

THE TRADE PRACTICES ACT — WHAT'S IN IT FOR BUSINESS



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Die skryfster van hierdie artikel is 'n senior lektrese aan die Nagraadse Bestuurskool van die Universiteit van Stellenbosch. Sy is van mening dat die Wet op Handelspraktyke nie as 'n skok gekom het nie. Niemand kan dit ontken nie dat die tyd aangebreek het vir wetgewing om 'n beter balans in bedingingsmag in die mark te weeg te bring — om die belange van die verbruiker te beskerm asook om maatskappye te vrywaar van onetiese handelspraktyke deur sommige van hulle mededingers. Die artikel is geskryf as 'n gids vir bestuur. Die bedoeling is nie om die Wet wetlik te interpreteer nie.

The Trade Practices Act has come as no shock. Few could deny that the time has come for legislation in South Africa in order to bring about a better balance of bargaining power in the market place — both to safeguard the interests of consumers and to protect companies from the unethical trading of some of their competitors.

OBJECT OF THE ACT

Protection of public interest has become very much a product of the times. The Act very clearly shows a basic change in Government thinking about its role in the relationship between business and consumer and its intention to become more involved in consumer protection now and in the future.

Objectives of the Act

The main focus of the Act is to prevent malpractice taking place in the marketplace. Three main issues are dealt with: false and misleading advertising and selling; unethical trade practices; and trade coupons or trading stamps. Each is dealt with separately in this article.

The three basic objectives which can be identified from the Act are:

- * to prevent customers being misled by business through false or deceptive advertising and selling
- * to set-up machinery to investigate and prohibit trade practices considered to be injurious to the public
- * to amend the existing law relating to trade coupons.

FALSE AND MISLEADING ADVERTISING AND SELLING

What the Act says

False or misleading statements made about "goods" or services either sold or leased by firms is prohibited

whether the statement considered false or misleading refers to:

- * to actual nature of the product or service
- * its properties
- * claimed advantages which the product or service has
- * uses of the product or service
- * conditions and terms of credit at which it can be purchased
- * the price at which it can be bought or leased.

In addition to prohibiting statements or other indications given are made in a false or misleading way relating to the actual characteristics and benefits of the product the Act specifically prohibits statements made or indications given by firms that are considered misleading about the price at which the product is being sold or leased — either misleading information or a misleading indication given that the price is:

- * equal to or less than a guide price
- * equal to or less than a previous price charged by a firm
- * less than it is actually being sold for.

An important part of this section of the Act is that the word "advertisement" is used to cover every aspect of marketing communication. This means that statements or indications considered false or misleading can be contained in advertising or direct mail, material, window displays, labels, billboards and so on *and* can be given orally, via radio and television *as well as* by salesmen.

What is false or deceptive?

From a legal point of view it seems that statements made or indications given by written promotional material, radio and T.V. advertisements and by salesmen can only be regarded as false if they are directly and plainly untrue or deceptive if what was

said or indicated was misleading in a material way — that is if the statement or 'message' was one which was capable of and actually did affect the purchase decision made by the consumer.

It is very difficult to actually define exactly what constitutes deception in promotional information. There is however a difference between something communicated by a firm which is basically misleading and/or done deliberately to give customers the wrong impression, and persuasive statements or imagery which is either creative or 'puffing' as it is called — an acceptable form of persuasive exaggeration. Puffing usually takes one of two forms — either where terms like 'best, greatest', and so on are used to boost a product — terms which any reasonable consumer could not be expected to take seriously or an outright exaggeration which is obviously untrue, for example, 'The perfume which will leave you fighting off the men!'

In reality though it is impractical to try to separate the persuasive aspects of advertising material from the informative aspects. If the Act is however to serve any real purpose clearcut guidelines, to distinguish between creative persuasion and deception based on the responses of relevant consumers will have to be provided by the authorities. Then these standards will have to be communicated to business and consumers so that each will know their rights.

The following could be a useful checklist for management to use to evaluate statements made or indications given in promotional material. The types of statements listed should be avoided or checked with the Advertising Standards Authority of S.A. (if contained in an advertisement), or with the Department of Commerce.

Statements which:

- * are clearly false about a product or service — either in terms of its physical properties or advantages over other products
- * contain testimonials made by either customers or 'personalities' which are untrue
- * give the wrong price or the wrong impression about the price of a product
- * give the wrong information or impression about credit facilities offered by the company
- * contain false claims that aspects of the product are scientifically or otherwise 'proven'
- * carry an untrue promise which can be expected to directly influence a consumers purchasing decision
- * are publically offensive
- * offer cheap goods which the firm does not have in stock.

Who is responsible?

The Act is directed at the firm selling or leasing goods and services. It is therefore clear that the firm will be held responsible for statements made or indications given to the public considered to be misleading. It

would not be likely therefore that advertising agents, printers or newspapers acting in good faith could be held responsible for the misleading promotional material of their customers.

As far as false or misleading statements made by salesman are concerned, the responsibility is the firms even if the salesman has left the company. (To ease this situation prosecution has to take place within a year.)

To avoid a conviction the employer must be able to prove that he actually took steps to prevent false or misleading statements being made by the salesman and must show that the salesman was given the correct information and that he or she acted unethically without the firms knowledge or permission. Alternatively the businessman must prove that a reasonable mistake was made or that information given to the customer was given in good faith based on information the company got from someone else.

