



# **The Consumer Protection Guide for Lawyers**

**Drafted for the Law Society of South Africa**

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## **Preface**

As most lawyers are by now well aware, the Consumer Protection Act heralds a bold new approach to consumer protection in which the State has leveled the playing field and created an agency, the National Consumer Commission, a regulatory framework which intervenes directly in day-to-day commercial transactions to ensure compliance by service providers and suppliers. The CPA complements and extends the protection afforded to consumers of credit, by the National Credit Act, to all consumers. The ambit of the CPA is very broad and the stated intention is to include as many industries as possible and ensure that at least equivalent protection exists in any industries which are granted exemption.

As such the CPA is arguably the most wide-ranging piece of legislation to have been enacted in South Africa. Purchases of goods or services, whether or not on credit, are included in the purview of the CPA and it is worth noting that while the National Credit Act strictly regulates the provision of credit, the CPA still applies to the sale or related transaction underlying the credit agreement.

Irrespective of whether you are protecting the interests of your clients or ensuring that you are personally not in breach of the provisions of the CPA, it is imperative that we grapple with the application of the CPA and become extremely familiar both with its aims and practical effect.

It is likely that irrespective of the nature of your legal practice the CPA will have at least partial application and it is crucial that we attorneys become familiar with its terms both as professionals engaged to guide our clients and as regulated service providers.

We have great pleasure in providing, what we hope, is a succinct guide to the CPA, and look forward to working with you, our fellows, to ensure this new legislation is clarified as required by the courts and given effect in a manner consistent with the laudable aims of the drafters.

Our comprehensive guide to the CPA, which will shortly be published by Juta, will expand on the this guide and deal with the topics in greater detail.

## **1. Chapter 1 – What is the Consumer Protection Act (CPA) about?**

- 1.1 Interpretation, Purpose and Policy of the CPA
- 1.2 Who May Lodge Consumer Complaints?
- 1.3 To Whom and to What does the CPA apply?
- 1.4 Key Definitions of terms used in the CPA
- 1.5 Transactions Excluded from the Application of the CPA
- 1.6 Calculation of a Juristic Person's Asset Value or Annual Turnover

## **2. Chapter 2 - Implementation of the CPA and its Application to Pre-existing Agreements**

- 2.1 Implementation of the CPA
- 2.2 Non-Application of the CPA to Pre-Existing Agreements
- 2.3 Application of the CPA to Pre-Existing Transactions and Agreements
- 2.4 Duty on the Administrator, Executor, Liquidator of a Supplier's Property
- 2.5 Pre-Existing Loyalty Programmes
- 2.6 Liability of a Supplier for Damage caused by Goods supplied in terms of a Pre-Existing Agreement
- 2.7 Relief from the requirement to register business names
- 2.8 Exclusion of Certain Laws

## **3. Chapter 3 – Franchise Agreements**

- 3.1 Regulatory Drafting Criteria of Franchise Agreements
- 3.2 Content of Franchise Agreements – Possible Precedent
- 3.3 Retrospective Application to Pre-Existing Agreements
- 3.4 Disclosure Document
- 3.5 Mandatory Provisions in a Disclosure Document

#### **4. Chapter 4 – Fundamental Consumer Rights**

- 4.1 Right of Equality in the Consumer Market
- 4.2 Permissible Differential Treatment of Consumers
- 4.3 Enforcement of the Right to Equality in the Consumer Market
- 4.4 What the Right to Equality in the Consumer Market means to the Consumer
- 4.5 Right to Confidentiality and Privacy and its Curtailment on Direct Marketing

#### **5. Chapter 5 – Consumer's Right to Choose**

- 5.1 Consumer's right to select suppliers
- 5.2 Consumer's right to choose, select and examine Goods
- 5.3 Delivery and Acceptance of Goods and Services
- 5.4 Unsolicited Goods and Service
- 5.5 Expiry and Renewal of Fixed-term Agreements
- 5.6 Advise when drafting Fixed-term Agreements
- 5.7 What is a Reasonable Cancellation Penalty?
- 5.8 Right to Cancel a Reservation, Booking or Order
- 5.9 Right to request Pre-authorisation for Repairs and Maintenance Services
- 5.10 Right to Cancel Direct Marketing Contracts and the Consumer's general right to return Goods

#### **6. Chapter 6 – Right to Disclosure and Information**

- 6.1 Right to information in plain and understandable language
- 6.2 What is plain language?
- 6.3 Pricing of Goods and Services
- 6.4 Product Labelling and Trade Descriptions
- 6.5 Product Labelling of Genetically Modified Organisms
- 6.6 Definition of Genetically Modified Organism
- 6.7 Disclosure of Reconditioned or Grey Market Goods

- 6.8 Disclosure by Intermediaries
- 6.9 Identification of Deliverers, Installers and Others
- 6.10 Sales Records

## **7. Chapter 7 – Consumer’s right to Fair and Responsible Marketing**

- 7.1 Marketing Standards
- 7.2 Bait Marketing
- 7.3 Negative Option Marketing
- 7.4 Direct Marketing
- 7.5 Catalogue or Electronic Marketing
- 7.6 Customer Loyalty Programmes
- 7.7 Trade Coupons and Similar Promotions
- 7.8 Promotional Competitions
  - 7.8.1 Key Definitions
  - 7.8.2 Obligations of Promoters
  - 7.8.3 Advertising of Promotional Competitions
- 7.9 Alternative Work Schemes
- 7.10 Referral Selling

## **8. Chapter 8: Fair and Honest Dealing and the Consumer’s right to Fair Agreements**

- 8.1 Consumer’s right to assume the supplier is entitled to supply goods
- 8.2 Unconscionable Conduct
- 8.3 False, Misleading or Deceptive Representations
- 8.4 Other Fraudulent Schemes
  - 8.4.1 Fraudulent Currency Schemes
  - 8.4.2 Fraudulent Financial Transactions
  - 8.4.3 Fraudulent Transfer of Property or Legal Rights

- 8.4.4 Fraudulent Public Property Syndication Schemes
- 8.4.5 Feasibility Studies Promising Funding
- 8.5 Deferrals, Waivers and Substitution of Goods
- 8.6 Over-selling and Over-booking
- 8.7 Auctions
  - 8.7.1 Mandatory Advertising of Auctions
  - 8.7.2 General Rules on the Advertising of Auctions
  - 8.7.3 Sale in Execution Auctions
  - 8.7.4 Insolvency Auctions
  - 8.7.5 Deceased Auctions
  - 8.7.6 Divorce Auctions
  - 8.7.7 Auctions Advertised as “Absolute” or “Without Reserve”
  - 8.7.8 Auction Rules and the Auctioneer’s duty to Hold and Account for the Consumer’s Property
  - 8.7.9 Auctioneer’s Duties
- 8.8 Prohibited Conduct on the part of an Auctioneer
  - 8.8.1 Persons disqualified from being Auctioneers
  - 8.8.2 Motor Vehicle Auctions
  - 8.8.3 Livestock, Game and Closed Auctions
- 8.9 Pyramid, Multiplication and Chain Letter Schemes

## **9. Chapter 9: The Right to Fair, Just and Reasonable Terms and Conditions**

- 9.1 Unfair, Unreasonable and Unjust Transactions
- 9.2 Written Consumer Agreements
- 9.3 Prohibited Transactions, Agreements, Terms or Conditions
- 9.4 The Courts Powers to ensure Fair and Just Conduct and Terms

## **10. Chapter 10: Quality and Safety of Goods**

- 10.1 The Consumer's Right to Good Quality and Safe Goods
- 10.2 Limitations on the right to Safe and Good Quality Goods
- 10.3 Important Definitions concerning Warranties
- 10.4 Implied Warranty of Quality
- 10.5 Warranty on Repaired Goods
- 10.6 Hazardous Activities and Facilities
- 10.7 Disposal of Hazardous or Dangerous Products
- 10.8 Paving the Way for the supply of Safe and Reliable Goods
- 10.9 The Issue of Strict Liability
- 10.10 Instances where Strict Liability is excluded
- 10.11 What harm is the Producer, Importer, Distributor or retailer liable for?

## **11. Chapter 11: Supplier's Accountability to Consumers**

- 11.1 Lay-bys
- 11.2 Prepaid Certificates, Credits and Vouchers
- 11.3 Supplier's duty to hold and account for Consumer's Property
- 11.4 Deposits paid for containers or similar objects
- 11.5 Return of Parts and Materials

## **12. Chapter 12: Protection of Consumer's rights**

- 12.1 Consumer's right to be heard and obtain redress
- 12.2 Enforcement of the CPA
- 12.3 Initiating Complaints to the NCC
- 12.4 Outcome of Investigation by NCC
- 12.5 Investigation by the NCC
- 12.6 Consumer Protection Groups

## **13. Chapter 13: National Consumer Protection Institutions**

- 13.1 Provincial Consumer Protection Groups
- 13.2 Establishment of the NCC
- 13.3 The Board of the NCC

- 13.4 General Functions of the NCC
- 13.5 Enforcement Functions of the NCC
- 13.6 Compliance Notices
- 13.7 Offences
- 13.8 Penalties
- 13.9 Administrative Fines
- 13.10 Limitations of ringing of action
- 13.11 Standard of Proof
- 13.12 Vicarious Liability
- 13.13 Serving of Documents

#### **14. Chapter 14: Business Names**

- 14.1 Identification of Suppliers
- 14.2 Mandatory Obligations of Suppliers
- 14.3 Registration of Business Names
- 14.4 Cancellation of Registered Business Names
- 14.5 Criteria for Business Names

### **Chapter 1**

#### **What is the Consumer Protection Act 68 of 2008 all about?**

##### **Interpretation, Purpose and Policy of the CPA**

Section 2 of the Consumer Protection Act (CPA) provides that the interpretation of the CPA must be effected in a manner that gives effect to the purpose of the CPA. The purposes of the CPA are set out in section 3 and are as follows:

1. To establish a legal framework for a consumer market that is fair, accessible, efficient, sustainable and responsible;
2. To promote fair business practices;
3. To protect consumers from unfair, unreasonable or other improper trade practices and also to protect the consumer from deceptive, misleading or other fraudulent conduct;
4. To promote social, economic and environmental responsibility in consumer markets;



5. To improve consumer awareness and information and to encourage responsible and informed consumer choice and behaviour;
6. To promote consumer confidence and empowerment and develop a culture of consumer responsibility through individual and group education, vigilance, advocacy and activism;
7. To provide a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions;
8. To provide an accessible, consistent, harmonized, effective and efficient system of redress for consumers;
9. Replace in a new and simplified manner, existing provisions from 5 Acts, including the Consumer Affairs (Unfair Business Practices) Act of 1988; Trade Practices Act of 1976; Sales and Service Matters Act of 1964; Price Control Act of 1964; and the Merchandise marks Act of 1941 (specifically Sections 2 – 13 and Sections 16 – 17).

For purposes of section 92(4), the official languages to be used by the Commission in any documents it is required to deliver in terms of the Consumer Protection Act are English and isiZulu (Regulation 41)

### **Who May Lodge Consumer Complaints?**

In law, a person must have *locus standi*, that is, the legal right to enforce or litigate any matter or issue or complaint. Any of the following persons may, in the manner provided for in the CPA, approach a court, the National Consumer Tribunal or National Consumer Commission alleging that a right entrenched in the CPA has been infringed, impaired or threatened or that prohibited conduct has occurred or is occurring:

1. A person acting on his or her own behalf;
2. An authorized person acting on behalf of another person who cannot act in their own name;
3. A person acting as a member of, or in the interest of, a group or class of affected persons;
4. A person acting in public interest with the leave of the National Consumer Tribunal or the court;
5. An association acting in the interest of its members.

Where a matter is brought before the Tribunal or a court they must develop the common law as necessary to improve the realisation and enjoyment of consumer rights. The Tribunal and

court are also obliged to promote the spirit and purposes of the Act and make appropriate orders to give practical effect to the consumer's right to redress. Orders provided for in the Act and any other "innovative order" may be made by the Tribunal or court. It is important to note that the court with the jurisdiction to make such orders is the Magistrate's Court as the definition of "court" in the Act merely states that a court does not include a consumer court.

### **To What and to Whom does the CPA Apply?**

Section 5 of the CPA provides that the CPA shall apply to every transaction, agreement, advertisement, production, distribution, promotion, sale or supply of goods or services. This means that the CPA shall have wide application. Further, the CPA shall apply to the promotion and marketing of any goods or services and to suppliers of goods and services.

Certain transactions are exempt. For instance, where the goods or services could not reasonably be the subject of a transaction falling within the ambit of the CPA or where the goods or services have been exempted from the application of the CPA (exemption requirements and procedure are set out in s5(3) and s5(4)).

### **Key Definitions of Terms used in the CPA**

We have seen that the CPA applies to consumers and suppliers of goods and services. Before moving on, it is important to explain the different terms, that is, who is a consumer for purposes of the CPA? Who is a supplier? What goods and what services does the CPA intend to regulate? What transactions and promotions are subject to the CPA?

*The CPA defines a consumer as follows:*

1. A person to whom goods or services are marketed in the ordinary course of the supplier's business;
2. A person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction has been granted exemption from the application of the CPA;
3. A user of goods or a recipient or beneficiary of services, irrespective of whether that user, recipient or beneficiary was a party to the transaction concerning the supply of those goods or services;
4. A franchisee in terms of a franchise agreement.

*A supplier is defined* as a person who markets any goods or services. The term 'market', when used as a verb, refers to the promotion and supply of any goods or services. This

means that promoters, marketers, retailers, distributors and suppliers are obliged to observe the provisions of the CPA.

**“Goods”** include –

1. Anything marketed for human consumption;
2. Any tangible object, including any medium on which anything is or may be written or encoded;
3. Any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product, or a licence to use any such intangible product;
4. A legal interest in land or any immovable property, other than an interest that falls within the definition of “service” in this section; and
5. Gas, water and electricity.

**“Services”** include, but are not limited to:-

1. Any work or undertaking performed by one person for the direct or indirect benefit of another;
2. The provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act;
3. Any banking services, or related similar financial services, or the undertaking, underwriting or assumption of risk by one person on behalf of another, except services that constitute advice or intermediary services that are regulated by the Financial Advisory and Intermediary Services Act, or services that are regulated by the Long-Term and Short-Term Insurance Acts;
4. The transportation of an individual or any goods;
5. The provision of accommodation or sustenance;
6. The provision of entertainment or similar intangible product or access to such entertainment or other intangible product;
7. The provision of access to any electronic communication infrastructure;
8. The provision of access, or a right of access, to an event or to any premises, activity or facility;
9. The provision of access to or use of premises or other property in terms of a rental agreement;
10. The provision of a right of occupancy of, or power or privilege over any land or other immovable property, other than in terms of a rental;
11. The provision of the rights of a franchisee in terms of a franchise agreement.

**“Transactions”** include:-

1. Agreements between or among persons for the supply or potential supply of goods or services in exchange for consideration;
2. The supply of goods to or at the direction of a consumer for consideration;
3. The performance by, or at the direction of a person acting in the ordinary course of business, of any services for or at the direction of a consumer for consideration;
4. The supply of goods or services to a franchisee in terms of a franchise agreement;
5. A franchise agreement or a supplementary agreement to a franchise agreement;
6. A solicitation to enter into a franchise agreement;
7. The supply of goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, irrespective of whether there is a charge or other economic contribution demanded or expected in order to become or remain a member of that entity.

The verb **“promote”** includes any:-

1. Advertisement, display or offer to supply goods or services in the ordinary course of business, to all or part of the public for consideration;
2. Any representation in the ordinary course of business that can be reasonably inferred as expressing a willingness to supply goods or services for consideration;
3. Conduct in the ordinary course of business that may be construed as being an inducement or attempted inducement to a person to engage in a transaction.

Another important definition to keep in mind is that “person” includes both natural and juristic persona, and that like the National Credit Act, the CPA adopts a wide definition of who exactly is a juristic person. The CPA defines a juristic person to include a body corporate, a partnership or association or a trust as defined in the Trust Property (Control) Act 57 of 1988.

**“Retailers”** in terms of the CPA refers to a person who, in the ordinary course of business, supplies goods to a consumer.

**“Suppliers”** means a person who markets any goods or services. The supply of goods includes the sale, rental, exchange and hire of those goods in the ordinary course of business. In relation to the supply of services, this includes the selling of services;

performing of services as well as the granting of access to any premises, event, activity or facility in the ordinary course of business for consideration.

### **Transactions Excluded from the application of the CPA (Section 5(2)(a) – (g))**

1. Goods or services promoted or supplied to the state
2. Where the consumer is a juristic person whose annual turnover or asset value exceeds or equals a determined financial threshold (the threshold has since been determined to be R2 million)
3. If the transaction has been exempted in terms of s5(3) and s5(4)\*1
4. If the transaction constitutes a credit agreement in terms of the National Credit Act \*
5. Employment contracts
6. Transactions giving effect to collective bargaining agreements in terms of the Labour Relations Act 66 of 1995

\*During the drafting stages of the CPA, sentiment was that any transaction that relates to a credit agreement as defined in the National Credit Act would be fully exempt from the application of the CPA. However, this is not the case. The CPA shall also apply to the actual goods or services that are the subject of a credit agreement.

\*1 In terms of section 5(3) a regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of the CPA. The basis of such an application would be that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority. For example, the long and short-term insurance industries have been given exemption. The Financial Services sector and Financial Intermediaries sector have also been granted exemption. The airline industry as well as the medical industry did not qualify for exemption as the relevant respective legislation governing these industries does not provide sufficient protection for consumers.

Where the Minister is satisfied that the regulatory scheme administered by the applicant achieves the purposes of the CPA, the Minister may grant exemption from the application of the CPA. Such exemption may be limited and subject to certain conditions.

However, even where the Minister grants full exemption from the CPA, importers or producers, distributors and retailers of goods, must still comply with the requirements of section 60 and section 61. Section 60 deals with the safety, monitoring and recall of goods that are found to be defective and hazardous. Where the Commission reasonably believes

that goods are unsafe or hazardous and that the producer or importer has not take adequate measures to notify consumers of the defect or to recall the goods, the Commission may give written notice to the producer calling on it to conduct an investigation into the nature, causes, extent and degree of risk posed to the public. The Commission may also require the producer to carry out a recall programme. Any producer or importer affected by such a notice may apply to the Tribunal to have the notice set aside in its entirety or in part.

Section 61 renders producers or importers, distributors or retailers of any goods, liable for harm caused by the supply of unsafe goods, product failure, defective or hazardous goods as well as where such harm is as the result of inadequate instructions or warnings being given to the consumer. This liability arises irrespective of whether the producer, importer, distributor or retailer acted negligently. Liability is therefore strict.

The liability does not arise in the following instances:

1. The hazard, failure or defect is wholly attributable to compliance with any public regulation;
2. The hazard, defect or failure did not exist at the time the goods were supplied
3. Adequate instructions were given to the consumer and the consumer failed to comply with such instructions;
4. Where it is unreasonable to expect the distributor or retailer to have known of the defect or hazard. In determining what is unreasonable, regard shall be had to the distributors or retailers role in marketing the goods to the consumer;
5. The claim is more than 3 years after the death or injury alleged to have been caused or attributed to the defective or hazardous goods. In essence, the claim for damages must be made at the earliest time at which the consumer had material facts of the harm, damage or injury or loss. Such a claim must be made within 3 years of the consumer acquiring such knowledge. Where economic loss has been suffered, the claim must be made within 3 years from the latest date on which the consumer suffered the loss.

