels of participation;

b) existing participants canvass and recruit new participants; or

c) each successive newly recruited participant—

(i) upon joining—

(aa) is required to pay certain consideration, which is distributed to one, some or all of the previously existing participants, irrespective of whether the new participant receives any goods or services in exchange for that consideration; and

(bb) is assigned to the lowest level of participation in the scheme; and

(ii) upon recruiting further new participants, or upon those new participants recruiting further new participants, and so on in continual succession—

(aa) may participate in the distribution of the consideration paid by any such new recruit; and

(bb) moves to a higher level within the scheme, until being removed from the scheme after reaching the highest level.

(6) The Cabinet Secretary, by regulation made in accordance with section 93, may declare any arrangement, agreement, practice or scheme to be a scheme contemplated in subsection (2)(d), if it is similar in purpose or effect to a scheme contemplated in that subsection.

Consumer's right to assume supplier is entitled to sell goods

38. (1) Subject to subsection (2), every consumer has a right to assume, and it is an implied provision of every transaction or agreement, that—

(a) in the case of a supply of goods, the supplier has the legal right, or the authority of the legal owner, to supply those goods;

(b) in the case of an agreement to supply goods, the supplier will have a legal right, or the authority of the legal owner, to—

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- (i) sell the goods at the time the title to those goods is to pass to the consumer; or
- (ii) lease the goods at the time the lessee is to take possession of the leased goods;
- (c) as between the supplier and the consumer, the supplier is fully liable for any charge or encumbrance pertaining to the goods in favour of any third party unless—
 - (i) such a charge or encumbrance is disclosed in writing to the consumer before the transaction or agreement is concluded; or
 - (ii) the supplier and consumer have colluded to defraud the third party; and
- (d) the supplier guarantees that the consumer is to have and enjoy quiet possession of the goods, subject to any charge or encumbrance disclosed as contemplated in paragraph (c)(i).

(2) If, as a result of any transaction or agreement in which goods are supplied to a consumer, a right or claim of a third party pertaining to those goods is infringed or compromised the supplier is liable to the third party to the extent of the infringement or compromise of that person's rights pertaining to those goods, except to the extent of a charge or encumbrance disclosed as contemplated in subsection (1)(c)(i).

Auctions

39. (1) In this section, “auction” includes a sale in execution of or pursuant to a court order, to the extent that the order contemplates that the sale is to be conducted by an auction.

(2) When goods are put up for sale by auction in lots, each lot is, unless there is evidence to the contrary, regarded to be the subject of a separate transaction.

(3) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in any other customary manner, and until that announcement is made, a bid may be retracted.

(4) Notice must be given in advance that a sale by auction is subject to—

- (a) a reserved or upset price; or
- (b) a right to bid by or on behalf of the owner or auctioneer, in which case the owner or auctioneer, or any one person on behalf of the owner or auctioneer, as the case may be, may bid at the auction.

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(5) Unless notice is given in advance that a sale by auction is subject to a right to bid by or on behalf of the owner or auctioneer—

- a) the owner or auctioneer must not bid or employ any person to bid at the sale;
- b) the auctioneer must not knowingly accept any bid from a person contemplated in paragraph (a); and
- c) the consumer may approach a court to declare the transaction fraudulent, if this subsection has been violated.

(6) The Cabinet Secretary may prescribe requirements to be complied with by an auctioneer, or different categories of auctioneer, in respect of—

- (a) the conduct of an auction;
- (b) the records to be maintained with respect to property placed for auction; and
- (c) the sale of any such property by auction.

Changes, deferrals and waivers, and substitution of goods

40. (1) The supply of goods or services as a result of a change to an existing agreement, or a deferral or waiver of a right under an existing agreement, is not to be treated as creating a new agreement for the purposes of this Act, if the change, deferral or waiver is made in accordance with this Act or the agreement.

(2) If, after delivery to the consumer of goods that are the subject of a transaction, the consumer and the supplier agree to substitute other goods for all or part of the goods sold—

- (a) from the date of delivery of the substituted goods, the transaction applies to the substituted goods rather than the goods originally described; and
- (b) if the transaction was the subject of a written agreement, or the sales record identified any specific goods, the supplier must prepare and deliver to the consumer an amended agreement or sales record, describing the substituted goods, but without making any other changes to the original document.

Over-selling and over-booking

41. (1) This section does not apply to—

- (a) a franchise agreement; or

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(b) a consumer agreement pertaining to the supply of any special-order goods.

(2) A supplier must not accept payment or other consideration for any goods or services if the supplier—

(a) has no reasonable basis to assert an intention to supply those goods or provide those services; or

(b) intends to supply goods or services that are materially different from the goods or services in respect of which the payment or consideration was accepted.

(3) If a supplier makes a commitment or accepts a reservation to supply goods or services on a specified date or at a specified time and, on the date and at the time contemplated in the commitment or reservation, fails because of insufficient stock or capacity to supply those goods or services, or similar or comparable goods or services of the same or better quality, class or nature, the supplier must—

(a) refund to the consumer the amount, if any, paid in respect of that commitment or reservation, together with interest at the prescribed rate from the date on which the amount was paid until the date of reimbursement; and

(b) in addition, compensate the consumer for costs directly incidental to the supplier's breach of the contract, except to the extent that subsection (5) provides otherwise.

(4) It is a defence to an alleged failure to supply any goods or services, as contemplated in subsection (3), if—

(a) the supplier offered to supply or procure another person to supply a consumer with comparable goods or services of the relevant kind to satisfy the consumer's request; and

(b) the consumer—

(i) accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted; or

(ii) unreasonably refused that offer.

(5) Subsection (3)(b) does not apply if—

(a) the shortage of stock or capacity is due to circumstances beyond the supplier's control, subject to subsection (6); and

(b) the supplier took reasonable steps to inform the consumer of the shortage of stock or capacity as soon as it was practicable to do so in the circumstances.

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(6) Without limiting the generality of subsection (5)(a), a shortage of stock or capacity is not “due to circumstances beyond the supplier’s control” if the shortage results partially, completely, directly or indirectly from a failure on the part of the supplier to adequately and diligently carry out any ordinary or routine matter pertaining to the supplier’s business.

**RIGHT TO FAIR, JUST AND REASONABLE TERMS AND
CONDITIONS**

Unfair, unreasonable or unjust contract terms

42. (1) A supplier must not—

(a) offer to supply, supply, or enter into an agreement to supply, any goods or services—

(i) at a price that is unfair, unreasonable or unjust; or

(ii) on terms that are unfair, unreasonable or unjust;

(b) market any goods or services, or negotiate, enter into or adCabinet Secretary a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or

(c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—

(i) to waive any rights;

(ii) assume any obligation; or

(iii) waive any liability of the supplier,

on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

(2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—

(a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;

(b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;

(c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 35 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or

(d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 43 (1), and—

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- (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
- (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 43.

Notice required for certain terms and conditions

43. (1) Any notice to consumers or provision of a consumer agreement that purports to—

- (b) limit in any way the risk or liability of the supplier or any other person;
- (c) constitute an assumption of risk or liability by the consumer;
- (d) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
- (e) be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).

(2) In addition to subsection (1), if a provision or notice concerns any activity or facility that is subject to any risk—

- a) of an unusual character or nature;
- b) the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or
- c) that could result in serious injury or death, the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsections (3) to (5), and the consumer must have assented to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.

(3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.

(4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer—

- (a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and

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- (b) before the earlier of the time at which the consumer—
- (i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or
 - (ii) is required or expected to offer consideration for the transaction or agreement.

(5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1).

Written consumer agreements

44. (1) The Cabinet Secretary may prescribe categories of consumer agreements that are required to be in writing.

(2) If a consumer agreement between a supplier and a consumer is in writing, whether as required by this Act or voluntarily—

- (a) it applies irrespective of whether or not the consumer signs the agreement; and
- (b) the supplier must provide the consumer with a free copy, or free electronic access to a copy, of the terms and conditions of that agreement, which must—
 - (i) satisfy the requirements of section 22; and
 - (ii) set out an itemised break-down of the consumer's financial obligations under such agreement.

(3) If a consumer agreement between a supplier and a consumer is not in writing, a supplier must keep a record of transactions entered into over the telephone or any other recordable form as prescribed.

Prohibited transactions, agreements, terms or conditions

45. (1) A supplier must not make a transaction or agreement subject to any term or condition if;

- a) its general purpose or effect is to—
 - (i) defeat the purposes and policy of this Act;
 - (ii) mislead or deceive the consumer; or
 - (iii) subject the consumer to fraudulent conduct;

- b) it directly or indirectly purports to—
 - (i) waive or deprive a consumer of a right in terms of this Act;
 - (ii) avoid a supplier's obligation or duty in terms of this Act;

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- (iii) set aside or override the effect of any provision of this Act; or
- (iv) authorise the supplier to—
 - (aa) do anything that is unlawful in terms of this Act; or
 - (bb) fail to do anything that is required in terms of this Act;

- c) it purports to—
 - (i) limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier;
 - (ii) constitute an assumption of risk or liability by the consumer for a loss contemplated in subparagraph (i); or
 - (iii) impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier, except to the extent contemplated in section 14(1);

- d) it results from an offer prohibited in terms of section 26;

- e) it requires the consumer to enter into a supplementary agreement, or sign a document, prohibited by subsection (2)(a);

- f) it purports to cede to any person, charge, set off against a debt, or alienate in any manner, a right of the consumer to any claim against the Guardian's Fund;

- g) it falsely expresses an acknowledgement by the consumer that—
 - (i) before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier; or
 - (ii) the consumer has received goods or services, or a document that is required by this Act to be delivered to the consumer;

- h) it requires the consumer to forfeit any money to the supplier—
 - (i) if the consumer exercises any right in terms of this Act; or
 - (ii) to which the supplier is not entitled in terms of this Act or any other law;

- i) it expresses, on behalf of the consumer—
 - (i) an authorization for any person acting on behalf of the supplier to enter any premises for the purposes of taking possession of goods to which the agreement relates;

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- (ii) an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed; or
- (iii) a consent to a predetermined value of costs relating to enforcement of the agreement, except to the extent that is consistent with this Act; or
 - j) it expresses an agreement by the consumer to—

(i) deposit with the supplier, or with any other person at the direction of the supplier, an identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying document or device; or

(ii) provide a personal identification code or number to be used to access an account.

(2) A supplier may not—

(a) directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a provision contemplated in subsection (1);

(b) request or demand a consumer to—

(i) give the supplier temporary or permanent possession of an instrument referred to in subsection (1)(j)(i) other than for the purpose of identification, or to make a copy of such instrument; or

(ii) reveal any personal identification code or number contemplated in subsection (1)(j)(ii); or

(c) direct, or knowingly permit, any other person to do anything referred to in this section on behalf or for the benefit of the supplier.

(3) A purported transaction or agreement, provision, term or condition of a transaction or agreement, or notice to which a transaction or agreement is purported to be subject, is void to the extent that it contravenes this section.

(4) This section does not preclude a supplier to require a personal identification code or number in order to facilitate a transaction that in the normal course of business necessitates the provision of such code or number.

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Powers of court to ensure fair and just conduct, terms and conditions

46. (1) If, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that—

(a) the supplier contravened section 35, 35A or 42; and

(b) this Act does not otherwise provide a remedy sufficient to correct the relevant Prohibited conduct, unfairness, injustice or unconscionability, the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3).

(2) In any matter contemplated in subsection (1), the court must consider—

- a) the fair value of the goods or services in question;
- b) the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position;
- c) those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made, irrespective of whether this Act was in force at that time;
- d) the conduct of the supplier and the consumer, respectively;
- e) whether there was any negotiation between the supplier and the consumer, and if so, the extent of that negotiation;
- f) whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier;
- g) the extent to which any documents relating to the transaction or agreement satisfied the requirements of section 18;
- h) whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any—
 - i. custom of trade; and
 - ii. any previous dealings between the parties;
- i) the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and
- j) in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.

