

THE CONSUMER PROTECTION BILL, 2011

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THE CONSUMER PROTECTION BILL, 2011

A Bill for

AN ACT of Parliament to provide for the protection of the consumer, prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto

ENACTED by the Parliament of Kenya as follows—

PART I—PRELIMINARY

Short title and commencement.

1. This Act may be cited as the Consumer Protection Act, 2011 and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint which date shall not exceed ninety days from the date of publication.

Interpretation.

2. (1) In this Act, unless the context otherwise requires—

“advance” means value, as prescribed, received by the borrower under a credit agreement;

“annual percentage rate” means the annual percentage rate in respect of a credit agreement that is determined in the prescribed manner;

“borrower” means a consumer who is or may become a party to a credit agreement and who receives or may receive credit or a loan of money from the other party, but does not include a guarantor;

“brokerage fee” means the payment that a borrower makes or agrees to make to a loan broker who assists the borrower in arranging a credit agreement, and includes an

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amount deducted from an advance made to the borrower that is paid to the broker;

“consumer” means a person who purchases goods or services;

“consumer agreement” means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment;

“consumer report” means a written, oral or other communication of credit information or personal information, or both, pertaining to a consumer;

“consumer transaction” means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement;

“cost of borrowing” means all amounts that a borrower is required to pay under or as a condition of entering into a credit agreement other than—

(a) a payment or repayment of a portion of the principal under the agreement as prescribed; and

(b) prescribed charges;

“credit agreement” means a consumer agreement under which a lender extends credit or lends money to a borrower and includes a supplier credit agreement and a prospective consumer agreement under which an extension of credit, loan of money or supplier credit agreement may occur in the future, but does not include an agreement under which a lender extends credit or lends money on the security of a mortgage of real property or consumer agreements of a prescribed type;

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“credit card” means a card or device under which a borrower can obtain advances under a credit agreement, as defined in Part VII, for open credit;

“credit information” means information about a consumer as to name, age, occupation, place of residence, previous places of residence, marital status, spouse’s name and age, number of dependants, particulars of education or professional qualifications, places of employment, previous places of employment, estimated income, paying habits, outstanding debt obligations, cost of living obligations and assets;

“credit repair” means services or goods that are intended to improve a consumer report, credit information, file or personal information, including a credit record, credit history or credit rating;

“credit repairer” means–

- (a) a supplier of credit repair; or
- (b) a person who holds himself out as a person described in clause (a);

“default charge” means a charge imposed on a borrower who does not make a payment as it comes due under a credit agreement or who does not comply with any other obligation under a credit agreement, but does not include interest on an overdue payment;

“direct agreement” means a consumer agreement that is negotiated or concluded in person at a place other than–

- (a) at the supplier’s place of business; or
- (b) at a market place, an auction, trade fair, agricultural fair or exhibition;

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“estimate” means an estimate of the total cost of work on and repairs to the goods being repaired;

“file”, when used as a noun, means all of the information pertaining to a consumer that is recorded and retained by a person, regardless of the manner or form in which the information is stored;

“fixed credit” means credit or a loan of money under a credit agreement that is not for open credit;

“floating rate” means a rate that bears a specified mathematical relationship to a public index that meets the prescribed requirements;

“future performance agreement” means a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement;

“initiation fee” means a fee in addition to an annual membership fee;

“internet agreement” means a consumer agreement formed by text-based internet communications;

“internet gaming site” means an internet site that accepts or offers to accept wagers or bets over the internet–

(a) as part of the playing of or participation in any game of chance or mixed chance and skill that is to take place inside or outside Kenya, or

(b) on any contingency or on any event that may or is to take place inside or outside of Kenya, including, without restricting the generality of the foregoing, a casino game, card game, horse race, fight, match, sporting event or contest;

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“loan broker” means,

(a) a supplier of loan brokering, or

(b) a person who holds himself out to be a person described in clause (a);

“lease” means a consumer agreement for the lease of goods, other than a consumer agreement for the lease of goods in connection with a residential tenancy agreement, and “lessor” and “lessee” have a corresponding meaning;

“lease term” means the period during which the lessee is entitled to retain possession of the leased goods;

“lender” means a supplier who is or may become a party to a credit agreement and who extends or may extend credit or lends or may lend money to the borrower and includes a credit card issuer;

“loan brokering” means services or goods that are intended to assist a consumer in obtaining credit or a loan of money, including obtaining credit or a loan of money from the loan broker who is providing the services or goods to the consumer;

“membership fee” means the amount payable by a consumer for personal development services;

“Minister” means the Minister for the time being responsible for matters relating to trade;

“open credit” means credit or a loan of money under a credit agreement, as defined in Part VII, that-

(a) anticipates multiple advances to be made as requested by the borrower in accordance with the agreement; and

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(b) does not define the total amount to be advanced to the borrower under the agreement, although it may impose a credit limit;

“operator” means–

(a) a person who is a credit repairer or a loan broker;
or

(b) a supplier who supplies such goods or services as may be prescribed or a person who holds himself out as a supplier of such goods or services.

“optional service” means a service that is offered to a borrower in connection with a credit agreement and that the borrower does not have to accept in order to enter into the agreement;

“personal development services” means–

(a) services provided for–

(i) health, fitness, diet or matters of a similar nature;

(ii) modeling and talent, including photo shoots relating to modeling and talent, or matters of a similar nature;

(iii) martial arts, sports, dance or similar activities;

(iv) such other services as may be prescribed, and

(b) facilities provided for or instruction on the services referred to in clause (a) and any goods that are incidentally provided in addition to the provision of the services;

“personal information” means information other than credit information about a consumer’s character, reputation, health, physical or personal characteristics or

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mode of living or about any other matter concerning the consumer;

“remote agreement” means a consumer agreement entered into when the consumer and supplier are not present together;

“repairer” means a supplier who works on or repairs vehicles or other prescribed goods;

“residual obligation lease” means a lease under which the lessor may require the lessee at the end of the lease term to pay the lessor an amount based in whole or in part on the difference, if any, between–

(a) the estimated wholesale value of the leased goods at the end of the lease term; and

(b) the realizable value of the leased goods at the end of the lease term.

“services” means anything other than goods, including any service, right, entitlement or benefit;

“supplier” means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds himself out to be a supplier or an agent of the supplier;

“supplier credit agreement” means a consumer agreement, other than a consumer agreement involving leases to which Part VIII applies, under which a supplier or an associate of the supplier, extends fixed credit to a consumer to assist the consumer in obtaining goods or services, other than credit or a loan of money, from the supplier;

“supplier creditor” means the supplier or an associate of a supplier in a supplier credit agreement;

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“time share agreement” means a consumer agreement by which a consumer–

(a) acquires the right to use property as part of a plan that provides for the use of the property to circulate periodically among persons participating in the plan, whether or not the property is located in Kenya, or

(b) is provided with access to discounts or benefits for the future provision of transportation, accommodation or other goods or services related to travel.

“trade-in allowance” means the greater of–

(a) the price or value of the consumer’s goods or services as set out in a trade-in arrangement, and

(b) the market value of the consumer’s goods or services when taken in trade under a trade-in arrangement.

“vehicle” means a motor vehicle as defined in the Traffic Act (Cap.403).

(2) Nothing in this Act shall be interpreted to limit any right or remedy that a consumer may have in law.

Application of Act.

3. (1) This Act applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Kenya when the transaction takes place.

(2) The substantive and procedural rights given under this Act shall apply to every consumer transaction despite any agreement or waiver to the contrary.

(3) In determining whether this Act applies to an entity or transaction, a court or other tribunal shall

consider the real substance of the entity or transaction and in so doing may disregard the outward form.

