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# CPA Functional Readiness Report Monarch Travel Goods (Pty) Ltd

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*A functional readiness report for Monarch Travel Goods by Michalsons  
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## Introduction

This is a detailed report with analysis of your degree of readiness for the Consumer Protection Act, based on the steps that you have taken to get your in line with the requirements of the CPA which we have knowledge of. This document has been completely personalised for Monarch and not other identical document exists.

Each section has relevant interpretation of the Act to provide perspective and assist with the formulation of a strategy if there is not already one. Where the functional area is within your exclusive knowledge, we have indicated this. You can therefore edit the document accordingly.

Some of the CPA sections have been duplicated to avoid the over-use of cross references, but where a text has been used multiple times we have cross referenced them.

### The following icons and tools were used to describe the various parts of the report.

Everywhere that the CPA is discussed, the heading will be in red and will have the heading: *What does the Act say? It* will appear everywhere where the CPA is quoted. In each section the relevant part of the CPA is set out so you can refer to it easily.



This picture will appear when your compliance with the CPA is discussed. This includes the steps that you have taken to ensure compliance with the CPA.



This picture will appear everywhere that we have made a suggestion that you can follow to help with your CPA compliance if you can improve it in any way.

## Consumer Protection Act Detailed Readiness Report

Each section of this report has relevant interpretation of the Act to provide perspective and assist with the formulation of a strategy.

The report has been structured in such a way as to enable each Functional Area of the Organisation to take their section and understand how the Consumer Protection Act will impact them and evaluate what behavioural changes must take place as well as what changes have already been made that has put you a step ahead of the game.

Since Monarch has taken various steps related to the implementation of CPA, this report also highlights the positive changes that Monarch has made to comply with the CPA.



## About the Act

### Effect of the Act on Business

The Consumer Protection Act has fundamentally changed the way business is done in South Africa. It requires businesses to *transform* the way in which they interact with consumers and to ensure that all their dealings with consumers are fair, reasonable and honest.

The challenge that the suppliers of goods or services will face is that it is not just a matter of simple compliance. They will find it difficult to implement, as it is cross-cutting and will require behaviour changes across the organisation.

Effective risk management will require, firstly, that everyone across the organisation is attuned to how he or she could place the organisation at risk and, secondly, that a sustainable change to functional behaviour is instituted. The penalties are severe - a supplier who is found by the Tribunal to have contravened

the Act may face:

- An administrative fine up to 10% of annual turnover or
- A fine of R1 Million, whichever is the greatest.

Most of the provisions of the Act came into effect on 1 April 2011. An important exception is the harsh **Section 61**, which holds suppliers liable for damages caused by defective goods even if the suppliers were not negligent. This section applies in respect of any goods that were first supplied to a consumer on or after 25 April 2010.

South Africa's mercantile law has often in the past been criticised for favouring powerful businesses and organisations over the 'little man', with the general approach applied being 'let the buyer beware.' Previously, it was virtually impossible for consumers who had suffered losses as a result of defective goods purchased from merchants to sue those merchants for damages.

Under the new Consumer Protection Act, consumers enjoy an array of protections, which include the legal right to demand quality service and safe, good quality goods. Consumers are now entitled to cancel agreements and bookings under certain circumstances.

A consumer no longer needs to prove fault on the part of an importer, producer, importer, distributor or retailer of goods in order to succeed in a legal claim in connection with any harm or loss suffered by a consumer that was caused by a defect in the goods supplied to the consumer.

This has opened the way for massive American style liability suits. Apart from this exposure to civil liability, a business that fails to comply with the Act could face a fine of R1 000 000 or 10% of its annual turnover, whichever is the greater.

Tick box compliance with the provisions of the Act will not be sufficient— the organisations covered by the Act will need to change the way they do business.

### Purpose and policy

**The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by— S3(1)**

(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;

(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, harmonised, effective and efficient system of redress for consumers*.

## Fundamental consumer rights

### Right of equality in consumer market

- Protection against discriminatory marketing
- Reasonable grounds for differential treatment in specific circumstances
- Equality court jurisdiction over this Part

### Consumer's right to privacy

- Right to restrict unwanted direct marketing
- Regulation of time for contacting consumers

### Consumer's right to choose

- Consumer's right to select suppliers
- Expiry and renewal of fixed-term agreements
- Pre-authorisation of repair or maintenance service
- Consumer's right to cooling-off period after direct marketing
- Consumer's right to cancel advance reservation, booking or order
- Consumer's right to choose or examine goods
- Consumer's rights with respect to delivery of goods or supply of service
- Consumer's right to return goods
- Unsolicited goods or services

### Right to disclosure and information

- Right to information in plain and understandable language
- Disclosure of price of goods or services
- Product labeling and trade descriptions
- Disclosure of reconditioned or grey market goods
- Sales records
- Disclosure by intermediaries
- Identification of deliverers, installers and others

### Right to fair and responsible marketing

- General standards for marketing of goods or services
- Bait marketing
- Negative option marketing
- Direct marketing to consumers
- Catalogue marketing
- Trade coupons and similar promotions
- Customer loyalty programmes
- Promotional competitions
- Alternative work schemes
- Referral selling
- Agreements with persons lacking legal capacity

### Right to fair and honest dealing

- Unconscionable conduct





- False, misleading or deceptive representations
- Fraudulent schemes and offers
- Pyramid and related schemes
- Consumer's right to assume supplier is entitled to sell goods
- Auctions
- Changes, deferrals, and waivers and substitution of goods
- Over-selling and over-booking

### Right to fair, just and reasonable terms and conditions

- Unfair, unreasonable or unjust contract terms
- Notice required for certain terms and conditions
- Written consumer agreements
- Prohibited transactions, agreements, terms or conditions
- Powers of court to ensure fair and just conduct, terms and conditions

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

- Consumer's rights to demand quality service
- Consumer's rights to safe, good quality goods
- Implied warranty of quality
- Warranty on repaired goods
- Warning concerning fact and nature of risks
- Recovery and safe disposal of designated products or components
- Safety monitoring and recall
- Liability for damage caused by goods

### Supplier's accountability to consumers

- Lay-by's
- Prepaid certificates, credits and vouchers
- Prepaid services and access to service facilities
- Supplier to hold and account for consumer's property
- Deposits in respect of containers, pallets or similar objects
- Return of parts and materials

## Why the Act applies to Monarch?



### *What does the Act say?*

The Act regulates the activities of suppliers and creates rights for consumers. It applies to virtually every entity supplying **goods** and **services** in South Africa and the **transactions** it enters into with consumers.

### *Definition of a Supplier:*

*A person or an entity who markets Goods and Services, irrespective of whether the supplier:*

- Resides or has its principal office within or outside the Republic
- Operates on a for-profit basis or otherwise
- Is an individual, company, close corporation, 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 ... or is a public-private partnership
- Is required or licensed in terms of any public regulation to make the supply of the particular goods or services available.

### *Definition of a Consumer:*

- A person to whom particular goods or services are marketed in the ordinary course of the supplier's business
- A person who has entered into a transaction with a supplier in the ordinary course of the supplier's business
- A user of those particular goods or recipient or beneficiary of those particular services, irrespective whether that user, recipient or beneficiary was a party to a transaction
- A juristic person whose annual turnover and asset value is less than R1Million (or a Sole Proprietor irrespective of Turnover)
- A franchisee in terms of a franchise agreement .

### *Definition of the term Market:*

#### *To Promote:*

- 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;
- Make any representation in the ordinary course of business that could be seen as expressing a willingness to supply any goods or services for consideration; or
- Doing anything 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

#### *To Supply:*



- In relation to **GOODS**: includes sell, rent, exchange and hire in the ordinary course of business for consideration;
- In relation to **SERVICES**: means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.

## What is Consideration?

*The consideration referred to in the definitions of promote and supply means anything of value given and accepted in exchange for goods or services, including:*

- Money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object
- Labour, barter or other goods or services
- Loyalty credit or award, coupon or other right to assert a claim
- 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.

## The definition of marketing refers to goods and services.

### *Goods:*

- Anything marketed for human consumption;
- Any other tangible object, including any medium on which anything is or may be written or encoded;
- Any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a license to use any such intangible product;
- 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
- Gas, water and electricity

### *Services:*

- Any work or undertaking performed by one person for the direct or indirect benefit of another;
- The provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the **Financial Advisory and Intermediary Services Act, 2002**
- Any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service:
  - Constitutes advice or intermediary services that is subject to regulation in terms of the **Financial Advisory and Intermediary Services Act**
  - Is regulated in terms of the **Long-term Insurance Act, 1998** or the **Short-term Insurance Act, 1998**.
- The transportation of an individual or any goods.
- The provision of:
  - Any accommodation or sustenance
  - Any entertainment or similar intangible product or access to any such entertainment or intangible product;
  - Access to any electronic communication infrastructure
- Access, or of a right of access, **to an event** or to any premises, activity or facility
- Access to or use of **any premises** or other property in terms of a **rental**.



- A right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and
- Rights of a franchisee in terms of a franchise agreement... irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service.

## Not covered by the Act - S5(2):

The Act does not apply to everyone and everything. Those entities and transactions that are not considered by the Act to be consumers are listed below. This means that the entities mentioned do not enjoy the benefits of being a consumer, although they may still be bound by the requirements that apply to suppliers.