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(3) If the court determines that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, the court may—

- (a) make a declaration to that effect; and
- (b) make any further order the court considers just and reasonable in the circumstances, including, but not limited to, an order—
 - (i) to restore money or property to the consumer;
 - (ii) to compensate the consumer for losses or expenses relating to—
 - (aa) the transaction or agreement; or
 - (bb) the proceedings of the court; and
 - (iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.

(4) If, in any proceedings before a court concerning a transaction or agreement between a supplier and a consumer, a person alleges that an agreement, a term or condition of an agreement, or a notice to which a transaction or agreement is purportedly subject, is void in terms of this Act or failed to satisfy any applicable requirements set out in section 49, the court may—

(a) make an order—

(i) in the case of a provision or notice that is void in terms of any provision of this Act—

(aa) severing any part of the relevant agreement, provision or notice, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the transaction, agreement, provision or notice as a whole; or

(bb) declaring the entire agreement, provision or notice void as from the date that it purportedly took effect; or

(ii) in the case of a provision or notice that fails to satisfy any provision of section 43, severing the provision or notice from the agreement, or declaring it to have no force or effect with respect to the transaction; and

(b) make any further order that is just and reasonable in the circumstances with respect to that agreement, provision or notice, as the case may be.

RIGHT TO FAIR VALUE, GOOD QUALITY AND SAFETY

Definitions applicable to this Part

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

(a) “**defect**” means—

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- (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 characteristic that—
 - (i) has been identified as, or declared to be, a hazard in terms of any other law; or
 - (ii) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised; and
- (d) “**unsafe**” means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.

Consumer’s rights to demand quality service

48. (1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to—

- (a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;
- (b) the performance of the services in a manner and quality that persons are generally entitled to expect;
- (c) the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and
- (d) the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services, having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.

(2) If a supplier fails to perform a service to the standards contemplated in subsection

(1), the consumer may require the supplier to either—

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- (a) remedy any defect in the quality of the services performed or goods supplied; or
- (b) refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

Consumer's rights to safe, good quality goods

49. (1) This section does not apply to goods bought at an auction, as contemplated in section 39.

(2) Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that—

- (a) are reasonably suitable for the purposes for which they are generally intended;
- (b) are of good quality, in good working order and free of any defects;
- (c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and
- (d) Comply with any applicable standards set under the Standards Act, or any other public regulation.

(3) In addition to the right set out in subsection (2)(a), if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, and the supplier—

- (a) ordinarily offers to supply such goods; or
- (b) acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.

(4) In determining whether any particular goods satisfied the requirements of subsection (2) or (3), all of the circumstances of the supply of those goods must be considered, including but not limited to—

- (a) the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of the goods;
- (b) the range of things that might reasonably be anticipated to be done with or in relation to the goods; and
- (c) the time when the goods were produced and supplied.

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(5) For greater certainty in applying subsection (4)—
(a) it is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods; and
(b) a product failure or defect may not be inferred in respect of particular goods solely on the grounds that better goods have subsequently become available from the same or any other producer or supplier.

(6) Subsection (2)(a) and (b) do not apply to a transaction if the consumer—
(a) has been expressly informed that particular goods were offered in a specific condition; and
(b) has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.

Implied warranty of quality

50. (1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements and standards contemplated in section 49, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.

(2) Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 49, and the supplier must, at the direction of the consumer, either—
(a) repair or replace the failed, unsafe or defective goods; or
(b) refund to the consumer the price paid by the consumer, for the goods.

(3) If a supplier repairs any particular goods or any component of any such goods and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must—
(a) replace the goods; or
(b) refund to the consumer the price paid by the consumer for the goods.

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- (4) The implied warranty imposed by subsection (1), and the right to return goods set out in subsection (2), are each in addition to—
- (a) any other implied warranty or condition imposed by the common law, this Act or any other public regulation; and
 - (b) any express warranty or condition stipulated by the producer or importer, distributor or retailer, as the case may be.

Warranty on repaired goods

51. (1) A service provider warrants every new or reconditioned part installed during any repair or maintenance work, and the labour required to install it, for a period of three months after the date of installation or such longer period as the supplier may specify in writing.

(2) A warranty in terms of this section—

- (a) is concurrent with any other deemed, implied or express warranty;
- (b) is void if the consumer has subjected the part, or the goods or property in which it was installed, to misuse or abuse; and
- (c) does not apply to ordinary wear and tear, having regard to the circumstances in which the goods are intended to ordinarily be used.

Warning concerning fact and nature of risks

58. (1) The supplier of any activity or facility that is subject to any—

- (a) risk of an unusual character or nature;
- (b) risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or
- (c) risk that could result in serious injury or death, must specifically draw the fact, nature and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49.

(2) A person who packages any hazardous or unsafe goods for supply to consumers must display on or within that packaging a notice that meets the requirements of section 18, and any other applicable standards, providing the consumer with adequate instructions or the safe handling and use of those goods.

(3) Subsection (2) does not apply to any hazardous or unsafe goods to the extent that a substantially similar label or notice has been applied in terms of any other public regulation.

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(4) A person who installs any hazardous or unsafe goods contemplated in subsection (2) for a consumer, or supplies any such goods to a consumer in conjunction with the performance of any services, must give the consumer the original copy of—

(a) any document required in terms of that subsection; or

(b) any similar document applied to those goods in terms of another public regulation.

Recovery and safe disposal of designated products or components

52. (1) If any national legislation prohibits the disposal or deposit of any particular goods, or any components, remnants, containers or packaging of any goods, into a common waste collection system—

(a) any person who in the ordinary course of business supplies goods of that kind to consumers, must accept the return of any such goods, components, remnants, containers or packaging from any consumer, without charge to the consumer, irrespective of whether that person supplied the particular object to that particular consumer; and

(b) any person who in the ordinary course of business produces, imports or distributes any such goods as part of the supply chain by which those goods reach the consumer, must in turn accept the return of any such goods, components, remnants, containers or packaging from any supplier contemplated in paragraph (a).

(2) If any regulation or industry waste management plan approved by any other legislation for the management of a specific waste type applies, the consumer may dispose or deposit the goods to a collection facility provided for in the regulation or industry waste management plan.

Safety monitoring and recall

53. (1) The Cabinet Secretary must promote, within the framework of section 68, the development, adoption and application of industry-wide codes of practice providing for effective and efficient systems to—

a) receive notice of—

(i) consumer complaints or reports of product failures, defects or hazards;

(ii) the return of any goods because of a failure, defect or hazard;

(iii) personal injury, illness or damage to property caused wholly or partially as a result of a product failure, defect or hazard; and

(iv) other indication of failure, defect or hazard, in any particular goods or in any component of them, or injury or damage resulting from the use of those goods;

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- b) monitor the sources of information contemplated in paragraph (a), and analyse the information received with the object of detecting or identifying any previously undetected or unrecognised potential risk to the public from the use of or exposure to those goods;
- c) conduct investigations into the nature, causes, extent and degree of the risk to the public;
- d) notify consumers of the nature, causes, extent and degree of the risk pertaining to those goods; and
- e) if the goods are unsafe, recall those goods for repair, replacement or refund.

Liability for damage caused by goods

54. (1) Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of—

- (a) supplying any unsafe goods;
- (b) a product failure, defect or hazard in any goods; or
- (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

(2) A supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purposes of this section.

(3) If, in a particular case, more than one person is liable in terms of this section, their liability is joint and several.

(4) Liability of a particular person in terms of this section does not arise if—

- (a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;
- (b) the alleged unsafe product characteristic, failure, defect or hazard—
 - (i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or

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(ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case subparagraph (i) does not apply;

(d) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers; or

(e) the claim for damages is brought more than three years after the—

(i) death or injury of a person contemplated in subsection (5)(a);

(ii) earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection (5)(b); or

(iii) earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in subsection (5)(c); or

(iv) the latest date on which a person suffered any economic loss contemplated in subsection (5)(d).

(5) Harm for which a person may be held liable in terms of this section includes;

a) the death of, or injury to, any natural person;

b) an illness of any natural person;

c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and

b) any economic loss that results from harm contemplated in paragraph (a), (b) or (c).

(6) Nothing in this section limits the authority of a court to—

(a) assess whether any harm has been proven and adequately mitigated;

(b) determine the extent and monetary value of any damages, including economic loss; or

(c) apportion liability among persons who are found to be jointly and severally liable.

SUPPLIER'S ACCOUNTABILITY TO CONSUMERS

Lay-bys

55. (1) If a supplier agrees to sell particular goods to a consumer, to accept payment for those goods in periodic installments, and to hold those goods until the consumer has paid the full price for the goods—

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(a) each amount paid by the consumer to the supplier remains the property of the consumer, and is subject to section 65, until the goods have been delivered to the consumer; and

(b) the particular goods remain at the risk of the supplier until the goods have been delivered to the consumer.

(2) If a supplier is unable to deliver any goods contemplated in subsection (1) when the consumer has paid the full price for those goods, the supplier must either, at the option of the consumer—

(a) supply the consumer with an equivalent quantity of goods that are comparable or superior in description, design and quality; or

(b) refund to the consumer—

(i) the money paid by the consumer, with interest in accordance with the Prescribed Rate of Interest if the inability to supply the goods is due to circumstances beyond the supplier's control; or

(ii) double the amount paid by the consumer, as compensation for breach of contract in any circumstances not contemplated in subparagraph (i).

(3) Without limiting the generality of subsection (2)(b)(i), a failure to supply the goods is not “due to circumstances beyond the supplier's control” if the shortage results partially, completely, directly or indirectly from a failure on the part of the supplier to adequately and diligently carry out any ordinary or routine matter pertaining to the supplier's business.

(4) If a consumer contemplated in subsection (1) terminates the agreement before fully paying for the goods, or fails to complete the payment for the goods within 60 business days after the anticipated date of completion, the supplier—

(a) may charge a termination penalty in respect of those goods, subject to subsections (5) and (6); and

(b) after deducting any such termination penalty, must refund to the consumer any amount paid by the consumer under that agreement.

(5) A cancellation penalty contemplated in subsection (4) may not be charged—

(a) if the consumer's failure to complete payment was due to the death or hospitalization of the consumer; or

(b) in any other case, unless the supplier informed the consumer of the fact and extent of the penalty before the consumer entered into the lay-by agreement.

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(6) The Cabinet Secretary may prescribe a basis for calculating the maximum amount of an cancellation penalty contemplated in subsection (4).

Prepaid certificates, credits and vouchers

56. (1) This section applies only to a transaction in which a supplier—
(a) accepts consideration from a person in exchange for a prepaid certificate, card, credit, voucher or similar device; and
(b) expressly or implicitly agrees to provide goods or services to any person who subsequently presents that certificate, card, credit, voucher or similar device, up to the value represented by it, but does not apply with respect to such a device, or the value represented by it, after all of the value of the device has been exchanged for goods, services or future access to services.

(2) A prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) does not expire until the earlier of—
(a) the date on which its full value has been redeemed in exchange for goods or services or future access to services; or
(b) three years after the date on which it was issued, or at the end of a longer or extended period agreed by the supplier at any time.

(3) Any consideration paid by a consumer to a supplier in exchange for a prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) is the property of the bearer of that certificate, card, credit, voucher or similar device to the extent that the supplier has not redeemed it in exchange for goods or services, or future access to services.

Prepaid services and access to service facilities

57. (1) If, in terms of any agreement, a consumer agrees or is required to pay—
(a) a one-time or periodic membership fee or any similar charge; or
(b) any amount in respect of services or access to services to be provided at a date more than 25 business days after the payment is made, other than by way of a prepayment device contemplated in section 56, the amount so paid remains the property of the consumer until the supplier makes a charge against it in accordance with subsection (2).

(2) A supplier may make a charge against the consumer's money contemplated in subsection (1) once each month in advance for the pro-

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rata portion of the amount so held, as required to pay the ensuing month's cost of the membership or service.

