

CONSUMER SCOTLAND ACT 2020

EXPLANATORY NOTES

THE ACT

Overview

Part 1

Consumer Scotland Establishment

Section 1 – Establishment of Consumer Scotland

5. Section 1 establishes the body as an entity to be known as ‘Consumer Scotland’. The Gaelic name Luchd-Cleachdaidh Alba has equal legal status.

Functions

Section 2 – General function

6. Section 2 sets out Consumer Scotland’s general function. As subsection (2) clarifies, the functions set out in section 3 to 6 all fall within the overarching general function which is provided for in subsection (1).
7. Consumer Scotland has the general function of providing consumer advocacy and advice with a view to achieving the outcomes set out in the section. These are:
- reducing consumer harm in Scotland,
 - increasing the confidence of consumers in Scotland in dealing with businesses supplying goods and services,
 - increasing the extent to which consumer matters are taken into account by public authorities in Scotland,
 - promoting sustainable consumption of natural resources, and other environmentally sustainable practices, in relation to the acquisition, use and disposal of goods by consumers in Scotland, and
 - otherwise advancing inclusion, fairness and prosperity and other aspects of wellbeing in Scotland.
8. “Consumer” and “consumer matters” are defined in sections 24 and 25 respectively.
9. “Harm” is not defined in the Act and therefore has its ordinary meaning. Examples of harm to consumers are wide-ranging and include, but are not limited to, harm that is financial, emotional, environmental or physical. Harm could include consumers paying more for goods or services because of unfair marketing practices, or the impact of plastic consumption in consumer packaging on the environment. It could also include consumers being denied equal access to goods or services without justification on the basis of where they live or other characteristics, such as disability or age. It should be

noted that reducing does not necessarily mean eliminating; lessening the level of harm may occur in cases where the harm cannot be removed altogether.

10. Increasing consumer confidence in dealing with businesses could take the form of both Consumer Scotland working to improve business practices, and improving consumer knowledge (and therefore confidence) through the dissemination of advice.
11. The term “natural resources” is not defined in the Act and therefore also takes its ordinary meaning, namely: materials or substances occurring in nature which can be exploited for economic gain. An example of promoting sustainable consumption of natural resources, or other environmentally sustainable practices, could include providing advice and information to consumers on the reuse or recycling of goods.

Section 3 – Representative function

12. Section 3 provides for Consumer Scotland’s representative function, allowing it to make representations on consumer matters. These representations can be in the form of providing advice and information, making proposals or representing consumer views. Representations may be made to the particular persons specified in subsection (3)(a) to (d) or to any other person whom Consumer Scotland considers might have an interest in the matter.
13. Subsection (2) requires Consumer Scotland to advise the Scottish Ministers on consumer matters when requested to do so. Consumer Scotland is independent of the Scottish Ministers, however, and may only provide advice or information, or make proposals or representations, when doing so is consistent with Consumer Scotland’s other functions and where it is reasonably practicable for Consumer Scotland to do so.

Section 4 – Research and investigation function

14. Section 4 allows Consumer Scotland to obtain, analyse and review information relating to consumer matters etc. and to undertake investigations into sectors or practices (or more broadly into anything relating to its functions). This provision supports the general function of Consumer Scotland of providing consumer advocacy and advice. Consumer Scotland is obliged by section 15 to publish reports on any investigations it conducts under this section.

Section 5 – Information function

15. Section 5 states that Consumer Scotland may provide information and advice to consumers. This covers information and advice about the body itself and its functions, about consumer matters (as defined by section 25), and about any other matters that the Scottish Ministers set out in regulations. It also provides that Consumer Scotland may work in conjunction with another organisation to provide this information and advice. Advice could include the publishing or issuing of guidance of general application or on a particular topic.
16. This section also gives Consumer Scotland the power to make that information and advice available in any way it thinks suitable to bring it to the attention of anyone with an interest, and also enables it to support or work with other organisations to make the information available.

Section 6 – Recall of goods function

17. Section 6 requires Consumer Scotland to develop and operate, or secure the development and operation of, a publicly available database of major recalls of goods in Scotland. For the purpose of this section, a recall of goods also covers cases where manufacturers or others take action short of a full recall, for example by offering repair of a product which would otherwise need to be taken back.

18. Section 6 also gives details of what Consumer Scotland may do in relation to the recall of goods. For example, Consumer Scotland may take such further steps it considers appropriate to provide or secure the provision of advice and information to consumers about the recall of goods.