(4) Unless otherwise stated, this Act shall not apply to those agreements made before the coming into force of this Act.

PART II—CONSUMER RIGHTS

Class proceedings.

4. (1) A consumer may commence a proceeding on behalf of a class of persons or may become a member of such class of persons in a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or other agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

(2) When a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.

(3) A settlement or decision that results from the procedure agreed to under subsection (2) shall be binding on the parties.

Quality of goods and services.

5. (1) The supplier is deemed to warrant that the goods or services supplied under a consumer agreement are of a reasonably merchantable quality.

(2) The implied conditions and warranties applying to the sale of goods under the Sale of Goods Act (Cap 31) shall apply with necessary modifications to goods that are leased, traded or otherwise supplied under a consumer agreement.

(3) Any provision, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the Sale of Goods Act or any condition or warranty under this Act is void.

(4) If a term or acknowledgement referenced in subsection (3) is a term of the agreement, it is severable from the agreement and shall not be evidence of circumstances showing intent that the deemed or implied warranty or condition does not apply.

Estimates.

6. (1) If a consumer agreement includes an estimate, the supplier shall not charge the consumer an amount that exceeds the estimate by more than ten per cent.

(2) If a supplier charges an amount that exceeds the estimate by more than ten per cent, the consumer may require that the supplier provide the goods or services at the estimated price.

(3) Nothing in this section prevents a consumer and a supplier from agreeing to amend the estimate or price in a consumer agreement, if the consumer requires additional or different goods or services.

Ambiguities.

7. Any ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer or of any information that must be disclosed under this Act shall be interpreted to the benefit of the consumer.

Charging consumers for assistance.

8. No person shall charge a consumer for assisting the consumer to obtain any benefit, right or protection to which the consumer is entitled under this Act, unless, before the consumer agrees to pay the charge, the person discloses the entitlement's existence and direct availability to the consumer and the cost, if any, the consumer would be required to pay for the entitlement if the consumer obtained the entitlement directly.

Unsolicited goods and services.

9. (1) Except as provided in this section, a recipient of unsolicited goods or services has no legal obligation in respect of their use or disposal.

(2) No supplier shall demand payment or make any representation that suggests that a consumer is required to make payment in respect of any unsolicited goods or services despite their use, receipt, misuse, loss, damage or theft unless, if at the time of consumption the consumer reasonably believed that the goods or services were meant for his consumption.

(3) A request for goods or services shall not be inferred solely on the basis of payment, inaction or the passing of time.

(4) If a consumer is receiving goods or services on an ongoing or periodic basis and there is a material change in such goods or services, the goods or services shall be deemed to be unsolicited from the time of the material change forward unless the supplier is able to establish that the consumer consented to the material change.

(5) A supplier may rely on a consumer's consent to a material change that is made orally, in writing or by other affirmative action but the supplier shall bear the onus of proving the consumer's consent.

(6) If a supplier has received a payment in respect of unsolicited goods or services, the consumer who made the payment may demand a refund of the payment in accordance with section 80 within one year after having made the payment.

(7) A supplier who receives a demand for a refund under subsection (6) shall refund the payment within the prescribed period of time.

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(8) In this section, "unsolicited goods or services" means goods that are supplied to a consumer who did not request them but does not include—

- (a) goods that the recipient knows or ought to know are intended for another person;
- (b) a change to periodically supplied goods, if the change in goods is not a material change; or
- (c) goods supplied under a written future performance agreement that provides for the periodic supply of goods to the recipient without further solicitation, or
- (d) services that are supplied to a consumer who did not request them but does not include—
 - (i) services that were intended for another person from the time the recipient knew or ought to have known that they were so intended;
 - (ii) a change to ongoing or periodic services that are being supplied, if the change in the services is not a material change; or
 - (iii) services supplied under a written future performance agreement that provides for the ongoing or periodic supply of services to the recipient without further solicitation.

Consumer may commence action.

10. A consumer who made payment under section 9(6) may commence action to recover the payment in accordance with section 84.

Advertising of illegal sites.

11. (1) No person shall advertise an internet gaming site that is operated contrary to any written law.

(2) No person, other than an internet service provider, shall arrange for or otherwise facilitate advertising prohibited under subsection (1) on behalf of another person.

(3) For the purpose of subsection (1), a person advertises an internet gaming site only if the advertising originates in Kenya or is primarily intended for Kenya residents.

(4) For the purpose of subsection (1), “advertise” includes–

(a) providing, by print, publication, broadcast, telecommunication or distribution by any means, information for the purpose of promoting the use of an internet gaming site;

(b) providing a link in a website for the purpose of promoting the use of an internet gaming site, but does not include a link generated as the result of a search carried out by means of an internet search engine; and

(c) entering into a sponsorship relationship for the purpose of promoting the use of an internet gaming site.

(5) This section applies despite section 3 (1).

PART III—UNFAIR PRACTICES

False representation.

12. (1) It is an unfair practice for a person to make a false, misleading or deceptive representation.

(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations–

(a) a representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have;

(b) a representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection the person does not have;

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(c) a representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not;

(d) a representation that the goods are new, or unused, if they are not or are reconditioned or reclaimed, but the reasonable use of goods to enable the person to service, prepare, test and deliver the goods does not result in the goods being deemed to be used for the purposes of this paragraph;

(e) a representation that the goods have been used to an extent that is materially different from the fact;

(f) a representation that the goods or services are available for a reason that does not exist;

(g) a representation that the goods or services have been supplied in accordance with a previous representation, if they have not;

(h) a representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed;

(i) a representation that the goods or services or any part of them will be available or can be delivered or performed by a specified time when the person making the representation knows or ought to know they will not be available or cannot be delivered or performed by the specified time;

(j) a representation that a service, part, replacement or repair is needed or advisable, if it is not;

(k) a representation that a specific price advantage exists, if it does not;

(l) a representation that misrepresents the authority of a salesperson, representative, employee or agent to negotiate the final terms of the agreement;

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(*m*) a representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive;

(*n*) a representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive;

(*o*) a representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer;

(*p*) a representation that misrepresents the purpose of any charge or proposed charge;

(*q*) a representation that misrepresents or exaggerates the benefits that are likely to flow to a consumer if the consumer helps a person obtain new or potential customers;

(*r*) unconscionable representation;

Unconscionable representation.

13. (1) It is an unfair practice to make an unconscionable representation.

(2) Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know—

(*a*) that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors;

(*b*) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers;

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(c) that the consumer is unable to receive a substantial benefit from the subject-matter of the representation;

(d) that there is no reasonable probability of payment of the obligation in full by the consumer;

(e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;

(f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;

(g) that a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment;
or

(h) that the consumer is being subjected to undue pressure to enter into a consumer transaction.

Renegotiation of price.

14. It is an unfair practice for a person to use his, her or its custody or control of a consumer's goods to pressure the consumer into renegotiating the terms of a consumer transaction.

Prohibition of unfair practices.

15. (1) No person shall engage in an unfair practice.

(2) A person who performs an act referred to in sections 12, 13 and 14 shall be deemed to be engaging in an unfair practice.

(3) It is not an unfair practice for a person, on behalf of another person, to print, publish, distribute, broadcast or telecast a representation that the person accepted in good faith for printing, publishing, distributing, broadcasting or telecasting in the ordinary course of business.

Rescinding agreement.

16.(1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be

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rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.

(2) A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible—

(a) because the return or restitution of the goods or services is no longer possible; or

(b) because rescission would deprive a third party of a right in the subject-matter of the agreement that the third party has acquired in good faith and for value;

(3) The consumer may express notice in any way as long as it indicates the intention of the consumer to rescind the agreement or to seek recovery where rescission is not possible and the reasons for so doing and the notice meets any requirements that may be prescribed.