(3) If a supplier intends to close a facility to which the supplier has committed to provide future access in terms of an agreement with a consumer to provide any service, without making available a reasonably accessible alternative facility, the supplier must—

(a) give written notice of that intention to such consumer at least 40 business days before the intended date of closure; and

(b) no later than five business days after closing that facility, refund to such consumer the balance of any money belonging to that consumer in terms of this section.

(4) Subsection (3)(b), read with the changes required by the context, applies equally in respect of any involuntary closing of a facility contemplated in this section.

Supplier to hold and account for consumer's property

58. (1) Subsection (2) does not apply to a supplier that is—

(a) a bank, as defined in the Banking Act;

(b) any other financial institution that is similarly licensed and authorized to conduct business and take deposits from the public in terms of any national legislation.

(2) When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the supplier—

(a) must not treat that property as being the property of the supplier;

(b) in the handling, safeguarding and utilization of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and

(c) is liable to the owner of the property for any loss resulting from a failure to comply with paragraph (a) or (b).

(3) A person who assumes control of a supplier's property as administrator, executor or liquidator of an estate—

(a) has a duty to the consumer—

(i) to diligently investigate the circumstances of the supplier's business to ascertain the existence of any money or other property belonging to the consumer and in the possession of the supplier; and

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- (ii) to ensure that any such money or property is dealt with for the consumer's benefit in accordance with this section; and
- (b) is liable to the consumer for any loss, unless that person has acted—
 - (i) in good faith; and
 - (ii) without knowledge of the existence of the consumer's interest.

Deposits in respect of containers, pallets or similar objects

59. (1) The Cabinet Secretary may, in consultation with the Cabinet Secretaries of Environment and Tourism, prescribe a minimum or maximum deposit that a supplier must or may require a consumer to pay in respect of the return of a bottle, container, pallet, reel or similar object used in respect of the packaging or delivery of any goods.

(2) If a person returns a bottle, container, pallet, reel or similar object contemplated in subsection (1) to any supplier of goods ordinarily sold in that bottle or container or on that pallet or in or on that reel or similar object, the supplier must pay that person the amount of the deposit—

- (a) if any, that is required to be charged in terms of any public regulation on the date on which the object is returned to the supplier; or
- (b) that the supplier charged for that object, or ordinarily charges for such an object, irrespective of whether the person returning the container paid a deposit for that object to that supplier.

Return of parts and materials

60. (1) When a supplier is authorized to perform any service to any goods or property belonging to or ordinarily under the control of the consumer, the supplier must—

- (a) retain any parts or components removed from any goods or property in the course of any repair or maintenance work;
- (b) keep those parts or components separate from parts removed from other goods or property; and
- (c) return those parts or components to the consumer in a reasonably clean container, unless the consumer declined the return of any such parts or materials.

(2) This section does not apply to any substance, parts or components that are required—

- (a) in terms of any warranty under which the work was carried out, to be returned to, or disposed of at the direction of, the producer or distributor;

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- (b) in terms of any insurance claim under which the work was carried out, to be returned to, or disposed of at the direction of, the insurer; or
- (c) in terms of any public regulation, to be recovered or disposed of in a safe manner in the interests of environmental safety or public health and safety.

PROTECTION OF CONSUMER RIGHTS AND CONSUMERS' VOICE

CONSUMER'S RIGHT TO BE HEARD AND OBTAIN REDRESS

Protection of consumer rights

61. (1) If a consumer has exercised, asserted or sought to uphold any right set out in this Act or in an agreement or transaction with a supplier, the supplier must not, in response—

- a) discriminate directly or indirectly against that consumer, compared to the supplier's treatment of any other consumer who has not exercised, asserted or sought to uphold such a right;
- b) penalise the consumer;
- c) alter, or propose to alter, the terms or conditions of a transaction or agreement with the consumer, to the detriment of the consumer; or
- d) take any action to accelerate, enforce, suspend or terminate an agreement with the consumer.

(2) If an agreement or any provision of an agreement is, in terms of this Act, declared to be void, or is severed from the agreement in terms of section 46(4), the supplier who is a party to that agreement must not, in response to that decision—

- a) directly or indirectly penalize another party to that agreement;
- b) alter the terms or conditions of any other transaction or agreement with another party to the impugned agreement, except to the extent necessary to correct a similarly unlawful provision; or
- c) take any action to accelerate, enforce, suspend or terminate another agreement with another party to the impugned agreement.

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Enforcement of rights by consumer

62. A person contemplated in section 5 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by—

- (i) referring the matter to a alternative dispute resolution agent contemplated in section 63; or
- (ii) filing a complaint with the Advisory Committee in accordance with section 71; or
- (iii) Approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.

Alternative dispute resolution

63. (1) A consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent who may be a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes

(2) If an alternative dispute resolution agent concludes that there is no reasonable probability of the parties resolving their dispute through the process provided for, the agent may terminate the process by notice to the parties.

(3) If an alternative dispute resolution agent has resolved, or assisted parties in resolving their dispute, the agent may—

- (a) record the resolution of that dispute in the form of an order, and
- (b) if the parties to the dispute consent to that order, submit it to the High Court to be made a consent order, in terms of its rules.

(4) With the consent of a complainant, a consent order confirmed in terms of subsection (3)(b) may include an award of damages to that complainant.

REDRESS BY COURT

Powers of court to enforce consumer rights

64. (1) In addition to any other order that it may make under this Act or any other law, a court considering a matter in terms of this Act may—

- a) order a supplier to alter or discontinue any conduct that is inconsistent with this Act;
- b) make any order specifically contemplated in this Act; and

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- c) award damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of this Act.

(2) This Act does not diminish any right of the consumer or the supplier—
(a) to recover interest or special damages in any case where by law interest or special damages may be recoverable; or
(b) to recover money paid if the consideration for the payment of it has failed.

CIVIL SOCIETY SUPPORT FOR CONSUMER’S RIGHTS

Support for consumer protection groups

65. The Advisory Committee may co-operate with, facilitate or otherwise support any of the following activities carried out by a consumer protection group:

- a) Consumer advice and education activities and consumer-related publications;
- b) research, market monitoring, surveillance and reporting;
- c) promotion of consumer rights and advocacy of consumer interests;
- d) representation of consumers, either specifically or generally, in court;
- e) alternative dispute resolution through mediation or conciliation; and
- b) Participation in national and international associations, conferences or forums concerned with consumer protection matters.

Accredited consumer protection group may initiate actions

66. (1) An accredited consumer protection group may—
(a) commence or undertake any act to protect the interests of a consumer individually, or of consumers collectively, in any matter or before any forum contemplated in this Act; and
(b) intervene in any matter before any forum contemplated in this Act, if the interests of consumers represented by that group are not otherwise adequately represented in that forum.

(2) In addition to any other authority set out in this Act, an accredited consumer protection group may direct a generally stated concern or

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complaint to the Advisory Committee in respect of any matter within the purposes of this Act.

(3) The Advisory Committee may accredit a consumer protection group if that person or association—

- a. functions predominantly to promote or represent the interests of all or a specific category of consumers generally;
 - b. is committed to achieving the purposes of this Act; and
- b) engages in, or makes a realistic proposal to engage in, actions to promote and advance the consumer interests of persons contemplated in section 4(1)(b).

(4) The Advisory Committee may impose reasonable conditions on the accreditation of a consumer protection group to further the purposes of this Act.

(5) The Advisory Committee —

- (a) must monitor the effectiveness of any accredited consumer protection group relative to the purposes and policies of this Act; and
- (b) may reasonably require any accredited consumer protection group to provide information necessary for the purposes of monitoring in terms of paragraph (a).

(6) The Cabinet Secretary may prescribe standards, procedures and related matters for the Advisory Committee to follow in assessing whether an applicant for accreditation meets the requirements of this section.

BUSINESS NAMES AND INDUSTRY CODES OF CONDUCT

BUSINESS NAMES

Identification of supplier

67. (1) A person must not carry on business, advertise, promote, offer to supply or supply any goods or services, or enter into a transaction or agreement with a consumer under any name except—

(a) the person's full name as—

- (i) recorded in an identity document or any other recognized identification document, in the case of an individual; or
- (ii) registered in terms of a public regulation, in the case of a juristic person; or

(b) a business name registered to, and for the use of, that person in terms of the Business Names Act, or any other public regulation.

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(2) A person doing anything contemplated in subsection (1) must include the following particulars on any trade catalogue, trade circular, business letter, order for goods, sales record or statement of account that the person issues:

- (a) The name, title or description under which the business is carried on;
- (b) a statement of the primary place at which, or from which, the business is carried on; and
- (c) if the activity is carried on under a business name, the name of the person to whom that business name is registered.

(3) If a person—

(a) does anything contemplated in subsection (1) under a name that is not that person's full name, or a business name registered to that person, the Advisory Committee may issue a compliance notice to that person, in terms of section 71, requiring the person—

(i) within a reasonable time, to—

(aa) apply for registration of the business name in terms of the Business Names Act; or

(bb) discontinue that conduct under that business name; and

(ii) if the application to register that business name is unsuccessful for any reason contemplated in this Part, to discontinue that conduct under that name within 40 business days after receiving notice of the failure of the application;

(b) fails to comply with any requirement of subsection (2), the Advisory Committee may issue a compliance notice to the person in terms of section 71; or

(c) does anything contemplated in subsection (1) under a business name that is registered to another person, that other person may apply to the court for an order contemplated in subsection (4).

(4) The court hearing an application contemplated in subsection (3)(c) may make an order directing a person to stop using a business name within a period, and on any terms, that the court considers just, equitable and expedient in the circumstances.

INDUSTRY CODES OF CONDUCT

Industry codes

68. (1) In this section—

(a) “**industry code**” means a code—

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- (i) regulating the interaction between or among persons conducting business within an industry; or
- (ii) regulating the interaction, or providing for alternative dispute resolution, between a person contemplated in subparagraph (i) and consumers; and

(b) “**proposal**” or “**proposed industry code**” includes any existing scheme that has been voluntarily established within an industry to regulate the conduct of persons conducting business within that industry.

(2) The Cabinet Secretary, by regulation, may—

- (a) prescribe an industry code on the recommendation of the Advisory Committee in terms of subsection (3); or
- (b) withdraw all or part of a previously prescribed industry code, on the recommendation of the Advisory Committee in terms of subsection (5).

(3) The Advisory Committee, acting on its own initiative, or in response to a proposal from persons conducting business within a particular industry, may recommend a proposed industry code to the Cabinet Secretary after—

- (a) publishing the proposed industry code for public comment;
- (b) considering any submissions made during the public comment period;
- (c) consulting with—

- (i) persons conducting business within the relevant industry; and
- (ii) relevant accredited consumer protection groups; and

- (d) making any revisions to the proposed industry code as published for comment.

(4) An industry code must be consistent with the purposes and policies of this Act.

(5) The Advisory Committee—

- (a) on the request of the Cabinet Secretary, must review the effectiveness of any industry code relative to the purposes and policies of this Act;
- (b) may otherwise conduct a review contemplated in paragraph (a) at intervals of at least five years; and
- (c) after conducting a review contemplated in this subsection, and taking the steps required by subsection (3), may make further

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recommendations to the Cabinet Secretary, including a recommendation to amend or withdraw all or part of a previously prescribed code.

(6) The Advisory Committee—

(a) must monitor the effectiveness of any industry code relative to the purposes and policies of this Act; and

(b) may reasonably require persons conducting business within the relevant industry to provide information necessary for the purposes of—

(i) monitoring in terms of paragraph (a); or

(ii) a review in terms of subsection (5).

(7) A supplier must not, in the ordinary course of business, contravene an applicable industry code.

Vicarious liability

69. (1) If an employee or agent of a person is liable in terms of this Act for anything done or omitted in the course of that person's employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person.

(2) This section does not apply in respect of criminal liability.