**Government** - Transactions including supply of goods and services to the State

**Big business** - Transactions involving supply of goods and services to juristic persons (companies, closed corporations etc.) whose asset value or annual income is over the threshold value of R2 million

**Credit agreement** - Any credit agreement under the National Credit Act (but the goods and services themselves are covered) **Employment services** - Services supplied under an employment contract

**Collective bargaining agreements** - Collective agreements & Collective bargaining agreements in terms of the Constitution and Labour Relations Act - **Exempted** - If exempted by the Minister

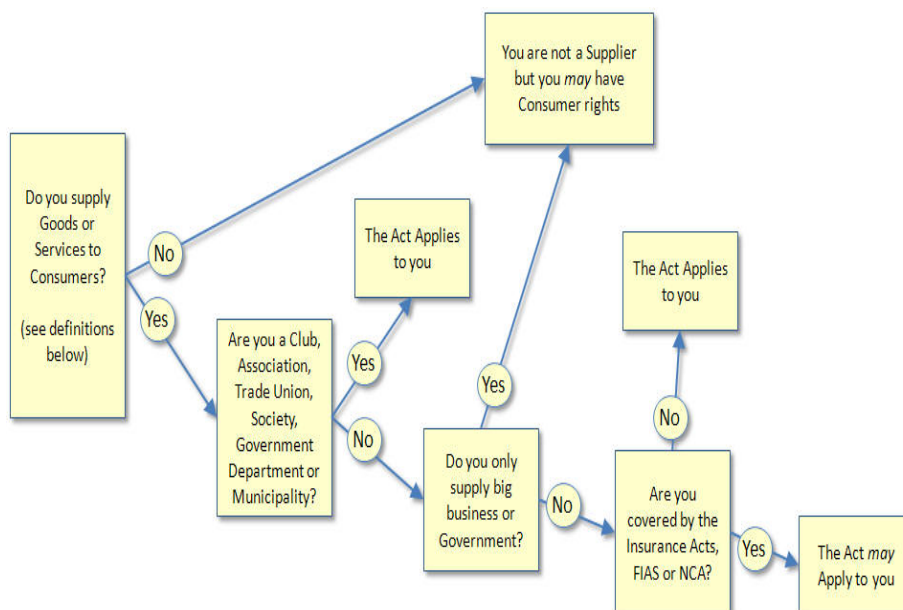
### Government

It is important to be aware that while the government, its agencies and municipalities (together 'the State') are considered to be suppliers under the Act and are bound by its requirements regarding the way they must deal with consumers, they are not entitled to be treated as consumers under it. In other words, those businesses that supply the State are not bound by the requirements of the Act in their dealings with the State.

### National Credit Act agreements

The Act does not apply to any transaction that constitutes a credit agreement under the NCA, but it applies to the goods or services that are the subject of the credit agreement.

### How do you know you are a supplier in terms of the CPA?





***Monarch is a supplier in terms of the CPA because:***

Monarch, markets and sells goods that are intended for use by consumers, you are affected by the Act. Even though you do not directly sell the products to your customers, you will still be jointly and severally liable with regard to the final use and safety of the products.

You and the services you supply are also, for the most part, not excluded from the application of the CPA. It is therefore imperative that you know, follow and apply the terms of the CPA to your business.

# Analysis of Monarch's functional maturity

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## Operational Management

### Monitor and analysis of the instances where consumers were dissatisfied with the delivery of goods

#### ***What does the Act say?***

***Delivery of goods (s 19)*** The parties are free to expressly agree upon whether the goods will be delivered and the details of the delivery. If they do not so agree, it becomes an implied condition of every transaction that the supplier is responsible to deliver the goods either on the agreed date and at the agreed time or within a reasonable time after the conclusion of the transaction of agreement at the agreed place of delivery (which is stated to be the supplier's place of business, if any, or the supplier's residence).

If no date or time has been specified for delivery of goods, this must not be done at an unreasonable time. The supplier remains liable for the risk of the goods being damaged or destroyed until they have been delivered to the customer.

***Right to check goods - S19(5)*** Before accepting delivery of goods, the consumer is entitled to examine them to make sure they are of the type and quality agreed upon or reasonably match the material (important) specifications, if a special order was placed.

***Changes to place or time and date of delivery of goods - s19(6)*** If the supplier wants to change the agreed arrangements for delivery, the customer has the option to agree to the change, insist on the delivery as agreed, or cancel the agreement.

***Delivery of large quantities of goods - s19(7)*** If the supplier delivers more of the goods than were ordered, the consumer can refuse to accept the goods at all or accept and pay for only the agreed quantity of goods and treat the rest as unsolicited goods.

***Delivery of mixed goods - s19(8)*** If some of the goods delivered are as agreed upon but others are not, the consumer can accept those that are as agreed and reject the rest or reject all of them.



#### ***What has Monarch done?***

Monarch does not bear the sole risk of non-delivery to consumers. The reason for this is that you do not deliver directly to consumers and have placed the risk on the distributors or outlets you supply to. If however you should find yourself supplying directly to consumers, you should monitor delivery.

Just be aware that if you delay delivery which in turn causes delay to the consumer, you can be held liable jointly and severally with the distributor or end suppliers of the products.



## Internal Support Functions

### Legal Services – including risk and insurance

#### Public liability cover for the risk or serious injury or death of a consumer

##### *What does the Act say?*

##### *Limitation of liability & potential risks of an unusual character - s49 (1)*

A producer, importer, distributor or retailer of any goods is liable, without proof of negligence on the part of the supplier of the goods, for any harm caused by the goods. The same applies to a supplier of services who also applies, supplies, installs or provides access to goods. If more than one party is potentially liable, the consumer can sue any one of them, as their liability is joint and several. This means that if the consumer sues one party and receives payment, that party can then sue the others for a contribution towards the payment.

The harm may arise from a product failure, defect or hazard or inadequate instructions or warnings regarding any hazard related to the use of any goods. It's sufficient to show that the damages were suffered only partly because of the shortcomings.

*The type of harm for which a person may be held liable includes—*

- the death of, or injury to, any natural person;
- an illness of any natural person;
- any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and
- any economic loss that results from the harm listed above.



##### **What has Monarch done?**

Not established if you have public liability cover.

If you have full cover then your functional readiness is good. If, on the other hand, you have no cover in place, it is advised that you get cover for serious injury or death of a consumer, which includes cover for legal costs.

#### Protect against losses due to the delivery of unsolicited goods in error

##### *What does the Act say?*

##### *Unsolicited goods (s 21)*

A consumer cannot be forced to pay for unsolicited goods and cost of delivery or services as long as the consumer complies with the requirements of the Act.

*Situations that are considered to amount to the provision of unsolicited goods:*

- Goods left with, or any service performed for a consumer by a supplier, during direct marketing, without requiring or arranging payment for them.
- Goods or services that are materially different from the goods or services previously supplied – not covered in an agreement
- Goods delivered after the termination of an agreement,
- Goods delivered or services performed other than as agreed
- Goods delivered in excess of the quantity than the consumer agreed to buy, unless the consumer rejects the entire delivery



- Any goods delivered to, or any services performed for, a consumer by a supplier without the consumer having expressly or implicitly requested that delivery or performance

**Goods are not regarded as being unsolicited goods** if the supplier informs the consumer within 10 business days after delivery that the goods were delivered in error, if they are clearly addressed to another person, and have obviously been wrongly delivered, or if it would be apparent to the ordinary alert consumer that the goods were intended to be delivered to someone else. The goods will, however, become unsolicited if the supplier fails to recover them within 20 business days of informing or being informed by the recipient that the goods were wrongly delivered.

**The recipient of wrongly delivered goods must not frustrate or impede any reasonable action by the supplier or deliverer to recover the goods within 20 business days.**

If they do, they will be liable for any additional costs of recovery of, or damage to, the goods that results. That person is not responsible for the cost of recovery of the goods or redelivering them or for any loss or damage to the goods during the time they are in the person's possession or control, unless intentional caused by them.

**If goods become unsolicited**, the recipient can either return them goods to the apparent supplier or deliverer at the risk and expense of the supplier or deliverer, or keep them. If the recipient decides to keep them, the right of ownership passes to the recipient, subject to any right or valid claim that an uninvolved third party may have with respect to those goods.



### ***What has Monarch done?***

Not established if you have public cover for delivery of the wrong goods. If you do not, then it might be advisable to do so if this has been a problem in the past.

## **Ensure that risk associated with the return of goods is managed**

### ***What does the Act say?***

#### ***Consumers right to return goods - section 20 (2)***

A consumer can cancel a sale and goods to the supplier and receive a full refund if the consumer did not have an opportunity to examine the goods before delivery and the consumer is not satisfied that the goods are of a type and quality that were agreed upon. The consumer must show, in the case where the consumer bought the goods solely on the basis of a description or sample, or both, that the goods delivered did not in all material respects correspond to what an ordinary alert consumer would have been entitled to expect, based on the description or on a reasonable examination of the sample. If the goods were supplied following a special order, they can be returned if they do not reasonably conform to the material specifications of the special order (s 19(5)).

When the supplier delivers a mixture of goods (some as agreed upon and some of a different description) the consumer can refuse delivery of all or part of the goods(s19(8)). If the supplier delivers a larger quantity of goods than the consumer agreed to buy, the consumer may either reject all of the delivered goods or accept and pay for the agreed quantity at the agreed rate and return the rest.

A consumer may return goods intended to satisfy a particular purpose communicated to the supplier (as per s 55(3)) within 10 business days after delivery to the consumer, if the goods have been found to be unsuitable for that particular purpose. If the supplier offers to deliver the goods or performance of any services differently to what was agreed in terms of place, date or time, the consumer may either accept the new arrangement, insist that the original arrangement is stuck to or cancel the agreement. In all of these situations, the goods may not be returned if any law prohibits their return for public health or other reasons or if the goods have been tampered with in some way after delivery.

Where it is permissible to return the goods, they are returned to the supplier at the consumer's risk and expense if the consumer cancels a direct marketing agreement, but at the supplier's risk and expense and within 10 business days after delivery to the consumer in all the other instances. Upon receiving





the returned goods, the supplier must refund to the consumer the price paid for the goods, less the amounts below.

STATE OF GOODS	PERMISSIBLE CHARGE
Original unopened packaging	no charge
In their original condition and repackaged in their original packaging	<ul style="list-style-type: none"> <li>• a reasonable amount for 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, or</li> <li>• 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;</li> </ul>
Any other case	<p>Costs for necessary restoration costs to make the goods fit for re-stocking, unless, considering the nature of the goods, and the manner in which they were packaged, it was necessary for the consumer to destroy the packaging to determine whether the goods were:</p> <ul style="list-style-type: none"> <li>○ the same as the description or sample provided, in the case of goods that had not been examined by the consumer before delivery; or</li> <li>○ fit for the intended purpose (as per s 55(3)).</li> </ul>



### **What has Monarch done?**

As far as we could ascertain from your knowledge and implementation of policies, your risk should be managed in line with the Act.

If you have a policy in place, it is advisable to review it in line with the Act and to make sure that your service level agreements make provision for the correct management of returned goods.