(4) Notice may be delivered in the manner used when entering into the contract.

(5) If notice is delivered other than by personal service, the notice shall be deemed to have been given when sent.

(6) The consumer may send or deliver the notice to the person with whom the consumer contracted at the address set out in the agreement or, if the consumer did not receive a written copy of the agreement or the address of the person was not set out in the agreement, the consumer may send or deliver the notice—

(a) to any address of the person on record with the consumer; or

(b) to an address of the person known by the consumer.

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(7) If a consumer has delivered notice and has not received a satisfactory response within the prescribed period, the consumer may commence an action.

(8) In the trial of an issue under this section, oral evidence respecting an unfair practice is admissible despite the existence of a written agreement and despite the fact that the evidence pertains to a representation in respect of a term, condition or undertaking that is or is not provided for in the agreement.

(9) A court may award exemplary or punitive damages in addition to any other remedy in an action commenced under this section.

(10) Each person who engaged in an unfair practice is liable jointly and severally with the person who entered into the agreement with the consumer for any amount to which the consumer is entitled under this section.

(11) If an agreement to which subsection (1) or (2) applies has been assigned or if any right to payment under such an agreement has been assigned, the liability of the person to whom it has been assigned is limited to the amount paid to that person by the consumer.

(12) When a consumer rescinds an agreement under subsection (1), such rescission operates to cancel, as if they never existed—

(a) the agreement;

(b) all related agreements;

(c) all guarantees given in respect of money payable under the agreement;

(d) all security given by the consumer or a guarantor in respect of money payable under the agreement; and

(e) all credit agreements, as defined in Part VII, and other payment instruments, including promissory notes—

- (i) extended, arranged or facilitated by the person with whom the consumer reached the agreement; or
- (ii) otherwise related to the agreement.

(13) If a consumer is required to give notice under this Part in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so.

PART IV—RIGHTS AND OBLIGATIONS RESPECTING SPECIFIC CONSUMER AGREEMENTS

Application of Part.

17.(1) Despite sections 78 and 79, in the prescribed circumstances, the effect of cancellation of a consumer agreement to which this Part applies by a consumer and the obligations arising as a result of the cancellation of the agreement may be subject to such limitations as may be prescribed.

(2) Sections 18 to 21—

(a) apply to future performance agreements if the consumer's total potential payment obligation under the agreement, excluding the cost of borrowing, exceeds a prescribed amount;

(b) do not apply to agreements that are future performance agreements solely because of an open credit arrangement.

(3) Sections 24 to 29—

(a) apply in respect of personal development services or proposed personal development services for which—

(i) payment in advance is required; and

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- (ii) the consumer's total potential payment obligation, excluding cost of borrowing, exceeds a prescribed amount.

(b) do not apply to personal development services that are provided—

- (i) on a non-profit or co-operative basis;
- (ii) by a private club primarily owned by its members;
- (iii) as an incidental part of the goods or services that are being supplied to the consumer; or
- (iv) by a golf club.

(4) Sections 31 to 33 apply to an internet agreement if the consumer's total potential payment obligation under the agreement, excluding the cost of borrowing, exceeds a prescribed amount.

(7) Sections 34 and 35 apply to direct agreements if the consumer's total potential payment obligations under the agreement, excluding the cost of borrowing, exceeds such amount as may be prescribed.

(8) Sections 36 to 38 apply to remote agreements if the consumer's total potential payment obligation under the agreement, excluding the cost of borrowing, exceeds such amount as may be prescribed.

Requirement for future performance agreements.

18. Every future performance agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

Cancelling future performance agreements.

19. A consumer may cancel a future performance agreement within one year after the date of entering into the agreement if the consumer does not receive a copy of the agreement that meets the requirements under section 18.

Repossession after payment of two-thirds.

20. (1) Where a consumer under a future performance agreement has paid two-thirds or more of his or her payment obligation as fixed by the agreement, any provision in the agreement, or in any security agreement incidental to the agreement, under which the supplier may retake possession of or resell the goods or services upon default in payment by the consumer is not enforceable except by leave obtained from the High Court.

(2) Upon an application for leave under subsection (1), the court may, in its discretion, grant leave to the supplier or refuse leave or grant leave upon such terms and conditions as the court considers advisable.

Late delivery.

21. (1) A consumer may cancel a future performance agreement at any time before delivery under the agreement or the commencement of performance under the agreement if the supplier—

(a) does not make delivery within thirty days after the delivery date specified in the agreement or an amended delivery date agreed to by the consumer in writing; or

(b) does not begin performance of his, her or its obligations within thirty days after the commencement date specified in the agreement or an amended commencement date agreed to by the consumer in writing.

(2) If the delivery date or commencement date is not specified in the future performance agreement, a consumer may cancel the agreement at any time before delivery or commencement if the supplier does not deliver or commence performance within thirty days after the date the agreement is entered into.

(3) If, after the period in subsection (1) or (2) has expired, the consumer agrees to accept delivery or authorize commencement, the consumer may not cancel the agreement under this section.

(4) For the purposes of subsections (1) and (2), a supplier is considered to have delivered or commenced performance under a future performance agreement if,

(a) delivery was attempted but was refused by the consumer at the time that delivery was attempted or delivery was attempted but not made because no person was available to accept delivery for the consumer on the day for which reasonable notice was given to the consumer that there was to be delivery; or

(b) commencement was attempted but was refused by the consumer at the time that commencement was attempted or commencement was attempted but did not occur because no person was available to enable commencement on the day for which reasonable notice was given to the consumer that commencement was to occur.

Requirements for time share agreements.

22. Every time share agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

Cancellation of time share agreements.

23. (1) A consumer may, without any reason, cancel a time share agreement at any time from the date of entering into the agreement until ten days after receiving the written copy of the agreement.

(2) In addition to the right under subsection (1), a consumer may cancel a time share agreement within one year after the date of entering into the agreement if the consumer does not receive a copy of the agreement that meets the requirements under section 22.

Requirements for personal development services agreements.

24. (1) Every personal development services agreement shall be—

(a) in writing;

(b) delivered to the consumer ;

(c) made in accordance with the prescribed requirements.

(2) No supplier shall require or accept payment for personal development services from a consumer with whom the supplier does not have an agreement that meets the requirements established under subsection (1).

An agreement is for one year.

25.(1) No personal development services agreement may be made for a term longer than one year after the day that all the services are made available to the consumer

(2) Any personal development services agreement that provides for a renewal or an extension of the agreement beyond one year shall be deemed to create a separate agreement for each renewal or extension of one year or less.

(3) A personal development services agreement that provides for the renewal or extension of the agreement is not valid unless the supplier complies with the prescribed requirements.

(4) A personal development services agreement that provides for a renewal or extension of the agreement shall be deemed not to be renewed or extended if the consumer notifies the supplier, before the time for renewal or extension that the consumer does not want to renew or extend.

(5) Subsections (2) and (3) do not apply to an agreement providing for successive monthly renewals if the consumer has the option of terminating on one month's notice or less.

Only one agreement.

26. (1) No supplier shall enter into a new agreement for personal development services with a consumer with whom the supplier has an existing agreement for personal

development services unless the new agreement is for personal development services that are distinctly different from the services provided under the existing agreement.

(2) Any new agreement entered into in contravention of subsection (1) is void.

(3) For the purposes of subsection (1), a different term or a different commencement date does not constitute a distinct difference in the personal development services to be provided.

(4) Nothing in this section prevents a personal development services agreement from being renewed during the term of the agreement provided that the renewal meets the requirements under section 24.

Initiation fee.