MISCELLANEOUS MATTERS

Interim relief

70. (1) A person who has applied for relief to a court, may apply to the court, subject to its rules, for an interim order in respect of that application, and the court may grant such an order if—

(a) there is evidence that the allegations may be true;

(b) an interim order is reasonably necessary to—

(i) prevent serious, irreparable damage to that person; or

(ii) to prevent the purposes of this Act being frustrated;

(c) the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and

(d) the balance of convenience favours the granting of the order.

(2) An interim order in terms of this section must not extend beyond the earlier of—

(a) the conclusion of a hearing into an application or a complaint; or

(b) the date that is six months after the date of issue of the interim order.

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(3) If an interim order has been granted, and a hearing into that matter has not been concluded within six months after the date of that order, the court, on good cause shown, may extend the interim order for a further period not exceeding six months.

Compliance notices

71. (1) Subject to subsection (2), the Advisory Committee may issue a compliance notice in the prescribed form to a person or association of persons whom the Advisory Committee on reasonable grounds believes has engaged in prohibited conduct.

(2) Before issuing a notice in terms of subsection (1) to a regulated entity, the Advisory Committee must consult with the regulatory authority that issued a licence to that regulated entity.

(3) A compliance notice contemplated in subsection (1) must set out—

- (a) the person or association to whom the notice applies;
- (b) the provision of this Act that has not been complied with;
- (c) details of the nature and extent of the non-compliance;
- (d) any steps that are required to be taken and the period within which those steps must be taken; and
- (e) any penalty that may be imposed in terms of this Act if those steps are not taken.

(4) A compliance notice issued in terms of this section remains in force until—

(a) it is set aside by the court; or

(b) the Advisory Committee issues a compliance certificate contemplated in subsection (5).

(5) If the requirements of a compliance notice issued in terms of subsection (1) have been satisfied, the Advisory Committee must issue a compliance certificate.

(6) If a person to whom a compliance notice has been issued fails to comply with the notice, the Advisory Committee may refer the matter to the Public prosecutor for prosecution as an offence in terms of section 73(2), but may not do both in respect of any particular compliance notice.

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Objection to notices

72. (1) Any person issued with a notice in terms of section 71 may apply to the Court in the prescribed manner and form to review that notice within—

(a) 15 business days after receiving that notice; or
(b) such longer period as may be allowed by the court on good cause shown.

(2) After considering any representations by the applicant and any other relevant information, the Court may confirm, modify or cancel all or part of a notice.

(3) If the Court confirms or modifies all or part of a notice, the applicant must comply with that notice as confirmed or modified, within the time period specified in it.

Offences relating to prohibited conduct

73. (1) It is an offence for any person to alter, obscure, falsify, remove or omit a displayed price, labelling or trade description without authority.

(2) It is an offence to fail to act in accordance with a compliance notice,

Penalties

74. (1) Any person convicted of an offence in terms of this Act is liable—

(a) in the case of a contravention of section 75 (1), to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or

(b) in any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

(2) Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in subsection (1).

Breach of confidence

75. (1) It is an offence to disclose any personal or confidential information concerning the affairs of any person obtained—

(a) in carrying out any function in terms of this Act; or

(b) as a result of initiating a complaint or participating in any proceedings in terms of this Act.

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- (2) Subsection (1) does not apply to information disclosed—
- (a) for the purpose of the proper administration or enforcement of this Act;
 - (b) for the purpose of the administration of justice; or
 - (c) at the request of an inspector or regulatory authority entitled to receive the information.

Class proceedings.

4. (1) A consumer may commence a proceeding on behalf of a class of persons or may become a member of such class of persons in a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or other agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

(2) When a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.

(3) A settlement or decision that results from the procedure agreed to under subsection (2) shall be binding on the parties.

Quality of goods and services.

5. (1) The supplier is deemed to warrant that the goods or services supplied under a consumer agreement are of a reasonably merchantable quality.

(2) The implied conditions and warranties applying to the sale of goods under the laws relating to the Sale of Goods shall apply with necessary modifications to goods that are leased, traded or otherwise supplied under a consumer agreement.

(3) Any provision, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the laws relating to the Sale of Goods or any condition or warranty under this Act is void.

(4) If a term or acknowledgement referenced in subsection (3) is a term of the agreement, it is severable from the agreement and shall not be evidence of circumstances showing intent that the deemed or implied warranty or condition does not apply.

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Estimates.

6. (1) If a consumer agreement includes an estimate, the supplier shall not charge the consumer an amount that exceeds the estimate by more than ten per cent of the total value of the estimate.

(2) If a supplier charges an amount that exceeds the estimate by more than ten per cent, the consumer may require that the supplier provide the goods or services at the estimated price.

(3) Nothing in this section prevents a consumer and a supplier from agreeing to amend the estimate or price in a consumer agreement, if the consumer requires additional or different goods or services.

Ambiguities.

7. Any ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer or of any information that must be disclosed under this Act shall be interpreted to the benefit of the consumer.

Charging consumers for assistance.

8. No person shall charge a consumer for assisting the consumer to obtain any benefit, right or protection to which the consumer is entitled under this Act, unless, before the consumer agrees to pay the charge, the person discloses the entitlement's existence and direct availability to the consumer and the cost, if any, the consumer would be required to pay for the entitlement if the consumer obtained the entitlement directly.

Unsolicited goods and services.

9. (1) Except as provided in this section, a recipient of unsolicited goods or services has no legal obligation in respect of their use or disposal.

(2) No supplier shall demand payment or make any representation that suggests that a consumer is required to make payment in respect of any unsolicited goods or services despite their use, receipt, misuse, loss, damage or theft unless, if at the time of consumption the consumer reasonably believed that the goods or services were meant for his consumption.

(3) A request for goods or services shall not be inferred solely on the basis of payment, inaction or the passing of time.

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(4) If a consumer is receiving goods or services on an ongoing or periodic basis and there is a material change in such goods or services, the goods or services shall be deemed to be unsolicited from the time of the material change forward unless the supplier is able to establish that the consumer consented to the material change.

(5) A supplier may rely on a consumer's consent to a material change that is made orally, in writing or by other affirmative action but the supplier shall bear the onus of proving the consumer's consent.

(6) If a supplier has received a payment in respect of unsolicited goods or services, the consumer who made the payment may demand a refund of the payment in accordance with section 80 within one year after having made the payment.

(7) A supplier who receives a demand for a refund under subsection (6) shall refund the payment within the prescribed period of time.

(8) In this section, "unsolicited goods or services" means goods that are supplied to a consumer who did not request them but does not include—

- (a) goods that the recipient knows or ought to know are intended for another person;
- (b) a change to periodically supplied goods, if the change in goods is not a material change; or
- (c) goods supplied under a written future performance agreement that provides for the periodic supply of goods to the recipient without further solicitation, or
- (d) services that are supplied to a consumer who did not request them but does not include—
 - (i) services that were intended for another person from the time the recipient knew or ought to have known that they were so intended;
 - (ii) a change to ongoing or periodic services that are being supplied, if the change in the services is not a material change; or
 - (iii) services supplied under a written future performance agreement that provides for the ongoing or periodic supply of services to the recipient without further solicitation.

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Consumer may commence action.

10. A consumer who made payment under section 9(6) may commence action to recover the payment in accordance with section 84.

Advertising of illegal sites.

11. (1) No person shall advertise an internet gaming site that is operated contrary to any written law.

(2) No person, other than an internet service provider, shall arrange for or otherwise facilitate advertising prohibited under subsection (1) on behalf of another person.

(3) For the purpose of subsection (1), a person advertises an internet gaming site only if the advertising originates in Kenya or is primarily intended for Kenya residents.

(4) For the purpose of subsection (1), “advertise” includes—

(a) providing, by print, publication, broadcast, telecommunication or distribution by any means, information for the purpose of promoting the use of an internet gaming site;

(b) providing a link in a website for the purpose of promoting the use of an internet gaming site, but does not include a link generated as the result of a search carried out by means of an internet search engine; and

(c) entering into a sponsorship relationship for the purpose of promoting the use of an internet gaming site.

(5) This section applies despite section 3 (1).

PART III—UNFAIR PRACTICES

False representation.

12. (1) It is an unfair practice for a person to make a false, misleading or deceptive representation.

(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations—

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- (a) a representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have;
- (b) a representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection the person does not have;
- (c) a representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not;
- (d) a representation that the goods are new, or unused, if they are not or are reconditioned or reclaimed, but the reasonable use of goods to enable the person to service, prepare, test and deliver the goods does not result in the goods being deemed to be used for the purposes of this paragraph;
- (e) a representation that the goods have been used to an extent that is materially different from the fact;
- (f) a representation that the goods or services are available for a reason that does not exist;
- (g) a representation that the goods or services have been supplied in accordance with a previous representation, if they have not;
- (h) a representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed;
- (i) a representation that the goods or services or any part of them will be available or can be delivered or performed by a specified time when the person making the representation knows or ought to know they will not be available or cannot be delivered or performed by the specified time;
- (j) a representation that a service, part, replacement or repair is needed or advisable, if it is not;
- (k) a representation that a specific price advantage exists, if it does not;

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(l) a representation that misrepresents the authority of a salesperson, representative, employee or agent to negotiate the final terms of the agreement;

(m) a representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive;

(n) a representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive;

(o) a representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer;

(p) a representation that misrepresents the purpose of any charge or proposed charge;

(q) a representation that misrepresents or exaggerates the benefits that are likely to flow to a consumer if the consumer helps a person obtain new or potential customers;

(r) unconscionable representation;

Unconscionable representation.

13. (1) It is an unfair practice to make an unconscionable representation.

(2) Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know—

(a) that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors;

(b) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers;

(c) that the consumer is unable to receive a substantial benefit from the subject-matter of the representation;

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(d) that there is no reasonable probability of payment of the obligation in full by the consumer;

(e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;

(f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;

(g) that a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment; or

(h) that the consumer is being subjected to undue pressure to enter into a consumer transaction.

Renegotiation of price.

14. It is an unfair practice for a person to use his, her or its custody or control of a consumer's goods to pressure the consumer into renegotiating the terms of a consumer transaction.

Prohibition of unfair practices.

15. (1) No person shall engage in an unfair practice.

(2) A person who performs an act referred to in sections 12, 13 and 14 shall be deemed to be engaging in an unfair practice.

(3) It is not an unfair practice for a person, on behalf of another person, to print, publish, distribute, broadcast or telecast a representation that the person accepted in good faith for printing, publishing, distributing, broadcasting or telecasting in the ordinary course of business.

Rescinding agreement.

16.(1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.

(2) A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible—

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(a) because the return or restitution of the goods or services is no longer possible; or

(b) because rescission would deprive a third party of a right in the subject-matter of the agreement that the third party has acquired in good faith and for value;

(3) The consumer may express notice in any way as long as it indicates the intention of the consumer to rescind the agreement or to seek recovery where rescission is not possible and the reasons for so doing and the notice meets any requirements that may be prescribed.

(4) Notice may be delivered in the manner used when entering into the contract.

(5) If notice is delivered other than by personal service, the notice shall be deemed to have been given when sent.

(6) The consumer may send or deliver the notice to the person with whom the consumer contracted at the address set out in the agreement or, if the consumer did not receive a written copy of the agreement or the address of the person was not set out in the agreement, the consumer may send or deliver the notice—

(a) to any address of the person on record with the consumer; or

(b) to an address of the person known by the consumer.

(7) If a consumer has delivered notice and has not received a satisfactory response within the prescribed period, the consumer may commence an action.

(8) In the trial of an issue under this section, oral evidence respecting an unfair practice is admissible despite the existence of a written agreement and despite the fact that the evidence pertains to a representation in respect of a term, condition or undertaking that is or is not provided for in the agreement.

(9) A court may award exemplary or punitive damages in addition to any other remedy in an action commenced under this section.