## **Cover for damage caused by goods**

### **What does the Act say?**

#### **Liability for damage caused by goods s61 (1)**

A producer, importer, distributor or retailer of any goods is liable, without proof of negligence on the part of the supplier of the goods, for any harm caused by the goods. The same applies to a supplier of services who also applies, supplies, installs or provides access to goods.

If more than one party is potentially liable, the consumer can sue any one of them, as their liability is joint and several. This means that if the consumer sues one party and receives payment, that party can then sue the others for a contribution towards the payment.

The harm may arise from a product failure, defect or hazard or inadequate instructions or warnings regarding any hazard arising from or associated with the use of any goods. It is sufficient to show that the damages were suffered only partly as a consequence of these shortcomings.

#### **The type of harm for which a person may be held liable includes—**

- the death of, or injury to, any natural person;
- an illness of any natural person;



- any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and
- any economic loss that results from the harm listed above.



### **What has Monarch done?**

If you have public liability cover in place, it might be wise to check if it covers you in the event that your products harm a consumer. If you do not have public liability cover, then this must be addressed.

## **Ensure insurance cover for the delivery of goods**

### **What does the Act say?**

#### ***Risk related to the Delivery of goods (s 19)***

The supplier remains liable for the risk of the goods being damaged or destroyed until they have been delivered to the customer. It is therefore important to be able to establish when this takes place. The Act sets out three possibilities. The acceptance of delivery is deemed (treated as if actually happened) to have occurred when:

- The customer expressly (actually) or impliedly (by conduct) communicates that the consumer has accepted the delivery. (Example: The supplier places the goods on the shop counter and the consumer picks them up and walks off with them).
- The consumer does anything in relation to the goods that is inconsistent with the supplier's ownership of them. The consumer keeps the goods for longer than is reasonable without telling the supplier that he or she does not want them.

#### ***Right to check goods - s19(5)***

Before accepting delivery of goods, the consumer is entitled to examine them to make sure they are of the type and quality agreed upon or reasonably match the material (important) specifications, if a special order was placed

The rules regarding the return of goods are set out in s 20.



### **What has Monarch done?**

If you have public liability cover in place, it might be wise to check if it covers you in the event goods are damaged or destroyed during delivery.

Having cover in place for when goods are in transit is essential. This can be done by taking out cover with an insurer, or by having an agreement in place with your transport company (if you do not deliver the goods yourself) that they bear the risk if damage occurs while goods are in transit.

If distributors or outlets purchase goods from you to resell it and collect it from your depot, it is advisable that you include a provision in your service level agreement that you will not be responsible for damage that happens in transit.

## **Documents, notices and agreements**

### **Differential treatment**

## **Ensure that all persons are treated the same in all agreements**

### **What does the Act say?**

#### ***Section 8 (2) ...***



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 section 9 of the Constitution, or one or more grounds set out in Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act, when—

- assessing the ability of the person to pay the cost, or otherwise meet the obligations, of a proposed transaction or agreement;
- deciding whether to enter into a transaction or agreement, or to offer to enter into a transaction or agreement;
- determining any aspect of the cost of a transaction or agreement to the consumer;
- interacting with the consumer—
  - in the supplier's place of business, or
  - in the course of displaying or demonstrating any goods, testing or fitting
  - any goods, or negotiating the terms of a transaction or agreement; or
  - selecting, preparing, packaging or delivering any goods for or to the consumer, or providing any services to the consumer;
  - proposing or agreeing the terms and conditions of a transaction or agreement;



### ***What has Monarch done?***

Monarch has had all their agreements, notices and instruction manuals checked to ensure that no discrimination takes place. The audit also included Monarch's credit agreements and the text on their website. All the consumer documents appear to be neutral and do not discriminate on any grounds mentioned in the Act and in law.

## **Document content**

### **Ensure all documents and information is in plain language**

#### ***What does the Act say?***

#### ***Plain language (s 22)***

In order to comply with the plain language requirement, the language must be such that an ordinary consumer of the class of persons for whom the agreement is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand its content and significance without undue effort.

In deciding whether the consumer could do so, the following factors must be taken into consideration:

- the context, comprehensiveness and consistency of the document;
- its organization, form and style;
- its vocabulary, usage and sentence structure; and
- the use of any illustrations, examples, headings or other aids to reading and understanding

#### ***Other Legislation also requiring plain language:***

S64 of the National Credit Act provides that all credit agreements must also be in plain and understandable language.



### ***What has Monarch done?***

A complete audit has been done of Monarch's consumer documents.



The Monarch credit agreements have also been reviewed. All the relevant documents have been redrafted into plain language and the instruction manuals have been specifically edited to include illustrations and other aids to reading and understanding as is required by S22.

Monarch has also sent delegates for training in plain language drafting, which will enable them to apply the basic principles of plain language to Monarch's business practices.

## Giving information if consumer cannot physically examine the goods

### ***What does the Act say?***

#### ***Catalogue marketing - s33(1)***

Where an agreement for the supply of goods or services is not entered into in person and the consumer does not have the opportunity to inspect the goods before concluding the agreement, a supplier must disclose certain information to a consumer, as listed below (s 33 (1)). Such agreements take place, for example, where a consumer orders goods he or she saw in a catalogue by telephone, postal or fax.

Information to be provided:

- The supplier's name and license or registration number, if any;
- The address of the supplier's physical business premises and related contact details;
- The sales record information required by section 26 (see block above);
- The currency in which amounts under the agreement are payable;
- The supplier's delivery arrangements, including—
- the identity of the shipper;
- the mode of transportation; and
- the place of delivery to the consumer;
- The supplier's cancellation, return, exchange and refund policies, if any;
- The manner and form in which a complaint may be lodged.

The information must be disclosed to the consumer before the conclusion of an agreement or transaction, in a manner that is appropriate to the means of communication being used by the parties.



### ***What has Monarch done?***

As far as we could ascertain, the catalogues that Monarch uses for their goods are not for use by the general public. Therefore the Monarch catalogues do not have to include all the prescribed information. If however, there are some catalogues that consumer may purchase products from, Monarch needs to ensure that they comply with these requirements and that all the prescribed information is included.

This does, however, not apply to catalogues that are used mainly for reference purposes. This section only applies to catalogues, for example on the internet, from which consumers can directly choose a product and the consumer can order from it.

## Warnings to consumers regarding unfavourable agreement terms or the risk of serious injury or death

### ***What does the Act say?***

#### ***Limitation of liability & potential risks of an unusual character***

There are certain instances when the supplier must warn the consumer of facts that might involve a risk to the consumer or a weakening of their legal position. A supplier must draw any limitation of risk or liability of the supplier or an assumption of risk or liability by the consumer to the attention of the consumer (s 49 (1)) and draw potential risks of an unusual character or that the consumer could not reasonably be expected to be aware of or that could result in serious injury or death to the attention of the consumer (s 58 (1))



### ***What has Monarch done?***

We have audited all the instruction manuals and other consumer agreements and have highlighted any potential risk for consumers. We have made sure these terms are clear and in plain language as well.

If Monarch communicates with consumers in any way, this must be done in all documents and communications

## **Ensure all agreements contain no false, deceptive or misleading representations**

### ***What does the Act say?***

**Section 4 (5)** states that a person engaged in business must not engage in any conduct that is misleading or deceptive, or that is reasonably likely to mislead or deceive.



### ***What has Monarch done?***

As far as we could ascertain Monarch's consumer documents do not contain any deceptive or misleading representations. It will be the responsibility of the Monarch personell, who have in depth knowledge about the products to do a in depth audit to ensure that there are no representations that could be regarded as false or misleading.

## **Internal legal opinion should steer clear of the legal bullying of clients**

### ***What does the Act say?***

#### ***Unconscionable conduct prohibited.***

The word 'unconscionable' means: shocking and morally unacceptable. For the purposes of the Act, unconscionable conduct consists of the use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any:

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

#### ***Taking advantage - s 40***

It is also unconscionable for a supplier to take advantage of a consumer's inability to protect their own interests owing to physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.



### ***What has Monarch done?***

We have done an audit of Monarch's documents and have checked that nothing has been included that could be regarded as unconscionable.

However Monarch must ensure that all direct communications with consumers are also done in such a way that may not be seen as 'bullying' or coercion in the scenarios set out above.

## **Ensure against any negative option marketing clauses in agreements**

### ***What does the Act say?***

#### ***Negative option marketing - s 31***



Negative option marketing consists of informing a consumer that a sale agreement will come into being or an agreement be modified unless the consumer informs the supplier that they do not wish to proceed with it. Typically, the supplier will either deliver the goods to the consumer or inform the consumer of the intended modifications to agreement. An agreement or modification of an agreement that results from negative option marketing is void



### **What has Monarch done?**

Since Monarch does not usually directly sell products to consumers, you will not have negative option marketing in place with consumers.

The nature of the products are also of such, that negative option marketing will have a detrimental effect on Monarch, since delivered goods will become unsolicited if a consumer did not order them or the delivered goods are different from what they have ordered.

## **Ensure that no agreement results in the bundling of goods & services to the detriment of the client**

### ***Consumer's right to select suppliers- bundling - s 13***

A supplier may not bundle goods and services unless the convenience to the consumer in doing so outweighs the limitation in the consumer's right to choice, or there is an economic benefit for consumers from the bundling or the bundled goods or services are also offered separately and at individual prices.

Bundling consists of requiring the consumer to purchase other goods and services from the supplier. For example:

- including the ironing board with an iron;
- enter into an additional agreement;
- enter into an additional agreement or transaction with the same supplier or another party;
- requiring that a maintenance contract be entered when buying it; or
- agreeing to purchase any goods or services from a designated third party.



### **What has Monarch done?**

Usually bundling of goods is a marketing and sales decision. This will have to be checked throughout the marketing and supply process. If goods are bundled together the test of "convenience" must be applied to see if it complies with the Act.

## **Systems**

### **Introduce system Protection against losses due to the delivery of unsolicited goods in error**

#### ***What does the Act say?***

#### ***Unsolicited goods - s 21( See p 15)***



### **What has Monarch done?**

This functional area must be assessed by Monarch to make sure that the correct processes are in place when goods are delivered.

If Monarch does not directly deliver goods to consumers, then it is good to keep in mind that you can still be jointly and severally liable if you deliver on the wrong date to their distributors and this results in a delivery delay to consumers.