The type of "harm" envisaged in the CPA is set out in section 61(5). In terms of this section, harm includes:-

- (a) The death of, or injury to, any natural person;
- (b) An illness of any natural person;
- (c) Any loss of, or physical damage to, any movable or immovable property'
- (d) Any economic loss that resulted from any harm.

The CPA does not specifically state where a consumer may lodge a claim for damages for such harm. However, section 61(6) refers to the courts' power to determine whether any harm claim has been proven, the courts power to assess the extent of the harm and to apportion liability amongst persons found to be jointly and severally liable. It is therefore arguable that such a claim must be made to either the Magistrates' Court or to the High Court.

The CPA therefore applies to the supply of goods and services. It also applies to foreign suppliers, that is, suppliers who reside or have their principal offices outside the Republic but who nevertheless supply goods within the Republic. It also applies to suppliers who operate on a non-profit basis, and to suppliers who are individuals, juristic persons, partnerships, trusts, organs of state, entities owned or directed by the state as well as to suppliers who are public-private partnerships.<sup>1</sup>

### **Calculation of a Juristic Persons Asset Value and Annual Turnover**

Transactions entered into for the supply of goods or services to a consumer who is a juristic person are excluded from the ambit and application of the CPA where such a consumer has an asset value or annual turnover exceeding R2 000 000 (Two Million Rands). The Regulations provide the method to be used in calculating the consumer's monetary threshold. The consumer's monetary threshold must be calculated in accordance with South African generally accepted accounting standards. The Regulations further stipulate that the asset value of a juristic person is based on the gross value of the juristic person's assets, namely:

- The asset value equals the total assets less any amount shown on that balance sheet for depreciation or diminution of value;
- The assets are to include all assets on the juristic persons balance sheet, including any goodwill or intangible assets;
- No deduction may be made for the juristic person's encumbrances;

For purposes of the CPA, the annual turnover of a juristic person is the gross revenue of that juristic person from income in, into or from the Republic, arising from the Republic, arising from the following transactions and events:

- the sale of goods;

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<sup>1</sup> Section 5(8)

- the rendering of services; and
- the use by others of juristic persons' assets yielding interest, royalties and dividends.

When calculating the annual turnover, the following amounts may be excluded:

- any amount that is properly excluded from gross revenue in accordance with South African generally accepted accounting standards;
- taxes, rebates, or any similar amount calculated and paid in direct relation to revenue, as for example, sales tax, value added tax, excise duties, and sales rebates;
- gains arising from noncurrent assets and from foreign currency transactions;
- for banks or insurance entities, revenue includes those amounts of income required to be included in an income statement in terms of South African generally accepted accounting practices.

The financial statements that may be used to calculate the juristic persons assets or turnover must be the juristic persons' audited financial statements. If the juristic person is legally obliged to produce the statements, such statements must be for the relevant period and must be prepared in accordance with South African generally accepted accounting standards.

## **Chapter 2: Implementation of the Consumer Protection Act and its Application to Pre-existing Agreements**

### **Implementation of the CPA**

Before examining in detail the incremental implementation of the CPA, and its effect, if any, on pre-existing agreements, it is important to explain certain terms that are critical to this examination. The CPA was implemented into practice in two phases, the first phase being known as the "early effective date" and the second phase as the "general effective date."

**"Early effective date"** means the date on which the provisions contained in item 2 (1) (Schedule 2) took effect. Essentially, this date is one year after the date on which the CPA was signed by the President (the early effective date is 1 April 2010)

**"General effective date"** means the date on which the provisions mentioned in item 2(2) took effect, that is, a date that is 18 months after the date on which the CPA was signed by the President and subsequently deferred by a further five months (the general effective date is consequently 1 April 2011)



**“Pre-existing agreement”** means an agreement that was made before the general effective date

**‘Pre-existing loyalty agreement’** means a loyalty programme that had any participating consumers immediately before the general effective date.

The CPA sets out the transitional provisions that shall apply during the incremental implementation of the Act. These provisions are contained in Schedule 2(2) of the Act and provide as follows:

Chapter 1 and Chapter 5 of the CPA, s120 and any other provisions authorizing the Minister of Trade and Industry to make regulations, shall take effect **one year after the date on which the CPA was signed by the President**. As the CPA was signed on 29 April 2009, these provisions shall be effective as from 29 April 2010.

Chapter 1 deals with the “interpretation, purpose and application of the CPA.

Chapter 5 deals with the National Consumer Protection Institutions

Section 120 contained in Chapter 7 of the Act contains the general provisions authorizing the Minister to make any regulation expressly authorized in the CPA. Before making any regulation, the Minister must: -

- publish the proposed regulation for public comment;
- consult the National Consumer Commission and provincial regulatory authorities.

Any ensuing regulation is then published in the Government Gazette. Regulations may relate to the following matters:

1. Forms
2. Time periods
3. Information required
4. Applicable definitions pertaining to the regulations
5. Filing fees
6. Access to confidential information
7. Manner and form of participation in the National Consumer Commission procedure.

In consultation with the chairperson of the National Consumer Tribunal, the Minister may also make regulations for matters relating to the function of the Tribunal and rules for the conduct of matters before the Tribunal in terms of the CPA. The Minister is also empowered to make regulations relating to unfair, unreasonable or unjust contract terms. The

Regulations were in fact signed into law by the Minister of Trade and Industry, Dr, Rob Davies, on 1 April 2011.

### **Non-Application**

Except to the extent expressly set out in Item 3 of Schedule 2, the Act does not apply to:

- The marketing of any goods or services before the general effective date;
- Any transaction concluded, or agreement entered into, before the general effective date;
- Any goods supplied, or services provided, to a consumer before the general effective date.

### **Application of the Consumer Protection Act to Pre-Existing Transactions and Agreements**

Certain provisions of the CPA shall apply to pre-existing agreements between suppliers and consumers in certain instances, as follows:

- Where the pre-existing agreement would have been subject to the CPA if the CPA had been in effect at the time the agreement was made; and
- Where the supplier and consumer is bound for a fixed term until a date that is on or after the second anniversary of the general effective date.

In other words, the agreement contemplated must be one in terms of the CPA and the agreement must be effective for at least 2 years after the general effective date, that is, 2 years calculated from October 2010 (For example, an agreement that shall expire in October 2012 or anytime thereafter).

The Sections of the Consumer Protection Act that apply to pre-existing agreements and transactions are detailed in Item 3 of Schedule 2 and are listed as the transitional provisions.

### **SECTIONS THAT APPLY TO PRE-EXISTING AGREEMENTS**

<b><u>SECTION</u></b>	<b><u>EXTENT OF APPLICATION</u></b>
<b>14 (Expiry and renewal of fixed-term</b>	<b>Only subsections (1)(b) to (d) and (2)</b>

<p><b>agreements)</b> This means that consumers who entered into fixed-term agreements prior to the Consumer Protection Act can also cancel such agreements without penalty or charge and that the supplier can only levy a reasonable cancellation penalty. Such a consumer would merely have to give the supplier 20 business days notice in writing.</p>	<p><b>apply with respect to the expiry and possible renewal of the agreement, on or after the general effective date</b></p>
<p><b>18 (Consumer’s right to choose or examine goods)</b></p> <p><b>19 (Consumer’s rights with respect to the delivery of goods or supply of service)</b></p> <p><b>20 (Consumer’s right to return goods)</b></p> <p><b>21 (Unsolicited goods or services)</b></p>	<p><b>Apply only with respect to goods that are delivered or deliverable to the consumer in terms of the agreement, on or after the effective date.</b></p>
<p><b>22 (Right to information in plain and understandable language)</b></p>	<p><b>Applies only to a notice, document or visual representation that is required to be produced, provided or displayed to a consumer, on or after the general effective date.</b></p>
<p><b>25 (Disclosure of reconditioned or grey market goods)</b></p>	<p><b>Applies only with respect to any goods supplied to a consumer in terms of the agreement, on or after the general effective date.</b></p>
<p><b>31 (Negative Option Marketing)</b></p>	<p><b>Applies only to any purported amendment to the agreement made, on or after the general effective date.</b></p>
<p><b>44 (Consumer’s right to assume supplier is entitled to sell goods)</b></p>	<p><b>Applies only with respect to any goods supplied to the consumer in terms of the agreement, on or after the general effective date.</b></p>
<p><b>53 to 58</b></p>	<p><b>Apply only with respect to any goods or</b></p>

<p>54 (Consumer’s right to demand quality service)</p> <p>55 (Consumer’s right to safe, good quality goods)</p> <p>56 (Implied warranty of quality)</p> <p>57 (Warranty on repaired goods)</p> <p>58 (Warning concerning the fact and nature of risks)</p>	<p>services supplied to the consumer in terms of the agreement, on or after the general effective date.</p> <p>These sections are incorporated or embodied in the consumer’s right to fair value, good quality and safety.</p>
<p>64(1) and (2)</p> <p>Where a consumer, in terms of an agreement agrees or pays a “one-time” or periodic membership fee or similar charge or pays an amount in respect of services to be rendered more than 25 business days after the payment is made, the amount paid shall remain the consumer’s property until the supplier makes a charge against it.</p> <p>Such a charge may only be made once each month in advance for the pro-rata portion of the amount held, as required for the ensuing month’s cost of the membership or service.</p>	<p>Apply only to an amount paid or payable by the consumer in terms of the agreement, on or after the general effective date.</p> <p>Section 64 generally deals with prepaid services and access to service facilities.</p>
<p>64(3) and (4)</p> <p>Obliges the supplier who intends to close a facility to which the supplier has agreed to provide future access to the consumer, to give written notice of the impending closure. Such notice must be given at least 40 business days before the</p>	<p>Apply only with respect to any closure of a facility contemplated in those provisions, if such closure occurs on or after the general effective date.</p>

**intended closure and the supplier is also obliged to refund to the consumer the balance of any money belonging to the consumer. These obligations are mandatory where the supplier does not offer or make available “a reasonably accessible alternative facility.”**

**The obligation to refund the consumer any money the supplier may be holding on behalf of the consumer also applies where the closure of the facility is involuntary, that is, beyond the supplier’s control.**

**65**

**This section places the following obligations on suppliers who possess any prepayment, deposit, membership fee, or any other property or other money belonging to the consumer to:**

- (a) Not treat that money or property as being the property of the supplier;**
- (b) Exercise the degree of care, diligence and skill that can be reasonably expected of a person responsible for managing any property belonging to another person;**
- (c) Account to the owner of the property for any ensuing loss incurred where the supplier has treated the property as his or where the degree of care, diligence and skill has not been observed by the supplier.**

**Applies only with respect to an amount paid or payable by the consumer, or to property that comes into the possession of the supplier, on or after the general effective date.**

<p>Further, the only instances where suppliers shall not have to hold and account for the consumer's property as required by the CPA, is where the supplier is a bank (as defined in the Banks Act 94 of 1990) or where the supplier is a mutual bank (as defined in the Mutual Banks Act 124 of 1993) or where the supplier is a financial institution that is licensed and authorized to conduct business and accept deposits from the public in terms of any national legislation. (s65(1)(a)).</p>	
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### **Duty on the Administrator, Executor or Liquidator of a Supplier's Property**

This duty envisages the scenario where a supplier goes into liquidation, or under administration or passes away. In any of these instances, the administrator, liquidator or executor must diligently investigate the circumstances of the supplier's business in a bid to ascertain whether the supplier holds any money or property that belongs to a consumer and where such money or property is found, the administrator, liquidator or executor must ensure that the money or property is dealt with for the consumers benefit (s64(3)(a)).

The administrator, liquidator or executor would be liable for any loss unless he or she acted in good faith and was unaware of the consumer's interest in the money or property (s64(3)(b)).

### **Pre-Existing Loyalty Programmes (Schedule 2:3(3))**

Section 35 applies to pre-existing loyalty programmes in the following instances:

1. Where an offer or document setting out an offer to participate in a loyalty programme is made or published after the general effective date;
2. Where a consumer tenders on or after the general effective date any loyalty credit or amount in consideration for the supply of any goods or services;
3. Any supply of goods or services where the consumer tenders any loyalty credit or award in consideration for those goods or services.

### **Liability of a Supplier for Damage caused by Goods supplied in terms of a Pre-existing Agreement**

This liability only arises where the goods are first supplied to a consumer on or after the “early” effective date (Schedule 2:3(4)). See also section 61 which deals with the liability of producers, importers, distributors and retailers for any harm caused by unsafe, defective or hazardous goods.

We have seen that the CPA shall have limited retrospective application, and then, only in certain instances. However, the CPA also provides that other provisions of the Act may also apply to a pre-existing agreement or transaction where such provisions are required or necessary to give proper interpretation of or compliance with the provisions that do have application to pre-existing agreements (Schedule 2:3(5)).

### **Relief from the requirement to register business names**

The requirement to register business names as set out in s79(1)(2)(3)(a) and (b) shall only take effect on a date to be determined by the Minister by notice in the Government Gazette. Such a date must be at least one year following the general effective date (Schedule 2:5(1)).

### **Exclusion of Certain Laws (Schedule 2:10)**

Short Term Insurance Act 53 of 1998

Long Term Insurance Act 52 of 1998

The above laws are excluded provided the sector laws governing the short term and long term insurance industries are aligned with the consumer protection measures entrenched in the CPA. Such alignment must be implemented within 18 months of the commencement of the CPA, failing which the provisions of the CPA shall apply.

**NB: Section 61** which deals with the producer, importer, distributor or retailer’s liability for damage caused by goods applies to any goods that were first supplied to a consumer on or after the early effective date (that is, 1 October 2010).

### **Schedule 2: Item 3(5):**

Any other provision of the Consumer Protection Act applies to pre-existing conduct, circumstance, transaction or agreement only to the extent required to ensure proper

interpretation of, or compliance with and enforcement of the provisions that are specifically applicable to pre-existing agreements.

**Schedule 2: Item 3(3):**

**Section 35** which deals with loyalty programmes applies to pre-existing loyalty programmes but only with respect to:

- Offer to participate in that loyalty programme, or document setting out the offer, that is made or published on or after the general effective date;
- Tender by the consumer, on or after the general effective date, of any loyalty credit or award;
- Any supply of goods or services if, on or after the general effective date, the consumer tendered any loyalty credit or award in the programme.

**NB: Schedule 2: Item 4**

Provides for the delayed operation of section 11(4)(b)(ii), that is, this provision remains ineffective until further promulgation. This provision generally prohibits direct marketers or any person associated with direct marketing from delivering any communication for the purpose of direct marketing to a person who has registered a pre-emptive block against such marketing. The delayed operation of this section is due to the fact that the register in which general and pre-emptive blocks can be registered is yet to be established by the National Consumer Commission.

**Chapter 3 - Franchise Agreements**

The franchise industry now finds itself falling squarely under the regulatory compliance of the Consumer Protection Act which defines a franchise agreement as follows:

*“A franchise agreement is an agreement between two parties, namely the franchisor and the franchisee, in terms of which the franchisor grants the franchisee the right to carry on business under a system or marketing plan “substantially determined or controlled by the franchisor or an associate of the franchisor.” This right may extend to all or part of a specific part of the country and must require the franchisee to pay consideration for the enjoyment of this right. The franchise agreement governs the business relationship between the franchisor and the franchisee, including the relationship between them with respect to the goods or services to be supplied to the franchisee.”*



Section 7 allows a franchisee to cancel a franchise agreement without cost or penalty within 10 business days after signing the agreement. This cancellation must be done via a written notice. Section 7 also deals with the requirements of franchise agreements and provides that a franchise agreement must be in writing and signed by or on behalf of the franchisee. The franchise agreement must be in plain and understandable language as set out in Section 22. In addition, franchise agreements must include any prescribed information, or address any prescribed categories of information and be in plain and understandable language. Hence, all franchise agreements must contain mandatory information, such information having been prescribed in the ensuing Regulations, namely Regulation 2.

### **Regulatory Drafting Criteria of Franchise Agreements**

Franchise agreements must be “in writing.” The Regulations, namely Regulation 2, defines in writing to include any electronic means recognized by the Electronic Communications and Transactions Act 25 of 2002.

Every franchise agreements must contain the exact text of section 7(2) of the CPA at the top of the first page of the franchise agreement, together with a reference to section 7(2) and the Act.

Section 7(2): ***“A franchisee may cancel a franchise agreement without cost or penalty within 10 business days after signing such agreement, by giving written notice to the franchisor.”***

Franchise agreements must not contain unreasonable or inflated fees, prices or conduct which is unnecessary or unreasonable in relation to the risks to be incurred by the franchisee. In essence, the franchise agreement must be reasonably designed to protect the legitimate business interests of the franchisor, franchisee or franchise system.

The agreement must also stipulate that the franchisor is not entitled to any undisclosed direct or indirect benefit or consideration from suppliers to its franchisees or the franchise system, unless such benefit or compensation is disclosed in writing and the benefit or compensation is explained. Hence, the regulatory provisions pertaining to franchise agreements seek to limit the franchisor’s benefit to the franchise agreement itself, the contents of which must be set out clearly and plainly at the inception of the relationship with the franchisee. The franchisor is to receive no ancillary benefit from the franchise relationship unless the franchisee presumably approves of such benefit or compensation accruing to the franchisor.

The regulatory provisions so far detailed retrospectively apply to all pre-existing franchise agreements and any provision in a franchise agreement that conflicts or undermines these regulatory provisions is void to the extent of such a conflict.