(10) Each person who engaged in an unfair practice is liable jointly and severally with the person who entered into the agreement with the

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consumer for any amount to which the consumer is entitled under this section.

(11) If an agreement to which subsection (1) or (2) applies has been assigned or if any right to payment under such an agreement has been assigned, the liability of the person to whom it has been assigned is limited to the amount paid to that person by the consumer.

(12) When a consumer rescinds an agreement under subsection (1), such rescission operates to cancel, as if they never existed—

(a) the agreement;

(b) all related agreements;

(c) all guarantees given in respect of money payable under the agreement;

(d) all security given by the consumer or a guarantor in respect of money payable under the agreement; and

(e) all credit agreements, as defined in Part VII, and other payment instruments, including promissory notes—

(i) extended, arranged or facilitated by the person with whom the consumer reached the agreement; or

(ii) otherwise related to the agreement.

(13) If a consumer is required to give notice under this Part in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so.

PART IV—RIGHTS AND OBLIGATIONS RESPECTING SPECIFIC CONSUMER AGREEMENTS

Application of Part.

17.(1) Despite sections 78 and 79, in the prescribed circumstances, the effect of cancellation of a consumer agreement to which this Part applies by a consumer and the obligations arising as a result of the cancellation of the agreement may be subject to such limitations as may be prescribed.

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(2) Sections 18 to 21—

(a) apply to future performance agreements if the consumer's total potential payment obligation under the agreement, excluding the cost of borrowing, exceeds a prescribed amount;

(b) do not apply to agreements that are future performance agreements solely because of an open credit arrangement.

(3) Sections 24 to 29—

(a) apply in respect of personal development services or proposed personal development services for which—

(i) payment in advance is required; and

(ii) the consumer's total potential payment obligation, excluding cost of borrowing, exceeds a prescribed amount.

(b) do not apply to personal development services that are provided—

(i) on a non-profit or co-operative basis;

(ii) by a private club primarily owned by its members;

(iii) as an incidental part of the goods or services that are being supplied to the consumer; or

(iv) by a golf club.

(4) Sections 31 to 33 apply to an internet agreement if the consumer's total potential payment obligation under the agreement, excluding the cost of borrowing, exceeds a prescribed amount.

(7) Sections 34 and 35 apply to direct agreements if the consumer's total potential payment obligations under the agreement, excluding the cost of borrowing, exceeds such amount as may be prescribed.

(8) Sections 36 to 38 apply to remote agreements if the consumer's total potential payment obligation under the agreement, excluding the cost of borrowing, exceeds such amount as may be prescribed.

Requirement for future performance agreements.

18. Every future performance agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

Cancelling future performance agreements.

19. A consumer may cancel a future performance agreement within one year after the date of entering into the agreement if the consumer does not receive a copy of the agreement that meets the requirements under section 18.

Repossession after payment of two-thirds.

20. (1) Where a consumer under a future performance agreement has paid two-thirds or more of his or her payment obligation as fixed by the agreement, any provision in the agreement, or in any security agreement incidental to the agreement, under which the supplier may retake possession of or resell the goods or services upon default in payment by the consumer is not enforceable except by leave obtained from the High Court.

(2) Upon an application for leave under subsection (1), the court may, in its discretion, grant leave to the supplier or refuse leave or grant leave upon such terms and conditions as the court considers advisable.

Late delivery.

21. (1) A consumer may cancel a future performance agreement at any time before delivery under the agreement or the commencement of performance under the agreement if the supplier—

(a) does not make delivery within thirty days after the delivery date specified in the agreement or an amended delivery date agreed to by the consumer in writing; or

(b) does not begin performance of his, her or its obligations within thirty days after the commencement date specified in the agreement or an amended commencement date agreed to by the consumer in writing.

(2) If the delivery date or commencement date is not specified in the future performance agreement, a consumer may cancel the agreement at any time before delivery or commencement if the supplier does not deliver or commence performance within thirty days after the date the agreement is entered into.

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(3) If, after the period in subsection (1) or (2) has expired, the consumer agrees to accept delivery or authorize commencement, the consumer may not cancel the agreement under this section.

(4) For the purposes of subsections (1) and (2), a supplier is considered to have delivered or commenced performance under a future performance agreement if,

(a) delivery was attempted but was refused by the consumer at the time that delivery was attempted or delivery was attempted but not made because no person was available to accept delivery for the consumer on the day for which reasonable notice was given to the consumer that there was to be delivery; or

(b) commencement was attempted but was refused by the consumer at the time that commencement was attempted or commencement was attempted but did not occur because no person was available to enable commencement on the day for which reasonable notice was given to the consumer that commencement was to occur.

Requirements for time share agreements.

22. Every time share agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

Cancellation of time share agreements.

23. (1) A consumer may, without any reason, cancel a time share agreement at any time from the date of entering into the agreement until ten days after receiving the written copy of the agreement.

(2) In addition to the right under subsection (1), a consumer may cancel a time share agreement within one year after the date of entering into the agreement if the consumer does not receive a copy of the agreement that meets the requirements under section 22.

Requirements for personal development services agreements.

24. (1) Every personal development services agreement shall be—

(a) in writing;

(b) delivered to the consumer ;

(c) made in accordance with the prescribed requirements.

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(2) No supplier shall require or accept payment for personal development services from a consumer with whom the supplier does not have an agreement that meets the requirements established under subsection (1).

An agreement is for one year.

25.(1) No personal development services agreement may be made for a term longer than one year after the day that all the services are made available to the consumer

(2) Any personal development services agreement that provides for a renewal or an extension of the agreement beyond one year shall be deemed to create a separate agreement for each renewal or extension of one year or less.

(3) A personal development services agreement that provides for the renewal or extension of the agreement is not valid unless the supplier complies with the prescribed requirements.

(4) A personal development services agreement that provides for a renewal or extension of the agreement shall be deemed not to be renewed or extended if the consumer notifies the supplier, before the time for renewal or extension that the consumer does not want to renew or extend.

(5) Subsections (2) and (3) do not apply to an agreement providing for successive monthly renewals if the consumer has the option of terminating on one month's notice or less.

Only one agreement.

26. (1) No supplier shall enter into a new agreement for personal development services with a consumer with whom the supplier has an existing agreement for personal development services unless the new agreement is for personal development services that are distinctly different from the services provided under the existing agreement.

(2) Any new agreement entered into in contravention of subsection (1) is void.

(3) For the purposes of subsection (1), a different term or a different commencement date does not constitute a distinct difference in the personal development services to be provided.

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(4) Nothing in this section prevents a personal development services agreement from being renewed during the term of the agreement provided that the renewal meets the requirements under section 24.

Initiation fee.

27. No supplier of personal development services shall—

(a) charge a consumer more than one initiation fee; or

(b) charge an initiation fee that is greater than twice the annual membership fee.

Installment plans.

28. (1) Every supplier of personal development services shall make available to consumers at least one plan for installment payments of membership fees and initiation fees, if applicable, that allow consumers to make equal monthly payments over the term of the personal development services agreement.

(2) No supplier shall provide an installment payment plan through which the total amount paid by installments exceeds the membership or initiation fee, if applicable, by more than twenty-five per cent.

Cancellation: cooling-off period.

29. (1) To the extent that this section applies to a transaction or agreement, it is in addition to and not in substitution for any right to rescind a transaction or agreement that may otherwise exist in law between a supplier and a consumer.

(2) A consumer may rescind a transaction resulting from any direct marketing without reason or penalty, by notice to the supplier in writing, or another recorded manner and form, within five business days after the later of the date on which—

(a) the transaction or agreement was concluded; or

(b) the goods that were the subject of the transaction were delivered to the consumer.

(3) A supplier must—

(a) return any payment received from the consumer in terms of the transaction within 15 business days after—

(i) receiving notice of the rescission, if no goods had been delivered to the consumer in terms of the transaction; or

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(ii) receiving from the consumer any goods supplied in terms of the transaction; and

(b) not attempt to collect any payment in terms of a rescinded transaction, except as permitted in terms of **section 20(6)**.

(4) A consumer may, without any reason, cancel a personal development services agreement at any time within ten days after the later of receiving the written copy of the agreement and the day all the services are available.

(5) In addition to the right under subsection (1), a consumer may cancel a personal development services agreement within one year after the date of entering into the agreement if the consumer does not receive a copy of the agreement that meets the requirements under section 24.

Trustee for payment for unavailable services.

30.(1) No supplier shall receive payment from a consumer for personal development services that are not available at the time the payment is made.

(2) Subsection (1) does not apply when one of the services that is not available is the use of a facility and the consumer has agreed in writing to use another facility provided by the supplier until the facility contracted for is available.

(3) If a facility is not available for use on the day specified in the agreement, the trustee shall refund all payment received from the consumer unless the consumer agrees in writing to permit the trustee to retain the payment.

(4) No permission given under subsection (3) applies for longer than ninety days but a subsequent permission may be given on the expiration of permission.

(5) Where a supplier has a trustee under subsection (1)–

(a) any notice to the trustee shall be deemed to be notice to the supplier; and

(b) any money payable by the supplier is payable by the trustee to the extent that the trustee holds sufficient trust funds for that purpose.

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(6) Every trustee under subsection (1) shall, upon receiving any payment from a consumer, provide the consumer with written confirmation of receipt of the payment and of the fact that the payment will be dealt with in accordance with sections 24 to 29 and with this section.

(7) No trustee shall release to a supplier funds received from a consumer until the personal development services are available.

(8) The trustee shall release the funds held under this section to the consumer if the consumer cancels the personal development services agreement in accordance with this Act.

Disclosure of information on internet agreement.

31. (1) Before a consumer enters into an internet agreement, the supplier shall disclose the prescribed information to the consumer.

(2) The supplier shall provide the consumer with an express opportunity to accept or decline the agreement and to correct errors immediately before entering into it.

(3) In addition to the requirements set out in section 5, disclosure under this section shall be accessible and shall be available in a manner that ensures that.

(a) the consumer has accessed the information; and

(b) the consumer is able to retain and print the information.

Copy of internet agreement.

32. (1) A supplier shall deliver to a consumer who enters into an internet agreement a copy of the agreement in writing within the prescribed period after the consumer enters into the agreement.

(2) The copy of the internet agreement shall include such information as may be prescribed.

(3) For the purposes of subsection (1), a supplier is considered to have delivered a copy of the internet agreement to the consumer if the copy is delivered in the prescribed manner.

Cancellation of internet agreement.

33. (1) A consumer may cancel an internet agreement at any time from the date the agreement is entered into until seven days after the consumer receives a copy of the agreement if-

- (a) the supplier did not disclose to the consumer the information required under section 38 (1); or
- (b) the supplier did not provide to the consumer an express opportunity to accept or decline the agreement or to correct errors immediately before entering into it.

(2) A consumer may cancel an internet agreement within thirty days after the date the agreement is entered into, if the supplier does not comply with a requirement under section 43.

Requirements for direct agreements.

34. Every direct agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

Cancellation of direct agreements.

35. (1) A consumer may, without any reason, cancel a direct agreement at any time from the date of entering into the agreement.

(2) In addition to the right under subsection (1), a consumer may cancel a direct agreement within one year after the date of entering into the agreement if the consumer does not receive a copy of the agreement that meets the requirements under section 34.

Disclosure of information on remote agreements.

36. Before a consumer enters into a remote agreement, the supplier shall disclose the prescribed information to the consumer and shall satisfy the prescribed requirements.

Copy of remote agreement.

37. (1) A supplier shall deliver to a consumer who enters into a remote agreement a copy of the agreement in writing within the prescribed period after the consumer enters into the agreement.

(2) The copy of the remote agreement shall include such information as may be prescribed.

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(3) For the purposes of subsection (1), a supplier is considered to have delivered a copy of the remote agreement to the consumer if the copy is delivered in the prescribed manner.

Cancellation of remote agreement.

38. (1) A consumer may cancel a remote agreement at any time from the date the agreement is entered into until seven days after the consumer receives a copy of the agreement if the supplier fails to comply with section 36.