27. No supplier of personal development services shall—

- (a) charge a consumer more than one initiation fee; or
- (b) charge an initiation fee that is greater than twice the annual membership fee.

Installment plans.

28. (1) Every supplier of personal development services shall make available to consumers at least one plan for installment payments of membership fees and initiation fees, if applicable, that allow consumers to make equal monthly payments over the term of the personal development services agreement.

(2) No supplier shall provide an installment payment plan through which the total amount paid by installments exceeds the membership or initiation fee, if applicable, by more than twenty-five per cent.

Cancellation: cooling-off period.

29. (1) A consumer may, without any reason, cancel a personal development services agreement at any time within ten days after the later of receiving the written copy

of the agreement and the day all the services are available.

(2) In addition to the right under subsection (1), a consumer may cancel a personal development services agreement within one year after the date of entering into the agreement if the consumer does not receive a copy of the agreement that meets the requirements under section 24.

Trustee for payment for unavailable services.

30.(1) No supplier shall receive payment from a consumer for personal development services that are not available at the time the payment is made.

(2) Subsection (1) does not apply when one of the services that is not available is the use of a facility and the consumer has agreed in writing to use another facility provided by the supplier until the facility contracted for is available.

(3) If a facility is not available for use on the day specified in the agreement, the trustee shall refund all payment received from the consumer unless the consumer agrees in writing to permit the trustee to retain the payment.

(4) No permission given under subsection (3) applies for longer than ninety days but a subsequent permission may be given on the expiration of permission.

(5) Where a supplier has a trustee under subsection (1)–

(a) any notice to the trustee shall be deemed to be notice to the supplier; and

(b) any money payable by the supplier is payable by the trustee to the extent that the trustee holds sufficient trust funds for that purpose.

(6) Every trustee under subsection (1) shall, upon receiving any payment from a consumer, provide the

consumer with written confirmation of receipt of the payment and of the fact that the payment will be dealt with in accordance with sections 24 to 29 and with this section.

(7) No trustee shall release to a supplier funds received from a consumer until the personal development services are available.

(8) The trustee shall release the funds held under this section to the consumer if the consumer cancels the personal development services agreement in accordance with this Act.

Disclosure of information on internet agreement.

31. (1) Before a consumer enters into an internet agreement, the supplier shall disclose the prescribed information to the consumer.

(2) The supplier shall provide the consumer with an express opportunity to accept or decline the agreement and to correct errors immediately before entering into it.

(3) In addition to the requirements set out in section 5, disclosure under this section shall be accessible and shall be available in a manner that ensures that.

(a) the consumer has accessed the information; and

(b) the consumer is able to retain and print the information.

Copy of internet agreement.

32. (1) A supplier shall deliver to a consumer who enters into an internet agreement a copy of the agreement in writing within the prescribed period after the consumer enters into the agreement.

(2) The copy of the internet agreement shall include such information as may be prescribed.

(3) For the purposes of subsection (1), a supplier is considered to have delivered a copy of the internet agreement to the consumer if the copy is delivered in the prescribed manner.

Cancellation of internet agreement.

33. (1) A consumer may cancel an internet agreement at any time from the date the agreement is entered into until seven days after the consumer receives a copy of the agreement if-

- (a) the supplier did not disclose to the consumer the information required under section 38 (1); or
- (b) the supplier did not provide to the consumer an express opportunity to accept or decline the agreement or to correct errors immediately before entering into it.

(2) A consumer may cancel an internet agreement within thirty days after the date the agreement is entered into, if the supplier does not comply with a requirement under section 43.

Requirements for direct agreements.

34. Every direct agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

Cancellation of direct agreements.

35. (1) A consumer may, without any reason, cancel a direct agreement at any time from the date of entering into the agreement.

(2) In addition to the right under subsection (1), a consumer may cancel a direct agreement within one year after the date of entering into the agreement if the consumer does not receive a copy of the agreement that meets the requirements under section 34.

Disclosure of information on remote agreements.

36. Before a consumer enters into a remote agreement, the supplier shall disclose the prescribed

information to the consumer and shall satisfy the prescribed requirements.

Copy of remote agreement.

37. (1) A supplier shall deliver to a consumer who enters into a remote agreement a copy of the agreement in writing within the prescribed period after the consumer enters into the agreement.

(2) The copy of the remote agreement shall include such information as may be prescribed.

(3) For the purposes of subsection (1), a supplier is considered to have delivered a copy of the remote agreement to the consumer if the copy is delivered in the prescribed manner.

Cancellation of remote agreement.

38. (1) A consumer may cancel a remote agreement at any time from the date the agreement is entered into until seven days after the consumer receives a copy of the agreement if the supplier fails to comply with section 36.

(2) A consumer may cancel a remote agreement within one year after the date the agreement is entered into, if the supplier does not comply with a requirement under section 37.

PART V—SECTORS WHERE ADVANCE FEE PROHIBITED

Requirements for consumer agreements on loan brokering etc.

39. Every consumer agreement for loan brokering, credit repair or for the supply of such other goods or services as may be prescribed shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

Advance payments prohibited.

40. (1) No operator shall require or accept any payment or any security for a payment, directly or

indirectly, from or on behalf of a consumer unless and until—

- (a) in respect of loan brokering, the consumer receives the credit or loan of money that the loan broker has assisted the consumer to obtain;
- (b) in respect of credit repair, the credit repairer causes a material improvement to the consumer report, credit information, file, personal information, credit record, credit history or credit rating of the consumer; or
- (c) in respect of the supply of such other goods or services as may be prescribed, the prescribed requirements are met.

(2) Every arrangement by which an operator takes security in contravention of subsection (1) is void.

Cancellation of consumer agreement on loan brokering etc

41. (1) A consumer who is a party to an agreement for loan brokering, credit repair or the supply of such goods and services as may be prescribed may, without any reason, cancel the agreement at any time from the date of entering into the agreement until ten days after receiving the written copy of the agreement.

(2) In addition to the right under subsection (1), a consumer who is a party to an agreement for loan brokering, credit repair or the supply of such goods and services as may be prescribed may cancel the agreement within one year after the date of entering into it if the consumer does not receive a copy of the agreement that meets the requirements under section 65.

Officers and Director.

42. The officers and directors of an operator are jointly and severally liable for any remedy in respect of which a person is entitled to commence a proceeding against the operator.

Prohibited representations.

43. An operator shall not communicate or cause to be communicated any representation that is prescribed as a prohibited representation.

PART VI—REPAIRS TO MOTOR VEHICLES AND OTHER GOODS

Estimates.

44. (1) No repairer shall charge a consumer for any work or repairs unless the repairer first gives the consumer an estimate that meets the prescribed requirements.

(2) Despite subsection (1), a repairer may charge for work or repairs without giving an estimate if—

(a) the repairer offers to give the consumer an estimate and the consumer declines the offer of an estimate;

(b) the consumer specifically authorizes the maximum amount that he or she will pay the repairer to make the repairs or do the work; and

(c) the cost charged for the work or repairs does not exceed the maximum amount authorized by the consumer.

Estimate fee.

45. (1) Subject to subsection (3), no repairer shall charge a fee for an estimate unless the consumer is told in advance that a fee will be charged and the amount of the fee.

(2) A fee for an estimate shall be deemed to include the cost of diagnostic time, the cost of reassembling the goods and the cost of parts that will be damaged and must be replaced when reassembling if the work or repairs are not authorized by the consumer.

(3) A repairer shall not charge a fee for an estimate if the work or repairs in question are authorized and carried out.

(4) Despite subsection (3), a repairer may charge a fee for an estimate if the repairer is unable to obtain, without unreasonable delay, authorization to proceed with the work or repairs and the goods are reassembled before being worked on or repaired so that the goods can be moved in order to free repair space.