**Content of Franchise Agreements – Possible Precedent – Based upon the provisions contained in Regulation 2(3)**

**FRANCHISE AGREEMENT**

**Entered into between:**

**(name of franchisor)**

**Of (address) (hereinafter called “the franchisor”**

**And**

**(name of franchisee)**

**Of (address) (hereinafter called “the franchisee”**

**WHEREBY IT IS AGREED AS FOLLOWS:**

**WHEREAS:**

**1 the Franchisor is presently carrying on business at (address) as (describe the franchise business system) under the name or style of (trading name);**

**2 the Franchisor has agreed to sell and the Franchisee has agreed to purchase a franchise such franchise being part of the Franchisor’s franchise business system;**

**NOW THEREFORE IT IS HEREBY AGREED AS FOLLOWS:**

**1 Consideration payable by the Franchisee to the Franchisor.**

**2 If applicable, any territorial rights granted to the franchisee.**

**3 Description of the site or premises from which the Franchisee shall operate.**

**4 Conditions under which the Franchisee or his estate may transfer or assign rights and obligations under the franchise.**

**5 Description of any trade mark, intellectual property or other licence owned by the**

**Franchisor and the conditions under which the Franchisee can make use of the trade mark or intellectual property or licence.**

**6 If applicable, the master Franchisor's identity.**

**7 Details of the initial training and assistance provided by the Franchisor. If ongoing training is to be provided, the details of the training and assistance.**

**8 Duration and terms of the renewal of the franchise agreement.**

**9 If the Franchisee is required to contribute to any advertising, marketing or in any other way fund the franchise system, then:**

**9.1 The amount or percentage of the Franchisee's contribution**

**9.2 The Franchisor shall give the Franchisee a copy of the Franchisor's financial statement within six months of the last financial year. This financial statement shall detail the Franchisor's receipts and expenses for the last financial year, the amounts spent on the marketing or advertising of the franchise system and/or the amount spent on marketing the franchise's goods or services.**

**9.3 The Franchisor shall make available the financial management accounts of the funds available to the franchises**

**9.4 The moneys in the Fund shall not be spent on advertising and marketing of the Franchisor's franchises for sale.**

**9.5 If an audit is carried out, then an auditor's certificate must stipulate that the fund's account has been audited to the best of the auditor's knowledge and are a true reflection of the fund's financial management and use of the money's of the fund. (If no audit is carried on, then an accountant's certificate must stipulate that management accounts have been prepared and are correct to the best of the accountant's knowledge and belief.**

**9.6 The Franchisee has the right to request a copy of the auditor's statement or accountant's certificate and certificate and the franchisor is obliged to give a copy within a reasonable period of receiving the request.**

**9.7 Details of any contribution that the Franchisee pays shall be deposited in a separate bank account and used only for the purposes of the fund.**

**9.8 If any, the Franchisor's contribution to the fund.**

**9.9 Exclusive benefit to be enjoyed by the Franchisee, exclusive in that the benefit is not enjoyed by independent franchises.**

## **10 TERMINATION AND EXPIRY OF THE FRANCHISE AGREEMENT**

**10.1 Extension and renewal of the franchise agreement and if there is an option to renew or extend the agreement, then details of such option.**

**11 the Franchisor shall furnish the franchisee with a written explanation of any terms, sections or conditions upon the franchisor's written request**

**12 the Franchisor's legal name, trading name, registered office address**

**13 the Franchisee's business office, street address, postal address, e-mail address, telephone number and fax number.**

**14 The names, identity numbers, town of residence, job titles and qualifications of Franchisor's directors or equivalent officers.**

**15 Where the company is not listed on a stock exchange, then the details of any proprietor, then details of any proprietor, member or shareholder. If such details differ from that above.**

**16 Any restrictions imposed on the Franchisee.**

**17 The nature and extent of the franchisor's involvement or approval in the process of site selection.**

**18 Terms and conditions relating to the termination, renewal, goodwill and assignment of the Franchisee.**

**19 Main Obligations of the Franchisor regarding any initial or ongoing training of the Franchisee.**

**20. Confirmation that any deposits that the Franchisee pays shall be deposited into a separate bank account and a description of how the deposits shall be utilised.**

**21 Full particulars of the Franchisee's financial obligations, including:**

**21.1 The initial fee payable and the purpose of the initial fee**

**21.2 the funds required to establish the franchised business, for example, the**

**purchase or lease of property, site conversion costs, décor and signage, equipment, furniture, hiring and training of staff; opening stock, legal and financial charges.**

**21.3 Where possible, the initial working capital required and how this is calculated.**

**21.4 The total investment required.**

**21.5 Whether or not any expenses, salary or wages of the employees of the franchised business and the costs of servicing any loans and whether such costs are included in the purchase price.**

**21.6 If any applicable funding is available from the franchisor, and if so, the applicable conditions.**

**21.7 The total amount the Franchisee must contribute towards the necessary funding before borrowing.**

**21.8 Ongoing amounts payable to the Franchisor and whether the amounts are fixed or variable; whether any part of the amount included in the price of the goods or services that must be purchased from the Franchisor or other preferred suppliers; the dates or intervals at which the amounts are payable; if any fee is payable in respect of management services provided by the Franchisor and details of any such service.**

### **Retrospective Application to Pre-Existing Franchise Agreements**

A franchise agreement which is renewed after the general effective date, that is, after 30 March 2011, is a new franchise agreement for purposes of the Consumer Protection Act.

### **Disclosure Document**

Regulation 3 requires that Franchisors must give prospective Franchisees a disclosure document that is dated and signed by an authorized officer of the Franchisor. This document must be given to prospective Franchisees at least **14 days prior to the signing of the actual franchise agreement.**

The disclosure document must contain certain mandatory provisions, all of which must be qualified and explained, and the disclosure document must be accompanied with a certificate on official letterhead from a person eligible in law to be registered as the accounting officer of a close corporation or the auditor of a company.

### **Mandatory Provisions in a Disclosure Document**

1. The number of individual outlets franchised by the Franchisor.
2. The growth of the Franchisor's turnover, net profit and the number of outlets that the Franchisor may have franchised on the previous financial year.
3. Confirmation that there have been no significant or material changes in the company's or Franchisor's financial position since the accounting officer or auditor's certificate was issued.
4. Confirmation that the company or Franchisor has reasonable grounds to believe that it will be able to pay its debts as and when they fall due.
5. Written projections in respect of potential sales, income, gross or net profits or other financial projection for the franchised business or franchisee and the basis of which these projections are calculated.

The disclosure document must be accompanied with a certificate on an official letterhead, such certificate being issued by a person eligible in law to be registered as an accounting officer of close corporation or the auditor of the company. This certificate must stipulate the following:

1. That the business of the Franchisor is a going concern.
2. That to the best of the knowledge and belief of the officer or the auditor, the Franchisor is financially able to meet its commitments in the ordinary course of business.
3. That the Franchisor is able to meet its current and contingent liabilities.
4. That the Franchisor's financial statements for the previous financial year have been drawn up in accordance with the general accepted accounting standards in South Africa and on the basis of accounting policies consistent with prior years.
5. That the Franchisor's financial statements comply with the provisions of the Companies Act 61 of 1973 or any legislation which replaces the Companies Act and all other applicable laws.
6. That the Franchisor's financial statements fairly reflect the Franchisor's financial position, affairs, operations and results as at the date and for the period to which they relate.

The following Annexures must be affixed to the disclosure document:

1. A list of current franchisees, if any and a list of outlets owned by the Franchisor. Where the Franchisor has other franchisees, or outlets, then the following information must also be stipulated:
  - a. The name under which any current franchisees or outlets carry on business.
  - b. The name/s of the franchisees or outlets.

- c. The current franchisees physical addresses.
  - d. The current franchisees ir outlets email and office telephone number;
  - e. That the prospective franchisee is entitled to contact any of the listed franchisees or alternatively, to visit any current franchised outlets to assess or verify the Franchisor's information and the franchise opportunity.
2. An organogram depicting the support system in place for franchisees.

#### **Chapter 4: FUNDAMENTAL CONSUMER RIGHTS**

The CPA entrenches certain consumer rights and as such, is tantamount to entrenching a “quasi-Bill of Rights for consumer.” The rights entrenched are as follows:

- 1. *The right to equal access to the consumer market***
- 2. *Right to confidentiality and privacy***
- 3. *The consumer's right to choose***
- 4. *The consumer's right to disclosure and information***
- 5. *The right to fair and responsible marketing and promotion;***
- 6. *The right to honest dealing and fair agreements***
- 7. *The right to fair, just and reasonable terms and conditions***
- 8. *The right to fair value, good quality and safety***
- 9. *The supplier's obligation to account to consumers***

#### **Right of Equality in the Consumer Market**

This right is entrenched in sections 8 – 10 and is a right afforded to consumers, including natural persons and juristic persons.

Discriminatory marketing is generally prohibited. Section 8 provides that a supplier of goods or services must not unfairly:-

- (a) Exclude any person from accessing goods or services;
- (b) Grant any person exclusive access to goods or services;
- (c) Assign priority for the supply of any goods or services to any person;
- (d) Supply different quality goods or services to any person;
- (e) Charge different prices for goods or services;
- (f) Give exclusive priority or preferential supply of goods or services to particular communities, districts, populations or market segments;
- (g) Refuse to supply goods or services to particular communities, districts, populations or market segments.

Discriminatory marketing is only permissible to the extent that it is “reasonable.” For example, a supplier may refuse a request to offer or to enter into a transaction in a manner that would ordinarily constitute “unfair discrimination” if the supplier is a private supplier and is a natural person, or the supplier is a partnership or close corporation or a juristic person or association formed for the purposes that are “predominantly concerned with matters of conscience, religion, thought, belief or opinion.” This is justifiable to the extent that the consumer does not have the right to demand that a supplier offers or sells him any goods or services where such a demand infringes the supplier’s right to exercise freedom of conscience, thought, religion, belief or opinion and the goods or services in question can be reasonably accessed from another supplier by the consumer.

**When differential treatment of consumers is permissible**

A supplier may refuse a request to offer or enter into a transaction or agreement in a manner that would ordinarily constitute “unfair discrimination” but does not, in the following instances:-

1. Where the consumer is a minor. In such instances, the supplier may require the consent of a parent, guardian or other responsible adult before entering into a transaction with the minor;
2. Suppliers may designate facilities or services for the exclusive use of minors generally or for minors below or above a specified age, or for adults who are at least 60 years of age;
3. Suppliers may also advertise, offer or agree to supply goods or services at a discounted price to exclusively minors or persons at least 60 years of age;
4. Suppliers may separate substantially similar facilities for the exclusive use of persons of each gender.
5. Suppliers may market goods or services with a focus for preference for a particular group of consumers, provided the goods or services are reasonably intended or designed to satisfy specific needs or interest that are common to and characteristic of that particular group of consumers. For example, the sale of kosher food stuffs to the Jewish community.



## **Enforcement of the Right to Equality in the Consumer Market<sup>2</sup>**

There is an evidentiary presumption that any differential treatment of consumers is deemed to be unfair discrimination. Therefore, there shall be an onus on the supplier to prove that any differential treatment of consumers is based on discrimination that is fair.

An accredited consumer protection group or the aggrieved consumer may institute proceedings before an equality court or file a complaint with the National Consumer Commission in respect of any alleged contravention of this right. If proceedings are instituted with the National Consumer Commission, the Commission must investigate the complaint to determine if it is valid and if found to be valid, refer the complaint to the equality court for adjudication.

### **What the Right to Equality in the Consumer Market Means to the Consumer**

- *the consumer has the right to free and unlimited access to goods and services*
- *the consumer has the right to high quality goods and services*
- *the consumer has the right to fair pricing of goods and services*
- *the consumer has the right to lodge complaints with the Equality Court where this right has alleged been contravened.*

### **Right to Confidentiality and Privacy and the Curtailment on Direct Marketing**

Consumers have the right to restrict unwanted direct marketing. This right is embodied in the right to privacy and provides that every person has the right to refuse to accept any approach or communication where such communication is “primarily for the purpose of direct marketing.” This right allows a consumer to request that such communications be discontinued and even to pre-emptively block these communications.

Consumers therefore have the right to request that any direct marketing communications be desisted. The National Consumer Commission may establish a registry in which a consumer may register a pre-emptive block. Where a pre-emptive block is registered, it may be general or specific. General in that the consumer prohibits all direct marketing communications or specific in that only direct marketing communications from a particular industry or sector is prohibited.

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<sup>2</sup> Section 10

Where a consumer requests that direct marketing communications be stopped, the supplier or marketer cannot demand that the consumer pay any fee for this. Further, the consumer who registers a pre-emptive block with the Commission does so at no cost or charge. In the event that the Commission does not establish such a registry, the Minister of Trade and Industry may prescribe regulations for the operation of the registry. Telemarketing companies may therefore find that they have to consult this registry before contacting prospective consumers.

Direct marketers may also be aware of the fact that the Minister has prescribed specific days, dates, public holidays or times of days that are to be “prohibited” for direct marketing purposes. Direct marketing in contravention of these prescribed times may only be permissible where the consumer has expressly or implicitly requested the marketing or agreed to it. Suppliers may not engage in any direct marketing to a consumer at the consumer’s home on the following days, dates, public holidays or times of day:

- Sundays or public holidays contemplated in the Public Holidays Act 36 of 1994;
- Saturdays before 09h00 and after 13h00; and
- All other days between the hours of 20h00 and 08h00 the following day.

Where the direct marketing communication is dispatched to the consumer’s home and the consumer receives the communication during the above prohibited times, the onus shall be on the direct marketer to prove that the direct marketing communication was dispatched during the allowed period.

Regulation 4 sets out the mechanisms that can be employed to block unwanted direct marketing. In terms of this Regulation, a consumer can block unwanted direct marketing by informing the direct marketer to desist from directly marketing any goods or services to him or her or, the consumer can place any communication or sign on a postal box, post office box or other container for mail indicating that he or she does not wish to receive any material related to direct marketing.

Where the direct marketer has been advised directly or by way of such communication, the direct marketer is prohibited from placing or attaching any material primarily aimed at direct marketing in the consumer’s postal box, post office box, container, or in, on or near the fence, gate or any other part of the premises of the consumer.

N.B: where the consumer has advised the direct marketer to desist from direct marketing, the direct marketer is obliged to provide the consumer with written confirmation that they have received the consumer’s notification.

## **Chapter 5: Consumer's Right to Choose**

The Consumer Protection Act entrenches the consumer's right to choose or select any goods or services that he or she wishes to purchase. This entrenchment is in line with the Competition Act 1998, the latter Act being established to provide for the establishment of the Competition Commission responsible for the investigation, control and evaluation of the restrictive practices, abuse of dominant position, and mergers. The Competition Act establishes the Competition Tribunal that is responsible for adjudicating such matters as well as the Competition Appeal Court. In essence, the Competition Act seeks to create an efficient, competitive economic environment by balancing the interests of workers, owners and consumers.

The Competition Commission is a statutory body constituted on terms of the Competition Act No 89 of 1998 and is empowered to investigate, control and evaluate restrictive business practices, abuse of dominant positions and mergers in order to achieve equity and efficiency in the South African economy.

Any person may lodge a complaint against anti-competitive conduct with the Commission, at no charge. Chapter 2 of the Competition Act sets out what anticompetitive conduct is. In particular, the Act prohibits restrictive horizontal practices, restrictive vertical practices, abuse of dominance and price discrimination engaged in by a dominant firm. Restrictive horizontal practices refer to anticompetitive conduct carried out by competing firms, while restrictive vertical practices are those conducted by firms in a customer/supplier relationship with each other. Abuse of dominance, including price discrimination, refers to unilateral; conduct engaged in by a dominant firm in a defined market. Section 6 and 7 of the Competition Act defines the requirements for such dominance.

### **Right to select suppliers<sup>3</sup>**

When a supplier offers to supply any goods or services to a consumer, the supplier cannot insist that the consumer purchases additional goods or services from the supplier unless the supplier can show financial or other efficiency benefits to the consumer. For instance, the additional goods or services that the consumer is required to purchase shall result in economic benefit for the consumer or the convenience of having those goods or services outweighs limiting the consumer's right to choose. Further, the additional goods or services may be offered to the consumer provided the supplier offers the goods or services separately and at individual prices.

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<sup>3</sup> Section 13

An example of when a supplier requires a consumer to purchase additional goods; when the primary goods and additional goods are sold in one package at a single price – this would not be permissible as the additional goods must be sold separately and at an individual price.

Another example: where a supplier of primary goods installs additional goods. In such an instance, the supplier would have to offer to supply the additional goods separately and at individual prices.

The consumer also has the right to authorize repair or maintenance services. Certain transactions and consumer agreements exceeding a price value above the threshold are affected by this right. The Minister of Trade and Industry is empowered to prescribe, by notice in the Government Gazette, a monetary threshold thereby excluding transactions that fall below the threshold from the mandatory obligation of providing a consumer with an estimate prior to undertaking to repair or perform any maintenance services for the consumer. A notice contained in the Regulations provides that the threshold for pre-authorization of repair or maintenance services generally is R1.00 (One Rand) excluding value-added tax. The said notice further provides that an estimate must specify the following:

- A breakdown and the total amount to be charged if the repair or maintenance is effected;
- The nature and extent of the repair or maintenance;
- The period of validity of the quote; and
- The period within which the consumer must collect the goods and the consequence if he or she does not do so.

If a service provider supplies a repair or maintenance service plan to a consumer, or supplies any replacement components to property belonging to a consumer, the service provider or supplier is obliged to furnish the consumer with an estimate, that is, a quote as to how much the repairs or maintenance work shall cost. If such an estimate is not given, the service provider cannot subsequently charge a consumer for the service unless the consumer has in writing, declined the offer of an estimate and authorized the work. Any pre-authorization must also be in writing and must authorize a maximum charge. The subsequent charge must not exceed this maximum charge. Hence, an estimate is not necessary where the consumer, in writing, or by any other recorded form, declined the offer of an estimate and authorized the supply of the goods or services upfront.

Where an estimate must be provided, this must be done without any charge to the consumer. The Act specifically provides that even where the preparation of an estimate

entails diagnostic work, disassembly or re-assembly, such labour cannot be recovered by charging for the preparation of the estimate, unless, prior to preparing the estimate, the service provider disclosed the price for preparing the estimate and the consumer approved it. Further, any damage or loss of material or parts in the course of preparing the estimate cannot be recovered.

**The consumer also has the right to choose, select and examine any goods he purchases**

Despite any statement or notice to the contrary, a consumer is not responsible for any loss or damage to any goods displayed by a supplier unless the loss or damage results from action by the consumer amounting to gross negligence or recklessness, malicious behaviour or criminal conduct.<sup>4</sup>

Further, if a consumer purchases goods solely on the basis of a trade description or sample of the goods, provided by the supplier, the goods subsequently delivered must in “all material respects and characteristics correspond to that which an ordinary alert consumer” would expect based on the given description or upon examination of the sample. Where the supply of goods is by sample and description, the goods supplied must correspond with the description. Moreover, if the displayed goods are sold from or displayed from open stock, the consumer has the right to select or reject any item from that stock prior to concluding that transaction.

**Delivery and acceptance of goods and services<sup>5</sup>**

The CPA entrenches the consumer’s right with respect to the delivery of goods or the supply of services. It is an implied condition of every transaction for the supply of goods or services that:<sup>6</sup>

- (a) The supplier bears the responsibility to deliver the goods or perform the services on the agreed date and time, failing which, within a reasonable time after concluding the transaction or agreement;

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<sup>4</sup> Section 18(1)

<sup>5</sup> Section 19

<sup>6</sup> Section 19(2)

- (b) The supplier bears the cost of delivery of the goods to the consumer and that the agreed place of delivery if goods or the performance of services is at the supplier's place of business, if the supplier has one, and if not, the supplier's residence;
- (c) Until the goods are delivered, the goods remain at the supplier's risk until the consumer has accepted delivery.

Where an agreement does not stipulate a specific date or time for the delivery of goods or the performance of services, the supplier must not require the consumer to accept delivery or performance at an unreasonable time.<sup>7</sup> .

