

## **How does the Consumer Protection Act, No. 68 of 2008 (“the CPA”) apply to Franchise Agreements**

### **1. Introduction**

Up to date franchise agreements were not subject to regulation by specific legislation core to the industry. The industry is subject to a Code of Ethics administered by the Franchising Association of South Africa and secondary legislation that also apply to other industries.

The CPA regulates franchise agreements to a limited degree. Certain provisions apply solely to franchise agreements, whilst other provisions apply generically to both consumer transactions and franchise agreements. Certain provisions are completely excluded from application to franchise agreements.

### **2. Provisions solely applicable to Franchise Agreements**

#### **2.1 The Franchise Agreement -Definitions**

The franchise agreement is concluded between the franchisor and the franchisee. The agreement is recognised by the following characteristics as more fully defined in the CPA:

- Consideration is paid by the franchisee to the franchisor for the franchisee’s right to carry on business within all or a specific part of the Republic under a system or marketing plan substantially determined or controlled by the franchisor or its associate.
- The business of the franchisee is substantially or materially associated with advertising schemes or programmes or one or more trade marks, commercial symbols or logos or any similar marketing, branding, labelling or devices, or any combination of such schemes, programmes or devices, that are conducted, owned, used or licensed by the franchisor or an associate of the franchisor.
- The agreement governs the business relationship between the franchisor and the franchisee, including the relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisee by or at the direction of the franchisor or an associate of the franchisor.

#### **2.2 Formalities of the Franchise Agreement –Section 7 and Section 22**

Section 7 of the CPA provides that a franchise agreement must:

- be in writing and signed by or on behalf of the franchisee;
- include any prescribed information, or address any prescribed categories of information; and
- comply with the requirements of section 22 that relates to the right to information in plain and understandable language
- 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.

Further requirements may be prescribed by the Minister.

### **3. Provisions that apply generically to both Consumer Agreements and Franchise Agreements.**

#### **3.1 Relationship between Franchise Agreements and Consumer Agreements-Definitions and Section 5(6) (b)-(e)**

The consumer agreement is distinguished from the franchise agreement in the CPA. The consumer agreement is defined as “an agreement between a supplier and a consumer other than a franchise agreement”. However, for the purposes of section 5(6) (b)-(e) a consumer includes a franchisee in terms of a franchise agreement to the extent applicable. This means that for the purposes set out below, the franchisee is a consumer and the transactions are concluded between supplier and consumer within the meaning of the act. The franchisee will have the same rights and protection afforded by the act in the following arrangements:

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

#### **3.2 The consumer’s right to select suppliers-Section 13**

In terms of section 13 a supplier must not require as a condition of offering to supply any goods or services or as a condition of entering into an agreement or transaction that the consumer must:

- Purchase any other particular goods or services from that supplier, enter into an additional agreement or transaction with the same supplier or a designated third party, or
- Agree to purchase any particular goods or services from a designated third party, unless the supplier offers bundled goods or services separately and at individual prices, or the supplier 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, or that the bundling of those goods or services results in economic benefit for consumers.

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 of 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.

#### **3.3 Other provisions**

Except for the exclusions contained below the provisions of the CPA apply to franchise agreements and as a result, the provisions pertaining to the control of market practices and unfairness in contracts.

#### 4. Provisions of the CPA that do not apply to Franchise Agreements

The below table indicates the sections that do not apply to franchise agreements:

<b>Section</b>	<b>Provisions in section</b>
Section 14(2) read with the definition of “consumer agreement”	Expiry and renewal of fixed term agreements.
Section 19	Consumer’s rights regarding the delivery of goods or the supply of services.
Section 33	Catalogue marketing.
Section 34	Trade coupons and similar promotions.
Section 38	Referral selling.
Section 47	Over-selling and over booking.
Section 49(1)	Consumer agreement.
Section 50	Consumer agreement.

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