## Ensure that information systems allow for the capture of delivery arrangement details at the point of sale and reserve stock for delivery

### ***What does the Act say?***

#### ***Delivery of goods (s 19) See p14***

The parties are free to expressly agree upon whether the goods will be delivered and the details of the delivery. If they do not so agree, it becomes an implied condition of every transaction that the supplier is responsible to deliver the goods either on the agreed date and at the agreed time or within a reasonable time after the conclusion of the transaction of agreement at the agreed place of delivery (which is stated to be the supplier's place of business, if any, or the supplier's residence).

If no date or time has been specified for delivery of goods, this must not be done at an unreasonable time.

The supplier remains liable for the risk of the goods being damaged or destroyed until they have been delivered to the customer.

***Right to check goods - s19(5)*** Before accepting delivery of goods, the consumer is entitled to examine them to make sure they are of the type and quality agreed upon or reasonably match the material (important) specifications, if a special order was placed.

***Changes to place or time and date of delivery of goods - s19(6)*** If the supplier wants to change the agreed arrangements for delivery, the customer has the option to agree to the change, insist on the delivery as agreed, or cancel the agreement.

***Delivery of large quantities of goods - s19(7)*** If the supplier delivers more of the goods than were ordered, the consumer can refuse to accept the goods at all or accept and pay for only the agreed quantity of goods and treat the rest as unsolicited goods.

***Delivery of mixed goods - s19(8)*** If some of the goods delivered are as agreed upon but others are not, the consumer can accept those that are as agreed and reject the rest or reject all of them.



### ***What has Monarch done?***

This functional area must be assessed by Monarch to make sure that the correct processes are in place when goods are delivered.

## **Asset Management**

### **Processes and Standard Operating Procedures (SOP)**

#### **Ensure all SOP's guard against overselling and substitution of goods**

### ***What does the Act say?***

#### ***Over-selling and over-booking (s 47)***

**A supplier must not accept payment for any goods or services unless the supplier has a reasonable basis for saying they will be able to supply those goods or provide those services.** The supplier may also not supply goods or services that are materially different from the goods or services paid for. A supplier must honour a commitment to supply goods or services on a specified date or at a specified time.

**If the supplier fails to do so because of insufficient stock or capacity to supply those or comparable goods or services, the supplier must refund the consumer the amount paid in respect of that**





commitment or reservation, plus interest at the prescribed rate, as well as compensate the consumer for costs directly incidental to the supplier's breach of the contract.

**It is a defense** if the supplier offered to get another person to supply a consumer with comparable goods or services and the consumer either accepted the offer or unreasonably refused it. The supplier will also not be liable if the shortage of stock or capacity is due to circumstances beyond the supplier's control and 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.

**A supplier cannot escape liability easily:** a shortage of stock or capacity is not 'due to circumstances beyond the supplier's control' if the shortage results in some way from the supplier's lack of diligence.



### **What has Monarch done?**

This area is for Monarch to assess. SOP's must be put in place and enforced that deal with overselling and substitution of goods. The reason is that goods that aren't correctly delivered can be regarded as unsolicited and can be seen as over-selling in terms of the Act

Monarch must also keep in mind that if they substitute one type of product for another while delivering to their buyers, without an agreement being in place and this results in substituted goods being delivered to consumers, that they can be held jointly and severally liable with the direct suppliers if the consumers are not happy with the substituted goods

## **Design procedure protection against losses due to the delivery of unsolicited goods in error**

### **What does the Act say?**

*Unsolicited goods (s 21) See P15*



### **What has Monarch done?**

This area is for Monarch to assess. SOP's must be put in place, which deal with correct delivery of goods.

The reason is that goods that aren't correctly delivered can be regarded as unsolicited and could result in a consumer keeping it, if it is not correctly collected.

## **Ensure the procedure for the closure of service facilities is compliant with the Act**

### **What does the Act say?**

*Written notice of the intention to close a service facility - s 64(3)*

If a supplier intends to close a facility under which a consumer is entitled to access any service, the supplier must either make available a reasonably accessible alternative facility or give at least 40 business days written notice of that intention to the consumer before the intended date of closure. Within five business days after closing that facility, the supplier must refund the consumer the balance of any money owing to the consumer.



### **What has Monarch done?**

This area is for Monarch to keep in mind if they ever have to or wish to close down a facility that, for example, provides maintenance services to consumers.

## **Processes must inform consumers of anything that could impact their Safety through the use of a product or service**

### **What does the Act say?**

**SAFETY**





### *Warning concerning fact and nature of risks - s58 (1)*

The supplier of any activity or facility with which certain types of risk are associated must specifically draw the fact, nature and potential effect of that risk to the attention of consumers in accordance with the requirements of section 49.

#### *The types of risk that must be pointed out are:*

- those risk of an unusual character or nature;
- those of which a consumer could not reasonably be expected to be aware or anticipate; or
- those risk that could result in serious injury or death.

Packages containing any hazardous or unsafe goods must have instructions advising the consumer on the safe handling and use of those goods. Such warnings already appear on items such as ant spray. If a person installs any hazardous or unsafe goods for a consumer, that person must give the consumer the original copy of any warning that applies to those goods in terms of any regulation.

Failure to comply with this provision may lead not only to the imposition of an administrative fine under s 112 (1), but also to liability for damages under s 61.



#### **What has Monarch done?**

We have done a full audit of all the instruction manuals to ensure that the requirements of the CPA have been met.

If Monarch has any other communications with consumers, you must keep this in mind and ensure that the consumers are informed about any safety risks.

### **Ensure processes result in goods that are safe, free of defect and have proper instructions for their use**

#### **What does the Act say?**

#### *Liability for damage caused by goods - s61(1) (See p18)*



#### **What has Monarch done?**

Monarch must ensure that products are safe and free of defects. An audit has however been done of all the instruction manuals that might hold harm or risk for consumers and they have been edited to comply with the Act.

### **Ensure that there is a procedure requiring that any discussion about suitability of goods is recorded**

#### **What does the Act say?**

#### *Goods - Quality and Safety - s55*

This section does not apply to goods bought at an auction which are covered by s45. All other goods must be reasonably suitable for the purposes for which they are generally intended. For example an ordinary toaster should be able to produce a dozen or so slices of properly done toast daily, but need not be suitable for use in a restaurant that requires hundreds of slices of toast a day.

The goods must be of good (not reasonable) quality, in good working order and free of defects, and be capable of being used for a reasonable period of time, depending upon the circumstances. A supplier would not be liable under this subsection if the consumer had been informed of the specific condition of



goods and accepted them on that basis. If, for example, floor tiles are sold as 'seconds', the buyer should expect some imperfections in them.

Goods must also comply with any applicable statute, including the Standards Act of 1995. Goods must be reasonably suitable for the specific purpose for which a consumer wishes to use them for if the consumer has specifically informed the supplier of that purpose and the supplier ordinarily supplies such goods or holds itself out as being knowledgeable about the use of such goods.

### *Remedy (s56)*

If the goods fail to comply with the requirements listed in section 55, the consumer is entitled to return them, at the supplier's risk and expense and without penalty and obtain a refund or have the item/s repaired or get a refund of the price paid. The choice is the consumers. The consumer can claim against any of the entities in the supply chain, namely the producer, importer, distributor or retailer of the goods.



### ***What has Monarch done?***

It might be worth your while to get feedback from your buyers with regard to the suitability of products for their intended purposes. Record all queries that you and your distributors have gotten in this regard and then consider putting extra information on the website, on the packaging or on the instruction manuals.

The instruction manuals have been audited so that, if there is a reference to a specific use or suitability, then this has been highlighted so that the consumer can be made aware of the limits to use.

## **Human Resources**

### **Training and Advocacy**

#### **Training and advocacy for general CPA standards**



### ***What has Monarch done?***

According to the heads of the various departments within Monarch, they have received training regarding the basic principles in the Act. CPA awareness has been cultivated within the company and this has made it possible to identify how the CPA affects the day-to-day business activities of Monarch.

#### **Plain language training**

### ***What does the Act say? See p19***



### ***What has Monarch done?***

Monarch has sent delegates to receive training in plain language drafting as required by the Act. These delegates need to promote plain language amongst the rest of the Monarch staff.

The basic principles of plain language communication also needs to be circulated and a policy adopted which serves to promote plain language and shows the Monarch staff how to use plain language in their drafting and writing.

#### **Training on specific areas such as warranties and container deposits**

### ***What does the Act say?***

### ***WARRANTEES***

A warrantee, which is often mistakenly called a guarantee, is a legally binding assurance that the product has particular properties. In business usage, it is an additional term of the contract to the effect that if a product becomes defective within a specified period of time, it will be replaced or repaired.



**Warranty on repaired goods (s 57)** All new or reconditioned parts installed during repairs or maintenance work, as well as labour involved, is automatically warranted for three months after installation. This does not apply to goods that have been abused or to ordinary wear and tear from usage.

The supplier cannot, in terms of s 48 (1) (c) require a consumer to waive any rights, so the use of voetstoets clauses will not be permitted in business contracts covered by the Act. The private seller of a house would not be prevented from including such a clause in an offer to purchase agreement.

## DEPOSITS

**Deposits in respect of containers, pallets or similar objects (s66)** A supplier must pay a person returning a containers, bottle, pallet or similar object the amount of the deposit required by law/ the Minister or the amount that the supplier charged for that object, or ordinarily charges for such an object. This applies whether or not the person returning the container was the person who originally paid a deposit for that object to that supplier.



### What has Monarch done?

As part of their general training, Monarch has been made aware of the targeted areas concerning warranties, deposits for containiers etc. If there has not been targeted training, then the relevant departments dealing with these issues must be informed accordingly.

## Finance

### Billing

#### The same prices are charged for everyone

##### 8. (1) Marketing treating the same in all agreements

A supplier of goods or services must not unfairly—

- exclude any person or category of persons from accessing any goods or services offered by the supplier;
- grant any person or category of persons exclusive access to any goods or services offered by the supplier;
- assign priority of supply of any goods or services offered by the supplier to any person or category of persons;
- supply a different quality of goods or services to any person or category of persons;
- charge different prices for any goods or services to any persons or category of persons;
- target particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or
- exclude a particular community, district, population or market segment from the supply of any goods or services offered by the supplier,

On the basis of one or more grounds of unfair discrimination contemplated in section 9 of the Constitution or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.