Where goods are delivered to a consumer, a consumer must be afforded a reasonable opportunity to examine the goods in order to ascertain if goods are of a type and quality reasonably contemplated in the agreement and in the case of a special-order agreement, that the goods reasonably conform to "the material specifications of the special order."<sup>8</sup>

If the goods are prematurely delivered to a consumer or the supplier tenders the delivery of the goods or performance of the services at a location, on a date or at a time other than as agreed with the consumer, the consumer may accept delivery or require delivery or performance at the agreed time and date, or cancel the agreement without penalty and treat the delivered goods or performed services as "unsolicited goods or services."<sup>9</sup>

A consumer is deemed to have accepted delivery of the goods when the consumer expressly or implicitly communicates acceptance of the delivery to the supplier.<sup>10</sup> Where the consumer does not expressly or implicitly communicate acceptance of the goods to the supplier, the consumer shall nevertheless be deemed to have accepted delivery if the goods have been delivered to the consumer and the consumer does

**Unsolicited goods or services<sup>11</sup>**

A consumer who is the recipient of unsolicited goods or services is not obliged to pay for such goods or services. Goods or services will be said to have been unsolicited if the consumer did not implicitly or expressly request the goods or services. The only exception is

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<sup>7</sup> Section 19(3)

<sup>8</sup> Section 19(5)

<sup>9</sup> Section 19(6)

<sup>10</sup> Section 19(4)(a)

<sup>11</sup> Section 21

where the consumer has an agreement with the supplier that goods or services shall be supplied from time to time without further approval or request. However, in the latter instance, any goods or services that materially differ from that agreed upon will be deemed to be unsolicited.

A recipient of unsolicited goods may retain the goods without payment or return the goods to the supplier at the supplier's risk and cost. After 10 business days have lapsed since receiving the goods, and the supplier has not indicated that such delivery was erroneously made, ownership in the unsolicited goods will pass to the consumer. The consumer does not have to make any payment in respect of unsolicited goods. In fact, a consumer who has paid for unsolicited goods or services may recover the amount paid with interest calculated from the date such payment was made.

This means that the supplier, that is, the owner of the goods, cannot institute action for the return of goods where such goods were delivered in error or as a result of fraud or theft.

Where the supplier mistakenly delivers goods to a consumer, the supplier must inform the consumer that the goods were delivered in error and this must be done within 10 business days of having delivered the goods. If after informing the consumer, the supplier fails to recover the goods within 20 business days, the goods become unsolicited. The consumer would then not be obliged to pay for the unsolicited goods or services.

In instances where a consumer has made any payment to a supplier for unsolicited goods or services, the consumer is entitled to recover that amount, together with interest from the date on which it was paid to the supplier.

### **Expiry and Renewal of Fixed-Term Agreements**

#### **Fixed Term Contracts**<sup>12</sup>

The provisions pertaining to the expiry and renewal of fixed-term agreements do not apply to transactions between juristic persons regardless of their annual turnover or asset value. The Act defines a "juristic person" to include the following:

- (a) A body corporate;
- (b) A partnership or association; or
- (c) A trust as defined in the Trust Property (Control) Act 57 of 1988.

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<sup>12</sup> Section 14

If a consumer agreement is for a fixed term, that term must not exceed the maximum period prescribed by the Minister with respect to that category of a consumer agreement. The consumer may cancel that agreement upon expiry of its fixed term without penalty or any charge or at any time by giving 20 business days notice in writing.

The supplier to a fixed term agreement may also cancel the agreement 20 business days after giving written notice to the consumer of a **material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure in that time.**

In the event that neither the consumer nor the supplier prematurely terminate a fixed term agreement and the agreement runs its course, it will be automatically continued on a month to month basis unless the consumer expressly directs the supplier to terminate the agreement on the expiry date or agrees to a renewal of the agreement for another fixed term.

Where the consumer prematurely cancels the agreement, the consumer remains liable to the supplier for any amounts owed to the supplier in terms of that agreement up to the date of cancellation and the supplier may impose a **reasonable cancellation penalty. Annexure B in the regulations is a sample notice that the supplier may give a consumer advising the consumer of the impending expiry of a fixed term agreement. Amongst the provisions contained in the said notice, the following provisions stipulate the criteria that the supplier shall use when calculating a reasonable cancellation penalty in the event that the consumer cancels the agreement prematurely:**

- The consumer's remaining liability to the supplier for any amounts owed to the supplier in terms of the agreement up to the date of cancellation, if any;
- Any goods supplied, services provided, or discounts granted to the consumer in contemplation of the agreement enduring for its intended fixed term;
- The supplier's obligation to then credit the consumer with any amount that remains the consumer's property as of the date of cancellation.

Suppliers in terms of fixed term consumer agreements are therefore obliged to notify the consumer of the impending expiration of the agreement. This obligation will arise not more than 80, nor less than 40 business days before the expiry date of the fixed term agreement. When fulfilling this obligation, a supplier must notify the consumer in writing of the following:

- (a) the impending expiry date;



- (b) any material change that would apply if the agreement is renewed or otherwise continued beyond the expiry date;
- (c) that the agreement will be automatically continued on a month to month basis unless the consumer expressly directs the supplier to terminate the agreement on the expiry date or agrees to a renewal of the agreement for a further fixed term.

**Regulation 5:** the maximum period of a fixed-term consumer agreement is 24 months from the date of signature by the consumer unless the consumer expressly agrees to a longer period and the supplier can show “a demonstrable financial benefit to the consumer” for concluding an agreement in excess of the 24 month threshold. This begs the question:

Regulation 5 further provides that a consumer agreement can exceed 24 months where regulation specifically permits this for a specific type of agreement, type of consumer, sector or industry or a particular industry code (a code established in terms of Section 82 of the Act) allows specific agreements or consumers or sectors or particular industry to exceed the maximum 24 month period.

### **What is a Reasonable Cancellation Penalty?**

Section 14(3) allows the supplier of any goods or services to charge a “reasonable cancellation penalty” in the event that the consumer cancels a fixed term agreement prematurely. As the fixed term is now capped at 24 months (albeit that some exceptions may be granted as detailed earlier), just how much the supplier can recover for the remainder of the 24 month term is critical. This amount must be reasonable and what is reasonable is not clearly defined. Rather, Regulation 5(2) provides criteria that can be used to determine or quantify a reasonable charge. A reasonable charge cannot exceed a reasonable amount, taking into account the following:

1. The amount the consumer is still liable for to the supplier up to the date of cancellation;
2. The value of the transaction up to cancellation;
3. The value of the goods which will remain in the consumer’s possession after cancellation;
4. The value of the goods that are returned to the supplier;
5. The initial fixed term that was agreed upon at the inception of the agreement;
6. Any benefits or losses incurred by the consumer as a result of the consumer entering into the agreement;
7. The nature of the goods or services that were reserved or booked;

8. The length of the consumer's cancellation notice;
9. The reasonable potential for the services provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation;
10. The general practice of the relevant industry.

***Regulation 5(3) provides that suppliers cannot charge a consumer a charge that would have the effect of negating the consumer's right to cancel a fixed term consumer agreement as afforded to the consumer by the Act.***

### **Right to cancel a Reservation, Booking or Order**<sup>13</sup>

The consumer's right to cancel a reservation, booking or order does not extend to franchise agreements and special-order goods.

Section 17(2) provides that a consumer has the right to cancel any advance booking, reservation or order for any goods or services to be supplied. Suppliers may still require payment of a reasonable deposit in advance and impose a reasonable charge for cancellation of the order or reservation.

If a consumer dies before carrying out a reservation or advance booking for a service, the supplier may not charge a cancellation fee and must refund any deposit to the administrator of the consumer's estate. In any other instance where a consumer cancels a reservation or advance booking, the supplier may charge a cancellation fee provided such fee is reasonable. In determining what is reasonable, regard will be had to the nature of the service or goods that were reserved or booked; the length of notice of cancellation provided by the consumer; the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation and the general practice of the relevant industry.

Further, a cancellation fee may not be charged where the consumer is unable to honour a booking, reservation or order, due to the death or hospitalisation of the person for whom, or to whose benefit the booking, reservation or order was made.

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<sup>13</sup> Section 17

### **Right to Request Pre-Authorisation for Repairs or Maintenance Services**

The Minister may, by notice in the Government Gazette, prescribe a monetary threshold for the purposes of section 15, that is, the section that deals with the pre-authorisation of repair and maintenance services. Where such a threshold is prescribed, any transactions or consumer agreements falling beneath the threshold shall not oblige the supplier to afford the consumer the opportunity or right to pre-authorise repair or maintenance services as this obligation only arises where transactions or consumer agreements exceed the prescribed threshold and, the transaction or agreement requires the supplier to maintain a service, or to supply or install any replacement parts or components in the consumer's property and further, the service provider has taken possession of the property in terms of an undertaking to repair or maintain the property.

A service provider is also obliged to give the consumer an estimate or quote where the consumer specifically requests such an estimate prior to the services or goods being supplied.

Where a service provider is obliged to give the consumer a quote, the services provider cannot charge the consumer for any goods or services unless the consumer has been given an estimate and the consumer has subsequently authorized the work or, the consumer has in writing, or any other recorded manner or form, declined the offer of an estimate and authorized the work, or the consumer has pre-authorized charges up to a specified maximum, and the amount charged does not exceed the maximum.

In preparing the estimate, service providers cannot charge consumers for preparing the estimate, for example, the cost of performing any diagnostic work, disassembly or re-assembly or for any damage or loss of materials or parts whilst preparing the estimate.

Further, where a supplier has prepared an estimate for a consumer, the supplier cannot charge the consumer more than the estimate unless the service provider informs the consumer of the additional estimated charges and the consumer has authorized the work to continue.

### **Right to Cancel Direct Marketing Contracts within the Cooling-Off Period and the Consumer's General Right to Return Goods**

This right is entrenched in Section 16 of the CPA. It is important to note that this right is not afforded to transactions that fall within section 44 of the Electronic Communications and Transaction Act.

Section 16 allows a consumer to rescind a transaction that came about as a result of direct marketing without reason or penalty. The consumer merely needs to give the supplier written notification of his or her intention to rescind the agreement, and this notification must be given within **5 business days** of the transaction being concluded or, within 5 business days of the goods being delivered to the consumer. Where the transaction entailed goods being delivered to the consumer, then the consumer must return the goods to the supplier at the consumer's risk and expense, and the goods must be returned to the consumer within 10 business days after the goods were delivered to the consumer. <sup>14</sup>

The format and content of the notice the consumer can give in this instance has been detailed in Annexure C of the Regulations by way of a template precedent...

Where a consumer exercises the right to cancel the transaction, the supplier is obliged to refund the consumer any payment received in terms of the transaction and this must be done within **15 business days** of the consumer receiving notice of the rescission. Where the transaction resulted in the consumer receiving any goods, then the supplier must refund the consumer within 15 business days of receiving the goods back from the consumer. Further, the supplier cannot charge the consumer on the basis of the transaction being rescinded, and is only permitted to charge an amount in terms of section 20(6).

Where goods are returned by the consumer, the supplier must refund the consumer the price paid for the goods, less an amount that takes into account the state or condition of the goods. For instance, whether the returned goods are in the original condition but have been opened and are now repackaged in their original packaging, then the supplier may charge a reasonable amount for the use of the goods whilst they were in the consumer's possession.

Where the returned goods are in the original packaging and have not been opened, then the supplier may not charge the consumer any amount for the consumer returning the goods. Suppliers may also charge the consumer who did not have the initial opportunity to examine the goods a reasonable amount necessary for any restoration costs to render the goods fit for re-stocking, unless the nature of the goods is such that it was necessary for the consumer to destroy the packaging in order to determine if the goods conformed to the description or sample initially provided by the supplier or the consumer has to destroy the packaging to determine whether the goods were fit for the consumers intended purposes.

The right to return goods is not only afforded to consumers who purchase goods as a result of direct marketing. When we look at section 20, we find that consumers are entitled to

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<sup>14</sup> Section 20(4(a) – (b)

return goods and thereby rescind transaction is several other instances, for instance, where the goods are unsafe or defective or of a poor quality (this gives rise to the supplier being held to honour an implied warranty of quality as set out in section 56).

Consumers also have the right to return goods and receive a full refund where the goods were intended to satisfy a particular purpose and this purpose was communicated to the supplier at the inception of the transaction, and the consumer has found that the goods are unsuitable for that particular purpose. In this instance, the consumer must return the goods within **10 business days** of taking delivery of the goods.

A consumer is also entitled to return unsafe or defective goods, including goods that are not of a good quality. This right is enforceable for a period of 6 months after the delivery of the goods to a consumer. Where the goods are returned, the consumer does so without penalty and at the supplier's risk and expense.

## **Chapter 6: Right to Disclosure and Information**

### **Right to Information in Plain and Understandable Language**

This right obliges producers of any notice, document or visual representation required by the CPA or any other law, to produce, provide or display this information in "plain and understandable language."<sup>15</sup> Before looking at what this obligation entails, it is important to understand who is deemed to be a "producer" in terms of the CPA.

The CPA defines a producer of any particular goods as being a person who –

- (a) Grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business; or
- (b) By applying a personal or business name, trademark, trade description or other visual representation, on or in relation to the goods, has created or established a reasonable expectation that the person is a person contemplated in paragraph (a).

Therefore, any person falling within the definition of a "producer" is obliged to furnish any required notice, document or visual representation in the prescribed form, and where no form is prescribed, the notice, document or visual representation must be in plain language.

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<sup>15</sup> Section 22

### **What is “plain language”?**

A notice, document or visual representation shall be deemed to be in plain language if it is reasonable to conclude that “an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation.”

Aspects such as the context, organization, form and style of the document, notice or visual representation shall be considered as well as the vocabulary, usage, sentence structure.

### **Pricing of Goods and Services<sup>16</sup>**

Goods that are displayed for sale or services offered must be displayed with a price. It is sufficient that a unit price be displayed. The supplier is exempt from this obligation if the goods are kept in an area that the public does not have access to or, the display of such goods or services is an advertisement.

A price is displayed if it is:

- Annexed or affixed to the goods or any other thing used in connection with the goods or the display
- Published in a current trade catalogue that is not out-dated
- A price relating to foreign goods must be displayed in local currency
- If two prices are displayed in relation to goods or services, the lower price is deemed to be the applicable price.

Retailers of goods or services are prohibited from displaying any goods for sale without displaying a price in relation to those goods.<sup>17</sup> This obligation does not arise where the supplier has given the consumer an estimate pertaining to the transaction, or the consumer has waived his or her right to such an estimate, or where section 43 of the Electronic Communications and Transactions Act applies to the transaction in question or, the goods are displayed predominantly as a form of advertisement or in an area that the public does

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<sup>16</sup> Section 23

<sup>17</sup> Section 23(3)

not ordinarily have access. In all other instances, retailers must therefore display any goods for sale with the relevant price. The price includes a unit price.<sup>18</sup>

The price must be in writing and must be in local currency. A price shall be deemed to be adequately displayed if it is annexed or affixed to the goods, or written, printed, stamped or otherwise applied to the goods or in close proximity to the goods or, it is published in a current catalogue, brochure, circular or similar form of publication that is available to the consumer or to the general public.

Suppliers are bound to honour any displayed price for goods or services and if more than one price is concurrently displayed, the lowest price is deemed to be the applicable price. However, if the displayed price contains an inadvertent and obvious error, the supplier is not bound by the incorrect price provided the supplier corrects the error in the displayed price and takes reasonable steps to inform consumers that the price previously displayed was erroneous.<sup>19</sup>

Where suppliers advertise that goods or services have been reduced and the displayed price does not correspond with the advertised reduced price, then the advertised reduced price is deemed to be the applicable price or percentage reduction.<sup>20</sup>

### **Product Labelling and Trade Description**<sup>21</sup>

The Consumer Protection Act defines a trade description as follows: -

A “trade description” means: –

(a) any description, statement or other direct or indirect indication, other than a trade mark, as to–

(i) the number, quantity, measure, weight or gauge of any goods;

(ii) the name of the producer or producer of any goods;

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<sup>18</sup> Section 23(2)

<sup>19</sup> Section 23(9)

<sup>20</sup> Section 23(11)

<sup>21</sup> Section 24

(iii) the ingredients of which any goods consist, or material of which any goods are made;

(iv) the place or country of origin of any goods;

(v) the mode of manufacturing or producing any goods; or

(vi) any goods being the subject of any patent, privilege or copyright; or

(b) any figure, work or mark, other than a trade mark, that, according to the custom of the trade, is commonly understood to be an indication of any matter contemplated in paragraph (a).

Where it is required that a trade description be affixed to the goods, such a trade description must be applied to the actual goods or attached to the goods in any other manner. It is sufficient that the trade description be displayed in close proximity to the goods and not necessarily to the actual goods. The trade description may be contained in a “sign, advertisement, invoice, wine list, business letter, business paper, or other commercial communication” and the consumer orders the goods from such source. (Section 24(1)(a) – (c)).

Trade descriptions must not mislead the consumer as to any matter implied or expressed in that trade description. Further, trade descriptions must not be altered, defaced, covered, removed or obscured in a manner calculated to mislead consumers. (Section 24(2)(a) and (b)). It is an offence for a supplier to use a misleading trade description or to alter or remove a trade description or trade mark applied to the goods.

The Minister may also prescribe categories of goods in respect of which trade descriptions must be applied as well as the rules to be used in respect of any international agreement in order to determine the origin of the goods or components of the goods. The Minister has now in fact prescribed the categories of goods that must bear trade descriptions and has given clarity as to what these mandatory trade descriptions must contain.

The goods detailed in Annexure D of Regulation 6(1) of the Act must now have trade descriptions applied or affixed to them and such trade descriptions must contain certain mandatory disclosure of information.

The goods detailed in Annexure D are as follows:

1. Textiles as listed in Chapter 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60 and 63 of the Harmonized Customs Tariff.



2. Clothing as listed in Chapter 61, 62 and 65 of the Harmonized Customs Tariff.
3. Shoes and leather goods as listed in Chapter 42, 43 and 64 of the Harmonized Customs Tariff.

Regulation 6 is designed to assist consumers in making informed decisions. This Regulation provides that any of the above goods that are imported into the Republic or offered for sale in the Republic must contain trade descriptions that meet the requirements of section 22, that is, trade descriptions that are in plain and understandable language and must be applied to the goods in a conspicuous and easily legible manner. Such trade descriptions must contain the following information:

- (a) The name of the country in which the goods were manufactured, produced or adapted;
- (b) If the goods are textiles, then the textile manufacturer, importer or seller must stipulate whether any imported greige fabric is used to produce dyed, printed or finished fabric and if so, then it must be stipulated that the fabric has been dyed, printed or finished in South Africa from imported fabric;
- (c) If the goods are locally manufactured but have been manufactured or adapted using imported materials, then the trade description must state: "Made in South Africa from imported materials."
- (d) Goods conform to the South African national standards for fibre content and case labeling in accordance with the provisions of Government Notice No 2410 of 2000.

If any of the goods detailed in Annexure D have been reconditioned, adapted, rebuilt or remade, then this must be brought to the consumer's attention by way of a trade description detailing that the goods have been reconditioned, adapted, rebuilt or remade. This requirement applies irrespective of whether or not the goods have been modified in the Republic and the trade description must once again be applied to the goods in a conspicuous and easily legible manner.

Where the goods detailed in Annexure D are wholly assembled or made in the Republic, it is sufficient to apply a conspicuous and easily legible trade description stating that the goods are "Made in South Africa."