(2) A consumer may cancel a remote agreement within one year after the date the agreement is entered into, if the supplier does not comply with a requirement under section 37.

PART V—SECTORS WHERE ADVANCE FEE PROHIBITED

Requirements for consumer agreements on loan brokering etc.

39. Every consumer agreement for loan brokering, credit repair or for the supply of such other goods or services as may be prescribed shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

Advance payments prohibited.

40. (1) No operator shall require or accept any payment or any security for a payment, directly or indirectly, from or on behalf of a consumer unless and until—

- (a) in respect of loan brokering, the consumer receives the credit or loan of money that the loan broker has assisted the consumer to obtain;
- (b) in respect of credit repair, the credit repairer causes a material improvement to the consumer report, credit information, file, personal information, credit record, credit history or credit rating of the consumer; or
- (c) in respect of the supply of such other goods or services as may be prescribed, the prescribed requirements are met.

(2) Every arrangement by which an operator takes security in contravention of subsection (1) is void.

Cancellation of consumer agreement on loan brokering etc

41. (1) A consumer who is a party to an agreement for loan brokering, credit repair or the supply of such goods and services as may be prescribed may, without any reason, cancel the agreement at any time from the date of entering into the agreement until ten days after receiving the written copy of the agreement.

(2) In addition to the right under subsection (1), a consumer who is a party to an agreement for loan brokering, credit repair or the supply of such goods and services as may be prescribed may cancel the agreement within one year after the date of entering into it if the consumer does not receive a copy of the agreement that meets the requirements under section 65.

Officers and Director.

42. The officers and directors of an operator are jointly and severally liable for any remedy in respect of which a person is entitled to commence a proceeding against the operator.

Prohibited representations.

43. An operator shall not communicate or cause to be communicated any representation that is prescribed as a prohibited representation.

PART VI—REPAIRS TO MOTOR VEHICLES AND OTHER GOODS

Return of Parts and Materials

48. (1) When a supplier is authorised to perform any service to any goods or property belonging to or ordinarily under the control of the consumer, the supplier shall—

- (a) retain any parts or components removed from any goods or property in the course of any repair or maintenance work;
- (b) keep those parts or components separate from parts removed from other goods or property; and
- (c) return those parts or components to the consumer in a reasonably clean container, unless the consumer declined the return of any such parts or materials.

(2) This section does not apply to any substance, parts or components that are required—

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(a) in terms of any warranty under which the work was carried out, to be returned to, or disposed of at the direction of, the producer or distributor;

(b) in terms of any insurance claim under which the work was carried out, to be returned to, or disposed of at the direction of, the insurer; or

(c) in terms of any public regulation, to be recovered or disposed of in a safe manner in the interests of environmental safety or public health and safety.

Warranty on repaired goods

49 (1) A service provider shall warrant every new or reconditioned part installed during any repair or maintenance work, and the labour required to install it, for a period of three months after the date of installation or such longer period as the supplier may specify in writing.

(2) A warranty in terms of this section—

(a) is concurrent with any other deemed, implied or express warranty;

(b) is void if the consumer has subjected the part, or the goods or property in which it was installed, to misuse or abuse; and

(c) does not apply to ordinary wear and tear, having regard to the circumstances in which the goods are intended to ordinarily be used.

44. (1) No repairer shall charge a consumer for any work or repairs unless the repairer first gives the consumer an estimate that meets the prescribed requirements.

(2) Despite subsection (1), a repairer may charge for work or repairs without giving an estimate if—

(a) the repairer offers to give the consumer an estimate and the consumer declines the offer of an estimate;

(b) the consumer specifically authorizes the maximum amount that he or she will pay the repairer to make the repairs or do the work; and

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(c) the cost charged for the work or repairs does not exceed the maximum amount authorized by the consumer.

Estimate fee.

45. (1) Subject to subsection (3), no repairer shall charge a fee for an estimate unless the consumer is told in advance that a fee will be charged and the amount of the fee.

(2) A fee for an estimate shall be deemed to include the cost of diagnostic time, the cost of reassembling the goods and the cost of parts that will be damaged and must be replaced when reassembling if the work or repairs are not authorized by the consumer.

(3) A repairer shall not charge a fee for an estimate if the work or repairs in question are authorized and carried out.

(4) Despite subsection (3), a repairer may charge a fee for an estimate if the repairer is unable to obtain, without unreasonable delay, authorization to proceed with the work or repairs and the goods are reassembled before being worked on or repaired so that the goods can be moved in order to free repair space.

Authorization required.

46. (1) No repairer shall charge for any work or repairs unless the consumer authorizes the work or repairs.

(2) No repairer shall charge, for work or repairs for which an estimate was given, an amount that exceeds the estimate by more than ten per cent.

Authorization not in writing.

47. If an authorization required by section 44, 45 or 46 is not given in writing, the authorization is not effective unless it is recorded in a manner that meets the prescribed requirements.

Posting signs.

48. A repairer shall post the prescribed signs in accordance with the prescribed requirements.

Return of parts.

49 (1) Every repairer shall offer to return to the consumer all parts removed in the course of work or repairs and shall return all such parts unless advised when the work or repairs are authorized that the consumer does not require their return.

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(2) Every repairer shall keep parts removed from goods being repaired separate from the parts removed from any other goods and, if their return is requested by the consumer, shall return the parts in a clean container.

(3) Subsections (1) and (2) do not apply to—

(a) parts for which there has been no charge for the part or for work on or repair to the part; or

(b) parts replaced under warranty whose return to the manufacturer or distributor is required.

Invoice.

50. The repairer shall, on completion of work or repairs, deliver to the consumer an invoice containing the prescribed information in the prescribed manner.

Warranty for vehicles.

51. (1) On the repair of a vehicle, every repairer shall be deemed to warrant all new or reconditioned parts installed and the labour required to install them for a minimum of ninety days or five thousand kilometres, whichever comes first, or for such greater minimum as may be prescribed.

(2) The warranty in subsection (1) is in addition to the deemed and implied conditions and warranties set out in section 5.

(3) The person having charge of a vehicle that becomes inoperable or unsafe to drive because of the failure or inadequacy of work or repairs to which a warranty under this section applies may, when it is not reasonable to return the vehicle to the original repairer, have the failure or inadequacy repaired at the closest facility available for the work or repairs.

(4) When work or repairs are made under subsection (3), the person entitled to a warranty under this section is entitled to recover from the original repairer the original cost of the work or repairs and reasonable towing charges.

(5) A consumer who subjects any vehicle part to misuse or abuse is not entitled to the benefit of the warranty on that part.

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(6) No repairer shall refuse to reimburse a consumer because of the operation of subsection (5) unless the repairer has reasonable grounds to believe that the part under warranty was subjected to misuse or abuse.

(7) A consumer who is seeking reimbursement under this section shall return, upon the request and at the expense of the original repairer, the defective parts to the original repairer unless, in the circumstances, it is not reasonably possible for the consumer to do so.

(8) An original repairer who is required to make a payment under this section is entitled to recover from the supplier of a defective part any amount paid to the consumer under subsection (4).

Consistent cost.

52. No repairer shall give an estimate or charge an amount for work or repairs that is greater than that usually given or charged by that repairer for the same work or repairs merely because the cost is to be paid, directly or indirectly, by an insurance company.

PART VII—CREDIT AGREEMENTS

Application of Part.

53. (1) This Part does not apply to a supplier credit agreement that—

- (a) requires the borrower to make payment in full in a single payment within a certain period after the supplier delivers a written invoice or statement of account to the borrower;
- (b) is unconditionally interest-free during the period for payment described in clause (a);
- (c) does not provide for any non-interest charges;
- (d) is unsecured apart from liens on the goods or services supplied through the agreement that may arise by operation of law; and
- (e) the supplier cannot assign in the ordinary course of business other than as security.

(2) If a loan broker assists a consumer to obtain credit or a loan of money and the creditor is not in the business of extending credit or lending money, the obligations that this Part would impose on a lender shall be deemed to be obligations of the loan broker and not the creditor, except as prescribed.

Agreement for credit card.

54. (1) Notwithstanding any other provision of this Act, a consumer who applies for a credit card without signing an application form or who receives a credit card from a credit card issuer without applying for it shall be deemed to have entered into a credit agreement with the issuer with respect to the card on first using the card.

(2) A consumer described in subsection (1) is not liable to pay the lender any amount in respect of the credit card received in the circumstances described in that subsection until the consumer uses the card.

Limiting liability for unauthorized charges.

55. A borrower is not liable for any amount that is greater than the prescribed maximum for unauthorized charges under a credit agreement for open credit.

Consequence of non-disclosure.

56. A borrower under a credit agreement is not liable to pay the lender,

(a) the cost of borrowing under a credit agreement if the borrower receives no statements required by this Part; or

(b) as part of the cost of borrowing, any amount in excess of the amounts specified in the statements that this Part requires to be delivered to the borrower in respect of the agreement.

Correcting errors.

57. If there is an error in a statement of account issued under a credit agreement for open credit, the lender shall correct the error in accordance with the prescribed requirements.

Required insurance.

58 (1) A borrower who is required under a credit agreement to purchase insurance may purchase it from any insurer who may lawfully provide that type of insurance, except that the lender may reserve the right to disapprove, on reasonable grounds, an insurer selected by the borrower.

(2) A lender who offers to provide or to arrange insurance required under a credit agreement shall at the same time disclose to the borrower in writing that the borrower may purchase the insurance through an agent or an insurer of the borrower's choice.

Termination of optional services.

59 (1) A borrower may terminate an optional service of a continuing nature provided by the lender or an associate of the lender on giving thirty days notice or such shorter period of notice as is specified in the agreement under which the service is provided.

(2) A borrower who terminates an optional service in accordance with subsection (1) is not liable for charges relating to any portion of the service that has not been provided at the time of termination and is entitled to a refund of amounts already paid for those charges.

(3) Notice under subsection (1) may be given in any way as long as it indicates the intention of the borrower to terminate the optional service and section 76 applies, with necessary modification, to such notice.

Deferral of payments.

60. (1) If the lender under a credit agreement invites the borrower to defer making a payment that would otherwise be due under the agreement, the invitation must disclose whether or not interest will accrue on the unpaid amount during the period of the deferral and, if interest will accrue, the invitation must also disclose the interest rate.

(2) If the lender does not comply with subsection (1), the lender shall be deemed to have waived the interest that would otherwise accrue during the period.

Default charges.

61. (1) A lender is not entitled to impose on a borrower under a credit agreement default charges other than—

(a) reasonable charges in respect of legal costs that the lender incurs in collecting or attempting to collect a required payment by the borrower under the agreement;

(b) reasonable charges in respect of costs, including legal costs, that the lender incurs in realizing a security interest or protecting the subject-matter of a security interest after default under the agreement; or

(c) reasonable charges reflecting the costs that the lender incurs because a cheque or other instrument of payment given by the borrower under the agreement has been dishonored.

Prepayment.

62. (1) A borrower is entitled to pay the full outstanding balance under a credit agreement at any time without any prepayment charge or penalty.

(2) If a borrower prepays the full outstanding balance under a credit agreement for fixed credit, the lender shall refund to the borrower or credit the borrower with the portion, determined in the prescribed manner, of the amounts that were paid by the borrower under the agreement or added to the balance under the agreement and that form part of the cost of borrowing, other than amounts paid on account of interest.

(3) A borrower is entitled to prepay a portion of the outstanding balance under a credit agreement for fixed credit on any scheduled date of the borrower's required payments under the agreement or once in any month without any prepayment charge or penalty.

(4) A borrower who makes a payment under subsection (3) is not entitled to the refund or credit described in subsection (2).

Disclosure representation.

63. No lender shall make representations or cause representations to be made with respect to a credit agreement, whether orally, in writing or in any other form, unless the representations comply with the prescribed requirements.

Disclosure of brokerage fee.