Authorization required.

46. (1) No repairer shall charge for any work or repairs unless the consumer authorizes the work or repairs.

(2) No repairer shall charge, for work or repairs for which an estimate was given, an amount that exceeds the estimate by more than ten per cent.

Authorization not in writing.

47. If an authorization required by section 44, 45 or 46 is not given in writing, the authorization is not effective unless it is recorded in a manner that meets the prescribed requirements.

Posting signs.

48. A repairer shall post the prescribed signs in accordance with the prescribed requirements.

Return of parts.

49 (1) Every repairer shall offer to return to the consumer all parts removed in the course of work or repairs and shall return all such parts unless advised when the work or repairs are authorized that the consumer does not require their return.

(2) Every repairer shall keep parts removed from goods being repaired separate from the parts removed from any other goods and, if their return is requested by the consumer, shall return the parts in a clean container.

(3) Subsections (1) and (2) do not apply to—

(a) parts for which there has been no charge for the part or for work on or repair to the part; or

(b) parts replaced under warranty whose return to the manufacturer or distributor is required.

Invoice.

50. The repairer shall, on completion of work or repairs, deliver to the consumer an invoice containing the prescribed information in the prescribed manner.

Warranty for vehicles.

51. (1) On the repair of a vehicle, every repairer shall be deemed to warrant all new or reconditioned parts installed and the labour required to install them for a minimum of ninety days or five thousand kilometres, whichever comes first, or for such greater minimum as may be prescribed.

(2) The warranty in subsection (1) is in addition to the deemed and implied conditions and warranties set out in section 5.

(3) The person having charge of a vehicle that becomes inoperable or unsafe to drive because of the failure or inadequacy of work or repairs to which a warranty under this section applies may, when it is not reasonable to return the vehicle to the original repairer, have the failure or inadequacy repaired at the closest facility available for the work or repairs.

(4) When work or repairs are made under subsection (3), the person entitled to a warranty under this section is entitled to recover from the original repairer the original cost of the work or repairs and reasonable towing charges.

(5) A consumer who subjects any vehicle part to misuse or abuse is not entitled to the benefit of the warranty on that part.

(6) No repairer shall refuse to reimburse a consumer because of the operation of subsection (5) unless the repairer has reasonable grounds to believe that the part under warranty was subjected to misuse or abuse.

(7) A consumer who is seeking reimbursement under this section shall return, upon the request and at the expense of the original repairer, the defective parts to the original repairer unless, in the circumstances, it is not reasonably possible for the consumer to do so.

(8) An original repairer who is required to make a payment under this section is entitled to recover from the supplier of a defective part any amount paid to the consumer under subsection (4).

Consistent cost.

52. No repairer shall give an estimate or charge an amount for work or repairs that is greater than that usually given or charged by that repairer for the same work or repairs merely because the cost is to be paid, directly or indirectly, by an insurance company.

PART VII—CREDIT AGREEMENTS

Application of Part.

53. (1) This Part does not apply to a supplier credit agreement that—

- (a) requires the borrower to make payment in full in a single payment within a certain period after the supplier delivers a written invoice or statement of account to the borrower;
- (b) is unconditionally interest-free during the period for payment described in clause (a);
- (c) does not provide for any non-interest charges;
- (d) is unsecured apart from liens on the goods or services supplied through the agreement that may arise by operation of law; and
- (e) the supplier cannot assign in the ordinary course of business other than as security.

(2) If a loan broker assists a consumer to obtain credit or a loan of money and the creditor is not in the business of extending credit or lending money, the obligations that this Part would impose on a lender shall be deemed to be

obligations of the loan broker and not the creditor, except as prescribed.

Agreement for credit card.

54. (1) Notwithstanding any other provision of this Act, a consumer who applies for a credit card without signing an application form or who receives a credit card from a credit card issuer without applying for it shall be deemed to have entered into a credit agreement with the issuer with respect to the card on first using the card.

(2) A consumer described in subsection (1) is not liable to pay the lender any amount in respect of the credit card received in the circumstances described in that subsection until the consumer uses the card.

Limiting liability for unauthorized charges.

55. A borrower is not liable for any amount that is greater than the prescribed maximum for unauthorized charges under a credit agreement for open credit.

Consequence of non-disclosure.

56. A borrower under a credit agreement is not liable to pay the lender,

(a) the cost of borrowing under a credit agreement if the borrower receives no statements required by this Part; or

(b) as part of the cost of borrowing, any amount in excess of the amounts specified in the statements that this Part requires to be delivered to the borrower in respect of the agreement.

Correcting errors.

57. If there is an error in a statement of account issued under a credit agreement for open credit, the lender shall correct the error in accordance with the prescribed requirements.

Required insurance.

58 (1) A borrower who is required under a credit agreement to purchase insurance may purchase it from any insurer who may lawfully provide that type of insurance, except that the lender may reserve the right to disapprove, on reasonable grounds, an insurer selected by the borrower.

(2) A lender who offers to provide or to arrange insurance required under a credit agreement shall at the same time disclose to the borrower in writing that the borrower may purchase the insurance through an agent or an insurer of the borrower's choice.

Termination of optional services.

59 (1) A borrower may terminate an optional service of a continuing nature provided by the lender or an associate of the lender on giving thirty days notice or such shorter period of notice as is specified in the agreement under which the service is provided.

(2) A borrower who terminates an optional service in accordance with subsection (1) is not liable for charges relating to any portion of the service that has not been provided at the time of termination and is entitled to a refund of amounts already paid for those charges.

(3) Notice under subsection (1) may be given in any way as long as it indicates the intention of the borrower to terminate the optional service and section 76 applies, with necessary modification, to such notice.

Deferral of payments.

60. (1) If the lender under a credit agreement invites the borrower to defer making a payment that would otherwise be due under the agreement, the invitation must disclose whether or not interest will accrue on the unpaid amount during the period of the deferral and, if interest will accrue, the invitation must also disclose the interest rate.

(2) If the lender does not comply with subsection (1), the lender shall be deemed to have waived the interest that would otherwise accrue during the period.

Default charges.

61. (1) A lender is not entitled to impose on a borrower under a credit agreement default charges other than—

(a) reasonable charges in respect of legal costs that the lender incurs in collecting or attempting to collect a required payment by the borrower under the agreement;

(b) reasonable charges in respect of costs, including legal costs, that the lender incurs in realizing a security interest or protecting the subject-matter of a security interest after default under the agreement; or

(c) reasonable charges reflecting the costs that the lender incurs because a cheque or other instrument of payment given by the borrower under the agreement has been dishonored.

Prepayment.

62. (1) A borrower is entitled to pay the full outstanding balance under a credit agreement at any time without any prepayment charge or penalty.

(2) If a borrower prepays the full outstanding balance under a credit agreement for fixed credit, the lender shall refund to the borrower or credit the borrower with the portion, determined in the prescribed manner, of the amounts that were paid by the borrower under the agreement or added to the balance under the agreement and that form part of the cost of borrowing, other than amounts paid on account of interest.

(3) A borrower is entitled to prepay a portion of the outstanding balance under a credit agreement for fixed credit on any scheduled date of the borrower's required payments under the agreement or once in any month without any prepayment charge or penalty.

(4) A borrower who makes a payment under subsection (3) is not entitled to the refund or credit described in subsection (2).

Disclosure representation.

63. No lender shall make representations or cause representations to be made with respect to a credit agreement, whether orally, in writing or in any other form, unless the representations comply with the prescribed requirements.

Disclosure of brokerage fee.

64. (1) If the borrower pays or is liable to pay a brokerage fee to a loan broker, either directly or through a deduction from an advance, the initial disclosure statement for the credit agreement must disclose the amount of brokerage fee.