The mandatory product labeling and trade description criteria set out in Regulation 6 does not apply to the following goods:

- (a) Textiles so small in size that labeling is not reasonably possible;
- (b) Second-hand clothing imported for charity purposes;

- (c) Goods where the number of goods imported by a natural person does not exceed 1000 single items in any one calendar month.

However, the above goods must nevertheless be labeled in accordance with Regulation 6 where such goods are imported into the Republic for marketing purposes.

### **Product Labelling of Genetically Modified Organisms (Regulation 7)**

#### **Definition of “genetically modified organism”**

A genetically modified organism is identified as being “a genetically modified organism as defined in section 1 of the Genetically Modified Organisms Act 15 of 1997.

Regulation 7 applies to goods approved for commercialization by the Executive Council for Genetically Modified Organisms (that is, the Council established by section 3 of the Genetically Modified Organisms Act 1997).

This Regulation applies to the aforementioned goods provided such goods contain “at least 5 percent of genetically modified organisms” irrespective of whether the making or manufacturing of the goods occurred in the Republic or elsewhere, and to the marketing material in respect of such goods. Any goods containing such components or ingredients must be labeled in a conspicuous and easily legible manner to the effect that the goods or ingredient or component “contains Genetically Modified Organisms.”

Further, if the goods are produced using genetic modification processes, then the goods or marketing material must be labeled in a manner that meets the requirements in section 22 and the label must stipulate: “produced using genetic modification.”

Goods can only be labeled as not containing genetically modified organisms where the goods or ingredient or component does not contain more than one percent genetically modified organisms but less than five percent, then a notice may be applied to the goods indicating that the goods contain “less than five percent of genetically modified organisms.”

If it is not scientifically practical or feasible to measure the level of genetically modified organisms or ingredients in the goods, then the notice “may contain genetically modified ingredients” is sufficient for compliance purposes.

N.B: Regulation 7 shall only come into effect 6 months after the commencement of the Act, that is, in October 2011.

### **Disclosure of Reconditioned or Grey Market Goods**

Section 25(2) of the Act obliges the person who offers or agrees to supply, or supplies, any goods that have been reconditioned, rebuilt or remade and bear the trade mark of the original producer or supplier to apply a conspicuous notice to indicate that the goods have been rebuilt, remade or reconditioned.

Regulation 8(1) requires such a person to place the notice in a place on the goods and the marketing material of the goods where a consumer is likely to see the notice. Further, the notice must be applied in an easily legible manner and size. This notice must be applied to the following:

1. To the actual goods;
2. To all forms of advertisement or promotion;
3. In-store promotions of the goods;
4. Packaging of the goods;
5. Websites and brochures detailing the goods.

The supplier of reconditioned or grey market goods must expressly draw the consumer's attention to the mandatory notice and must explain the meaning of the notice to the consumer, such explanation being in plain language. The notice must be displayed in such a place on the goods and on the marketing material of the goods where an ordinary consumer is likely to see the notice. The notice must be in an easily legible size and manner and must be applied to the goods and all forms of advertising or promotion, including in-store promotions, packaging, websites and brochures when such goods are advertised or promoted.

Further, if the goods bear a trade mark, then the notice must clearly state that the goods have been imported without the approval or licence of the registered owner of that trade mark and that no guarantee or warranty in respect of the goods shall be honoured or fulfilled by any official or licensed importer of the goods (section 25(2) read with Regulation 8(2)).

### **Other Mandatory Disclosures**

#### **Disclosure by Intermediaries<sup>22</sup> e.g. estate agents**

Intermediaries must disclose all prescribed information. The Minister has now prescribed the information that must be disclosed by different categories of intermediaries. These

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<sup>22</sup> Section 27

requirements include the requirement that an intermediary is obliged to disclose the basis on which the intermediary gains, profits or is compensated or rewarded for that transaction and any relationship between the intermediary and any party to the transaction.

“**intermediary**” means a person who, in the ordinary course of business and for remuneration or gain, engages in the business of:

- (a) Representing another person with respect to the actual or potential supply of any goods or services;
- (b) Accepting possession of any goods or other property from a person for the purpose of offering the property for sale; or
- (c) Offering to sell to a consumer, soliciting offers for or selling to a consumer any goods or property that belongs to a third person, or service to be supplied by a third person, but does not include a person whose activities as an intermediary are regulated in terms of any other national legislation.

Before looking at the mandatory information that intermediaries are now obliged to give the consumer, it is important to note that the disclosure requirement does not extend to intermediaries who are the executor or other administrator of a deceased's estate, in respect of the estate's property. Liquidators of an insolvent estate are also not intermediaries for the purpose of the Act when dealing with the estate's property, and neither are trustees when dealing with trust property (Section 27(2)).

### **Information to be disclosed by Intermediaries**

#### **Regulation 9:**

An intermediary must in the manner and form of delivery agreed to with the consumer, disclose the following information:

1. The intermediary's full names, physical address, postal address, phone number, cell number, fax number, email address and its registration number if any.
2. The intermediaries identity number, unless the intermediary is a juristic person, in which case the intermediary must disclose its registration number;
3. If the intermediary is a juristic person, the contact details of its public officers;
4. The exact service to be rendered by the intermediary;
5. Upon the consumer's request, the fee the intermediary shall receive for providing the services;
6. The costs the consumer is liable for, and under what circumstances the costs can be recovered;

7. The frequency with which the consumer shall receive written accounts updating the consumer on its mandate;
8. All relevant information that the consumer requires in order to decide whether or not to acquire the intermediaries services, or whether to continue with the services;
9. The commission, consideration fees, charges or brokerages payable to the intermediary by any other person;
10. Details of any code of conduct or other standard applicable to the intermediary or the service.

In addition, intermediaries are obliged to disclose whether he or she has ever been found guilty of any offence involving dishonesty which was punishable by criminal imprisonment without the option of a fine; placed under sequestration, liquidation or judicial management or is still an unrehabilitated insolvent as well as any other relevant information. Any personal interest the intermediary may have in the services or goods which may give rise to a potential conflict of interest must also be disclosed to the consumer in writing and the intermediary must take all reasonable steps to ensure the consumer is treated fairly.

Intermediaries must provide all the mandatory information to the consumer timeously and where the information pertains to the financial aspects of the transaction, then such information must be in writing. If the information is provided electronically, then the information must be in a generally available electronic format specified by the consumer. The information must be in plain language and must be in a clear and readable size, spacing and format. This information must be clearly distinguishable from marketing and promotional material and must avoid unclear technical or legal language. Where legal language is used, then proper explanations of any legal terms or words must also be given. Information regarding any amounts, sums, values, charges, fees or remuneration must be expressed in specified monetary terms and where this is not reasonably determinable, then the basis of calculation must be disclosed to the consumer.

### **Identification of Deliverers, Installers and Others**

In terms of section 28 of the CPA, any person who markets goods or services or installs services or delivers goods to a consumer's residential premises is obliged to wear a badge or other identification device that satisfies any prescribed standards or to provide suitable identification to the consumer

### **Sales Records<sup>23</sup>**

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<sup>23</sup> Section 26

Suppliers of goods or services that have been specifically granted exemption from the requirements of this section<sup>24</sup> and transactions that fall within section 43 of the Electronic Communications and Transactions Act do not have to give the consumer a written record of the transaction, that is, the obligation to provide a sales record to the consumer does not arise in these two instances. In all other instances, a supplier of goods or services must provide a written record of each transaction to the consumer to whom any goods or services are supplied.

Exemptions for certain categories of goods or services have been granted thereby relieving suppliers of such goods or services from the necessity of furnishing the consumer with a sales record. A notice included in the regulations provides that a hawker is exempt from the requirement that he or she provides the consumer with a sales record. A “hawker” is defined as a natural person lawfully engaged, solely for his or her own benefit, in the selling of goods on the street or in public places or spaces in respect of which all members of the public enjoy unrestricted and unconditional access subject only to the law.

A supplier is also exempt from the duty of providing a sales record where the consumer is party to the transaction does not expressly require a sales record.

Where a written record is required, this record must contain the following information:

- The supplier’s name or registered business name, and VAT registration number if any
- The address at which the goods or services were supplied
- The date of the transaction
- A name or description of the goods or services
- The unit price for each good or service
- The quantity of each good or service
- The total price of the transaction before tax
- The amount of applicable taxes
- The total price of the transaction including taxes

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<sup>24</sup> The Minister of Trade and Industry may exempt suppliers of certain goods or services from the requirement of having to furnish such a written record.

## **Chapter 7: Consumer's right to Fair and Responsible Marketing**

### **Marketing Standards<sup>25</sup>**

Producers, importers, distributors, retailers or service providers must not market or promote goods or services in a misleading, fraudulent or deceptive manner. Thus, the nature and the use of the goods or services cannot be distorted, let alone the conditions on which the goods or services may be acquired.

A manufacturer, producer, importer, distributor or supplier cannot promote or supply goods or services that are unlawful. Promotion of goods or services must so be done in a manner that does not violate the dignity of any person or is based on a ground of unfair discrimination.

Section 41 of the Act provides that when marketing goods or services, the supplier must not, by words or conduct, imply a false, misleading or deceptive representation concerning a material fact or use exaggeration, innuendo or ambiguity as to a material fact. The supplier is also obliged to correct any apparent misapprehension that the consumer may be labouring under and to disclose a material fact if the suppliers failure to disclose that fact amounts to deception.

Where a supplier engages in deceptive, fraudulent or misleading marketing, the court may make a declaration to that effect and make any further order that is just and reasonable in the circumstances. Such an order may include ordering the supplier to refund the consumer any monies paid in terms of the transaction or to compensate the consumer for losses or expenses relating to the transaction or the proceedings in court. The court may even order the supplier to cease to practice, or alter any practice, form or document that it uses for marketing and promotion purposes.

Thus, we have seen that marketing standards for goods and services must not be misleading, fraudulent, exaggerated or in any other way deceptive. It is likely that "puffery" shall not be permissible. This prohibition extends to:

- The nature, properties, advantages or uses of the goods or services;
- The manner in or conditions on which the goods or services may be supplied;
- The price of the goods or services;
- The sponsoring of an event;
- Any other material aspect of the goods or services.

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<sup>25</sup> Section 29

### **Bait Marketing**<sup>26</sup>

A supplier is prohibited from advertising goods or services as being available at a particular place and price for a particular period unless the supplier reasonably anticipates having a sufficient quantity of the goods or capacity to supply the services so advertised. If the supplier is not sure of the quantity will meet the demand for the goods or services, then the advertisement must specify that the goods or services are available in a specified limited quantity at the specified price, at a specified time or limited duration or until the quantity is exhausted.

If for some reason the supplier cannot supply the goods or services so advertised, the supplier can procure another person to supply the advertised goods or services provided the consumer accepts such an offer.

### **Negative Option Marketing**<sup>27</sup>

Negative option marketing is marketing where an agreement or transaction comes into existence due to the consumer failing to decline an offer or inducement. The CPA now regulates this type of marketing and provides that a supplier must not offer to supply or enter into or modify an agreement on the basis that if the consumer fails to decline such an offer or modification, then the agreement or modification will automatically come into existence. If negative option marketing results in an agreement, such an agreement is unlawful and is accordingly void. Similarly, if a modification is made on the basis of negative marketing, such modification is deemed to be an unlawful provision and is void.

### **Direct Marketing**<sup>28</sup>

Direct marketers are obliged to advise the consumer of his or her right to rescind an agreement that resulted from direct marketing. This right to rescind an agreement is in essence a “cooling-off period” and must be exercised by the consumer within 5 business days after the transaction or agreement was concluded or within 5 business days of the goods being delivered to the consumer. Where a consumer exercises this right, he or she must do so in writing and the supplier cannot charge the consumer for rescinding the

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<sup>26</sup> Section 30

<sup>27</sup> Section 31

<sup>28</sup> Section 32



transaction provided the returned goods are in the original unopened packaging or if they have been opened. Where the goods have been opened but repackaged in their original packaging, the supplier may charge the consumer a reasonable amount for the use of the goods whilst they were in the consumer's possession.

If a direct marketer leaves goods with a consumer without requiring payment or arranging payment for the goods, the goods are deemed to be unsolicited goods to which section 21 applies.<sup>29</sup>

### **Catalogue or Electronic Marketing**<sup>30</sup>

Some examples of catalogue or electronic marketing include:

- Telephone
- Fax or internet transactions
- Postal orders
- Any other instance where the consumer is not afforded the opportunity to inspect the goods prior to the transaction being concluded.

The requirements regarding catalogue or electronic marketing apply in the following instances: Where an agreement for the supply of goods or services is not concluded in person, but is concluded telephonically at the request of the consumer, by postal order, fax or internet transaction or in any other instance where the consumer does not inspect the goods before concluding the agreement. The requirements do not extend to an agreement or transaction that resulted from direct marketing.

Before entering into an agreement that has resulted from marketing in which the consumer was not afforded the opportunity to inspect the actual goods, the supplier must disclose the following to the consumer:

- The supplier's name and licence or registration number if any;
- Supplier's physical address and other contact details;
- The supplier's electronic mail address if applicable;
- A trade description of the goods or services;
- Information required in terms of section 26 (that is, the mandatory information pertaining to sales records);

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<sup>29</sup> Section 32(2)

<sup>30</sup> Section 33

- The currency in which the amounts under the agreement are payable;
- Any delivery arrangements i.e. identity of the shipper, mode of transportation and place of delivery;
- The supplier’s cancellation, return, exchange and refund policies;
- The procedure to lodge a complaint

The above information must be provided to the consumer PRIOR to concluding the agreement. Further, the consumer must be afforded the opportunity to accept or decline the agreement, to correct any errors in the information and to confirm the details of the transaction.

A copy of the agreement must be given to the consumer within 10 business days after the conclusion of the agreement. If such a copy is not delivered within this time period, the consumer may terminate the agreement without any penalty.

### **Customer Loyalty Programs**<sup>31</sup>

In terms of the CPA, a “loyalty programme” is defined as follows:

“any arrangement or scheme in the ordinary course of business, in terms of which a supplier of goods or services, association of such suppliers, or other person on behalf of or in association with any such suppliers, offers or grants to a consumer any loyalty credit or award in connection with a transaction or an agreement.”

A customer loyalty program may allow consumers to exchange their loyalty credits or awards for goods or services. Where the program permits this, the sponsor or any person who accepts the loyalty credits in terms of the said program, is obliged to accept the awards in exchange for goods or services provided the awards constitute adequate consideration for the goods or services as the loyalty credits or awards are deemed to be a legal medium of exchange.<sup>32</sup>

The goods or services must be available at any given time must be sufficient to cover the consideration of the loyalty awards or credits that are earned by all consumers. Moreover, where a consumer uses loyalty awards to obtain goods or services, the goods or services so

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<sup>31</sup> Section 35

<sup>32</sup> Section 35(1)

obtained must not be of an inferior quality to goods or services that the consumer would have obtained had the consumer used a different form of consideration.<sup>33</sup>

Where loyalty awards or credits are used as consideration for goods or services, no administration or processing charge may be levied and the consumer is not obliged to purchase any other goods or services or to pay any monetary charge in respect of such a transaction. Such monetary charge is precluded even where it is ordinarily imposed by public regulation or the supplier incurs a charge in order to afford the consumer the right to gain access to or utilize his or her loyalty credits.<sup>34</sup>

Further, the sponsor of a loyalty programme cannot demand that the consumer purchases any other goods or services when the consumer seeks to utilise his or her loyalty credits or awards.<sup>35</sup>

The sponsor of a loyalty program or a supplier that accept loyalty credits or awards as consideration for goods or services may restrict the use of loyalty awards. Such restriction may not exceed 30 days per annum and notice of the impending restriction must be given to members of the programme at least 20 business days before the onset of the restricted period. Moreover, the restriction on the usage of loyalty credits or awards as consideration for goods or services cannot exceed a total of 90 days within a calendar year.<sup>36</sup>

Earlier drafts of the Consumer Protection Act provided that goods or services that are given in exchange for loyalty awards may be sold at a higher price for a period not exceeding 30 days per annum. Before the aforementioned could take place, the sponsor was obliged to give at least 60 business days notice to the members of the program. This provision has since been removed from the final draft of the CPA. It is likely that this provision was removed on the basis of section 35(2) and section 35(3) providing for certainty and full disclosure at the onset to the consumer that joins a loyalty programme. Section 35(2) prohibits any person from offering a loyalty programme or loyalty credit or award without the intention of providing such a programme, award or credit or from providing the programme, award or loyalty credit in a manner other than the manner in which it is initially offered to the consumer.

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<sup>33</sup> Section 35(4)(d)

<sup>34</sup> Section 35(4)(e)

<sup>35</sup> Section 35(4)(f)

<sup>36</sup> Section 35(5)

Where the sponsor of a loyalty programme is not able to accept the consumer's tendered loyalty credits or awards in exchange for particular goods or services, the supplier can procure another person to supply the goods or services in question and where the consumer unreasonably refuses the sponsor's offer to do so, the sponsor shall not be found to be in contravention of CPA.<sup>37</sup>

### **Trade Coupons and Similar Promotions**<sup>38</sup>

A promotional offer is an offer or promise via a prize, reward, gift, free good or service, price reduction, concession, enhancement of quantity or quality of goods or services and a promotional offer cannot require that the consumer enters into an additional transaction in order to accept the promotional offer.<sup>39</sup> Persons making promotional offers must therefore intend to fulfill the offer as it is originally offered to the consumer.

Any document disclosing a promotional offer must clearly state the following:<sup>40</sup>

- The nature of the prize, reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services;
- The goods or services to which the offer relates;
- What the prospective consumer must do in order to accept the promotional offer;
- The details of the person from whom or the place where the consumer may receive the benefit advertised in the promotional offer.

Persons marketing or sponsoring a promotional offer must ensure that the benefit encapsulated in the promotional offer is sufficient to accommodate all reasonably anticipated demands that are likely to arise from the offer.<sup>41</sup> Further, consumers cannot be required to tender any payment for the administration, processing or handling of a transaction in respect of which the consumer tenders a trade coupon.<sup>42</sup>

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<sup>37</sup> Section 35(6)

<sup>38</sup> Section 34

<sup>39</sup> Section 34(2)

<sup>40</sup> Section 34(4)

<sup>41</sup> Section 34(5)(a)

<sup>42</sup> Section 34(5)(d)

## **Promotional Competitions**

### **Definitions**<sup>43</sup>

“**Participant**” means a person who enters, competes in or is otherwise eligible to win a promotional competition;

“**Prize**” includes a reward, gift, free good or service, price reduction or concession, enhancement of quality of goods or services, or other discounted or free thing;

“**Promoter**” means a person who directly or indirectly promotes, sponsors, organizes or conducts a promotional competition, or for whose benefit such a competition is promoted, organized or conducted;

“**Promotional Competition**” means any competition, game, scheme, arrangement, system, plan or device for distributing prizes by lot or chance. Such a competition must be conducted in the ordinary course of business and the purpose of the competition must be to promote a producer, distributor, supplier or to promote the actual sale of any goods or services. To qualify as promotional competition in terms of the CPA, the value of the prize offered cannot exceed the prescribed threshold. The Minister has in fact prescribed the monetary threshold for competitions with “low-value prizes” for the purposes of excluding the regulatory requirements of the Act. The threshold is set at R1.00 (one Rand).

