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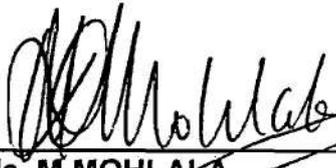
GENERAL NOTICE

NOTICE 128 OF 2011

NATIONAL CONSUMER COMMISSION

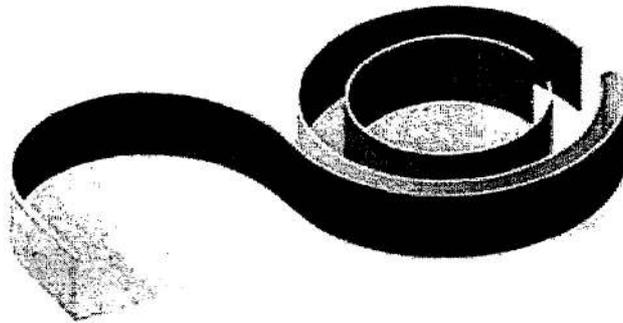
I, Mamodupi Mohlala, Commissioner of the National Consumer Commission, hereby publish draft guidelines for the development of industry Codes of Conduct for accreditation in terms of the provisions of Section 82 of the Consumer Protection Act, 2008 (Act No 68 of 2008).

Interested persons may submit their comments on the draft guidelines in writing on or before **30 March 2011**, quoting the following reference number **(NCC/GN/0002)** to: The National Commissioner, National Consumer Commission c/o Ms Prudence Moilwa P O Box 30251 Sunnyside, Pretoria, 0132 or per fax to (012) 394 2544 or email to pmoilwa@thedti.gov.za



Ms. M MOHLALA

COMMISSIONER: NATIONAL CONSUMER COMMISSION



NATIONAL CONSUMER COMMISSION

**GUIDELINES FOR THE DEVELOPMENT OF INDUSTRY
CODES OF CONDUCT FOR ACCREDITATION UNDER
THE CONSUMER PROTECTION ACT 68 OF 2008**

1. PART A

Introduction

The purpose of this document is to provide practical guidelines to industry groups on the development of industry codes of conduct. It should be noted that subjects listed in this document constitute the minimum contents of an industry code of conduct which National Consumer Commission (NCC) will recommend to the Minister for accreditation.

The NCC welcomes the development of industry codes of conduct containing legally correct provisions that are aligned to the object and spirit of the Consumer Protection Act 68 of 2008 (the Act). Industry groups are encouraged to start drafting their industry codes for submission to the Commission for its review and recommendation to the Minister to accredit under Section 82 of the Act. There are many positive aspects to be gained from having industry codes of conduct developed and accredited through the accreditation process. Formal accreditation of these codes reduces legal uncertainty where codes are used to guide the resolution of disputes in an industry.

Research conducted on behalf of the NCC suggests that codes of conduct tend to be more effective if they:

- have widespread support of industry
- comprises representatives of the key stakeholders, including consumers, consumer associations, the government and other community groups
- operates an effective system of complaints handling.

Although the Act does not obligate this, the Commission prepared these guidelines to assist industry groups with aspirations to develop codes of conduct. It is important for industry groups to gather some information before the industry code of conduct is actually written. Codes of conduct should be consistent with the Act and all other

relevant public regulations. For example, an industry code of conduct that refers to the disposal of hazardous waste should be consistent with public health, transport and environmental legislation as well as the relevant occupational safety and health legislation.

In the planning stage, industry groups should consider ways to produce, distribute, promote and evaluate their codes of conduct. This will remain the responsibility of the industry group. It is important that copies of every accredited code of conduct are available within a reasonable time to people who require them and the distribution is not restricted to certain sectors of an industry, such as membership of an organisation.

Once it is approved, the industry code of conduct may be sold by industry groups to recover the publication and distribution costs. The NCC will include a copy of the accredited code of conduct on its web site for download.

When considering applications for accreditation the NCC would adopt flexible approach which would simply require industries to develop their applications using a generic criterion proposed in this document. The granting of accreditation should be seen as a mutually beneficial exercise which is in the interest of both consumers and suppliers in the industry concerned.

Legislative Framework

The Act provides for the Minister of Trade and Industry to prescribe industry codes of conduct. Section 82 of the Act sets out the objectives of an industry code as follows:-

- to regulate the interaction between or among persons conducting business within an industry or

- regulating the interaction, or providing for alternative dispute resolution between person conducting business in an industry and consumers.

A prescribed industry code should promote fair and equitable business practices in the industry, among persons conducting business in an industry, encourage fair play and open communication between industry participants and consumers as a means of avoiding disputes.

The code should also provide a simple, accessible and an alternative dispute resolution (ADR) mechanism to consumers in the event of a dispute. To this end, where an industry ombud scheme exists and the NCC consider that scheme adequately situated and equipped to provide dispute resolution services comparable to those generally provided in terms of any public regulation, such ombud scheme may be recommended for accreditation as an "accredited industry ombud".