64. (1) If the borrower pays or is liable to pay a brokerage fee to a loan broker, either directly or through a deduction from an advance, the initial disclosure statement for the credit agreement must disclose the amount of brokerage fee.

(3) If a loan broker has delivered an initial disclosure statement to the borrower, the lender may adopt it as his, her or its own initial disclosure statement or may elect to deliver a separate initial disclosure statement to the borrower.

Initial disclosure statement.

65. (1) Every lender shall deliver an initial disclosure statement for a credit agreement to the borrower at or before the time that the borrower enters into the agreement, unless the lender has adopted the loan broker's initial disclosure statement as his, her or its own.

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(2) The initial disclosure statement for a credit agreement for fixed credit shall disclose the prescribed information.

(3) The initial disclosure statement for a credit agreement for open credit shall disclose the prescribed information.

(4) If a loan broker assists in arranging a credit agreement, the initial disclosure statement shall disclose the prescribed information.

Subsequent disclosure on fixed credit.

66. (1) If the interest rate in a credit agreement for fixed credit is a floating rate, the lender shall, at least once every twelve months after entering into the agreement, deliver to the borrower a disclosure statement for the period covered by the statement disclosing the prescribed information.

(2) If the interest rate in a credit agreement for fixed credit is not a floating rate and the agreement allows the lender to change the interest rate, the lender shall, within thirty days after increasing the annual interest rate to a rate that is at least 1 per cent higher than the rate most recently disclosed to the borrower, deliver to the borrower a disclosure statement disclosing the prescribed information.

(3) The lender shall deliver to the borrower notice if the amount of the borrower's scheduled payments required by a credit agreement for fixed credit is no longer sufficient to cover the interest accrued under the agreement because the principal set out in the agreement has increased as a result of default charges or the failure of the borrower to make payments under the agreement.

(4) The notice under subsection (3) shall be in writing, shall disclose the situation and shall be delivered within thirty days after the point when the amount of the scheduled payments is no longer sufficient to cover the accrued interest.

(5) Subject to subsection (6), if the parties have agreed to amend a credit agreement for fixed credit and the amendment changes any of the information prescribed under subsection (2), the lender shall, within thirty days after the amendment is made, deliver to the borrower a supplementary disclosure statement setting out the changed information.

(6) If an amendment to a credit agreement consists only of a change in the schedule of required payments by the borrower, it is not necessary for

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the supplementary disclosure statement to disclose any change to the annual percentage rate or any decrease in the total required payments by the borrower or the total cost of borrowing under the agreement.

Subsequent disclosure on open credit.

67. (1) Subject to subsection (2), the lender under a credit agreement for open credit shall deliver a statement of account to the borrower at least once monthly after entering into the agreement.

(2) The lender is not required to deliver a statement of account to the borrower at the end of any period when, since the most recent statement of account, the borrower has received no advances and made no payments under the agreement and—

(a) at the end of the period the outstanding balance payable by the borrower under the agreement is zero; or

(b) the borrower is in default and has been notified that the lender has cancelled or suspended his or her right to obtain advances under the agreement and has demanded payment of the outstanding balance.

(3) The lender shall provide to the borrower a telephone number at which the borrower can make inquiries about the borrower's account during the lender's ordinary business hours without incurring any charges for the telephone call.

(4) A statement of account for a credit agreement for open credit shall disclose the prescribed information.

(5) A lender under a credit agreement for open credit who, pursuant to the agreement, changes the interest rate under the agreement shall deliver a disclosure statement to the borrower disclosing the change,

(a) in the next statement of account after the change, in the case of a credit agreement that is not for a credit card; and

(b) at least thirty days before the change, in the case of a credit agreement that is for a credit card where the interest rate is not a floating rate.

(6) Subject to subsection (7), if the parties have agreed to amend a credit agreement for open credit and the amendment changes any of the

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information prescribed under subsection (4), the lender shall, within thirty days after the amendment is made, deliver to the borrower a supplementary disclosure statement setting out the changed information.

(7) If the parties have agreed to amend a credit agreement for open credit in respect of a credit card and the amendment changes any of the information prescribed under section 65 (3), the lender shall deliver to the borrower a supplementary disclosure statement setting out the changed information—

- (a) within thirty days after the amendment is made, if the change is not a material change, as prescribed; and
- (b) at least thirty days before the amendment is made, if the change is a material change, as prescribed.

Assignment of negotiable instrument.

68. (1) If a person assigns a negotiable instrument given to secure credit or a loan of money, the person shall deliver to the assignee with the negotiable instrument a copy of the statement required by section 65 and, if the person is a supplier creditor, a copy of the consumer agreement for the goods or services that were obtained with the fixed credit.

(2) Every assignee of a negotiable instrument who reassigns the instrument shall deliver to the person to whom the instrument is being reassigned the statement and the consumer agreement, if any, received by the assignee in respect of the instrument.

(3) If an assignee of a negotiable instrument to which subsection (2) applies is entitled to recover on the instrument from the maker, the maker is entitled to be indemnified by any assignor of the instrument who has not complied with subsection (1) or (2), as the case may be.

Obligations of assignee of lender.

69 (1) If a lender assigns to a person the lender's rights in connection with the extension of credit or the lending of money to a borrower, the assignee has no greater rights than, and is subject to the same obligations, liabilities and duties as, the assignor in connection with the extension of the credit or the lending of the money, and the provisions of this Act apply equally to such assignee.

(2) Despite subsection (1), a borrower shall not recover from, or be entitled to set off against, an assignee of the lender an amount greater than the balance owing under the consumer agreement at the time of the

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assignment, and, if there have been two or more assignments, the borrower shall not recover from an assignee who no longer holds the benefit of the consumer agreement an amount that exceeds the payments made by the borrower to that assignee.

Order to pay indemnity.

70. (1) If an assignor of a negotiable instrument is convicted of a contravention of section 65, the High Court making the conviction may order that the person convicted is liable to indemnify the maker.

(2) If an indemnity order is made under subsection (1) in favour of a person who is or becomes liable under a judgment of a court to an assignee of the negotiable instrument in respect of which the indemnity order was made, the person entitled to the indemnity may file the indemnity order in the court office of the court in which the judgment was issued.

(3) Upon the filing of the indemnity order, the local registrar or clerk of the court shall issue a default judgment in favour of the person entitled to the indemnity and against the person required by the indemnity order to give the indemnity, and the amount of the default judgment shall be the amount of the judgment referred to in subsection (1) and costs together with the costs of issuing the default judgment, or such lesser amount as the person entitled to the indemnity by requisition requests.

(4) Upon application, the court in which the default judgment is issued may set aside the default judgment or may determine the amount of the indemnity or make an order of reference for the purpose and may vary the amount of the default judgment.

Allowance for trade-in subject to adjustment.

71. (1) If the amount to be paid by a consumer under a consumer agreement is determined after an allowance for a trade-in and is stated in the consumer agreement to be subject to adjustment after the existence or amount of liens against the trade-in is ascertained or confirmed, any statements of the terms of payment and the cost of borrowing, as required under this Act, shall be based upon the amount as determined upon the information provided by the consumer.

(2) If there is an additional adjustment to the amount to be paid by a consumer under a consumer agreement to which subsection (1) applies after the adjustment under subsection (1), the consumer agreement shall not be adjusted to change—

(a) the percentage rate by which the cost of borrowing is expressed;

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(b) the total number of installments required to pay the total indebtedness; or

(c) the price shown in the consumer agreement.

PART VIII—LEASING

Application of Part.

72. This Part applies to—

(a) leases for a fixed term of four months or more;

(b) leases for an indefinite term or that are renewed automatically until one of the parties takes positive steps to terminate them; and

(c) residual obligation leases.

Representations

73. (1) Any person who makes representations or causes representations to be made about the cost of a lease, whether orally, in writing or in any other form, shall do so in accordance with the prescribed requirements.

(2) Every lessor shall deliver a disclosure statement for a lease to the lessee before the earlier of—

(a) the time that the lessee enters into the lease; and

(b) the time that the lessee makes any payment in connection with the lease.

(3) The disclosure statement for a lease shall disclose the prescribed information.

Disclosure statement.

74. (1) The maximum amount of compensation that may be charged to a lessee by a lessor for termination of a lease before the end of the lease term may be limited as prescribed.

(2) The maximum liability of the lessee at the end of the term of a residual obligation lease after returning the leased goods to the lessor shall be the amount calculated in the prescribed manner.

PART IX—PROCEDURES FOR CONSUMER REMEDIES

Application of Part.

75. This Part does not apply to remedies claimed in respect to unfair practices under Part III.

Form of consumer notice.

76. (1) If this Act requires a consumer to give notice to a supplier to request a remedy, the consumer may do so by giving notice in accordance with this section.

(2) The notice may be expressed in any way, as long as it indicates the intention of the consumer to seek the remedy being requested and complies with any requirements that may be prescribed.

(3) Unless the regulations require otherwise, the notice may be oral or in writing and may be given by any means.

(4) If notice in writing is given other than by personal service, the notice shall be deemed to be given when sent.

(5) The consumer may send or deliver the notice to the address set out in a consumer agreement or, if the consumer did not receive a written copy of a consumer agreement or the address was not set out in the written agreement, the consumer may send or deliver the notice—

(a) to any address of the supplier on record; or

(b) to an address of the supplier known by the consumer.

Consumer agreements not binding.

77. (1) A consumer agreement is not binding on the consumer unless the agreement is made in accordance with this Act and the Regulations.

(2) Despite subsection (1), a court may order that a consumer is bound by all or a portion or portions of a consumer agreement, even if the agreement has not been made in accordance with this Act or the Regulations, if the court determines that it would be inequitable in the circumstances for the consumer not to be bound.

(3) The provisions of this section shall not apply to those agreements made before the coming into force of this section.

Cancellation of consumer agreement.

78. (1) If a consumer has a right to cancel a consumer agreement under this Act, the consumer may cancel the agreement by giving notice in accordance with section 76.

(2) The cancellation takes effect when the consumer gives notice.

Effect of cancellation.

79. (1) The cancellation of a consumer agreement in accordance with this Act operates to cancel, as if they never existed—

(a) the consumer agreement;

(b) all related agreements;

(c) all guarantees given in respect of money payable under the consumer agreement;

(d) all security given by the consumer or a guarantor in respect of money payable under the consumer agreement; and

(e) all credit agreements, as defined in Part VII, and other payment instruments, including promissory notes—

(i) extended arranged or facilitated by the person with whom the consumer reached the consumer agreement; or

(ii) otherwise related to the consumer agreement.

(2) The provisions of this section shall not apply to those agreements made before the coming into force of this section.

Obligations on cancellation.

80. (1) If a consumer cancels a consumer agreement, the supplier shall, unless the contrary is provided for in the agreement, in accordance with the prescribed requirements—

(a) refund to the consumer any payment made under the agreement or any related agreement; and

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(b) return to the consumer in a condition substantially similar to when they were delivered all goods delivered under a trade-in arrangement or refund to the consumer an amount equal to the trade-in allowance.

(2) Upon canceling a consumer agreement, the consumer, in accordance with the prescribed requirements and in the prescribed manner, shall permit the goods that came into the consumer's possession under the agreement or a related agreement to be repossessed, shall return the goods or shall deal with them in such manner as may be prescribed.

(3) If a consumer cancels a consumer agreement, the consumer shall take reasonable care of the goods that came into the possession of the consumer under the agreement or a related agreement for the prescribed period.

(4) The consumer owes the obligation described in subsection (3) to the person entitled to possession of the goods at the time in question.

(5) Compliance with this section discharges the consumer from all obligations relating to the goods and the consumer is under no other obligation, whether arising by contract or otherwise, to take care of the goods.

(6) If a consumer has cancelled a consumer agreement and the supplier has not met the supplier's obligations under subsection (1), the consumer may commence an action.

(7) If a consumer has cancelled a consumer agreement and has not met the consumer's obligations under this section, the supplier or the person to whom the obligation is owed may commence an action.