### **Obligations of Promoters of Promotional Competitions**

A person cannot inform a consumer that a consumer has won a competition in the either of the following instances:

- if no such competition has in fact been conducted OR
- if the consumer has not entered such a competition
- If the consumer has entered the competition but has in fact not won
- If the prize is subject to a previously undisclosed condition
- If the consumer is required to offer further consideration after the competition results have been announced
- The prize or benefit is generally available to others.

Promoters:-

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<sup>43</sup> Section 36

- May not require any consideration from participants in the promotional competition e.g. a promoter cannot require that the participants pay any consideration to participate in the competition or that the participants purchase goods or services at a price that exceeds the price ordinarily charged for such goods or services
- Must file an abstract of the competition rules with the NCC before consumers participate in the competition
- Make the competition rules available on request and without cost to any participant
- Must not award a prize to a winner if it is unlawful to supply those goods or services to the prize winner
- Must not award a prize to a director, member, partner, employee or agent or consultant to the promoter or is so linked to the supplier of the goods or services that are connected with the competition

Section 36(3)(a) prohibits promoters of promotional competitions from charging any consideration to the consumer or on behalf of the consumer other than the “reasonable costs of posting or otherwise transmitting an entry form or device” in order to take part in a promotional competition. Regulation 1(1) limits the reasonable cost of electronically transmitted entries to R1.50 (one rand and fifty cents). This maximum amount includes the total cost for all ensuing electronic communication to the consumer in respect of the consumer’s entry.

Regulation 11(3) renders the usage of the following provisions null and void:

1. A provision that permits the promoter to use the prize winner’s image in marketing material without the consumer been given the opportunity to decline such usage;
2. A provision that requires the prize winner to participate in any marketing activity without being afforded the opportunity to decline or a provision that does not advice the prize winner of his or her right to decline such usage;
3. A provision that requires the prize winner to be present when the draw is taking place or the winners are announced without further stipulating that the prize winner has the right to decline such an invitation.

Further, promoters must have “an independent accountant, registered auditor, attorney or advocate” oversee and certify the conducting of the competition and such a person must report this through the promoter’s internal audit reporting or other appropriate validation or verification procedures.

The Minister has also prescribed the minimum standards and forms that are required for keeping records associated with promotional competitions. The prescribed information is contained in Regulation 11(6). Promoters of promotional competitions are now obliged to keep the following records:

1. Full details of the promoter, including identity or registration numbers, addresses and contact numbers;
2. The rules of the promotional competition;
3. A copy of the offer to participate in a promotional competition;
4. Names and identity numbers of persons responsible for conducting the promotional competition;
5. A full list of all the prizes offered in the promotional competition;
6. A representative selection of materials used to market the competition. An electronic copy of such materials is sufficient provided such copy is easily accessible in a generally available format;
7. A list of all instances when the promotional competition was marketed, including the dates, the medium used and places where the marketing took place;
8. The names and identity numbers of the persons responsible for conducting the selection of the prize winners;
9. An acknowledgement of receipt of the prize signed by the prize winner, or legal guardian, and the prize winner or legal guardian's identity number, and the date of receipt of the prize, or where this is not possible, proof that the prize was sent by post or other electronic means to the winner;
10. Declarations by persons responsible for conducting the promotional competition to the effect that the prize winners were not directors, members, partners, employees, agents or consultants of any other person who directly or indirectly controls or is controlled by the promoter or marketing service providers, or the spouses, life partners, business partners or immediate family members. The aforementioned declaration must be made under oath or affirmation.
11. The basis on which the prize winners were determined;
12. A summary detailing the selection of the winners, the names of the persons responsible for determining the prize winners; the date and place where the winners were selected and whether the selection process was open to the general public;
13. Whether an independent person oversaw the selection of the prize winners, and if so, the independent person's name and identity numbers;
14. The means by which the prize winners were announced and the frequency thereof;
15. A list of the names and identity numbers of the prize winners;

16. A list of the dates when the prizes were handed over or paid to the prize winners;
17. In the event that a prize winner could not be contacted, then the steps that the promoter took to contact the winner must be detailed;
18. In the event that a prize winner did not receive or accept his prize, then the reason why the prize winner did not receive or accept the prize and the promoter's steps to hand over or pay the prize to that prize winner.

The National Consumer Commission may in writing request a promoter to submit an extensive report as detailed above. The promoter would then be obliged to submit this report to the Commission at the promoter's expense.

### **Advertising of Promotional Competitions**

An offer to participate in a promotional competition must be in writing and must state:

- Benefit of the competition
- Steps to take in order to participate in the competition
- Basis upon which the results of the competition will be determined
- The maximum number of potential participants and the odds of winning the competition
- How participants will be informed of the results
- How, when and where the successful participant may collect the prize

### **Alternative Work Schemes<sup>44</sup>**

Examples of alternative work schemes that used to often appear advertised to the public include advertisements that state "work from home" or "invest your money – huge return" Such advertisements must now contain a cautionary statement disclosing the uncertainty of the extent the work, business or activity and the uncertainty of the income or any other benefit. The physical address and contact numbers of the advertiser, together with the nature of the work, must also be disclosed in such an advertisement. In addition, consumers may not be charged a fee in respect of the promotion or conduct of any such work, business, activity or investment, except to the extent that the consumer has received the work, business or activity.

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<sup>44</sup> Section 37



The Regulations, namely Regulation 12, now prescribes the exact detail of what the cautionary notice should contain:

***“Results, examples and testimonials promised or contained in this advertisement may be out of the ordinary and should not be taken to provide guarantees with regard to the availability of work, business or activity available, projected income or other benefit promised or implied. There is no guarantee whatsoever that you will achieve the results or outcomes promised or implied in this advertisement. You are strongly urged to ascertain or obtain, at your own cost, assistance to ascertain the probable results or outcomes based on realistic facts and assumptions and all currently relevant and applicable circumstances.”***

The above cautionary notice must be in the same font as the rest of the advertisement and must be in a prominent place where the consumer is likely to see it. Such a notice must be provided to consumers without any charge and must not detract from the other provisions applicable to advertising or promotion.

### **Referral Selling**<sup>45</sup>

Referral selling is still permissible in terms of the CPA provided that the referral selling is not conditional upon an event occurring after the consumer agrees to enter into a transaction. For instance, a consumer signs up for a gym membership and is advised by the salesperson that if the consumer supplies the names of friends that subsequently join, the consumer shall then be entitled to a free months gym membership. This would be permissible to the extent that the consumer is automatically rewarded with the one month’s free membership upon merely supplying the names. The one month’s free membership cannot be conditional upon the consumer’s friends joining the gym as whether the consumer’s friends join is an event that occurs after the consumer agrees to the transaction.

Persons are therefore prohibited from promoting, offering, supplying, agreeing to supply, or inducing consumers to accept any goods or services on the basis that the consumer shall receive a rebate, commission or other benefit only if the consumer subsequently gives the supplier the names of prospective consumers or otherwise assists the supplier to supply goods or services to other consumers if that rebate, commission, or other benefit is contingent upon an event occurring after the consumer enters into the transaction.<sup>46</sup>

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<sup>45</sup> Section 38

<sup>46</sup> Section 38(1)

This means that our example of the gym membership scenario is permissible to the extent that the consumer will receive a benefit i.e. a free month's membership if he or she gives the supplier the name of his or her friends. Such benefit will accrue to the consumer merely by virtue of such a referral and the fact that his or her friends may take up membership at a later stage, is a contingency that is not permissible in determining whether the benefit, rebate or commission accrues to the consumer.

## **Chapter 8: Right to Fair and Honest Dealing and the Consumer's Right to Fair Agreements**

### **8.1 Consumer's right to assume the supplier is entitled to supply goods**

In terms of section 44, every consumer has the right to assume that a supplier has the legal right to sell the goods or that the lessor has the legal right to lease the goods. This assumption is an applied provision in every transaction or agreement that a consumer enters into with a supplier. This presumption does not apply in respect of used goods or immovable property.

Further, the supplier is fully liable to third parties for any charge or encumbrance pertaining to the goods unless the charge or encumbrance was disclosed prior to the conclusion of the transaction. Where the transaction does infringe a third party's right to the goods, the supplier is liable to the third party to the extent of the infringement or compromise.<sup>47</sup>

### **8.2 Unconscionable Conduct**

Suppliers and their agents are prohibited from using "physical force, coercion, undue influence, pressure or harassment, unfair tactics" in connection with the following:<sup>48</sup>

- Marketing goods or services
- supplying goods or services to a consumer
- Negotiating, concluding or enforcement of an agreement to supply goods or services to a consumer
- Demanding or collecting payment for goods or services e.g. debt collectors – often very threatening
- Recovering goods from the consumer

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<sup>47</sup> Section 44(1)(c) and section 44(2)

<sup>48</sup> Section 40(1)(a) – (e)

The above list is not exhaustive. This section goes on further to provide that it is also “unconscionable conduct” if a supplier, to the detriment of the consumer’s interests, takes advantage of the consumer’s disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.

Unconscionable conduct that results in a transaction or agreement is deemed to be a prohibited transaction in terms of section 51. The court shall then have to consider the principles, purposes and provisions of the CPA to determine whether the transaction or agreement is in fact unconscionable conduct as set out in section 40.<sup>49</sup> If the supplier or their agent is found to have engaged in unconscionable conduct, then the court may order that the supplier or agent restores any property or money to the consumer or that the consumer is compensated for losses or expenses relating to the transaction or agreement or to the court proceedings. The court may also order that the supplier ceases any practice, or alters any practice, form or document so as to prevent future repetition of the supplier’s unlawful conduct.<sup>50</sup>

### **8.3 False, Misleading or Deceptive Representations**<sup>51</sup>

In the supply of goods or services or in the marketing of such goods or services, the supplier or supplier’s agent must not, by words or conduct, “imply a false, misleading or deceptive representation” concerning a material fact. The supplier must also not exaggerate or use innuendo or ambiguity as to a material fact or knowingly allow the consumer to believe a false, misleading or deceptive fact. If the supplier knows that the consumer is labouring under a false or misleading apprehension, the supplier must correct such an apprehension.<sup>52</sup>

For example, the supplier leads the consumer to falsely believe that the supplier has status or is affiliation or sponsorship that they do not have; or the supplier falsely leads the consumer to believe that the goods are of a particular standard, quality, grade, style or model when in fact the goods are not or, the supplier holds the goods out to be new when in

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<sup>49</sup> Section 52(1)(a) read with section 52(3)

<sup>50</sup> Section 52(3)(b)

<sup>51</sup> Section 41

<sup>52</sup> Section 41 (1)(a) – (c)

fact the goods have been used or are reconditioned. It is important to note that a supplier's representation that the goods are new is not false, misleading or deceptive if those goods have only been used by or on behalf of the producer, importer, distributor or retailer for the purposes of testing, service, preparation or delivery.<sup>53</sup>

#### **8.4 Other Fraudulent Schemes**

Persons are prohibited from initiating, sponsoring, promoting or knowingly participating in the distribution of any communication that offers to supply any goods or services and falsely states or represents that the communication is authorized by another person or the author of the communication represents another person.<sup>54</sup>

##### **8.4.1 Fraudulent Currency Schemes**

An arrangement, agreement, practice or scheme is deemed to be a fraudulent currency scheme if it involves the person directly or indirectly promoting the scheme with the intention to defraud another person on the basis that they are capable of producing currency by washing, dipping or otherwise treating any substance that is not currency with a chemical substance, or exposing it to an electrical charge or to radiation of any kind. An arrangement, agreement, scheme or undertaking is also a fraudulent currency scheme where a person undertakes to produce currency or increase a sum of money through scientific means, invocation of any juju or through the use of an invisible medium.<sup>55</sup>

##### **8.4.2 Fraudulent Financial Transactions**

A fraudulent financial transaction is defined as an arrangement, agreement, practice or scheme that intentionally promotes the carrying on of a specified unlawful activity or is designed to conceal or disguise the nature, location, source of ownership or control of the proceeds of a specified unlawful activity or to avoid a lawful transaction.<sup>56</sup>

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<sup>53</sup> Section 41(4)

<sup>54</sup> Section 42(1)

<sup>55</sup> Section 42(3)(a)

<sup>56</sup> Section 42(4)

### **8.4.3 Fraudulent Transfer of Property or Legal Rights**

An arrangement, agreement, practice or scheme is a fraudulent transfer of property or legal rights if it involves a person, by false pretence intentionally defrauding another person by obtaining property from that person or any other third person or by inducing another person to deliver property or conferring a benefit on the understanding that the benefit has or will be paid for.<sup>57</sup>

The Minister of Trade and Industry has declared certain arrangements, agreements, and practices to be fraudulent. These fraudulent transactions are detailed in the Regulations.

### **8.4.4 Fraudulent Transport Contracts by Intermediaries**

Regulation 14 provides that “an arrangement, agreement, practice or scheme is a fraudulent transport contract if it involves a person by false pretence or with the intent to defraud another person, represents that the first person is capable of arranging a transport contract, whether of cargo or passengers, for execution by the consumer and requires the consumer to pay in advance a fee or remuneration of whatever nature, whether goodwill or any other form of consideration.”

### **8.4.5 Fraudulent Public Property Syndication Schemes<sup>58</sup>**

This scheme envisages a public property syndication scheme in which a person by false pretence or with the intent to defraud another person, represents to that person that the property he is investing in is worth more than its true market value.

A promoter of a public property syndication scheme includes a company and its directors, a trust and its trustees and all other persons actively involved in forming and establishing a public property syndication scheme.

A “public property syndication scheme” means “the assembly of a group of investors invited, by word of mouth or through the use of electronic print media, radio, television, telephone, newspapers and magazine advertising, brochures and direct mail, to participate in such schemes by investing in entities, which could be companies, close corporations, trusts, partnerships or individuals, whose primary asset or assets are commercial, retail, industrial or residential properties, and where

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<sup>57</sup> Section 42(5)

<sup>58</sup> Regulation 15

the investors share in the profits and losses in these properties or enjoy the benefits of net rental growth there from through proportionate share of income.”

#### **8.4.6 Feasibility Studies Promising Funding**

Regulation 16 prohibits any person from falsely pretending and intentionally defrauding another by offering, conducting, selling or otherwise providing an agreement for a feasibility study or a feasibility study itself which states, promises or otherwise intimates that the purchase or use of the feasibility study guarantees funding, financing, sponsorship or any other backing, whether from within the Republic or elsewhere.

#### **8.5 Deferrals, Waivers and Substitution of Goods**<sup>59</sup>

If the goods to be provided in terms of an agreement are substituted with other goods, wholly or in part, the substitution does not create a new agreement provided the consumer and the supplier agree to the substitution. If the transaction was embodied in a written agreement or sales record, the supplier must give the consumer an amended agreement or sales record describing the substituted goods and no other changes need to be made to the original agreement or sales record.<sup>60</sup>

#### **8.6 Over-selling and Over-booking**<sup>61</sup>

If a consumer dies before carrying out a reservation or advance booking for a service, the supplier may not charge a cancellation fee and must refund any deposit to the administrator of the consumer’s estate. In any other instance where a consumer cancels a reservation or advance booking, the supplier may charge a cancellation fee provided such fee is reasonable. In determining what is reasonable, regard will be had to the nature of the service, when cancellation notice was given and whether the service provider could have found an alternative consumer from the time of receiving the notice to the actual cancellation date.

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<sup>59</sup> Section 46

<sup>60</sup> Section 46(1)(d)

<sup>61</sup> Section 47

Suppliers must take heed not to oversell any goods or overbook any services. Suppliers are prohibited from accepting payment or other consideration for any goods or services if the supplier has no reasonable basis to assert an intention to supply those goods or services or, the supplier in fact intends to supply goods or services that are materially different from those advertised or sold.

Where a supplier accepts a reservation or otherwise commits to supply goods or services on a specified time and date, the supplier must ensure that there is sufficient stock or capacity to supply the goods or services, failing that, that there is alternative goods or services that are of a comparable nature and of the same, if not better, quality, class or nature. If a supplier oversells or overbooks, the supplier must refund the consumer the amount, if any, paid in respect of that commitment or reservation, together with interest at the prescribed rate from the date on which the amount was paid until the date of reimbursement. Further, the supplier must compensate the consumer for costs directly incidental to the supplier's breach of contract. Where a supplier is not able to supply the goods or services due to a shortage of stock or capacity and the supplier has taken reasonable steps to inform the consumer of the shortage of stock or capacity as soon as it was practicable to do in the circumstances, the consumer is not entitled to claim compensation for costs directly incidental to the supplier's breach of contract. The shortage of stock or capacity must however be due to circumstances beyond the supplier's control. It is not "due to circumstances beyond the supplier's control" if the shortage results partially, completely, directly or indirectly from a failure on the part of the supplier to adequately and diligently carry out any ordinary or routine matter pertaining to the supplier's business.<sup>62</sup>

The provisions pertaining to overbooking and overselling do not apply to franchise agreements or to consumer agreements pertaining to the supply of special-order goods.<sup>63</sup>

## **8.7 Auctions**<sup>64</sup>

When goods are sold at auction in lots, each lot is deemed to be a separate transaction. Goods are deemed sold at an auction as soon as the auctioneer's hammer falls. Until the goods are sold, a bid may be retracted and is not binding on the bidder.

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<sup>62</sup> Section 47(6)

<sup>63</sup> Section 47(1)

<sup>64</sup> Section 45

If the sale by auction is subject to a reserved price or to the right to bid by or on behalf of the owner or auctioneer, notice to this effect must be given in advance. If such notice is not given, and the sale proceeds, the consumer may approach a court to have the transaction declared fraudulent.

### **8.7.1 Mandatory advertising of auctions**<sup>65</sup>

No goods may under any circumstances be sold by auction unless the inclusion of the item or lot or service in that auction has been advertised. The general public must be given a reasonable opportunity to know if the auction, the goods on offer and of the rules governing the auction. The onus is on the auctioneer to show that the auction was accordingly advertised.

The auction of a particular item or lot must be advertised at least 24 hours prior to the commencement of the auction. However, any goods so advertised can still be withdrawn from the auction at any time prior to the start of the auction. Further, unmovable property that is to be auctioned must be advertised at least 5 business days prior to the intended auction. Moreover, if any part of the auction relates to goods sold in execution or by order of court, then this fact must be clearly stated in the advertisement.

### **8.7.2 General Rules on the advertising of Auctions**

Regulation 20 sets out the general rules pertaining to the advertising of auctions.

All advertising of auctions must be accurate and must provide sufficient information for a reasonable consumer to understand that the advertisement relates to the auction. The advertisement must also adequately advise the consumer as to the place where the auction is to be held.<sup>66</sup>

The advertisement of an auction must be in a legible format and size and must contain a reference to the regulations contained in the CPA and must contain a URL of an operational internet site where a copy of the regulations can be found. The advertisement must also state the date, place and time of the auction as well as the name of the auctioneer and the auction house if any. It is possible that the registration of auctioneers and auction houses can become mandatory, in which case, the registration or licensing number of the auctioneer and/or auction house must be stated.