2. PART B

The following captions constitutes the minimum information that should be covered in the code or proposed code presented to the NCC for accreditation. The guidelines document does not purport to limit any additions if required in the circumstances of a particular industry.

2.1. Definitions

- (i) A code should at least have definitions which clearly help explain technical and legal terms used therein to enable a lay person to understand the context in which terms applicable to the industry are used in the code.
- (ii) If terms defined in the Act or its Regulations are used they should retain the same meaning in the code or proposed code.

2.2. Purpose and Objectives of Industry Code

- (i) A code of conduct should outline its purpose and objectives which must be in line with the objectives as outlined in Section 3 of the Act. The emphasis of the purpose and objectives must be protection of consumers, guidance to suppliers, promotion of fair business practices, ADR etc.
- (ii) The universal purpose and objectives should be to raise the standards of conduct without endangering the vitality and growth of business, to reduce the cost of resolving disputes in the sector, to reduce risk and generate growth in the sector by increasing the level of certainty for all participants.

2.3. Application, Scope and Type of Supplier (Demarcation of Industry)

- (i) A code of conduct must state to whom it applies.
- (ii) It must clearly demarcate the suppliers trading in the industry it applies to.
- (iii) Suppliers may be distinguished by the goods or services they render.
- (iv) If at all possible, a list of all entities trading in the industry.
- (v) The code should have a provision making it mandatory for all suppliers belonging to the industry.

2.4. Plain and Understandable Language

- (i) While the code should be consistent with the law, it should be easy for stakeholders to understand their rights and obligations. Using plain language will prevent ambiguity and vagueness and will instill confidence and certainty.
- (ii) The industry code of conduct must be written in plain language and be made available in English and any other indigenous language of the Republic.
- (iii) It must be reasonable to conclude that an ordinary consumer of the class of persons for whom the code is intended, with average literacy skills and

minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and importance of the code of conduct without undue effort, having regard to –

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

2.5 IMPLEMENTATION AND REVIEW

2.5.1. Consumer and Industry Awareness

- (i) The code must incorporate a strategy on how the industry will raise consumers' and industry awareness on the code and its contents, including its complaints handling provisions.
- (ii) In many cases a code fails to operate effectively, not because its principles and procedures are inadequate, but because employees or industry members are either unaware of the code or fail to follow it in day-to-day dealings.
- (iii) It is therefore essential that the code contain a provision requiring employees and agents to be instructed in its principles and procedures.

2.5.2. Data Collection

- (i) The code must incorporate a requirement for collection of data about the origins and causes of complaints, and the identification of systemic and recurring problems which industry members need to address.
- (ii) The type of data collected should include details of:
 - complainant
 - business complained about
 - the type and frequency of complaint
 - how the complaint was resolved
 - time taken to deal with complaint
 - type of sanction(s) imposed.
- (iii) The data should be able to be analysed to produce reports that highlight any systemic issues and areas for potential improvement. These reports provide important feedback for management, staff and industry to continually improve compliance with the Act.

2.5.3. Monitoring

- (i) The accredited ombud scheme should regularly monitor codes for compliance to ensure the desired outcomes for all stakeholders and the community at large. The accredited ombud scheme should have a system for monitoring compliance which may include evaluating data collected regularly to identify and remedy problems as well as to identify ways of increasing compliance.

2.5.4 Accountability

- (i) The accredited ombud scheme should also produce annual reports on the operation of the code, allowing for periodic assessment of its effectiveness. These reports should be readily available to all stakeholders and interested parties.

2.5.5. Review

- (i) The code should provide for regular reviews to ensure that the standards incorporated are meeting identified objectives and current consumer expectations and that it is working effectively.
- (ii) This exercise is made obligatory by the Act to enable the NCC to report to the Minister from time to time on the effectiveness of accredited industry codes.

2.5.6. Performance indicators

- (i) Performance indicators should be developed with reference to these criteria and implemented as a means of measuring the code's effectiveness.
- (ii) The measurements may either be qualitative or quantitative but should be objective so that another person in similar circumstances would obtain the same measurement.

2.5.7. Consultation

- (i) The code should lay down a mandatory consultation process before it is submitted to the NCC for accreditation. Section 82 of the Act stipulates that groups developing an industry code of practice should consult with:
 - All industry participants conducting business in the industry;
 - Relevant consumer protection groups with interest in the industry;
 - Any other relevant stakeholder.

- (ii) Although the Act also provides that the NCC must publish the code for public comment, extensive consultation early in the development process may avoid delays in the review of the code of conduct of practice by the NCC, especially where some items are controversial.