Section 7 – General provision about functions

19. This section sets out general requirements that Consumer Scotland must adhere to when carrying out its functions. These include having regard to its own forward work programme (see section 14) and the desirability of working in collaboration with others where appropriate.
20. Among other things, Consumer Scotland must have regard to the activities carried on by specified persons and also by persons with the same functions as, or similar functions to, Consumer Scotland. Specified persons are persons specified by the Scottish Ministers by regulations. As noted below, “person” takes the meaning given in the Interpretation and Legislative Reform (Scotland) Act 2010 (see paragraph 52).
21. In exercising its functions under the Act, Consumer Scotland must have regard to the interests of vulnerable consumers. Consumer Scotland must also have regard to the importance of communicating in an inclusive way, recognising that some individuals may need to be provided with information in a particular format (for example, large print or braille). The term “communicating in an inclusive way” is defined as communicating in a way that ensures that individuals who have difficulty communicating (in relation to speech, language or otherwise) can receive information and express themselves in ways that best meet their individual needs.
22. There is also a requirement that, in exercising its functions, Consumer Scotland must have regard to the environmental impact of the actions of consumers. This complements the existing environmental duties Consumer Scotland will have by virtue of being made subject to the Freedom of Information (Scotland) Act 2002. For more information on this, see paragraph 101 of these Notes.
23. As noted in the Policy Memorandum, the intention is that Consumer Scotland is to be made part of the Scottish Administration. As such, Consumer Scotland will then be subject to the Public Finance and Accountability (Scotland) Act 2000. In particular, section 14(3)(d) of that Act imposes a duty on the accountable officer for the Scottish Administration to ensure that resources are used economically, efficiently and effectively. This duty is also one that, in line with section 15(7)(c) of that Act, can be delegated to an accountable officer for a particular part of the Scottish Administration. Consumer Scotland’s resources will therefore need to be managed in line with this requirement.

Section 8 – Exercise of functions

24. This section clarifies that Consumer Scotland may use its functions to act for a specific consumer, but it is not required to do so.

Information-gathering

Section 9 – Requirement to provide information to Consumer Scotland

25. Subsection (1) enables Consumer Scotland to serve a notice on a person listed in subsection (2) requiring the person to provide it with certain information. It may only do so in relation to information which it requires for the purpose of exercising its functions. The persons listed in subsection (2) and therefore potentially subject to this requirement are a “designated regulator”, a regulated provider, any person who supplies goods or services in the course of business and any other person or description of person specified, through regulations, by Ministers.

26. The Scottish Ministers will specify who is a “designated regulator” and a “regulated provider” for the purposes of this section, and sections 10 to 12, through regulations. Where anyone else is made subject to this power using the regulation-making power under subsection (2)(d), provision can be made in accordance with subsection (5) about the sanctions that are to apply for breach.
27. Consumer Scotland can specify the manner and form in which information is to be provided. When making a request for information Consumer Scotland must consider the importance of minimising the costs, or any other detriment the request might cause, for the person on whom the notice is served.
28. Before specifying a “designated regulator” or “regulated provider”, the Scottish Ministers must consult with such persons as they consider appropriate. Where the Scottish Ministers propose to designate a regulator (including where they propose to extend the regulator’s remit to cover another regulated provider), the appropriate persons consulted must include the proposed regulator.

Section 10 – Failure by a designated regulator to comply with a section 9 notice

29. Section 10 provides that, should a designated regulator fail to give information to Consumer Scotland, that designated regulator can be required to produce a written statement explaining the reasons for the failure. Consumer Scotland has the power to publish this explanation.
30. This section can also be applied to others who are made subject to the information-gathering requirement using the power under section 9(2)(d) (see section 9(5)(a)).

Section 11 – Enforcement by a designated regulator of section 9 notice

31. Section 11 applies where a regulated provider (to be specified by the Scottish Ministers in regulations under section 9(6)(b) but potentially covering providers in regulated sectors such as electricity, gas, postal services or water) fails to comply with an information notice served by Consumer Scotland under section 9(1).
32. In such cases, Consumer Scotland may refer the matter to the “relevant designated regulator”, being the designated regulator for the particular regulated provider as specified in regulations under section 9(6)(b), insofar as the failure to comply with the information notice relates to something within the relevant designated regulator’s remit.
33. The relevant designated regulator must consider any representations made by Consumer Scotland or by the regulated provider and must determine whether the provider was entitled to refuse to provide the information requested by Consumer Scotland. If the relevant designated regulator determines that the provider was not entitled to refuse, then it must direct the provider to provide the information.

Section 12 – Enforcement by the court of a section 9 notice

34. This section applies where a person (other than a person to whom section 10 applies or a regulated provider covered by section 11) refuses or fails to comply with a notice under section 9(1) requiring information to be provided to Consumer Scotland. In this circumstance, Consumer Scotland may apply to the Court of Session for an order requiring the person served with the notice to comply with it. Whether such an order is granted will be at the court’s discretion. Any questions of expenses arising from such an application will be for the court to determine but it is usual practice that, where an application for such an order is unsuccessfully resisted, judicial expenses are awarded against the party that resisted the application. As such, should a person resist the granting of an order under this section, they could find themselves liable for the expenses of the proceedings.