(3) If a loan broker has delivered an initial disclosure statement to the borrower, the lender may adopt it as his, her or its own initial disclosure statement or may elect to deliver a separate initial disclosure statement to the borrower.

Initial disclosure statement.

65. (1) Every lender shall deliver an initial disclosure statement for a credit agreement to the borrower at or before the time that the borrower enters into the agreement, unless the lender has adopted the loan broker's initial disclosure statement as his, her or its own.

(2) The initial disclosure statement for a credit agreement for fixed credit shall disclose the prescribed information.

(3) The initial disclosure statement for a credit agreement for open credit shall disclose the prescribed information.

(4) If a loan broker assists in arranging a credit agreement, the initial disclosure statement shall disclose the prescribed information.

Subsequent disclosure on fixed credit.

66. (1) If the interest rate in a credit agreement for fixed credit is a floating rate, the lender shall, at least once every twelve months after entering into the agreement, deliver to the borrower a disclosure statement for the period covered by the statement disclosing the prescribed information.

(2) If the interest rate in a credit agreement for fixed credit is not a floating rate and the agreement allows the lender to change the interest rate, the lender shall, within thirty days after increasing the annual interest rate to a rate that is at least 1 per cent higher than the rate most recently disclosed to the borrower, deliver to the borrower a disclosure statement disclosing the prescribed information.

(3) The lender shall deliver to the borrower notice if the amount of the borrower's scheduled payments required by a credit agreement for fixed credit is no longer sufficient to cover the interest accrued under the agreement because the principal set out in the agreement has increased as a result of default charges or the failure of the borrower to make payments under the agreement.

(4) The notice under subsection (3) shall be in writing, shall disclose the situation and shall be delivered within thirty days after the point when the amount of the scheduled payments is no longer sufficient to cover the accrued interest.

(5) Subject to subsection (6), if the parties have agreed to amend a credit agreement for fixed credit and the amendment changes any of the information prescribed under subsection (2), the lender shall, within thirty days after the amendment is made, deliver to the borrower a supplementary disclosure statement setting out the changed information.

(6) If an amendment to a credit agreement consists only of a change in the schedule of required payments by the borrower, it is not necessary for the supplementary disclosure statement to disclose any change to the annual

percentage rate or any decrease in the total required payments by the borrower or the total cost of borrowing under the agreement.

Subsequent disclosure on open credit.

67. (1) Subject to subsection (2), the lender under a credit agreement for open credit shall deliver a statement of account to the borrower at least once monthly after entering into the agreement.

(2) The lender is not required to deliver a statement of account to the borrower at the end of any period when, since the most recent statement of account, the borrower has received no advances and made no payments under the agreement and—

(a) at the end of the period the outstanding balance payable by the borrower under the agreement is zero; or

(b) the borrower is in default and has been notified that the lender has cancelled or suspended his or her right to obtain advances under the agreement and has demanded payment of the outstanding balance.

(3) The lender shall provide to the borrower a telephone number at which the borrower can make inquiries about the borrower's account during the lender's ordinary business hours without incurring any charges for the telephone call.

(4) A statement of account for a credit agreement for open credit shall disclose the prescribed information.

(5) A lender under a credit agreement for open credit who, pursuant to the agreement, changes the interest rate under the agreement shall deliver a disclosure statement to the borrower disclosing the change,

(a) in the next statement of account after the change, in the case of a credit agreement that is not for a credit card; and

(b) at least thirty days before the change, in the case of a credit agreement that is for a credit card where the interest rate is not a floating rate.

(6) Subject to subsection (7), if the parties have agreed to amend a credit agreement for open credit and the amendment changes any of the information prescribed under subsection (4), the lender shall, within thirty days after the amendment is made, deliver to the borrower a supplementary disclosure statement setting out the changed information.

(7) If the parties have agreed to amend a credit agreement for open credit in respect of a credit card and the amendment changes any of the information prescribed under section 65 (3), the lender shall deliver to the borrower a supplementary disclosure statement setting out the changed information—

(a) within thirty days after the amendment is made, if the change is not a material change, as prescribed; and

(b) at least thirty days before the amendment is made, if the change is a material change, as prescribed.

Assignment of negotiable instrument.

68. (1) If a person assigns a negotiable instrument given to secure credit or a loan of money, the person shall deliver to the assignee with the negotiable instrument a copy of the statement required by section 65 and, if the person is a supplier creditor, a copy of the consumer agreement for the goods or services that were obtained with the fixed credit.

(2) Every assignee of a negotiable instrument who reassigns the instrument shall deliver to the person to whom the instrument is being reassigned the statement and the consumer agreement, if any, received by the assignee in respect of the instrument.

(3) If an assignee of a negotiable instrument to which subsection (2) applies is entitled to recover on the instrument from the maker, the maker is entitled to be indemnified by any assignor of the instrument who has not complied with subsection (1) or (2), as the case may be.

Obligations of assignee of lender.

69 (1) If a lender assigns to a person the lender's rights in connection with the extension of credit or the lending of money to a borrower, the assignee has no greater rights than, and is subject to the same obligations, liabilities and duties as, the assignor in connection with the extension of the credit or the lending of the money, and the provisions of this Act apply equally to such assignee.

(2) Despite subsection (1), a borrower shall not recover from, or be entitled to set off against, an assignee of the lender an amount greater than the balance owing under the consumer agreement at the time of the assignment, and, if there have been two or more assignments, the borrower shall not recover from an assignee who no longer holds the benefit of the consumer agreement an amount that exceeds the payments made by the borrower to that assignee.

Order to pay indemnity.

70. (1) If an assignor of a negotiable instrument is convicted of a contravention of section 65, the High Court making the conviction may order that the person convicted is liable to indemnify the maker.

(2) If an indemnity order is made under subsection (1) in favour of a person who is or becomes liable under a judgment of a court to an assignee of the negotiable instrument in respect of which the indemnity order was made, the person entitled to the indemnity may file the indemnity order in the court office of the court in which the judgment was issued.

(3) Upon the filing of the indemnity order, the local registrar or clerk of the court shall issue a default judgment in favour of the person entitled to the indemnity and against the person required by the indemnity order to

give the indemnity, and the amount of the default judgment shall be the amount of the judgment referred to in subsection (1) and costs together with the costs of issuing the default judgment, or such lesser amount as the person entitled to the indemnity by requisition requests.

(4) Upon application, the court in which the default judgment is issued may set aside the default judgment or may determine the amount of the indemnity or make an order of reference for the purpose and may vary the amount of the default judgment.

Allowance for trade-in subject to adjustment.

71. (1) If the amount to be paid by a consumer under a consumer agreement is determined after an allowance for a trade-in and is stated in the consumer agreement to be subject to adjustment after the existence or amount of liens against the trade-in is ascertained or confirmed, any statements of the terms of payment and the cost of borrowing, as required under this Act, shall be based upon the amount as determined upon the information provided by the consumer.

(2) If there is an additional adjustment to the amount to be paid by a consumer under a consumer agreement to which subsection (1) applies after the adjustment under subsection (1), the consumer agreement shall not be adjusted to change—

(a) the percentage rate by which the cost of borrowing is expressed;

(b) the total number of installments required to pay the total indebtedness; or

(c) the price shown in the consumer agreement.

PART VIII—LEASING

Application of Part.

72. This Part applies to—

(a) leases for a fixed term of four months or more;

- (b) leases for an indefinite term or that are renewed automatically until one of the parties takes positive steps to terminate them; and
- (c) residual obligation leases.

Representations.

73. (1) Any person who makes representations or causes representations to be made about the cost of a lease, whether orally, in writing or in any other form, shall do so in accordance with the prescribed requirements.