3. PART C

3.1. Sustainable Funding Model

- (i) A code of conduct must propose a supportable and sustainable funding model for the maintenance and effective operation of the Office of the Ombud.
- (ii) Provision must be made in the code for collection of fees from all suppliers demarcated into the industry and who voluntarily subscribe to the ombud.
- (iii) Effect of non-payment of fee (provision on effect of non-payment which may be appropriate and effective within the particular industry);
- (iv) Automatic annual increase of fee (mechanism automatic rise in fee (e.g. CPI index, set percentage); annual date of automatic increase; provision that current fee is to be published on Office of Ombud website);

4. PART D

DISPUTE RESOLUTION/ COMPLAINTS HANDLING

- 4.1. Procedure to submit complaints (prescribed forms; documentation required; submission by hand, mail, fax or email, and applicable addresses or numbers; right of accredited consumer protection group to bring complaint);
- 4.2. Time limit for submission of complaints (not less than three years from the date of the cause of the complaint);

- 4.3. Duty to attempt settlement first (consumer's duty to bring complaint to attention of supplier and attempt to settle the matter prior to submitting complaint to the Office of the Ombud);
- 4.4. Compliance notices (provision to enable Ombud to issue compliance notice where complaint indicates minor transgression of industry code; time period within which supplier must comply with Notice; effect of non-compliance);
- 4.5. Rules for submission of papers for mediation or adjudication (procedure; exchange of documents; inspection of goods or premises; time limits; effect of non-compliance; set down of date for mediation or adjudication)
- 4.6. Mandatory bona fide attempt at mediation prior to adjudication (mediation to be attempted before adjudication)
- 4.7. Provision making it mandatory for the ombud scheme to provide interpreters for consumers who require such assistance.
- 4.8. Rules for mediation procedure (procedure; rules of evidence and standard of proof (e.g. balance of probabilities); admissibility of documents as prima facie evidence; expert evidence; vicarious liability in respect of suppliers' employees);
- 4.9. Legal representation during mediation process (provision to allow or disallow, if appropriate);
- 4.10. Time limits for finalisation of complaint (period, not exceeding one year from date of receipt of complaint);
- 4.11. Extension of time limits by agreement (agreement to be done in writing);
- 4.12. Effect of non-compliance with time limit which may be appropriate and effective within the particular industry);
- 4.13. Repeated non-compliance by supplier which may be appropriate and effective within the particular industry);

- 4.14. Assistance by Office of Ombud to indigent or unsophisticated consumers (duty on staff of Office of Ombud to assist indigent or unsophisticated consumers)
- 4.15. Prohibition on discrimination (provision on prohibition on discrimination on grounds contemplated in section 9(3) of the Constitution of the Republic of South Africa, 1996); and section 8 of the Consumer Protection Act.
- 4.16. Conflict with other industry codes (provision to regulate overlap, determining which code prevails when conflict arises; mechanism to determine jurisdiction when two or more Ombuds cannot agree on jurisdiction);

5. PART E

Establishment of Office of Ombud

5.1. The purpose of establishing an Ombud scheme

The industry code of conduct may propose the establishment of an ombud scheme. Provisions on the establishment must also provide for the name, and general purpose of the ombud in line with the provisions of the Act.

5.2. Define powers of the ombud scheme

- (i) The industry code must detail powers of the ombud scheme in handling of complaints both from consumers and suppliers in the industry with a turnover below threshold set by the Minister.
- (ii) Types of complaints (jurisdiction of Office of Ombud; consumer/supplier and supplier/supplier);
- (iii) Matters outside jurisdiction of Ombud (matters subject to litigation; matters subject to jurisdiction of other Ombud; frivolous or vexatious complaints);
- (iv) Determination by Ombud whether to pursue complaint (provision that empowers Ombud to decline pursuing a complaint if the formal requirements are not met or

the matter is not within the jurisdiction of the Ombud; mandatory provision of written reasons when Ombud declines to pursue matters);

5.3. Independence of Office of Ombud for Industry

The industry code must have formal independence provision and mechanisms of dealing with threats to its independence. Ombud must have the following qualities:

- (i) Must be a fit and proper person who is honest and has impeccable integrity with regard to his or her character.
- (ii) Must demonstrate high level of competence and capability; and financial soundness.