Section 13 – Exemptions from requirement to provide information

35. Section 13 provides exemptions from the requirement to provide information. Subsection (1) means that no person may be required under section 9(1) or section 12 to provide information which they could not be compelled to provide in legal proceedings before the Court of Session.
36. This section also gives the Scottish Ministers the power to prescribe additional exemptions from the requirement to provide information to Consumer Scotland. They would do so by regulations and can detail the persons, type of information or circumstances to which an exemption could apply.

Accountability

Section 14 - Forward work programmes

37. Section 14 requires that Consumer Scotland must, before each programme year, prepare and publish a forward work programme. A programme year corresponds to a financial year (i.e. 1 April to 31 March). This document must include, for the following year:
- Consumer Scotland's priorities (in relation to consumers generally and in relation to vulnerable consumers);
 - a description of its main planned activities (in relation to consumers generally and in relation to vulnerable consumers);
 - details of any other priorities, and
 - details of any investigations it plans to undertake over and above those which are routine activities necessary to fulfil its functions.
38. When the forward work programme is being prepared, Consumer Scotland must have regard to the views of consumers and other persons, bodies and organisations having an interest in consumer matters.
39. This published programme must also be laid before the Scottish Parliament. Under section 7, Consumer Scotland must have regard to its forward work programme when exercising its functions.

Section 15 – Reports on investigations

40. Section 15 requires Consumer Scotland to publish its findings and recommendations as soon as reasonably practicable after the conclusion of an investigation conducted under section 4(2). The report must also set out how, in conducting the investigation, Consumer Scotland has had regard to the activities carried on by specified persons and also by any persons with the same functions as, or similar functions to, Consumer Scotland. Specified persons are persons specified by the Scottish Ministers by regulations under section 7(8). A copy of this report must be sent to the Scottish Ministers.

Section 16 – Annual report

41. Section 16 places an obligation on Consumer Scotland to publish an annual report on its activities and to lay this before the Scottish Parliament as soon as reasonably practicable after the end of each financial year. A copy of the report must also be sent to the Scottish Ministers. The report must set out how Consumer Scotland has had regard to the activities carried on by specified persons and also by any persons with the same functions as, or similar functions to, Consumer Scotland. Specified persons are persons specified by the Scottish Ministers by regulations under section 7(8).

Section 17 – Consumer welfare report

42. Section 17 requires Consumer Scotland to produce a consumer welfare report as soon as reasonably practicable after the end of every three year reporting period (to 31 March). This report must be published, sent to the Scottish Ministers and laid before the Scottish Parliament. The report must set out how well consumer interests are being served in Scotland and, where there is consumer harm, what form that takes and how widespread it is.
43. Consumer Scotland must have regard to the views of consumers and other persons, bodies and organisations having an interest in consumer matters when preparing this report. Consumer Scotland will therefore have to consult, ask for evidence from, or work collaboratively with such persons when preparing the report.
44. Consumer Scotland must also, when preparing the consumer welfare report, set out how it has had regard to the interests of vulnerable consumers.

Finance

Section 18 – Grants and loans by Consumer Scotland

45. Section 18 allows Consumer Scotland to provide grants and loans to other organisations, where it appears to Consumer Scotland to be conducive to the performance of Consumer Scotland's functions.
46. As noted in the Financial Memorandum, there is no requirement for provision to be made about the provision of funding to Consumer Scotland. As part of the Scottish Administration, it will be for the Scottish Ministers to decide the overall budgetary allocation for Consumer Scotland in future, as part of the normal Scottish Government budget cycle.

Review of performance and modification of functions

Section 19 – Review of Consumer Scotland's performance

47. Section 19 requires that, within the first three years of operation and at least every five years thereafter, Consumer Scotland must appoint a suitable person to conduct an external review of its performance in carrying out its functions. The person who is appointed to carry out this review must have relevant expertise and must be independent of Consumer Scotland (which is achieved where the condition in subsection (3)(b) is met). Consumer Scotland must publish this review, lay a copy before the Scottish Parliament and send a copy to the Scottish Ministers. Any payment for this review may only be made where it has been approved by the Scottish Ministers.

Section 20 – Power to modify Consumer Scotland's functions

48. Section 20 empowers the Scottish Ministers, following consultation with Consumer Scotland (and, where appropriate, others) and subject to parliamentary process, to confer new functions on Consumer Scotland or to modify or remove existing ones. This power will enable Consumer Scotland's remit to be adjusted in future without the need for further primary legislation, but subject to parliamentary oversight and agreement.
49. However, Ministers may not use this regulation-making power to remove (either by variation or by outright removal) Consumer Scotland's core functions as set out under section 2.