(2) Every lessor shall deliver a disclosure statement for a lease to the lessee before the earlier of—

- (a) the time that the lessee enters into the lease; and
- (b) the time that the lessee makes any payment in connection with the lease.

(3) The disclosure statement for a lease shall disclose the prescribed information.

Disclosure statement.

74. (1) The maximum amount of compensation that may be charged to a lessee by a lessor for termination of a lease before the end of the lease term may be limited as prescribed.

(2) The maximum liability of the lessee at the end of the term of a residual obligation lease after returning the leased goods to the lessor shall be the amount calculated in the prescribed manner.

PART IX—PROCEDURES FOR CONSUMER REMEDIES

Application of Part.

75. This Part does not apply to remedies claimed in respect to unfair practices under Part III.

Form of consumer notice.

76. (1) If this Act requires a consumer to give notice to a supplier to request a remedy, the consumer may do so by giving notice in accordance with this section.

(2) The notice may be expressed in any way, as long as it indicates the intention of the consumer to seek the remedy being requested and complies with any requirements that may be prescribed.

(3) Unless the regulations require otherwise, the notice may be oral or in writing and may be given by any means.

(4) If notice in writing is given other than by personal service, the notice shall be deemed to be given when sent.

(5) The consumer may send or deliver the notice to the address set out in a consumer agreement or, if the consumer did not receive a written copy of a consumer agreement or the address was not set out in the written agreement, the consumer may send or deliver the notice—

(a) to any address of the supplier on record; or

(b) to an address of the supplier known by the consumer.

Consumer agreements not binding.

77. (1) A consumer agreement is not binding on the consumer unless the agreement is made in accordance with this Act and the Regulations.

(2) Despite subsection (1), a court may order that a consumer is bound by all or a portion or portions of a consumer agreement, even if the agreement has not been made in accordance with this Act or the Regulations, if the court determines that it would be inequitable in the circumstances for the consumer not to be bound.

(3) The provisions of this section shall not apply to those agreements made before the coming into force of this section.

Cancellation of consumer agreement.

78. (1) If a consumer has a right to cancel a consumer agreement under this Act, the consumer may cancel the agreement by giving notice in accordance with section 76.

(2) The cancellation takes effect when the consumer gives notice.

Effect of cancellation.

79. (1) The cancellation of a consumer agreement in accordance with this Act operates to cancel, as if they never existed—

(a) the consumer agreement;

(b) all related agreements;

(c) all guarantees given in respect of money payable under the consumer agreement;

(d) all security given by the consumer or a guarantor in respect of money payable under the consumer agreement; and

(e) all credit agreements, as defined in Part VII, and other payment instruments, including promissory notes—

(i) extended arranged or facilitated by the person with whom the consumer reached the consumer agreement; or

(ii) otherwise related to the consumer agreement.

(2) The provisions of this section shall not apply to those agreements made before the coming into force of this section.

Obligations on cancellation.

80. (1) If a consumer cancels a consumer agreement, the supplier shall, unless the contrary is provided for in the

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agreement, in accordance with the prescribed requirements–

(a) refund to the consumer any payment made under the agreement or any related agreement; and

(b) return to the consumer in a condition substantially similar to when they were delivered all goods delivered under a trade-in arrangement or refund to the consumer an amount equal to the trade-in allowance.

(2) Upon canceling a consumer agreement, the consumer, in accordance with the prescribed requirements and in the prescribed manner, shall permit the goods that came into the consumer's possession under the agreement or a related agreement to be repossessed, shall return the goods or shall deal with them in such manner as may be prescribed.

(3) If a consumer cancels a consumer agreement, the consumer shall take reasonable care of the goods that came into the possession of the consumer under the agreement or a related agreement for the prescribed period.

(4) The consumer owes the obligation described in subsection (3) to the person entitled to possession of the goods at the time in question.

(5) Compliance with this section discharges the consumer from all obligations relating to the goods and the consumer is under no other obligation, whether arising by contract or otherwise, to take care of the goods.

(6) If a consumer has cancelled a consumer agreement and the supplier has not met the supplier's obligations under subsection (1), the consumer may commence an action.

(7) If a consumer has cancelled a consumer agreement and has not met the consumer's obligations under this section, the supplier or the person to whom the obligation is owed may commence an action.

Illegal charges and payments.

81. If the consumer recovers an amount equal to the trade-in allowance under section 71 (1) and the title of the consumer to the goods delivered under the trade-in arrangement has not passed from the consumer, the title to the goods vests in the person entitled to the goods under the trade-in arrangement.

Illegal charges and payments.

82. (1) If a supplier has charged a fee or an amount in contravention of this Act or received a payment in contravention of this Act, the consumer who paid the charge or made the payment may demand a refund by giving notice in accordance with section 76 within one year after paying the charge or making the payment.

(2) A supplier who receives a notice demanding a refund under subsection (1) shall provide the refund within the prescribed period of time

(3) The consumer may commence an action in accordance with section 84 to recover—

(a) the payment of a fee or an amount that was charged by the supplier in contravention of this Act; or

(b) a payment that was received by the supplier in contravention of this Act.

(4) This section and section 76 apply, with the necessary modifications, to a person who is not a supplier, if the person has received a payment in contravention of section 8.

Consumer's recourse on credit card charges.

83. (1) A consumer who has charged to a credit card account all or any part of a payment described in subsection (2) may request the credit card issuer to cancel or reverse the credit card charge and any associated interest or other charges.

(2) Subsection (1) applies to—

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(a) a payment in respect of a consumer agreement that has been cancelled under this Act or in respect of any related agreement;

(b) a payment that was received in contravention of this Act;

(c) a payment in respect of a fee or an amount that was charged in contravention of this Act; and

(d) a payment that was collected in respect of unsolicited goods or services for which payment is not required under section 9.

(3) A consumer may make a request under subsection (1) if the consumer has cancelled a consumer agreement or demanded a refund in accordance with this Act, and the supplier has not refunded all of the payment within the required period.

(4) A request under subsection (1) shall be in writing, shall comply with the requirements that are prescribed under section 76 (2), and shall be given to the credit card issuer, in the prescribed period, in accordance with section 76.

(5) The credit card issuer—

(a) shall, within the prescribed period, acknowledge the consumer's request; and

(b) if the request meets the requirements of subsection (4), shall, within the prescribed period—

(i) cancel or reverse the credit card charge and any associated interest or other charges; or

(ii) after having conducted an investigation, send a written notice to the consumer explaining the reasons why the credit card issuer is of the

opinion that the consumer is not entitled to cancel the consumer agreement or to demand a refund under this Act.

(6) A consumer may commence an action against a credit card issuer to recover a payment and associated interest and other charges to which the consumer is entitled under this section.

(7) If a consumer charges all or part of a payment described in subsection (2) to a prescribed payment system, the consumer may request that the charge be cancelled or reversed and this section applies with necessary modifications to the cancellation or reversal of such a charge.

Action in Court.

84. (1) If a consumer has a right to commence an action under this Act, the consumer may commence the action in the appropriate Court.

(2) If a consumer is successful in an action, unless in the circumstances it would be inequitable to do so, the court shall order that the consumer recover—

(a) the full payment to which he or she is entitled under this Act; and

(b) all goods delivered under a trade-in arrangement or an amount equal to the trade-in allowance.

(3) In addition to an order under subsection (2), the court may order exemplary or punitive damages or such other relief as the court considers proper.

Waiver of notice.

85. If a consumer is required to give notice under this Act in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so.

Confidentiality.