### What has Monarch done?

This is for internal audit and discussion with your buyers. If there is a distinguishing in price that you or your buyers implement, then it must not be made with regard to the categories of persons as described in the Act.



## Ensure that no person is treated differently directly or indirectly

### ***What does the Act say?***

#### ***Section 8 (2) ...***

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 section 9 of the Constitution, or one or more grounds set out in Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act, when—

- assessing the ability of the person to pay the cost, or otherwise meet the obligations, of a proposed transaction or agreement;
- deciding whether to enter into a transaction or agreement, or to offer to enter into a transaction or agreement;
- determining any aspect of the cost of a transaction or agreement to the consumer;
- interacting with the consumer—
  - in the supplier's place of business, or
  - in the course of displaying or demonstrating any goods, testing or fitting any goods, or negotiating the terms of a transaction or agreement; or
  - selecting, preparing, packaging or delivering any goods for or to the consumer, or providing any services to the consumer;
  - proposing or agreeing the terms and conditions of a transaction or agreement.



### ***What has Monarch done?***

This is for internal audit. When consumers are billed, they must not be treated differently. Mostly this will be done by Monarch's distributors, but this must still be kept in mind when any invoices are sent out.

## Purpose of the Act is complied with (no loop holes)

### ***What does the Act say?***

#### ***Avoiding the effects of the Act prohibited, s 51(1)***

Stated broadly, s 51(1) ensures that suppliers do not escape their obligations under the Act merely by getting consumers to agree to not hold them to those obligations. The section states that a supplier must not make a transaction or agreement subject to any term or condition that is intended to or in effect defeats the purposes and policy underlying the Act. It permits a court or other dispute resolution body to go beyond the mere wording of the Act and look at the underlying intentions of the Act, or its spirit. These would prevent 'loophole lawyers' from relying on technicalities to avoid the section.

A transaction or agreement can't be made subject to any term or condition that:

- misleads or deceives the consumer or subjects the consumer to fraudulent conduct;
- waives or deprives a consumer of a right in terms of the Act;
- avoids a supplier's obligation or duty in terms of the Act;
- sets aside or override the effect of any provision of the Act; or
- authorises the supplier to do anything that is unlawful in terms of the Act; or not do something that is required in terms of this Act;
- limits or exempts 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 or amounts to an assumption of risk or liability by the consumer for a loss caused by such gross negligence.

#### ***Other terms or conditions that that are not permitted:***



**Require to pay for damaged display items** Impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier (unless they cause the damage maliciously, as set out in s 18(1)).

### *Negative option marketing*

Result from a negative option marketing offer prohibited in terms of s 31.

### *Supplementary agreement*

Require the consumer to enter into a supplementary agreement containing a prohibited provision.

### *Claim against the guardian's fund*

Dispose of a right of the consumer to any claim against the Guardian's Fund.

### *False acknowledgement*

Falsely expresses an acknowledgement by the consumer that—

- before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier; or
- the consumer has received goods or services, or a document that is required to be delivered to the consumer.

### *Forfeit any money*

Require the consumer to forfeit any money to the supplier—

- if the consumer exercises any right in terms of the Act; or
- to which the supplier is not entitled in terms of the Act or any other law.

### *Repossession of goods*

Authorise 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. Exemption clauses and notices are now only permitted to the extent that they exclude ordinary negligence (subject to what was said above about bringing risks to the attention of consumers and terms being fair and reasonable).



### ***What has Monarch done?***

This is for internal audit by Monarch if they conclude agreements directly with consumers. Since they usually supply through a third party, this will only apply in limited situations.



## Supply Chain Management

### Procurement

Ensure that the correct procedures are followed when returning goods

#### ***What does the Act say?***

*Consumers right to return goods -s20 (2) – see p18*



#### ***What has Monarch done?***

For internal audit. It is important for Monarch to manage all the other parties in the supply chain to avoid being held jointly liable with a party that does not comply with the Act. It is also important that Monarch ensures that if a product is returned, it was not damaged by the consumer. The shop or outlet that sells the product must have testing procedures in place to do this or must send it to Monarch to test before giving consumers a refund.

#### Ensure stocks are at a level to support commitments



#### ***What has Monarch done?***

If Monarch does not have enough stock to support commitments made to consumers, it might lead to Monarch being liable to:

- take back goods that have been rejected because they are unsolicited;
- refund money paid for goods that could not be delivered, and
- damages if consumers had suffered these in pursuance of a product that was marketed or promised to them, which also included indirect damages.

You must make sure that you have enough stock to support your commitments to your buyers so that they can fulfil their commitments to the consumer.



## Manufacturing

### Design of packaging

#### Disclosure of price of goods or services on the design of containers or packaging

##### *What does the Act say?*

##### *Price of goods and services -s23*

Suppliers must inform consumers of the price of goods and services offered by them. In the case of goods, a retailer must show the price for any goods on display, by marking it or attaching it to the item in some way or representing it in a way in which the consumer would be able to understand what it was. This does not apply to goods in advertising displays. A supplier is also bound by any displayed reduction in price.

A supplier may not charge a price higher than the displayed price or the lowest displayed price if more than one price is displayed. It is permissible to cover an earlier price, so long as it is fully covered.

If there is an **obvious error** in the price, a supplier will not be bound by the price if the supplier has corrected the error and or taken steps to inform customers of the wrong price is displayed as a result of an unauthorized person tampering with the price in some way.

##### *What has Monarch done?*



If goods are marketed or sold directly to consumers, then Monarch must ensure that the prices for these products are correctly displayed. In normal circumstances it should be the duty of the direct suppliers to price the goods and ensure that these prices are clear for consumers to see.

#### Product labelling and trade descriptions on container or packaging designs must comply with CPA

##### *What does the Act say?*

##### *Label or trade description - s24*

Any label or trade description that is attached to goods, displayed alongside them or is contained in any advertising material from which a consumer can place an order must not be such that it is likely to mislead a consumer. An existing trade description must not be tampered with in any way that would lead to consumers being misled.

Suppliers of goods that contain genetically modified components must label the goods in accordance with applicable regulations.

##### *What has Monarch done?*



This is for internal audit by Monarch in designing container or package designs and labels. Some of the packaging has been checked and this can be done each time a new label or package covering is designed to ensure that they comply with the CPA.



## Disclosure of risks to consumer – See p24

### ***What has Monarch done?***

Packaging must be designed so that any potential risk for consumers are clearly indicated. Legal audits of packaging can be conducted when new packaging is designed so that this is complied with.

## Design safe to use products

*See in general p15 - 17*

### Ensure that goods are packaged in such a way as to avoid accidental damage

#### ***What does the Act say?***

*Risk related to the Delivery of goods (s 19) See p8*

The supplier remains liable for the risk of the goods being damaged or destroyed until they have been delivered to the customer.



#### ***What has Monarch done?***

This is to protect Monarch from having to replace, refund or repair goods that were manufactured according to the correct specifications, but were subsequently damaged in transit.

Also this limits the chance that a defective product is sold to consumers, after delivery to a distributor. Putting in place an agreement with the carriers of the goods is also another way to limit these risks.





# Marketing and Sales

## Sales of Products

### People treated the same

***What does the Act say?*** (See also p18)

***Section 8*** prevents a supplier of goods or services from unfairly discriminating against any person or category of persons by:

- supplying a different quality of goods or services to anyone;
- on the basis of one or more grounds of unfair discrimination contemplated in section 9 of the Constitution (race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth) or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.

#### ***Reasonable grounds for differential treatment (section 8)***

It is not considered unfair to discriminate by refusing to supply or provide access to any particular goods or services to an unemancipated minor, or to require the consent of a parent, guardian or other responsible adult before doing so, in accordance with the law or to protect the health, welfare or safety of the minor;

It is also permissible to offer any facility or service for the exclusive use of minors generally or of a specified age group, or between specified ages or for adults older than 60 years; or to advertise or offer or any goods or services at a discounted price to members of these two groups.

***Special Needs*** A supplier may, in a reasonable manner, provide and designate separate but substantially equivalent facilities for the exclusive use of persons of each gender; or for persons of one gender.

A supplier may also, in a reasonable manner, target the marketing of any goods or service at a particular group of consumers 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.

#### ***LEGAL CONSEQUENCES OF UNFAIR DISCRIMINATION***

The Equity court set up by the promotion of Equity and the Prevention of Unfair Discrimination Act deals with alleged unfair discrimination.

#### ***COURT APPROACH (s 10)***

##### *Presumption of unfair discrimination*

If the party bringing the case proves that the supplier has treated one customer differently to another on the basis of the group (race, gender etc) the customer belongs to, the court may draw the inference (or conclusion) that the supplier has discriminated unfairly, unless the supplier is able to provide an alternative reasonable and justifiable explanation for the difference in treatment.



### **What has Monarch done?**

Marketing material must treat all consumers the same and must not target certain groups above others. Monarch must ensure that, if they are responsible for marketing the product, that they comply with this.

## Labeling and trade descriptions on products and displays

### **What does the Act say?**

#### *Label or trade description - s24*

Any label or trade description that is attached to goods, displayed alongside them or is contained in any advertising material from which a consumer can place an order must not be such that it is likely to mislead a consumer. An existing trade description must not be tampered with in any way that would lead to consumers being misled.

Suppliers of goods that contain genetically modified components must label the goods in accordance with applicable regulations.



### **What has Monarch done?**

When products are labelled or described in marketing materials or on the product packaging itself, it must comply with the act. This is a self-assessment category that Monarch need to take head of when labelling products.

## All reconditioned or gray market goods must be labeled clearly

### **What does the Act say?**

#### *Reconditioned or gray market goods -s25*

Suppliers are required to warn consumers, with a conspicuous notice, that branded goods have been reconditioned or that they have been imported without the approval or license of the registered owner of the trade market, as the case may be.



### **What has Monarch done?**

If Monarch sells reconditioned goods, this must be clearly indicated on all the packaging.

