THE CONSUMER PROTECTION ACT and TYPICAL PROPERTY TRANSACTIONS

1. INTRODUCTION

In South Africa consumer protection legislation has for a long time not been in line with those of other countries. This changed when The Consumer Protection Act (CPA) was signed into law on 24 April 2009. The provisions that impact on estate agents will come into operation on 1 April 2011.

The main purposes of the CPA include the prohibition of certain unfair marketing and business practices and the establishment of a *National Consumer Commission*. The provisions include a "Consumer Bill of Rights" that grants various rights to consumers namely the right to equality, the right to privacy, the right to choose your suppliers, the right to disclosure of information, the right to fair and responsible marketing, the right to fair and honest dealings, the right to fair, just and reasonable terms and conditions and finally, the right to fair value, good quality and safety. A consumer may approach a Court, the Tribunal or the Commission alleging that his/her consumer rights have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring. The penalties are severe, with a maximum up to the greater of an administrative fine of up to 10% of one's annual turnover or R1-million.

2. SCOPE OF THE CPA IN RELATION TO PROPERTY TRANSACTIONS

The CPA will regulate every transaction between a supplier and a consumer involving the *supply* of goods or services in the ordinary course of business; the *promotion* of such goods and services that could lead to a transaction being entered into; and the goods and services themselves *after the transaction is completed*. Certain juristic persons with turnovers or asset values over a threshold still to be announced will fall outside the protection of CPA.

A consumer is defined to include (amongst others) a person to whom goods or services are *marketed* and a person who has *entered into a transaction* with a supplier in the ordinary course of the supplier's business. In turn, a supplier is defined as *"a person who markets any goods or services in the ordinary course of business for consideration"*. Supply of goods, include sell, rent, exchange and hire and supply of services include to sell, perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility. Because the definition refers to "in the ordinary course of business for consideration", the CPA applies to regular transactions and excludes once off transactions.

"Goods" is defined to include a legal interest in land or any other immovable property (excluding immovable property sold via auction in terms of Section 45). Read with the definition of a supplier, it would appear (although some commentators argue differently) that the CPA will not apply to the once off transactions but only to the sale of properties by speculators and developers.

3. **THE CPA AND THE VOETSTOOTS CLAUSE**

In terms of Section 55 of the CPA, every consumer has the right to receive goods that are reasonably suitable for the purpose for which they are generally intended, of good quality, in good working order and free of any defects, will be usable and durable for a reasonable period of time (having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply), and comply with the applicable standards. This would imply that the voetstoots clause will be excluded where the CPA applies (in the case of supply by developers and speculators) and will remain applicable in once off transactions. The CPA also states that there is an implied clause in a contract covered by it that the producer or importer, the distributor and the retailer warrant that the goods comply with the prescribed requirements and standards. A consumer may therefore within six (6) months after the delivery of any goods return them to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy those prescribed requirements and standards and the supplier must at the discretion of the consumer either repair or replace the failed, unsafe or defective goods or refund the price paid for of such goods.

4. **HOW DOES THE ACT APPLY TO ESTATE AGENTS**

It is clear that estate agents fall under the definition of a supplier as they market services in the normal course of their business for consideration. As an agent will market the seller's house to the general public on instructions of the seller, the agent, will be a "supplier" *vis-à-vis* any potential purchaser and the agent's marketing practices will have to comply with the provisions of the CPA. The CPA prohibits unconscionable conduct and states that a supplier or an agent of the supplier may not use physical force, coercion or undue influence, pressure, duress or harassment or unfair tactics in the marketing of goods or services whether it is in the negotiation, conclusion or execution stage of an agreement. The CPA also disallows false, misleading and deceptive representations to a consumer concerning a material fact, the use of exaggerations, innuendos or ambiguities as to a material fact, or failure to disclose a material fact if that failure amounts to a deception or failure to correct an apparent misapprehension on the part of a consumer. It also states that no statement may be made on the characteristics of land or immovable property that it does not have or that the property may be lawfully used or is capable of being used for a purpose that is in fact unlawful or impractical or that it has or is proximate to any facilities, amenities or natural features that it does not have, or that are not available or proximate to it.

5. **CONCLUSION: EFFECT ON OTP'S AND MANDATES**

The CPA impacts on any clauses that relate to the commission of an estate agent, an OTP where the seller is a developer or a speculator, and all mandate agreements. Agreements that are too one-sided to be in the consumer's best interest, adversely impact on the consumer, involve unfair or unreasonable waiving of rights and that contain unjust terms or charge unreasonable prices are disallowed. In addition, agreements must be in plain and understandable language and must contain fair, reasonable and just terms. The consumer has the right to receive express notice in an agreement of any term which limits the risk or liability of the provider, or of any term which constitutes an assumption of risk or liability by the consumer, and has a cooling-off right which allows him to cancel the agreement within five (5) business days after contracting as well as the right to return defective goods within six (6) months.

In conclusion, we have to point out that there are many unanswered questions and grey areas when any new Act comes into operation, which has to be interpreted by a Court of Law.