Illegal charges and payments.

81. If the consumer recovers an amount equal to the trade-in allowance under section 71 (1) and the title of the consumer to the goods delivered under the trade-in arrangement has not passed from the consumer, the title to the goods vests in the person entitled to the goods under the trade-in arrangement.

Illegal charges and payments.

82. (1) If a supplier has charged a fee or an amount in contravention of this Act or received a payment in contravention of this Act, the consumer who paid the charge or made the payment may demand a refund

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by giving notice in accordance with section 76 within one year after paying the charge or making the payment.

(2) A supplier who receives a notice demanding a refund under subsection (1) shall provide the refund within the prescribed period of time

(3) The consumer may commence an action in accordance with section 84 to recover—

(a) the payment of a fee or an amount that was charged by the supplier in contravention of this Act; or

(b) a payment that was received by the supplier in contravention of this Act.

(4) This section and section 76 apply, with the necessary modifications, to a person who is not a supplier, if the person has received a payment in contravention of section 8.

Consumer's recourse on credit card charges.

83. (1) A consumer who has charged to a credit card account all or any part of a payment described in subsection (2) may request the credit card issuer to cancel or reverse the credit card charge and any associated interest or other charges.

(2) Subsection (1) applies to—

(a) a payment in respect of a consumer agreement that has been cancelled under this Act or in respect of any related agreement;

(b) a payment that was received in contravention of this Act;

(c) a payment in respect of a fee or an amount that was charged in contravention of this Act; and

(d) a payment that was collected in respect of unsolicited goods or services for which payment is not required under section 9.

(3) A consumer may make a request under subsection (1) if the consumer has cancelled a consumer agreement or demanded a refund in accordance with this Act, and the supplier has not refunded all of the payment within the required period.

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(4) A request under subsection (1) shall be in writing, shall comply with the requirements that are prescribed under section 76 (2), and shall be given to the credit card issuer, in the prescribed period, in accordance with section 76.

(5) The credit card issuer—

(a) shall, within the prescribed period, acknowledge the consumer's request; and

(b) if the request meets the requirements of subsection (4), shall, within the prescribed period—

(i) cancel or reverse the credit card charge and any associated interest or other charges; or

(ii) after having conducted an investigation, send a written notice to the consumer explaining the reasons why the credit card issuer is of the opinion that the consumer is not entitled to cancel the consumer agreement or to demand a refund under this Act.

(6) A consumer may commence an action against a credit card issuer to recover a payment and associated interest and other charges to which the consumer is entitled under this section.

(7) If a consumer charges all or part of a payment described in subsection (2) to a prescribed payment system, the consumer may request that the charge be cancelled or reversed and this section applies with necessary modifications to the cancellation or reversal of such a charge.

Action in Court.

84. (1) If a consumer has a right to commence an action under this Act, the consumer may commence the action in the appropriate Court.

(2) If a consumer is successful in an action, unless in the circumstances it would be inequitable to do so, the court shall order that the consumer recover—

(a) the full payment to which he or she is entitled under this Act; and

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(b) all goods delivered under a trade-in arrangement or an amount equal to the trade-in allowance.

(3) In addition to an order under subsection (2), the court may order exemplary or punitive damages or such other relief as the court considers proper.

Waiver of notice.

85. If a consumer is required to give notice under this Act in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so.

Confidentiality.

86. (1) A person who obtains information in the course of exercising a power or carrying out a duty related to the administration of this Act or the Regulations shall preserve privacy with respect to the information and shall not communicate the information to any person except—

(a) as may be required in connection with a proceeding under this Act or in connection with the administration of this Act or the Regulations;

(b) to a ministry, department or agency of a government engaged in the administration of legislation that protects consumers or to any other entity to which the administration of legislation that protects consumers has been assigned;

(c) to a prescribed entity or organization, if the purpose of the communication is consumer protection;

(d) to a law enforcement agency;

(e) to his, her or its counsel; or

(f) with the consent of the person to whom the information relates.

(2) Except in a proceeding under this Act, no person shall be required to give testimony in a civil proceeding with regard to information obtained in the course of exercising a power or carrying out a duty related to the administration of this Act or the Regulations.

Disclosure of information.

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87 (1) If a supplier is required to disclose information under this Act, the disclosure shall be clear, comprehensible and in accordance with the standards approved under the relevant laws.

(2) If a supplier is required to deliver information to a consumer under this Act, the information must, in addition to satisfying the requirements in subsection (1), be delivered in a form in which it can be understood by the consumer.

Limitation of arbitration.

88. (1) Any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.

(2) Despite subsection (1), after a dispute over which a consumer may commence an action in the High Court arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law.

(3) A settlement or decision that results from the procedure agreed to under subsection (2) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply.

PART X—THE KENYA CONSUMERS PROTECTION ADVISORY COMMITTEE

Establishment of the Committee.

89. (1) There is established a committee to be known as the Kenya Consumers Protection Advisory Committee.

(2) The Committee shall consist of -

- (a) a chairperson elected by members from among the members referred to in paragraph (d)(1);
- (b) the Permanent Secretary in the ministry for the time being responsible for matters relating to trade and industry;
- (c) the Attorney-General;

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(d) the following persons appointed by the Cabinet Secretary

- (i) four persons nominated by registered consumer organizations in such manner as may be prescribed;
- (ii) one person nominated by the Kenya Bureau of Standards;
- (iii) one person nominated by the Kenya Medical Association;
- (iv) one person nominated by the Kenya Association of Manufacturers;
- (v) One person nominated by the Civil Society Organization
- (vi) One person nominated by the Law Society of Kenya
- (vii) One representative of the Advisory Committee Advisory Committee on Administrative Justice.

(2) The conduct and regulation of the business and affairs of the Committee shall be as prescribed.

(3) The Ministry shall provide the secretariat to the Committee.

Functions of the Committee.

90. (1) The functions of the Committee shall be to;

- i. advise the Cabinet Secretary on all aspects relating to consumer protection;
- ii. the formulation of policy relating to this act and legislative proposals in the interest of consumers and the modification, consolidation or updating of legislation providing protection to consumers in the areas covered under, or related to this Act;
- iii. the co-ordination and networking of consumer activities and the development of linkages with consumer organizations and the competent authorities and agencies locally and outside Kenya for the protection of consumer interests;

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- iv. the promotion or participation in consumer education programmes and activities, the dissemination of consumer issues with a view to proposing corrective measures, providing advice to consumers on their rights and responsibilities under appropriate laws, and making available to consumers general information affecting the interest of consumers;
- v. the creation or facilitating the establishment of conflict resolution mechanisms on consumer issues, investigate any complaint received regarding consumer issues, investigate any complaint received regarding consumer protection, where appropriate, refer the complaint to the appropriate competent authority and ensure that action may be taken by the competent authority to whom the complaint has been referred; Work in consultation with the Chief Justice and institutions on the establishment of dispute resolution mechanisms.
- vi. do anything or all things that are necessary, to expedite or convenient for or in connection with the performance of its functions under this Act.
- vii. to monitor and keep under review trading and business practices relating to the supply of goods and services to consumers and to activities related or ancillary thereto;
- viii. at the request of the Minister, to undertake or commission any study or research which may be necessary to promote consumer protection;
- ix. to monitor the working and enforcement of laws that directly or indirectly affect the consumer;
- x. to draw up and review consumer protection directives and minimum service standards for submission to the Minister;
- xi. to monitor the development of consumer associations and draw up and review rules of practice for registered consumer associations;

- xii. to examine and determine whether a consumer association has the requirements to be an accredited consumer association in accordance with this Act; and

PART XI—GENERAL

Compliance with Cap 394.

91. (1) No aircraft shall fly within Kenyan airspace unless such aircraft meets the safety requirements under the Civil Aviation Act.

(2) Passenger air carriers shall provide such services including overnight accommodation or meals as may be prescribed to passengers whose flights have been cancelled or are subject to long delays.

General penalty.

92. Any person convicted of an offence under this Act for which no penalty is provided shall be liable to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding three years, or to both.

Regulations.

93. (1) The Cabinet Secretary shall make regulations for the better carrying out of the purposes of this Act.

(2) Without prejudice to the generality of subsection (1), the regulations made under this section shall—

(a) prescribe anything that is required to be prescribed under this Act;

(b) provide for passenger rights and the standards of service by air carriers including access to necessary services while on a grounded air carrier, customer complaints, notification of delays, cancellations, overbooking, baggage concerns, compensation for passengers and the right to deplane where such rights are infringed.

(3) There may be annexed to a breach of the regulations made under this section a penalty of a fine not exceeding the sum of five hundred thousand shillings or imprisonment for a term not exceeding two years or both such fine and imprisonment.

MEMORANDUM OF OBJECTS AND REASONS

The main object of this Bill is to establish a regime of consumer protection law, in order to provide comprehensive consumer protection and appropriate legal recourse to aggrieved consumers.

Part I contains preliminary provisions. Under clause 3, the proposed legislation will apply to all consumer transactions if either the consumer or the person engaging in the transaction with the consumer is located in Kenya when the transaction takes place. As a result, the proposed law will apply to all companies and other persons dealing with consumers in this country, even if they do not have a business presence in Kenya. The clause provides that the substantive and procedural rights given under this legislation apply despite any agreement or waiver to the contrary and that any term a consumer agreement that disputes arising out of the consumer agreement must be submitted to arbitration is invalid if it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.

Part II relates to consumer rights and warranties. Under clause 5, suppliers are deemed to warrant that any services they supply under a consumer contract are of a reasonably acceptable quality. The Part also seeks to protect consumers against inaccurate or misleading estimates. In particular, where a consumer has been provided with an estimate, the final price would have to be within ten percent of that estimate. Under clause 9, the practice of demanding payment for unsolicited goods or services would be illegal. No corresponding provisions exist in current legislation.

Part III seeks to protect consumers from unfair practices. These include the giving of false, misleading or deceptive representations. It also seeks to protect consumers against suppliers who use the possession of the consumer's goods to pressure the consumer into re-negotiating the terms of a transaction.

Part IV relates to the rights and obligations of specific consumer agreements. The proposed legislation would apply beyond sales of goods to include future performance agreements (agreements where the goods or services are provided at a later date), personal development services (such as gym, fitness club and health services agreements), direct sales agreements, credit agreements, leases, trade-ins and other types of consumer transactions. The legislation would also address for the first time

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rights and obligations arising under time share agreements and internet sales agreements. It is a particular source of concern that no law currently exists to specifically regulate consumer agreements entered into online. The proposed legislation aims to extend protection to consumers doing business via the Internet.

Part V prohibits the charging of an advance fee in certain sectors.

These include, loan brokering, credit repair and such other goods or services as may be prescribed.

Part VI seeks to protect consumers in repairs of motor vehicles and other goods.

A consumer shall not be charged a fee for an estimate of the cost of repairs if the consumer authorizes the repairs and they are carried out. Also, a repairer shall not charge the consumer for any work or repairs not authorized by the consumer. In addition, a repairer shall be deemed to warrant all new and re-conditioned parts installed and the labour required to install them for the prescribed duration. This is a safeguard against shoddy workmanship and defective parts.

Part VII is on credit agreements.

The Bill imposes disclosure requirements on the lender and proposes to limit the liability of a borrower to pay charges that were not disclosed.

Part IX sets out the procedure for consumer remedies. An aggrieved consumer may commence an action in the High Court and if successful may recover the full payment to which he or she is entitled under the proposed law.

Part X proposes the establishment of the Kenya Consumers Protection Committee whose functions shall include the coordination, liaison and networking of consumer organizations and relevant authorities locally and abroad, creation and facilitation of conflict resolution mechanisms on consumer issues and investigation of consumer complaints and reference of such complaints to relevant authorities for appropriate action.

The enactment of this Bill will not occasion additional expenditure of public funds.

Consumer Protection Bill, 2011

Dated the 26th July, 2011.

JAKOYO MIDIWO,
Member of Parliament.