## No false, deceptive or misleading representations

### **What does the Act say?**

*Section 4 (5)* states that a person engaged in business must not engage in any conduct that is misleading or deceptive, or that is reasonably likely to mislead or deceive. This is especially relevant to sales and marketing, since this induces a consumer to buy the product

## Sales agreement must have clear product specifications, quantities and achievable delivery dates

### **What does the Act say?**

#### *Over-selling and over-booking - s 47 (see p23)*



### **What has Monarch done?**

This is to safeguard against being held liable if you cannot deliver on time, the right amount or on the agreed dates. It also helps guard against consumers becoming confused about the intended use of the product.

**No use of physical force, coercion or unfair tactics must be used in the sales process**

### **What does the Act say?**

*Unconscionable conduct -s 40 (See p 21)*



### **What has Monarch done?**

This is especially relevant to marketing and direct sales. Marketing material must be checked and sales personell must be briefed. If a sales person, for example, promises a consumer that a product can do more than what it is built for, the sales person opens up the rest of the supply chain to liability.

**Sales methods must not take advantage of others' weaknesses**

### **What does the Act say?**

*Taking advantage (s 40)*

It is also unconscionable for a supplier to take advantage of a consumer's inability to protect their own interests owing to physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.

### *Prohibited schemes and practices*

Before the Act, the law already offered protection against dishonesty by recognizing fraud as a crime and as a delict. A Party who was induced to enter an agreement through fraud could sue the offending party for cancellation of the contract and damages.

All the Act has now done is to specify certain practices as being prohibited. The effect of this is that anyone who conducts such practices will be liable for an administrative fine, assuming they are traceable.

### *FRAUDULENT SCHEMES AND OFFERS (S 42).*

*Pretended authorisation* Initiating, sponsoring, promoting or knowingly participating in the distribution of any communication that—

- offers to supply any goods or services, or
- offers/ invites offers to enter into a transaction, or enter into a transaction; and
- falsely states, implies or represents that—
  - the communication is authorised by another person; or
  - the person making the communication represents another person.

*Fraudulent currency scheme* Pretending that one can turn something into money by washing, dipping or treating it with a chemical substance, or exposing it to an electrical charge, using magic etc. or making or issuing any currency without being authorised to do so.

*Fraudulent financial transactions (money laundering)* Using the proceeds of a specified unlawful activity with intent to promote the carrying on of a specified unlawful activity which is designed to conceal or disguise the nature, location, source of ownership or control of the proceeds of a specified unlawful activity.



**Fraudulent transfer of property** Obtaining any property from a person by false pretence and with the intent to defraud or inducing someone to confer a benefit of any kind on the understanding that the benefit has or will be paid for.

**False information** Representing, by false pretence, that one is in possession of:

- any property;
- information relating to the whereabouts of any property or relating to any legal rights or potential legal claims; or
- that one has the ability to effect the transfer of any property or to locate or determine the whereabouts of an individual.

### **Unauthorised disposal of property**

Inviting another person to participate for a fee in assisting to effect a transfer of any property that one is not authorised to transfer. **The Minister may declare any arrangement, agreement, practice or scheme to be a fraudulent scheme.**

### **PYRAMID TYPE SCHEMES (S 43)**

**Multiplication scheme** Offering/guaranteeing an effective annual interest rate, at least 20 per cent above the REPO Rate.

**Pyramid scheme** 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.

**CHAIN LETTER SCHEME** Participants canvass and recruit new participants and receive a share of what the new participants pay, and moves to higher levels within the scheme. **The Minister may declare any arrangement, agreement, practice or scheme to be a fraudulent scheme. It does not matter if new participants receive any goods or services in exchange for what they pay.**



### **What has Monarch done?**

As stated above, sales methods and practices must be regulated. Sales personnel must be trained and Monarch must make sure that no fraudulent schemes or practices are implemented in the sale or marketing of Monarch products.

## **Ensure that all direct marketing practices comply with the Act**

### **What does the Act say?**

#### **Direct marketing Sections 12, 28, and 32**

A person has the right to refuse to accept any marketing approach or communication or to pre-emptively block such contact. The National Consumer Commission may establish a register for people to record their desire not to be contacted for the purposes of direct marketing.

Once a person receives a marketing communication, they can contact the direct marketer to require them not to send any further communications. The direct marketer must have in place procedures to process such demands and ensure that the person is not contacted again.

Direct Marketers may not contact a consumer at home at all during periods and on days set out in the regulations, unless the consumer has expressly or implicitly requested or agreed to be contacted (s 12). In practice, they will usually have done so by ticking a box on an application form or online.



Persons calling in person at the premises of a consumer to engage in direct marketing with a consumer must visibly wear or display a badge or similar identification device or provide suitable identification when requested to do so by the consumer (s 28)

A supplier who concludes a transaction or agreement with a consumer following directly marketing any goods or services to them must inform the consumer of the right to cancel that agreement within 5 business days. Any goods left with the consumer without the consumer requiring or arranging payment for them are considered to be unsolicited goods (s 32).



### ***What has Monarch done?***

Direct marketing is restricted in terms of the Act and Monarch must ensure that, if they decide to directly market to consumers, they comply with the Act.

## **Ensure no sales agreements are entered into with minors or mentally unfit persons**

### ***What does the Act say?***

#### ***CONTRACTUAL CAPACITY***

***No agreements with persons lacking legal capacity s39*** A party to a contract is required to have the legal capacity to enter into it. In terms of the common law, there are various categories of persons who are considered not to have this capacity, including insane persons, intoxicated persons, minors and prodigals (a person whose financial affairs are looked after by a court appointed curator). The Act deals with only two of these categories: the mentally unfit and minors. An agreement entered into with a consumer who has been declared mentally unfit when the supplier knew or could easily have established the person had been so declared is void. This means the agreement is not legally enforceable at all.

If a contract is entered into with an unemancipated minor, without the consent of his or her guardian, it is voidable, or valid until cancelled, at the option of the minor. The age of majority was lowered from 21 to 18 years by s17 of the Children's Act (38 of 2005). An agreement with a minor can, however, be valid and enforceable if the adult responsible for the minor ratifies (or confirms) it or if the minor himself or herself ratifies it after reaching the age of 18 years.

The section does not apply if the consumer or someone acting on their behalf induced the supplier to believe that the consumer had an unfettered (unrestricted) legal capacity to contract or conceal the fact that the consumer's legal capacity was actually restricted. This proviso would cover situations such as a minor producing a false identification document in order to buy alcohol.



### ***What has Monarch done?***

This will be the responsibility of the party who sells the product to a consumer. This will usually be a distributor or outlet that Monarch supply to. If however, Monarch sells a product directly to a consumer, they must take head of this.

## **Provide a written record of every transaction**

### ***What does the Act say?***

#### ***Sales records - s26 (2)***

Even if the terms and conditions of an agreement are not in writing, a supplier of goods or services must provide a written record of every transaction. The record must contain at least the following information:

- The supplier's full name, or registered business name, and VAT registration number, if any;
- The address of the premises at which, or from which, the goods or services were supplied;



- The date on which the transaction occurred;
- A name or description of any goods or services supplied or to be supplied;
- The unit price of any particular goods or services supplied or to be supplied;
- The quantity of any particular goods or services supplied or to be supplied;
- The total price of the transaction, before any applicable taxes;
- The amount of any applicable taxes; and
- The total price of the transaction, including any applicable taxes.



### ***What has Monarch done?***

This will be the responsibility of the party who sells the product to a consumer. This will usually be a distributor or outlet that Monarch supply to. If however, Monarch sells a product directly to a consumer, you must make sure you comply with the Act.

## **Agreements must have unfair, unreasonable or unjust terms**

### ***What does the Act say?***

#### ***Unfair, unreasonable or unjust agreement terms s 48(1)***

A supplier must not negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a **manner** that is unfair, unreasonable or unjust. A supplier must not offer to enter into an agreement to supply any goods or services:

- At a **price** that is unfair, unreasonable or unjust;
- On **terms** that are unfair, unreasonable or unjust

#### ***Notice required for certain terms and conditions (s 49)***

Obligation imposed upon suppliers by s 49 to draw to the attention of consumers any clause in the agreement that purports (claims) to:

- limit in any way the risk or liability of the supplier;
- constitute an assumption (acceptance) of risk or liability by the consumer;
- impose an obligation on the consumer to indemnify (relieve of liability) the supplier; or
- be an acknowledgement of any fact by the consumer (such as that they have received something or been informed of something).

Such terms must be in plain language, and drawn to the attention of the consumer in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer.

The consumer must be made aware of the terms long enough before the consumer enters into the transaction or agreement or makes payment to give him or her sufficient time to understand them. If the provision or term concerns any activity or facility entails any **risk of an unusual character** or that could result in **serious injury or death** and provision or term is of such a nature that the consumer could not reasonably be expected to be aware of or notice it, the supplier must, in addition to what must be done with the assumption of risk provisions discussed above, **specifically** draw the fact, nature and potential effect of that risk to the attention of the consumer.

The consumer must show that he or she agrees to that provision by signing or initialing the provision or otherwise acting in a manner that is consistent with the consumer acknowledging having been made aware of the risk and accepting the provision.



### ***What has Monarch done?***

This has been done in the Credit Agreements and instruction manuals. Any other consumer agreements must be checked and edited accordingly.



## Changes to agreements or cancellations

### *What does the Act say?*

#### *CHANGES (Section 46)*

A new agreement is not created as a result of a change to an existing agreement, or a deferral or waiver of a right under an existing agreement, if the change, deferral or waiver is made in accordance with the Act or original agreement.

Likewise, if the parties agree to a substitution of other goods after delivery has taken place, the transaction applies to the substituted goods rather than the goods originally described; and if there was an agreement or the sales record, the supplier must provide an amended agreement or sales record, reflecting the change.

#### *CANCELLATION, EXPIRY AND RENEWAL*

##### *Cooling-off period after direct marketing S 16 20(2)(a)*

A consumer who enters into an agreement as a result of direct marketing can rescind it within five business days after the date on which the transaction or agreement was concluded or on which the goods were delivered to the consumer. All the consumer needs to do is give notice of the cancellation to the supplier, in writing or another recorded form, and return the goods if received. The consumer need not give a reason and cannot be penalized by the supplier, who must return any payment received within 15 business days of receiving the notice or of getting the goods back, whichever happens last. description or on a reasonable examination of the sample.

The supplier may be entitled to recover certain costs relating to the use of the goods in terms of s 20(6).