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<sup>65</sup> Regulation 19

<sup>66</sup> Regulation 20(1)



The advertisement must also advise consumers as to where a copy of the rules pertaining to the auction can be obtained and the particulars of the goods that are to be sold at the auction. If the auction is to be held over more than one day, then the duration of the auction should be stipulated as well as whether the auction is subject to a reserved or upset price. Whether the auction is subject to a right to bid by or on behalf of the owner or auctioneer should also be disclosed in the advertisement and prospective bidders should be reminded that they should register prior to making any bids and that such registration requires proof of identity and of residence. The advertisement should also disclose the possible total costs of advertising and conducting the auction.

Where the advertisement of an auction is in the classifieds printed in newspapers or contained in roadside advertising, then it is not necessary that the advertisement contain the aforementioned mandatory advertising criteria.<sup>67</sup> The advertisement would still however need to display at the top the word “auction”, the date, place and time of the auction as well as where a consumer can obtain a full advertisement of the auction.<sup>68</sup> Consumers are entitled to request that the auctioneer provides him or her with a free copy of the full advertisement of the auction. The auctioneer would then be obliged to provide one free copy and such a copy may be provided by the auctioneer referring the consumer to a URL of an operational website where such a copy can be found.

### **8.7.3 Sale in Execution Auctions**

An auction can only be advertised as a sale in execution or imply court action provided at least 75% of the items or lots at the auction are offered in pursuant to a court order. The items or lots must not have been purchased or attained for the purpose of resale at an auction and the advertisement must contain an explanation of the court order and the name of the court that issued the court order.<sup>69</sup> If not all the items and lots are offered pursuant to a court order, then the advertisement must indicate that the auction is “with additions”, “supplemented” or similar wording.<sup>70</sup>

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<sup>67</sup> Regulation 20(3)

<sup>68</sup> Regulation 20(3)

<sup>69</sup> Regulation 20(6)

<sup>70</sup> Regulation 20(7)

#### **8.7.4 Insolvency Auctions**

For an auction to be advertised as an insolvency auction, at least 75% of the items or lots must be offered pursuant to an order of the Master of the High Court and the order number or the Master of the High Court must be contained in the advertisement. Further, the items or lots must not have been purchased for the purpose of resale at an auction.<sup>71</sup>

#### **8.7.5 Deceased Auctions**

For an auction to be advertised as a “deceased auction” or the usage of similar wording implying insolvency, at least 75% of the items or lots in the auction must be offered pursuant to an order of the Master of the High Court. The items or lots should not have been purchased or attained for the purpose of resale at an auction and the advertisement must contain the order number of the Master of the High Court.<sup>72</sup>

It is important to note that unless all the items or lots at the auction are offered in pursuant to an order of the Master of the High Court, the advertisement must indicate that the auction is “with additions”, “supplemented” or use similar wording.<sup>73</sup>

#### **8.7.6 Divorce Auctions**

For an auction to be advertised as a “divorce auction” at least 75% of the items or lots offered at the auction must be offered pursuant to a court order and the advertisement must contain an explanation of the court order including the identification of the court. Once again, the items or lots should not have been purchased or attained for the purpose of resale at the auction.<sup>74</sup>

#### **8.7.7 Auctions advertised as “Absolute” or “Without Reserve”**

Auctioneers can only advertise an auction as being “absolute” or “without reserve” provided there are no liens or encumbrances on the goods. The only restrictions that would be

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<sup>71</sup> Regulation 20(8)

<sup>72</sup> Regulation 20(12)

<sup>73</sup> Regulation 20(13)

<sup>74</sup> Regulation 20(15)

permissible re property tax obligations, easements or recorded restrictions. If there are any liens or encumbrances on the goods, then the holder of such a lien or restriction must agree in writing to accept the highest bid for the property and there must be a *bona fide* intention at the time of advertising and at the time of the auction to transfer ownership of the goods to the highest bidder.<sup>75</sup>

### **8.7.8 Auction Rules and the Duty of the Auctioneer to hold and account for consumer's property**

Regulation 21 requires an auctioneer to compile written rules of the auction, and these rules must be available to the general public at least 24 hours prior to the commencement of the auction. The only exception to this requirement is where the auction relates to livestock or game, or the auction is a closed auction, that is an auction where the auctioneer or the owner issues an invitation to take part in an auction, only to a finite list of consumers). The rules of the auction must be signed and certified by the auctioneer. An auctioneer is personally accountable and liable for the contents of the rules of the auction. The rules of the auction may not exclude the right of inspection.

Where the auctioneer is not the owner or rightful holder of the goods to be auctioned, the auctioneer must also ensure that a written agreement is entered into with the owner or rightful holder of the goods to be sold. Essentially, this agreement contains the terms and conditions upon which the auctioneer accepts the goods for sale at the auction.<sup>76</sup> The auctioneer is obliged to retain a copy of every agreement signed by the owner or rightful holder of the goods for a period of at least three years from the date of the auction.<sup>77</sup>

### **8.7.9 Auctioneer's Duties**

Every auctioneer is deemed to be the agent of the owner or rightful holder of the goods for all aspects of an auction.<sup>78</sup> The auctioneer is obliged to follow all lawful and reasonable requests of the owner or rightful holder and must ensure that the highest or most favourable

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<sup>75</sup> Regulation 20(8)

<sup>76</sup> Regulation 22(2)

<sup>77</sup> Regulation 22(4)

<sup>78</sup> Regulation 35(a)

offer made by a bidder is accepted. An auctioneer must perform his or her duties in accordance with the highest standards applicable to auctions.<sup>79</sup>

Upon the sale of any goods at the auction, the auctioneer must provide the owner or rightful holder with an itemized account of the goods sold. The itemized account must contain the item or lot sold, the amount received for the item or lot and the name of the buyers of every item or lot.<sup>80</sup>

### **8.8 Prohibited Conduct on the part of an Auctioneer**

Auctioneers may not charge or receive any fee or commission in respect of the sale of movable goods unless the goods have been delivered to the purchaser.<sup>81</sup> Similarly, auctioneers cannot charge or receive any fee or commission in respect of the sale of immovable property until the purchaser and the seller have signed a written agreement in respect of the sale of the property.<sup>82</sup>

Auctioneers cannot levy any charge or fee or receive any commission where the seller defaults. Where the seller defaults and the purchaser has already paid a fee or commission to the auctioneer, the auctioneer is obliged to refund the purchaser the amount paid, including any deposit.<sup>83</sup>

#### **8.8.1 Persons disqualified from being auctioneers (Regulation 23)**

1. A person found guilty by a court of law, whether in the Republic or elsewhere, of an offence of which fraud or dishonesty is an element, or of any other offence for which the person was sentenced to imprisonment exceeding 5 years without the option of a fine.
2. A person of unsound mind.
3. An unrehabilitated insolvent.

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<sup>79</sup> Regulation 22(5)(b) – (d)

<sup>80</sup> Regulation 22(9)

<sup>81</sup> Regulation 24(a)

<sup>82</sup> Regulation 24(b)

<sup>83</sup> Regulation 24(c)

Auctioneers BEWARE!!! You must now ensure that any person who wishes to sell his property way of auction must sign a declaration stating that he or she is the owner or rightful holder of the goods.<sup>84</sup> .

### **8.8.2 Motor Vehicle auctions**

All auctions advertising the auction of a motor vehicle as defined in section 1 of the National Road Traffic Act 93 of 1996 must contain a notice containing the particulars and statements embodied in Regulation 32. This notice must be attached to the motor vehicle as soon as the motor vehicle is available for inspection by prospective bidders. The notice must contain the following information.<sup>85</sup>

- The name and business address of the auctioneer
- If the auctioneer or auction house is conducting the sale on his or their own behalf, then whether the auctioneer or auction house is liable for repairs of the motor vehicle
- If the auction of the motor vehicle is on behalf of a bank or other financial entity, then the name and address of the bank or entity and whether the dealer, bank or entity is liable to discharge the duty of repair
- If the auction is on behalf of any other person, then the name and address of the last owner of the motor vehicle or a statement that the last owner's name and address are available upon request. A statement as to whether the owner bears a duty to repair the vehicle and if so, the details of the repair
- If the owner let the vehicle on hire to another person under a vehicle leasing agreement, then the name and address of the person to whom the vehicle is leased, or alternatively, a statement advising prospective bidders that this information is available upon request
- The motor vehicle's year of manufacture, if known
- The motor vehicles year of first registration
- The vehicle's manufacturer and model designation
- The vehicle's registration number

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<sup>84</sup> Regulation 27

<sup>85</sup> Regulation 32(a) – (l)

- The vehicle's engine number
- The vehicle's identification number (VIN)
- A statement whether or not the reading of the odometer of the vehicle is guaranteed

The auctioneer must also state the reason for the auction of the motor vehicle unless the reason is the normal and voluntary disposal of the vehicle by the owner.

### **8.8.3 Livestock, game and closed auctions<sup>86</sup>**

The mandatory advertising of goods to be offered at an auction<sup>87</sup> does not apply where the auction is a closed auction<sup>88</sup> or where the auction pertains to the auction of livestock<sup>89</sup> or game<sup>90</sup> provided that in the latter instance, the auction is conducted regularly on a weekly or monthly basis. Further, for the livestock or game auction to escape the mandatory advertising requirement, the auction must not only be conducted regularly, but also at the same time and at the same place and by the same auctioneer or auction house. The auction must also be subject to the same rules of auction, and nothing but livestock or game must be offered at the auction.

## **8.9 Pyramid, Multiplication and Chain Letter Schemes**

Multiplication, pyramid and chain letter schemes are illegal in terms of the CPA. Such schemes are therefore prohibited and unlawful.

A pyramid scheme is one in which participants receive compensation primarily from their recruitment of other persons as participants, rather than from the sale of goods or services or the emphasis in the promotion of the scheme indicates that the arrangement or practice entails the recruitment of other persons as participants as the basis upon which a participant shall receive compensation.<sup>91</sup>

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<sup>86</sup> Regulation 33

<sup>87</sup> Regulation 19(1)

<sup>88</sup> A "closed auction" means an auction where the auctioneer or owner issues an invitation to take part in an auction only to a finite list of consumers

<sup>89</sup> "Livestock" means cattle, sheep, goats, pigs, horses, mules and donkeys

<sup>90</sup> "Game" means game as defined in section 1 of the Game Theft Act 105 of 1991

<sup>91</sup> Section 43(4)

A multiplication scheme is one in which a person offers, promises or guarantees to any prospective consumer, investor or participant an effective annual interest rate, as calculated in the prescribed manner, that is at least 20 per cent above the repo rate determined by the South African Reserve Bank as at the date of investment or commencement of participation, irrespective whether the consumer, investor or participant becomes a member of the lending party.<sup>92</sup>

Regulation 17 details the calculation of interest for multiplication schemes. The REPO rate is the rate which applied at the date of the investment or commencement of participation in the scheme. The effective annual interest rate is:

$$r = \frac{R \times 1200}{C \times T}$$

C x T

Where,

r = the effective interest rate

R = the interest in Rand, which is the difference between the amount paid out to the investor or participant and the amount invested

C = the amount invested by the investor or any amount paid by a person to become a member of the scheme

T = the period of the investment in months

An arrangement, agreement, practice or scheme is a chain letter scheme if –

- (a) it has various levels;
- (b) existing participants canvass and recruit new participants;
- (c) each successive newly recruited participant –
  - (i) upon joining –
    1. is required to pay certain considerations, which is distributed to one, some or all of the previously existing participants, irrespective whether the new participant receives any goods or services in exchange for that consideration; and

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<sup>92</sup> Section 43(3)

2. is assigned to the lowest level of participation in the scheme;  
and
- (ii) upon recruiting further new participants, or upon those new participants recruiting further new participants, and so on in continual succession –
1. may participate in the distribution of the consideration paid by any such new recruit; and
  2. moves to a higher level within the scheme, until being removed from the scheme after reaching the highest level.<sup>93</sup>

## **Chapter 9: Right to Fair, Just and Reasonable Terms and Conditions**

### **9.1 Unfair, Unjust or Unreasonable Transactions**

Suppliers must not offer to supply, supply or enter into an agreement to supply goods or services at an unfair, unjust or unreasonable price or on terms that are unfair, unjust or unreasonable.<sup>94</sup> Suppliers are also prohibited from marketing any goods or services in an unfair or unjust manner.<sup>95</sup>

Suppliers cannot also require that a consumer waives any rights, assumes any obligations or limit the supplier's liability on terms that are unfair, unreasonable or unjust.<sup>96</sup>

Terms, conditions, agreements and transactions shall be deemed to be unfair, unreasonable or unjust if it excessively favours another person other than the consumer to whom the goods or services are supplied. Further, terms or conditions that are adverse to the consumer in that they are inequitable shall also be deemed to be unfair, unreasonable or unjust as shall false, misleading or deceptive representations. Deceptive and misleading representations include words or conduct on the part of the supplier concerning a material fact; the usage of exaggeration, innuendo or ambiguity and the omission of a supplier to disclose a material fact if such omission amounts to deception. Suppliers are also obliged to correct any misapprehension that a consumer has concerning the goods or services

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<sup>93</sup> Section 43(5)

<sup>94</sup> Section 48(1)

<sup>95</sup> Section 48(1)(b)

<sup>96</sup> Section 48(1)(c)



supplied, and failure to do so shall amount to false, misleading or deceptive representation.<sup>97</sup>

Any provision or notice that limits the supplier's liability must be specifically drawn to the consumer's attention and must be in plain language.<sup>98</sup> Moreover, if the provision or notice concerns an activity or facility that is subject to risk of an unusual character or nature or an activity or facility that could result in serious injury or death, then the supplier must specifically draw the fact, nature and potential effect of that risk to the consumer's attention.<sup>99</sup> The consumer must also be afforded a reasonable opportunity in the circumstances to receive and comprehend the provision or notice.<sup>100</sup>

Hence, any provision that limits the supplier's liability or constitutes an assumption of risk by the consumer or purports to be an acknowledgement of any fact by the consumer must be drawn to the consumer's attention prior to the consumer entering into the transaction or agreement, or prior to the consumer engaging in the hazardous activity. This notice or provision must be in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer.<sup>101</sup>

Prior to the implementation of the CPA, our courts often found that provisions whereby one person limited his or her liability must be in plain language and be detailed in a conspicuous manner. In *Mercurius Motors vs Lopez* 2008(3)SA 572(SCA) a motor car repairer was found liable for the theft of a customer's motor vehicle despite the customer having signed a contract that contained provisions limiting the motor car repairers liability for the theft of the motor vehicle. The decision in this case has now been formalized and entrenched in section 49 of the CPA.

## **9.2 Written Consumer Agreements**<sup>102</sup>

The Minister of Trade and Industry may prescribe categories of consumer agreements that must be in writing. If the agreement is in writing, this section applies even if the consumer

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<sup>97</sup> Section 48(2)(c) read with section 49(1)

<sup>98</sup> Section 49(1)

<sup>99</sup> Section 49(2)

<sup>100</sup> Section 49(5)

<sup>101</sup> Section 48(4)

<sup>102</sup> Section 50

has not signed the agreement. Further, the supplier is obliged to provide the consumer with a free copy, or free electronic access to a copy of the agreement. This copy of the agreement must be in plain and understandable language and must detail the consumer's financial obligations.

If the consumer agreement or transaction is not in writing, the supplier must keep a record of transactions entered into over the telephone.

### **9.3 Prohibited Transactions, Agreements, Terms or Conditions<sup>103</sup>**

The following terms or conditions are prohibited:

- A provision or term that defeats the purposes and policy of the CPA
- A provision or term that is misleading or deceptive
- A provision that subjects the consumer to fraudulent conduct
- A provision that directly or indirectly waives or deprives a consumer of a right entrenched in the CPA
- A provision that avoids a supplier's duty in terms of the CPA
- A provision that sets aside or overrides the effect of any provision contained in the CPA
- A provision that authorizes the supplier to do anything that is unlawful in terms of the CPA
- A provision that limits or exempts a supplier of goods or services from liability for any loss attributable to the supplier's gross negligence
- A provision that results from an offer made during the course of negative option marketing
- A provision that imposes an obligation on the consumer to pay for damage or assume the risk of handling any goods displayed by the supplier (the consumer is only liable for any loss or damage that results from gross negligence or recklessness on the consumer's part.<sup>104</sup>

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<sup>103</sup> Section 51

<sup>104</sup> Section 18(1) read with section 51(1)(c)(iii)

Section 120(d) of the CPA empowers the Minister to make regulations relating to unfair, unreasonable or unjust contract terms. The Minister has in fact made these regulations that are now detailed in Regulation 44. Regulation 44 gives a list of contract terms which are presumed not to be fair or reasonable. This list is only indicative in that the list may contain a term that is in fact fair when one has regard to the particular circumstances of the case<sup>105</sup> and the list is not exhaustive of all terms that shall be deemed to be fair or unreasonable.<sup>106</sup>

Terms that shall be presumed to be unfair and unreasonable:

1. A term that limits the supplier's liability for death or personal injury to the consumer;
2. A term that excludes or restricts the consumer's rights or remedies against the supplier in the event that the supplier breaches any part of the agreement, including the consumer's right to set off a debt owed to the supplier against any claim which the consumer has against the supplier;
3. A term that limits the supplier's obligation to honour his or her obligations or that of an agent subject to compliance with a particular condition which depends exclusively on the supplier;
4. A term that limits the supplier's vicarious liability for its agents;
5. A term that compels the consumer to indemnify the supplier against liability incurred by it to third parties;
6. A term that excludes or restricts the consumer's right to rely on the statutory defence of prescription
7. A term modifying the normal rules regarding the distribution of risk to the consumer's detriment;
8. A term that allows the supplier to increase the price agreed with the consumer when the agreement was concluded without giving the consumer the right to terminate the agreement. Such terms are however permissible in transactions concerning transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control. Suppliers in agreements for the

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<sup>105</sup> Regulation 44(2)(a)

<sup>106</sup> Regulation 44(2)(b)

purchase or sale of foreign currency, traveler's cheques and international money orders may also increase the agreed price without giving the consumer the right to terminate the agreement.<sup>107</sup>

9. A term that gives the supplier the right to determine whether the goods or services supplied conform with the agreement or gives the supplier the exclusive right to interpret any term of the agreement;
10. A term that allows the supplier to terminate the agreement at will where the same right is not granted to the consumer. However, this does not apply to a term in terms of which a supplier of financial services reserves the right to unilaterally terminate an open-ended agreement without notice.<sup>108</sup>
11. A term that allows the supplier to terminate an open-ended agreement without reasonable notice except where the consumer has committed a material breach of contract;
12. A term that obliges a consumer to fulfill all his or her obligations where the supplier has failed to fulfill all his or her obligations;
13. A term that permits the supplier to avoid or limit performance of the agreement;
14. A term permitting the supplier, but not the consumer, to renew or not renew the agreement;
15. A term that allows the supplier an unreasonably long time to perform;
16. A term that allows the supplier to retain a payment by the consumer where the consumer fails to conclude or perform the agreement, without giving the consumer the right to be compensated in the same amount if the supplier fails to conclude or perform the agreement (without depriving the consumer of the right to claim damages as an alternative);
17. A term that requires the consumer who fails to fulfill his or her obligation to pay damages which significantly exceed the harm suffered by the supplier;

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<sup>107</sup> Regulation 44(3)(h) read with Regulation 44(4)(b)

<sup>108</sup> Regulation 44(3)(k) read with Regulation 44(4)(a)

18. A term that permits the supplier, upon termination of the agreement to demand unreasonably high remuneration for the use of a thing or right, or to demand unreasonably high reimbursement;
19. A term that allows the supplier to transfer his or her obligations under the agreement to the consumer's detriment without the consumer's agreement;
20. A term that restricts the consumer's right to resell the goods by limiting the transferability of any commercial guarantee provided by the supplier;
21. A term that limits the legal period available to a consumer to take legal action against the supplier;
22. A term that entitles the supplier to claim legal or other costs on a higher scale than usual;
23. A term that provides that a law other than that of the Republic shall apply to the consumer agreement.