5.4. Process for Appointment Office of Ombud for Industry

- (i) Public invitations for application for appointment as Ombud (provision making publication of invitation to apply mandatory);
- (ii) Transparent process to appoint Ombud (provision to ensure transparent and accountable; identification of appointment body/entity; requirements, qualification and disqualifications for appointment);
- (iii) Appointment of Ombud (provisions for appointment, including terms and conditions of employment);

5.5. ADMINISTRATIVE MATTERS

- (i) Mechanism, process and grounds for removal of the ombud which are in line with fair administrative procedures provided for by the Promotion of Administrative Justice Act (PAJA)
- (ii) Term of office of Ombud (period and possible renewal period);

- (iii) Conflict of interest provision (person to be appointed and family member of business partner of him or her may not have any direct or indirect interest including shareholding in any supplier);
- (iv) Acting Ombud (senior staff member; not longer than three months, all disqualifications and conflict of interest provisions apply during that period);
- (v) Staff of Office of Ombud (appointment of staff in line with employment equity legislations);
- (vi) Location of offices of Office of Ombud (Physical address); branch offices (Physical address); Office of Ombud website (Mandatory website); In determining the location of the offices of the Office of the Ombud, regard must be had to the geographical areas where the industry serves consumers, the categories or types of consumers, suppliers, goods or services to whom the code applies or for whose benefit it is to be prescribed.
- (vii) Communication with consumers (Information and education duty in respect of general public) ;
- (viii) Access to Information (PAIA requirements to be applicable)
- (ix) Protection of personal information (Applicable to staff; non-compliance is subject to employment law ground for summary dismissal)
- (x) Register of Suppliers (duty of supplier to register details with Office of Ombud; register of known suppliers to whom the code applies to be available on Office of Ombud website;
- (xi) Annual report (provision for annual report to the NCC; provision for publication of report on Office of Ombud website; time frames);

- (xii) Keeping of accounting records, drawing up of financial statements and auditing (self explanatory; provision to publish on Office of Ombud website; time frames);
- (xiii) Limitation of liability (provision to exclude liability of Ombud and staff of Office of Ombud for action in good faith);
- (xiv) Hindering administration of code (provision to prohibit influencing or harassing Ombud or staff of Office of Ombud or consumer, as the case may be; effective applicable sanctions);
- (xv) No detracting from any rights (provision to explicitly provide that the code does not amend, repeal or diminish any other right a consumer may have in law);

5.6. Existing Ombud Schemes

- (i) In the event that an Office of the Ombud, irrespective of its name, already exists in a particular industry, and the Commission considers that the scheme is adequately situated and equipped to provide alternative dispute resolution services comparable to those generally provided in terms of any public regulation, the Commission may in its sole discretion recommend to the Minister to direct that such an Office be accredited as an industry ombud.
- (ii) Where the Office of the Ombud replaces any other institution, adequate transitional provisions must be included to ensure a transition from the one to the other on the date of commencement of the code, especially in respect of proceedings initiated under the previous dispensation but not finalised on that date.

6. PART F

Safety monitoring and recall

6.1. The industry code must encompass the development, adoption and application of a safety monitoring and safety recall mechanism which will create an effective and efficient system to -

(a) Receive notice of -

- (i) consumer complaints or reports of product failures, defects or hazards;
- (ii) the return of any goods because of a failure, defect or hazard;
- (iii) personal injury, illness or damage to property caused wholly or partially as a result of a product failure, defect or hazard; and,
- (iv) other indication of failure, defect or hazard,
in any particular goods or in any component of them, or injury or damage resulting from the use of those goods;

(b) monitor the sources of information contemplated in paragraph (a), and analyse the information received with the object of detecting or identifying any previously undetected or unrecognised potential risk to the public from the use of or exposure to those goods;

(c) conduct investigations into the nature, causes, extent and degree of the risk to the public;

(d) notify consumers of the nature, causes, extent and degree of the risk pertaining to those goods; and,

(e) if the goods are unsafe, recall those goods for repair, replacement or refund.

7. PART G

7.1. APPLICATION PROCESS

Applications for accreditation of industry codes must be submitted to the National Consumer Commission for its consideration and recommendation to the Minister of Trade and Industry and must be supported by the following information –

- a) the extend of consultation with all relevant stakeholders;
- b) an undertaking by the applicant to co-operate and comply with all reasonable requirements of the NCC.
- c) names of the industry group and/or people who have developed the code and their contact details.
- d) the proposed method of publication, distribution and promotion of the code

Applications can be submitted to

The National Commissioner,

National Consumer Commission

C/o Ms Prudence Moilwa,

P O Box 30251

Sunnyside,

Pretoria, 0132 or per fax to (012) 394 2544 or email to pmoilwa@thedti.gov.za

7.2 ACCREDITATION PROCESS

7.2.1. Upon receipt of an application for accreditation of a code the NCC will do the following -

- a) publishing the proposed industry code for public comment;
- b) *considering any submissions made during the public comment period;*
- c) consulting with—
 - (i) persons conducting business within the relevant industry; and
 - (ii) relevant accredited consumer protection groups; and
- d) making any revisions to the proposed industry code as published for comment.

7.2.2. When the Minister approves an industry code under Section 82 of the Act, the industry will be informed in writing. The code cannot be circulated with any endorsement or statement that infers that it has been approved under Section 82 until the NCC has arranged for publication of the Notice stating the Minister's approval in the gazette.