##### *Consumer's right to return goods - section 20 (2) See also p18*

A consumer can cancel a sale and goods to the supplier and receive a full refund if the consumer did not have an opportunity to examine the goods before delivery and the consumer is not satisfied that the goods are of a type and quality that were agreed upon.

The consumer must show, in the case where the consumer bought the goods solely on the basis of a description or sample, or both, that the goods delivered did not in all material respects correspond to what an ordinary alert consumer would have been entitled to expect, based on the If the goods were supplied following a special order, they can be returned if they do not reasonably conform to the material specifications of the special order (s 19(5)).

When the supplier delivers a mixture of goods (some as agreed upon and some of a different description) the consumer can refuse delivery of all or part of the goods (s19(8)).

If the supplier delivers a larger quantity of goods than the consumer agreed to buy, the consumer may either reject all of the delivered goods or accept and pay for the agreed quantity at the agreed rate and return the rest.

A consumer may return goods intended to satisfy a particular purpose communicated to the supplier (as per s 55(3)) within 10 business days after delivery to the consumer, if the goods have been found to be unsuitable for that particular purpose.

If the supplier offers to deliver the goods or performance of any services differently to what was agreed in terms of place, date or time, the consumer may either accept the new arrangement, insist that the original arrangement is stuck to or cancel the agreement.





In all of the above situations, the goods may not be returned if any law prohibits their return for public health or other reasons or if the goods have been tampered with in some way after delivery.

Where it is permissible to return the goods, they are returned to the supplier at the consumer's risk and expense if the consumer cancels a direct marketing agreement, but at the supplier's risk and expense and within 10 business days after delivery to the consumer in all the other instances.

### *Consumer's right to cancel advance reservation, booking or order - S 17*

A consumer has the right to cancel any advance booking, reservation or order for any goods or services, but may be liable for a charge for doing so. The supplier may require payment of a reasonable deposit in advance and impose a reasonable charge for the cancellation.

What is reasonable is to be decided by reference to what is fair in the circumstances, having regard to:

- the nature of the goods or services that were reserved or booked;
- the length of notice of cancellation provided by the consumer;
- the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation; and
- the general practice of the relevant industry.

A supplier may not, however, charge a cancellation fee if the consumer was unable to honour the booking because of the death or hospitalization of the person for whom the booking was made. This is yet another instance where the risk has now passed from the consumer to the supplier and where it would be advisable for the supplier to consider obtaining appropriate insurance cover.



### ***What has Monarch done?***

This will only apply to agreements with consumers. Monarch must insure that, if they directly sell to consumers, these requirements are met in terms of the Act.

## **Ensure all fixed term agreements comply with the Act in terms of expiry and renewal**

### ***What does the Act say?***

#### ***Expiry and renewal of fixed-term agreements (section 14)***

Where a consumer agreement is for a fixed term, the supplier must notify the consumer in writing or in any other recordable form, of the looming expiry date, between 40 and 80 business days before the expiry date. At the same time, the supplier must bring any significant changes that would apply if the agreement is to be renewed to the attention of the consumer, as well as the options available to the consumer.

The options are that the contract will be automatically continued on a month-to-month basis, unless the consumer expressly directs the supplier to terminate the agreement on the expiry date or agrees to a renewal of the agreement for a further fixed term.

The consumer can cancel the agreement on the expiry date, without penalty or charge, or at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form. If the consumer gives such notice, the consumer remains liable to the supplier for any amounts outstanding and the supplier is permitted to impose a reasonable cancellation penalty.

If, however, the consumer does not cancel the agreement, it will be automatically continued on a month-to-month basis, subject to any material changes of which the supplier give notice. This is the one instance when negative option marketing is, in effect, permitted.





### *Cancellation by supplier (section 14(2)(b)(ii))*

The supplier may cancel the agreement 20 business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time.



### ***What has Monarch done?***

In normal circumstances Monarch will not have fixed term agreements with consumers, but it is beneficial to take note of the CPA requirements in case they decide to do so.

## **Hold amounts prepaid until a charge is made against them**

### ***What does the Act say?***

***Prepaid certificates, credits and vouchers (s 63)*** Where a consumer makes an advance payment for goods or services to a supplier and is provided with a prepaid certificate, card, voucher or similar device that device remains valid until its full value has been redeemed in exchange for goods or services; or three years after the date on which it was issued (unless the supplier extends that period). The outstanding credit on the device remains the property of the consumer.

***Prepaid membership/ service fees (s 64)*** In respect of prepayments for services other than by means of prepaid devices (discussed above), the amount so paid remains the property of the consumer until the supplier makes a charge against it. The charge may be made once per month in advance for the pro-rata portion of the amount held, to pay the month's cost of the membership or service.



### ***What has Monarch done?***

In most instances this will not apply to Monarch.



## Quality Control

The quality of goods or services must be the same for all customers

***What does the Act say?***

*S8 See p18*



***What has Monarch done?***

As far as we are aware, Monarch supplies the same quality goods to all their customers. There is no differentiation, based on the exclusions in S8, that Monarch makes when producing or supplying goods.

Ensure product delivery and service level agreement performance levels are in line with those agreed upon

***What does the Act say?***

*Goods - Quality and Safety (s 55)*

This section does not apply to goods bought at an auction which are covered by s45.

All other goods must be reasonably suitable for the purposes for which they are generally intended. For example an ordinary toaster should be able to produce a dozen or so slices of properly done toast daily, but need not be suitable for use in a restaurant that requires hundreds of slices of toast a day.

The goods must be of good (not reasonable) quality, in good working order and free of defects, and be capable of being used for a reasonable period of time, depending upon the circumstances.

A supplier would not be liable under this subsection if the consumer had been informed of the specific condition of goods and accepted them on that basis. If, for example, floor tiles are sold as 'seconds', the buyer should expect some imperfections in them.

Goods must also comply with any applicable statute, including the Standards Act of 1995.

Goods must be reasonably suitable for the specific purpose for which a consumer wishes to use them for if the consumer has specifically informed the supplier of that purpose and the supplier ordinarily supplies such goods or holds itself out as being knowledgeable about the use of such goods.

### ***WARRANTEES***

A warrantee, which is often mistakenly called a guarantee, is a legally binding assurance that the product has particular properties. In business usage, it is an additional term of the contract to the effect that if a product becomes defective within a specified period of time, it will be replaced or repaired.

In the common law, every agreement for the sale of goods is deemed to have an implied warrantee or term that the goods have no hidden defect that will make them unfit for the purpose for which they are bought. This means the term is automatically part of the agreement even if the parties do not mention it. If there is a defect, the seller is obliged to compensate the buyer. The scale of compensation depends on the degree to which the usefulness of the goods falls short of what is required.

Sellers are able to avoid the effects of the implied warrantee by including a *voetstoets* clause in the agreement.

In addition to any warrantee implied by the common law or given expressly by a supplier, all agreements involving the supply of goods are now taken as having an implied term that the goods are reasonably



suitable for the purposes for which they are intended, of good quality, deliverable and comply with statutory standards.

### *Remedy (s56)*

If the goods fail to comply with the requirements listed in the above paragraph, the consumer is entitled to return them, at the suppliers risk and expense and without penalty and obtain a refund or have the item/s repaired or get a refund of the price paid. The choice is the consumers.

The practice that some retailers have of giving a consumer vouchers rather than money, to avoid shop lifters from cashing in on their wrong doings, will not be permissible if a consumer insists on a cash refund. The consumer can claim against any of the entities in the supply chain, namely the producer, importer, distributor or retailer of the goods. In practice, the consumer is likely to approach the entity that it interacted with, which will usually be the retailer.

The implication of this section for retailers is that they will need to ensure that their contracts with producers or distributors enable them in turn, to recoup their losses. Another implication is that each entry in the supply chain will need to hold sufficient stock of a product after it is discontinued to enable it to replace returned items. The section does not apply if the goods fail to meet the necessary standard because they were tampered with in some way after learning of the control of the entity claimed against.



### **What has Monarch done?**

As far as we are aware, Monarch produces good quality products. Monarch must take note of the warranty periods to ensure that their products comply with it and that they put mechanisms in place when goods are returned.

It would be advisable to ensure that customer relations are handled in such a way that most customers would be persuaded to accept a cash refund rather than insisting upon the original item being replaced. If the customer opts, however, to have the goods repaired, the supplier has only one opportunity 'to tinker' or attempt to repair the goods. If the problem with the goods reoccurs, they must be replaced or a refund made.

## Ensure that the safety features of the product are effective

### **What does the Act say?**

#### *Liability for damage caused by goods s61 (1)*

A producer, importer, distributor or retailer of any goods is liable, without proof of negligence on the part of the supplier of the goods, for any harm caused by the goods. The same applies to a supplier of services who also applies, supplies, installs or provides access to goods.

If more than one party is potentially liable, the consumer can sue any one of them, as their liability is joint and several. This means that if the consumer sues one party and receives payment, that party can then sue the others for a contribution towards the payment.

The harm may arise from a product failure, defect or hazard or inadequate instructions or warnings regarding any hazard arising from or associated with the use of any goods. It is sufficient to show that the damages were suffered only partly as a consequence of these shortcomings.

The type of harm for which a person may be held liable includes—

- the death of, or injury to, any natural person;
- an illness of any natural person;
- any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and

any economic loss that results from the harm listed above.



### **What has Monarch done?**

As far as we are aware Monarch's products are safe and effective. Monarch must take note of the standard of safety and quality of the products and ensure that they comply with it at all times.

## **Ensure that the customer is satisfied that the delivery of goods complied with the arrangements made**

### **What does the Act say?**

#### *Customer's right to examine goods*

A customer has the right to pick and choose from goods openly displayed. The customer cannot, however, be held liable for the loss or damage to goods displayed by a supplier unless it was caused by the gross negligence, recklessness, malicious behaviour or criminal conduct of the consumer. Any statement or notice the supplier may put up to the contrary would be of no effect.

If the customer buys the goods solely on the basis of a description or sample, or both, provided by the supplier, the supplier must deliver goods that correspond 'in all material respect and characteristics to what an ordinary alert consumer would have been entitled to expect based on the description or on a reasonable examination of the sample. Goods sold by sample and description must correspond with both.