Practically speaking the latter is reasonably feasible provided the businessman is aware of the relevant information received and the information is given to salespersonnel. The former however could be an extremely difficult task.

Undoubtedly though, in general, recruiting and training of salespersonnel will have to be improved. Management will have to ensure that salespersonnel's product knowledge is good and that training programmes are aimed not only at improving selling techniques, but at giving the salesperson the right kind of information and instructions to pass this information on to the consumer.

UNETHICAL TRADE PRACTICES

What the Act Says

Part of the Trade Practices Act sets up the machinery to deal with trade practices considered injurious to the public and to the trade.

It provides for the setting up of a 'Trade Practices Advisory Committee' to investigate the activities of firms or certain business practices if they, the Committee, feel that such practices could be harmful to public interest.

Once the committee has investigated a company or marketing practice it can recommend to the Minister that that particular business practise constitutes unethical trading and should be prohibited. Once this is done there is no right of appeal for the companies concerned.

What to expect ...

There is no definite indication as to which types of trade practices are most likely to be investigated or given priority investigation by the Committee. But it is felt that the following types of operations are the most likely:

- * certain door-to-door selling practices
- * the offering of discounts to purchasers if he finds more purchases
- * multiple or multi-level selling — where agents are appointed to engage more agents to sell goods with these agents paying for the privilege of being appointed
- * the sending of goods to customers, usually with an invoice but without an order, requesting the customer to return the goods within a specific time if they don't want them.

No doubt the existence of these Advisory Committees will be a deterrent to unethical business practices in the market place. Companies who are not engaged in anything likely to be thought of as unethical will not be affected — this section of the Act should certainly not inhibit companies from engaging in innovative marketing techniques provided they are ethical. Those firms or individuals who contemplate or are involved in marketing methods or practices likely to be regarded as 'unorthodox' should consult with and discuss their plans with the Department of Commerce before making any decisions.

TRADE COUPONS OR TRADING STAMPS

What the Act Says

A person or company cannot supply or give a customer a trading stamp (or trade coupon) if the customer has to buy or hire something in order to get the benefit which the coupon offers.

The firm *can* however

- * give a customer a trading stamp which gives or promises the customer a cash discount when he or she buys the product (provided only cash is involved and not goods).
- * give the customer, when he or she buys a product a trade coupon which allows the customer a refund in cash of a certain amount of the purchase price
- * give the customer a trade coupon which "offers" goods to the customer provided the goods "are of the same kind and manufactured from substantially the same materials" as the purchased goods (for example a wooden kitchen table and wooden kitchen chairs)
- * give the customer 'package sales' — a single package for one price (for example a package of perfume and toilet water)
- * give away a product when another product is bought by a customer (for example give away toilet water when perfume is bought)
- * give someone a trade coupon to win or get something free or enter a competition (provided the customer doesn't have to buy or hire something in order to get the coupon).

The Coupons Themselves

The provisions laid down in the Act apply to: the supplying or giving of coupons or trading stamps or to

a promise made by a person or company to supply a customer with or give a customer a trade coupon; or to the selling of a trading stamp when another product is sold or leased; or to the selling supplying or giving of a trading stamp to another person selling or leasing goods; or to the publishing of a trade coupon in printed matter like a book or newspaper.

If cash or goods offered to customers in trade coupons legitimately, the coupon must show exactly how much or what can be claimed. It must also show exactly from whom and where the claim can be made.

DISCLOSING INFORMATION AND PENALTIES

Inspectors can be asked to get information from a company applicable to any part of the Act. A businessman could also receive a letter from the Secretary of Commerce asking for certain information concerning his business. In both cases the company is forced to cooperate.

A businessman can be convicted if false information is given or if information is withheld or if he refuses to cooperate and give an inspector documents or manuscripts. The maximum penalty on conviction is 2 years imprisonment and a R2 000 fine.

IMPLICATION OF THE ACT FOR BUSINESS IN THE FUTURE

As yet it is uncertain the extent to which the Trade Practices Act will influence business — whether it will prevent misconduct in the marketplace and whether in practical terms it can cure some of the ills which exist in the marketplace.

But the fact that the Act exists has far wider implications for business. It highlights the general interest in consumer protection which has been growing in South Africa over the past few years. It gives permanence to 'Consumerism' and the 'Consumer Movement' and it acts as a strong warning signal to business. Its message is clear and very simple: unless business can resolve consumer grievances in the future Government will do it for them.

Industry wide action is needed and needed immediately — voluntary action and self regulation geared to protect consumers and business alike. Fair standards of business behaviour and performance and codes of ethics are needed from industry and trade associations to re-establish rapport between business and consumers, and improve the relationship of consumers and business.

However consumer problems go beyond protection from malpractices — consumers needs more information and a foundation of knowledge through consumer education programmes, necessary to give them the opportunity to become better consumers capable of making better decisions.

South African companies can no longer afford to adopt a defensive attitude to the problems facing consumers. The time has come in this country for a greater awareness by management of what is happening in the marketplace, and a more careful understanding by them of what is going on in their own organizations.

The first step is for business to accept that there is discontent in the marketplace and that 'Consumerism' is relevant to our economy and our society — the next step is for companies to commit themselves to closer dialogue with consumers and make a far more serious attempt to incorporate consumer needs into their planning programmes. Industries and companies who respond earliest will have the most to gain ...

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