86. (1) A person who obtains information in the course of exercising a power or carrying out a duty related to the administration of this Act or the Regulations shall preserve secrecy with respect to the information and shall not communicate the information to any person except—

(a) as may be required in connection with a proceeding under this Act or in connection with the administration of this Act or the Regulations;

(b) to a ministry, department or agency of a government engaged in the administration of legislation that protects consumers or to any other entity to which the administration of legislation that protects consumers has been assigned;

(c) to a prescribed entity or organization, if the purpose of the communication is consumer protection;

(d) to a law enforcement agency;

(e) to his, her or its counsel; or

(f) with the consent of the person to whom the information relates.

(2) Except in a proceeding under this Act, no person shall be required to give testimony in a civil proceeding with regard to information obtained in the course of exercising a power or carrying out a duty related to the administration of this Act or the Regulations.

Disclosure of information.

87 (1) If a supplier is required to disclose information under this Act, the disclosure shall be clear, comprehensible and in accordance with the standards set under the Standards Act.

(2) If a supplier is required to deliver information to a consumer under this Act, the information must, in addition to satisfying the requirements in subsection (1), be delivered in a form in which it can be understood by the consumer.

Limitation of arbitration.

88. (1) Any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.

(2) Despite subsection (1), after a dispute over which a consumer may commence an action in the High Court arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law.

(3) A settlement or decision that results from the procedure agreed to under subsection (2) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply.

**PART X—THE KENYA CONSUMERS PROTECTION
ADVISORY COMMITTEE**

Establishment of the Committee.

89. (1) There is established a committee to be known as the Kenya Consumers Protection Advisory Committee.

(2) The Committee shall consist of -

- (a) a chairperson elected by members from among the members referred to in paragraph (d)(1);
- (b) the Permanent Secretary in the ministry for the time being responsible for matters relating to trade and industry;
- (c) the Attorney-General;
- (d) the following persons appointed by the Minister

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- (i) four persons nominated by registered consumer organizations in such manner as may be prescribed;
 - (ii) one person nominated by the Kenya Bureau of Standards;
 - (iii) one person nominated by the Kenya Medical Association;
 - (iv) one person nominated by the Kenya Association of Manufacturers;
- (2) The conduct and regulation of the business and affairs of the Committee shall be as prescribed.
- (3) The Ministry shall provide the secretariat to the Committee.

Functions of the Committee.

90. (1) The functions of the Committee shall be to advise the Minister on—

- (a) on all aspects relating to consumer protection;
- (b) the formulation of policy and legislative proposals in the interest of consumers and the modification, consolidation or updating of legislation providing protection to consumers in the areas covered under, or related to this Act;
- (c) the co-ordination and networking of consumer activities and the development of linkages with consumer organizations and the competent authorities and agencies locally and outside Kenya for the protection of consumer interests;
- (d) the promotion or participation in consumer education programmes and activities, the dissemination of consumer issues with a view to proposing corrective measures, providing advice to consumers on their rights and responsibilities under appropriate laws, and making available to consumers general information affecting the interest of consumers;

(e) the creation or facilitating the establishment of conflict resolution mechanisms on consumer issues, investigate any complaint received regarding consumer issues, investigate any complaint received regarding consumer protection, where appropriate, refer the complaint to the appropriate competent authority and ensure that action may be taken by the competent authority to whom the complaint has been referred;

(f) do anything or all things that are necessary, to expedite or convenient for or in connection with the performance of its functions under this Act.

PART XI—GENERAL

Compliance with Cap 394.

91. (1) No aircraft shall fly within Kenyan airspace unless such aircraft meets the safety requirements under the Civil Aviation Act.

(2) Passenger air carriers shall provide such services including overnight accommodation or meals as may be prescribed to passengers whose flights have been cancelled or are subject to long delays.

General penalty.

92. Any person convicted of an offence under this Act for which no penalty is provided shall be liable to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding three years, or to both.

Regulations.

93. (1) The Minister shall make regulations for the better carrying out of the purposes of this Act.

(2) Without prejudice to the generality of subsection (1), the regulations made under this section shall—

(a) prescribe anything that is required to be prescribed under this Act;

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(b) provide for passenger rights and the standards of service by air carriers including access to necessary services while on a grounded air carrier, customer complaints, notification of delays, cancellations, overbooking, baggage concerns, compensation for passengers and the right to deplane where such rights are infringed.

(3) There may be annexed to a breach of the regulations made under this section a penalty of a fine not exceeding the sum of five hundred thousand shillings or imprisonment for a term not exceeding two years or both such fine and imprisonment.

MEMORANDUM OF OBJECTS AND REASONS

The main object of this Bill is to establish a regime of consumer protection law, in order to provide comprehensive consumer protection and appropriate legal recourse to aggrieved consumers.

Part I contains preliminary provisions. Under clause 3, the proposed legislation will apply to all consumer transactions if either the consumer or the person engaging in the transaction with the consumer is located in Kenya when the transaction takes place. As a result, the proposed law will apply to all companies and other persons dealing with consumers in this country, even if they do not have a business presence in Kenya. The clause provides that the substantive and procedural rights given under this legislation apply despite any agreement or waiver to the contrary and that any term a consumer agreement that disputes arising out of the consumer agreement must be submitted to arbitration is invalid if it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.

Part II relates to consumer rights and warranties. Under clause 5, suppliers are deemed to warrant that any services they supply under a consumer contract are of a reasonably acceptable quality. The Part also seeks to protect consumers against inaccurate or misleading estimates. In particular, where a consumer has been provided with an estimate, the final price would have to be within ten percent of that estimate. Under clause 9, the practice of demanding payment for unsolicited goods or services would be illegal. No corresponding provisions exist in current legislation.

Part III seeks to protect consumers from unfair practices. These include the giving of false, misleading or deceptive representations. It

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also seeks to protect consumers against suppliers who use the possession of the consumer's goods to pressure the consumer into re-negotiating the terms of a transaction.

Part IV relates to the rights and obligations of specific consumer agreements. The proposed legislation would apply beyond sales of goods to include future performance agreements (agreements where the goods or services are provided at a later date), personal development services (such as gym, fitness club and health services agreements), direct sales agreements, credit agreements, leases, trade-ins and other types of consumer transactions. The legislation would also address for the first time rights and obligations arising under time share agreements and internet sales agreements. It is a particular source of concern that no law currently exists to specifically regulate consumer agreements entered into online. The proposed legislation aims to extend protection to consumers doing business via the Internet.

Part V prohibits the charging of an advance fee in certain sectors. These include, loan brokering, credit repair and such other goods or services as may be prescribed.

Part VI seeks to protect consumers in repairs of motor vehicles and other goods.

A consumer shall not be charged a fee for an estimate of the cost of repairs if the consumer authorizes the repairs and they are carried out. Also, a repairer shall not charge the consumer for any work or repairs not authorized by the consumer. In addition, a repairer shall be deemed to warrant all new and re-conditioned parts installed and the labour required to install them for the prescribed duration. This is a safeguard against shoddy workmanship and defective parts.

Part VII is on credit agreements.

The Bill imposes disclosure requirements on the lender and proposes to limit the liability of a borrower to pay charges that were not disclosed.

Part IX sets out the procedure for consumer remedies. An aggrieved consumer may commence an action in the High Court and if successful may recover the full payment to which he or she is entitled under the proposed law.

Part X proposes the establishment of the Kenya Consumers Protection Committee whose functions shall include the coordination, liaison and networking of consumer organizations and relevant authorities locally and abroad, creation and facilitation of conflict

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resolution mechanisms on consumer issues and investigation of consumer complaints and reference of such complaints to relevant authorities for appropriate action.

The enactment of this Bill will not occasion additional expenditure of public funds.

Dated the 26th July, 2011.

JAKOYO MIDIWO,
Member of Parliament.