#### *Delivery of goods (s 19) See p14*



### **What has Monarch done?**

If Monarch delivers directly to consumers, you must make sure they deliver on time and if they deliver to distributors then they must note that late deliveries may also make them jointly liable if this results in late delivery to consumers.

It is also important to take note that consumers may check and examine goods and that they may open packaging to do so. This will impact Monarch, in that they might have to repackage opened goods.



## After Sales Services

### Maintenance

Maintenance agreements – see documents, notices and agreements p18

Bundling of goods and maintenance services – See p22

Ensure that descriptions of services are accurate

#### *What does the Act say?*

#### *SERVICES (s 54)*

In the field of marketing, reference is made to differentiating one's products and services on the basis of their quality standing out above that of one's competitors' products and services. Now the bar has been raised for all businesses, as quality is no longer an extra but a minimum requirement that a consumer can insist on.

As is to be expected, the Act was not able to describe precisely what quality means for the very many types of possible business transactions. What it does do is require that services be performed in a manner and quality that persons are generally entitled to expect s 54. So, in deciding whether a service was of the required quality, one needs to take into consideration what the average persons expectations of a particular type of service would be.

In practice, the person involved in the resolution of the dispute, be they ombudsman or commissioner, will have to rely on their own expectations and experience to decide what the expected level of service is. This provision obviously has important consequences for the suppliers of professional services such as doctors, lawyers and accountants. Undoubtedly, consumers expect a successful outcome from the services of such professionals, although, realistically, this is not always possible. Unfortunately, not everyone gets better and usually at least one of the parties to a legal dispute is not successful.

The section also requires that the service be performed and completed in good time, or that the supplier gives the consumer timely notice of any unavoidable delay. The use of the word 'unavoidable' suggests a delay not arising as a result of a fault on the part of the supplier, acting reasonably diligently.

Where any particular goods are required to be used, delivered or installed in the performance of the service, they must be free of defect and of the quality that persons are generally entitled to expect.

**Example:** The wiring installed by an electrician, or the welding rods used by a welder.

Another important right attaching to a service is the consumer's right to have any property over which the supplier had control in at least as good a condition as it was in before the performance of the service. In terms of s 67, the supplier must also return any goods removed during the course of repair and maintenance work and return them to the consumer in a reasonable clean container. A supplier must also exercise reasonable care and diligence in looking after property, including deposits of fees held on behalf of a consumer (s65). The supplier would be liable for any loss arising from its failure to take reasonable care.

**Remedy:** If the consumer fails to perform the service to the necessary standards or as agreed, the consumer can require the supplier to make good any defect or shortcoming or insist on a refund of a portion of the price agreed upon that is consistent with the degree of the shortcoming.



### **What has Monarch done?**

If products need maintenance, then the maintenance service will fall under the CPA. Monarch must take note of the CPA requirements of a service.

## **Ensure that arrangements agreed on about maintenance service are possible and are captured accurately**

### **What does the Act say?**

#### **Supply of service s 19**

The parties are free to expressly agree upon how the services will be performed. If they do not so agree, it becomes an implied condition of every transaction that the supplier is responsible to perform the services either on the agreed date and at the agreed time or within a reasonable time after the conclusion of the transaction of agreement at the agreed place of performance (which is stated to be the supplier's place of business, if any, or the supplier's residence).

If no date or time has been specified for performance of services, this must not be done at an unreasonable time.

#### **Changes to place or time and date of performance of services (s19(6))**

If the supplier wants to change the agreed arrangements for delivery of performance, the customer has the option to agree to the change, insist on the performance as agreed, or cancel the agreement.

## **New or reconditioned parts installed during repairs or maintenance work and labour involved are of a high and durable standard**

### **What does the Act say?**

#### **WARRANTEES**

A warrantee, which is often mistakenly called a guarantee, is a legally binding assurance that the product has particular properties. In business usage, it is an additional term of the contract to the effect that if a product becomes defective within a specified period of time, it will be replaced or repaired.

**Warranty on repaired goods (s 57)** All new or reconditioned parts installed during repairs or maintenance work, as well as labour involved, is automatically warranted for three months after installation. This does not apply to goods that have been abused or to ordinary wear and tear from usage.

The supplier cannot, in terms of s 48 (1) (c) require a consumer to waive any rights, so the use of voetstoets clauses will not be permitted in business contracts covered by the Act. The private seller of a house would not be prevented from including such a clause in an offer to purchase agreement.



### **What has Monarch done?**

Monarch must make sure that they accept and repair defective goods as set out in the CPA. Repaired goods also have a further warranty and they must be accepted and repaired if the consumer wishes.



## Repairs

### Repairs to goods sold

Property over which the supplier had control must be kept in at least as good a condition as before service and any goods removed during repair and maintenance work must be returned to the consumer

#### *What does the Act say?*

*SERVICES (s 54) See p45*

Quality is a minimum requirement that a consumer can insist upon. The Act requires that services be performed in a manner and quality that persons are generally entitled to expect s 54. One needs to take into consideration what the average person's expectations of a particular type of service would be. This provision obviously has important consequences for the suppliers of professional services such as doctors, lawyers and accountants.

The section also requires that the service be performed and completed in good time, or that the supplier gives the consumer timely notice of any unavoidable delay. The use of the word 'unavoidable' suggests a delay not arising as a result of a fault on the part of the supplier, acting reasonably diligently.

Where any particular goods are required to be used, delivered or installed in the performance of the service, they must be free of defect and of the quality that persons are generally entitled to expect. Another important right attaching to a service is the consumer's right to have any property over which the supplier had control in at least as good a condition as it was in before the performance of the service. In terms of s 67, the supplier must also return any goods removed during the course of repair and maintenance work and return them to the consumer in a reasonable clean container. A supplier must also exercise reasonable care and diligence in looking after property, including deposits of fees held on behalf of a consumer (s65). The supplier would be liable for any loss arising from its failure to take reasonable care.

#### *Remedy*

If the consumer fails to perform the service to the necessary standards or as agreed, the consumer can require the supplier to make good any defect or shortcoming or insist on a refund of a portion of the price agreed upon that is consistent with the degree of the shortcoming.

***All new or reconditioned parts installed during repairs or maintenance work, as well as labour involved, is automatically warranted for three months after installation***

*WARRANTEES – See p46*



#### **What has Monarch done?**

Monarch must make sure that you accept and repair defective goods as set out in the CPA. Repaired goods also have a further warranty and they must be accepted and repaired if the consumer wishes. If Monarch is responsible for maintenance and repairs they must comply with the Act and return goods to the consumer in the required state.

If the repair or maintenance service is outsourced, then Monarch must be aware that if the third party repairers do not comply with the Act, Monarch can be held liable. It is advised that this is addressed in the service level agreement.



## Conclusion and how to use the report

Monarch has taken various steps to ensure CPA compliance. In doing so you have protected yourself against liability and reputational loss, resulting from non-compliance with the CPA.

If you take the attached report and go through each section individually you can get a thorough idea of where you are in terms of CPA readiness. If you then write down all the steps you have taken under the headings “What has Monarch done” you can use the report as a marketing tool to attract more clients.

The report is provided to you in word format so that you can use it and edit it according to your needs. Another use for it, is to have it available on the internet as a information and marketing tool that customers and visitors to your website can access.

Once you have gone through the report in detail, it will be useful to print out a copy of the report and distribute it amongst the staff at Monarch. Each functional area relates to a different business component and every staff member needs to know where they fit into the greater scheme of things and how important it is that they do their job thoroughly and correctly.

The report can also be adapted annually, or from time to time, when you feel it is needed or when you have implemented a new CPA readiness mechanism.

This report has been specifically compiled for you and there is currently not report that is identical to yours. Edit it, use it, update it and personalise it to suit your needs.

For more information and to contact us, please visit our website at [www.michalsons.co.za](http://www.michalsons.co.za).





## Attachment 1 – Plain language checklist for effective documents

Find out if your document is effective by marking <b>Yes</b> or <b>No</b> for the following questions.	Yes	No
<b>Content:</b>		
Is all the necessary information included?		
Have you excluded unnecessary and irrelevant information?		
Are the details correct?		
Is the tone of your document appropriate to the reader and situation?		
Does the content create a positive image of Monnarch (Pty) Ltd?		
<b>Structure:</b>		
Is the document structured for the average reader's needs?		
Does your opening create interest and summarise the document's purpose?		
Have you put related material together and in a logical order?		
Have you kept to only one idea per sentence?		
Have you linked your sentences?		
Have you kept to only one thought per paragraph?		
Have you used short paragraphs?		
Have you used useful descriptive headings or titles for different sections?		
Have you avoided cross references where possible?		
<b>General writing and grammar:</b>		
Have you communicated clearly and directly in language familiar to the average reader?		
Have you written more about the reader than about us where appropriate?		
Have you checked for spelling mistakes?		
Have you used punctuation correctly?		
Have you used the active instead of the passive tense?		
Have you used positive language?		



Are your sentences short? (Less than 25 words, averaging 15 to 20)		
Have you included the important information at the end of your sentences?		
<b>Plain language:</b>		
Have you used simple commonly used words and phrases where possible?		
Have you removed legalese, Latin, jargon, archaic or unnecessary words?		
Have you replaced every 'shall' with 'must', 'may' or 'will'?		
Have you explained technical terms and acronyms?		
Have you used verbs instead of nouns (nominalisations)?		
Have you used 'that' and 'which' correctly?		
Have you numbered one to nine in words and 10 onwards in numerals?		
Have you used minimal CAPITALS?		
<b>Design:</b>		
Does your document design help the reader understand the information?		
Have you used tables, charts, lists or other graphics to explain concepts?		
When the reader sees the document, will they think it looks professional?		
Is there enough white space?		
Have you used at least 10 point font size? (11 or 12 point is better)		
Have you used the correct font style? (We prefer Franklin Gothic)		
<b>Legal issues (relevant to the Consumer Protection Act):</b>		
Have you highlighted clauses dealing with transfer of risk or liability?		
Have you removed misleading, unfair, unreasonable or prohibited terms?		
Have you ensured that no legal rights have been lost or diluted?		

If you marked "No" to any of these questions, you may need to change your document.

If you marked "Yes" for all these questions, your document is ready to be edited by someone else, tested or printed.

Michalsons Attorneys publish guidance about plain language in South Africa at <http://www.michalsons.co.za/category/plain-language>