Further, terms that provide that a consumer is deemed to have made or not made a statement or acknowledgement to his or her detriment are permissible to the extent that the consumer is afforded a suitable period of time to make such a statement or acknowledgement and the supplier must have drawn the consumer's attention to the meaning that shall be attached to the statement or acknowledgement.<sup>109</sup>

Terms that unilaterally enable the supplier to alter the terms of an agreement or the characteristics of the product or service are also deemed to be unfair and unreasonable.<sup>110</sup>

However, such a term is permissible where a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or where the term allows for changes in the amount of other charges for financial services. The supplier of the financial services would then be obliged to immediately inform the consumer of the change in the interest rate or other charges. The consumer would then be free to dissolve the agreement at the earliest opportunity.<sup>111</sup>

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<sup>109</sup> Regulation 44(3)(v)

<sup>110</sup> Regulation 44(3)(i)

<sup>111</sup> Regulation 44(3)(i) read with Regulation 44(c)(i)

#### **9.4 Powers of the Court to ensure Fair and Just Conduct, terms and Conditions**<sup>112</sup>

Where a court finds that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, the court may make an order that is just and reasonable in the circumstances.<sup>113</sup> The court would be obliged to consider those circumstances that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made and the principles, purposes and provisions of this Act *irrespective of whether the CPA was in force at that time.*”

Such orders include the following:<sup>114</sup>

- An order that any money or property be restored to the consumer;
- An order that the consumer is compensated for losses or expenses relating to the transaction or the proceedings of the court.
- An order that the supplier ceases any practice, or alters any practice, form or document so as to avoid repetition of the supplier’s conduct.

Where a provision or term is found to be unlawful, the court may make an order that the unlawful term or provision is severed from the agreement thereby rendering the rest of the transaction or agreement lawful and binding on the supplier and consumer. Where it is not reasonable to sever the offending provision or notice, the court may declare the entire agreement, provision or notice void as from the date that it purportedly took effect.<sup>115</sup> The court may also make any other order that that is just and reasonable in the circumstances.

### **Chapter 10: Quality and Safety of Goods**<sup>116</sup>

#### **10.1 The Consumer’s Right to Good Quality and Safe Goods**

“Every consumer has a right to receive goods that:<sup>117</sup>

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<sup>112</sup> Section 52

<sup>113</sup> Section 52(3)

<sup>114</sup> Section 52(4)

<sup>115</sup> Section 52(4)

<sup>116</sup> Section 55

<sup>117</sup> Section 55(2)

- (a) are reasonably suitable for the purposes for which they are generally intended;
- (b) are of good quality, in good working order and free of any defects;
- (c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and
- (d) comply with any applicable standards set under the Standards Act.”

Unless a consumer has been expressly informed and expressly accepted goods that are not of a good quality, the consumer has the right to receive goods that are reasonably suitable for the purposes for which they are generally intended, good quality, good working order, free of defects or hazards, useable and durable for a reasonable period having regard to the normal use and the surrounding circumstances of their supply or lease. The consumer also has the right to comply with the mandatory standard set under the Standards Act No 29 of 1993. In determining whether goods supplied meet the aforementioned criteria, the manner in which, and the purposes for which, the goods are marketed and packaged, the use of any trade description or mark, any instructions for use, or any warnings for use; what the goods will be used for and the time when the goods were manufactured and supplied.

The safety of goods the components, ingredients or raw materials from which the goods are made and the risk of injury or death posed by such goods or damage to property. Producers and distributors are prohibited from producing and distributing unsafe goods.

To determine whether the goods supplied to the consumer were in fact reasonably suited for the purposes for which they are generally intended and were of good quality, all of the circumstances surrounding the supply of those goods must be considered, including:<sup>118</sup>

- the manner in which and the purposes for which the goods were marketed, packaged and displayed, including the use of any trade description or mark;
- any warnings or instructions for the usage of the goods that were given to the consumer;
- the range of things that might reasonably be anticipated to be done with or in relation to the goods;
- the time when the goods were produced or supplied.

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<sup>118</sup> Section 55(4)

Where the goods are found to not be safe or found not to be of good quality, the supplier cannot claim that the product failure, defect or hazard was latent or patent or that consumer should have detected such failure or defect before taking delivery.<sup>119</sup> Further, the fact that “safer goods” or better goods later become available does not necessarily mean that the goods the consumer purchased previously are defective or likely to fail.<sup>120</sup> cannot avail the consumer who previously purchased the earlier versions of the goods, of the right to fair value, good quality and safety.

If the consumer informs the supplier of a particular purpose or purposes for which the goods shall be used, the goods so supplied should be reasonably suitable for such purpose.

### **10.2 Limitations on the Right to receive Safe and Good Quality Goods**

The consumers right to receive goods that are reasonably suitable for the generally intended purposes does not apply if the consumer has been expressly informed or advised that the particular goods are offered in a specific condition and, the consumer has expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition.<sup>121</sup>

### **10.3 Important Definitions concerning Warranties<sup>122</sup>**

**“Defect”** includes any “material imperfection in the manufacture of the goods or components, or in the performance of the services ... or a characteristic that renders the goods less useful, practicable or safe.”

**“Failure”** refers to instances where the goods fail to perform in the intended manner or intended effect.

**“Hazard”** means a characteristic that –

- (iii) has been identified as, or declared to be, a hazard in terms of any other law;
- or

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<sup>119</sup> Section 55(5)(a)

<sup>120</sup> Section 55(5)(b)

<sup>121</sup> Section 55(6)

<sup>122</sup> Section 53



(iv) presents a significant risk of personal injury to any person, or damage to property, when the goods are utilized.

**“Unsafe”** means that, due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.

#### **10.4 Implied Warranty of Quality**<sup>123</sup>

In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods are safe and of good quality. This warranty is an implied provision in any transaction or agreement provided the goods have not been altered or modified in any manner contrary to the instructions of the producer, importer, distributor or retailer.

The implied warranty is in addition to any other implied warranty imposed by the common law or any other public regulation as well as any express warranty or condition that the consumer has in respect of the goods.<sup>124</sup> This warranty is valid for a period of six months. The six month period is calculated from the date of delivery of the goods to the consumer. During this period, the consumer may return the defective goods without penalty and at the supplier’s risk and expense.<sup>125</sup>

When a consumer relies upon the implied warranty of quality when returning the goods, the consumer has the election as to whether the supplier must repair or replace the goods, or whether the supplier should merely refund the consumer the price paid for the goods.<sup>126</sup>

In addition to the right to return the defective goods to the supplier, the consumer may also demand that the supplier repairs or replaces the goods. Where the goods are repaired and within three months of repair the failure or defect is not remedied or another failure or defect arises, the supplier must replace the goods or refund the consumer the price paid by the consumer for the goods.<sup>127</sup>

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<sup>123</sup> Section 56 read with section 55

<sup>124</sup> Section 56(4)

<sup>125</sup> Section 56(2)

<sup>126</sup> Section 56(2)(a) – (b)

<sup>127</sup> Section 56(3)

The implied warranty entrenched in the CPA is in addition to any other implied warranty or condition imposed by the common law or any other public regulation, and, is in addition to any express warranty or condition given by the producer or importer, distributor or retailer.

#### **10.5 Warranty on Repaired Goods**<sup>128</sup>

Previous drafts of the CPA provided that a service provider warrants every new or re-conditioned part installed during repair or maintenance work for a period of six months after the date of installation. This period has now been reduced to three months after the date of installation or such longer period as the supplier may specify in writing.

This warranty on repaired goods is concurrent with any other deemed, implied or express warranty. However, the warranty on repaired goods will be void if the consumer has subjected the part, or the goods or property in which it was installed, to misuse or abuse. Moreover, the warranty on repaired goods does not apply to ordinary wear and tear, having regard to the circumstances in which the goods are intended to be ordinarily used.<sup>129</sup>

#### **10.6 Potentially Hazardous Activities and Facilities**

Suppliers of any activity or facility that poses a risk of an unusual character or nature or a risk that may result in serious injury or death must inform consumers of the risk. In doing so, the supplier must specifically draw the fact, nature and potential effect of the risk to the consumer's attention. This must be done in a form and manner that meets the standards set out in section 49.<sup>130</sup> The consumer must then have consented or otherwise assented to the notice either by signing or initialing the notice or acted in a manner consistent with the acknowledgement of the notice, awareness of and acceptance of the risk.

From the above, it is evident that suppliers of hazardous activities and facilities must fully inform consumers of the risk of any potential injury or death and must do so in a conspicuous manner that is likely to attract the attention of an ordinarily alert consumer. Once again, the circumstances in which the activity is performed or the facility run shall be taken into account. Further, the consumer must be seen to have been aware of the risk and accepted the risk. This duty on suppliers also exists where an activity or facility is subject to

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<sup>128</sup> Section 57

<sup>129</sup> Section 57(2)

<sup>130</sup> Section 58(1)

**any** risk, the presence of which the consumer could not reasonably be expected to be aware of or notice.

Consumers must be informed before entering into the transaction or agreement or before they engage in the activity or enter or gain access to the facility or before tendering consideration for the transaction or agreement. The consumer must also be given an adequate opportunity in the circumstances to receive and understand the notice.<sup>131</sup>

Further, any notice or provision in a consumer agreement that limits the risk or liability of the supplier or any other person must be brought drawn to the consumer's attention. This applies to any notice or provision that constitutes an assumption of liability or risk by the consumer or a mere statement purporting to be an acknowledgement of any fact by the consumer.

If a provision or notice concerns an activity or facility that poses a risk of "an unusual character or nature" or a risk of which the consumer was not aware of or a grave risk that may result in serious injury or death, the supplier must specifically draw the fact, nature and potential effect of that risk.

Similarly, packagers of potentially hazardous goods must provide the consumer with instructions for the safe handling and use for such goods.<sup>132</sup> The packager is also obliged to provide safe handling instructions and safety disposal instructions where goods contain any hazardous ingredients or components. It is important to note that such hazards include goods/ingredients that "present a chemical or biological hazard to humans or the environment." The person who installs any hazardous goods must give the consumer the original copy of the document furnished by the packager or any other similar document in terms of another public regulation.<sup>133</sup>

### **10.7 Disposal of Hazardous or Dangerous Products**<sup>134</sup>

If public regulation prohibits the disposal of certain goods, containers or packaging into a common waste disposal system, the supplier must accept the return of the goods from the consumer, without any charge to the consumer. Similarly, the person who supplied the

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<sup>131</sup> Section 58(1) read with section 49

<sup>132</sup> Section 58(2)

<sup>133</sup> Section 58(4)

<sup>134</sup> Section 59

goods to the supplier, that is, the manufacturer or importer must accept the returned goods from the supplier.

#### **10.8 Paving the Way for the Supply of Safe and Reliable Goods**

The National Consumer Commission is obliged to develop, adopt and apply industry-wide codes of practice designed to receive consumer complaints and reports of product failures, defects or hazards. These industry codes of practice must address instances where consumers return goods because of a failure, defect or hazard and instances where personal injury, illness or damage to property results from the goods.

The National Consumer Commission shall then monitor and analyse the complaints and reports received in a bid to detect and identify any potential risk posed to the public from the use of and exposure to the goods. The Commission may conduct investigations into the extent and degree of the risk posed to the public and notify consumers of the extent and nature of risk pertaining to the goods. Where the goods are found to be unsafe, the Commission may also recall those goods for repair, replacement or refund.

Where a producer or importer fails to take any steps required by any prescribed industry code of practice, the Commission may give written notice to the producer, calling upon them to conduct an investigation into the consumer's complaint or to carry out a recall programme. A producer or importer affected by such a notice, may apply to the National Consumer Tribunal to set aside the notice in its entirety or in part.

Section 60 deals with the safety monitoring and recall. It provides the following:

(1) The Commission must promote ... the development, adoption and application of industry-wide codes of practice providing for effective and efficient systems to –

(a) receive notice of –

- (i) consumer complaints or reports of product failures, defects or hazards;
- (i) the return of any goods because of a failure, defect or hazard;
- (ii) personal injury, illness or damage to property caused wholly or partially as a result of a product failure, defect or hazard.”

The Commission is also tasked with conducting investigations into the nature, causes, extent and degree of the risk to the public as well as notifying consumers of the nature, causes, extent and degree of the risk pertaining to those goods. The Commission must also notify

consumers if the goods are unsafe and recall those goods for repair, replacement and refund.

If the Commission on has reasonable grounds to believe that any goods may be unsafe, or that there is a potential risk to the public from the continued use of or exposure to the goods, and the producer or importer of those goods has not taken any steps required by an applicable code promoted by the Commission, the Commission, by written notice, may require the producer to:<sup>135</sup>

- (a) conduct an investigation as to the failure, defect or hazard; or
- (b) carry out a recall programme on any terms required by the Commission.

A producer or importer affected by such a notice may apply to the Tribunal to set aside the notice in whole or in part.

### **10.9 The Issue of Strict Liability**

The CPA imposes strict liability on producers, importers, distributor or retailer for supplying unsafe goods. Strict liability is also imposed in respect of product failure, defective and hazardous goods.<sup>136</sup> This liability shall also arise where a consumer is given inadequate instructions or warnings pertaining to any hazard that is likely to arise from the usage of the goods. Liability is said to be “strict” as a producer, importer, distributor or retailer shall be held liable irrespective of “whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer.” Such liability is joint and several and extends to suppliers of services whose rendering of services necessitates the application, supply, installation or provision of access to goods.

If we look at the protection afforded to consumers in England, we find that strict liability is only imposed on the producer of goods. Section 2(2)(b) of the Consumer Protection Act of 1987 provides that strict liability is imposed on “any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product.” This means that the protection afforded to consumers in South Africa in respect of defective, hazardous goods is much wider than that found in other jurisdictions. As such, consumers who purchase such goods may have recourse against the producer or importer, distributor or retailer. A consumer may therefore

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<sup>135</sup> Section 60(2)

<sup>136</sup> Section 61

recover from either the producer or importer and the distributor or retailer.<sup>137</sup> The harm for which the consumer seeks damages need not be wholly attributable to the fact that the goods are unsafe, defective or hazardous or the fact that inadequate instructions were given as it also includes consequential harm.

#### **10.10 Instances Where Strict Liability is Excluded:-**

1. The unsafe product characteristic, failure, defect or hazard that causes the harm is wholly attributable to compliance with any public regulation;
2. At the time the goods were supplied to another person alleged to be liable or at the time the goods were supplied to the consumer, the goods were safe and fully functional and free from the alleged defect or hazard.
3. Where it is unreasonable to expect the retailer or distributor to have discovered that the goods were unsafe, defective, hazardous or likely to fail. In determining what is unreasonable, the distributor or retailers role in the marketing of the goods to consumers shall be of paramount importance.
4. The claim for damages has prescribed. Such a claim prescribes three years after –
  - (i) the death or injury attributed to the goods;
  - (ii) A person learns of the material facts of any illness attributable to the goods; or
  - (iii) A person with a legal interest in any property has knowledge of the material facts concerning loss or damage to that property; or
  - (iv) The latest date on which a person suffered economic loss alleged to be as a result of the purchase of the goods.

#### **10.11 What Harm is the Producer or Importer, Distributor or Retailer Liable for?**

Producers or importers, distributors or retailers are liable for the death of, or illness or injury to any natural person. Loss of, or physical damage to any immovable or movable property may also be recouped as may any economic loss that resulted from the defective, unsafe or hazardous goods.

The court in adjudicating a claim for damages shall assess whether the harm has been proven and adequately mitigated. Where it has been, the court shall then determine the extent and monetary value of any damages, including economic loss, and may apportion liability among persons found to be jointly and severally liable for the ensuing harm.

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<sup>137</sup> Section 61(1)

## **Chapter 11: Supplier's Accountability to Consumers**

### **11.1 Lay-bys**<sup>138</sup>

A lay-by is an agreement in terms of which the supplier enters into an agreement with a consumer to accept the payment for goods installments over a period of time. Such installments paid by the consumer are to be held in trust for the consumer's benefit. The goods that are the subject of a lay-by agreement remain at the supplier's risk until the consumer takes possession.

If the supplier is unable to deliver the goods once the consumer has paid the full price, the supplier must, at the consumer's option either:<sup>139</sup>

1. supply the consumer with an same quantity of goods that are comparable or superior in description, design and quality, or
2. Where the supplier is not able to supply goods due to reasons beyond his control, then to refund to the consumer the money paid, with interest at the prescribed rate or
3. Refund the consumer double the amount paid by the consumer, as compensation for breach of contract

If a consumer terminates or rescinds a lay-by agreement before paying the full purchase price, or fails to make full payment within 60 business days after the anticipated date of completion, the supplier may charge a cancellation penalty provided the penalty and extent of the penalty was disclosed to the consumer before the consumer entered into the agreement. The penalty must be reasonable and must not exceed one percent of the full purchase price of the goods.<sup>140</sup> On cancellation, the supplier must give the consumer written details on how the penalty was calculated, upon the consumer's request, unless the consumer waives this right in writing.<sup>141</sup>

### **11.2 Prepaid Certificates, Credits and Vouchers**<sup>142</sup>

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<sup>138</sup> Section 62

<sup>139</sup> Section 62(2)

<sup>140</sup> Regulation 34(1)

<sup>141</sup> Regulation 34(2)

<sup>142</sup> Section 63

Suppliers may issue prepaid certificates, cards, credit or vouchers or similar to persons in exchange for consideration e.g. payment. The basis of such issue is that the supplier undertakes to provide goods or services to any person who later presents such device up to the value represented by such device.

Such a supplier must hold all the consideration paid for such devices in a trust and is only permitted to make a charge against that trust when, and to the extent that the device is presented as consideration for goods or services supplied to or on behalf of a consumer. The person in possession of such a device is therefore a beneficiary of the trust to the extent of the value of such device.

### **11.3 Supplier's to hold and account for consumer's property<sup>143</sup>**

When a supplier is in possession of a consumer's property or property that is ordinarily under the consumer's control, the supplier must not treat that property as being the property of the supplier. The supplier must exercise the degree of care, diligence and skill that can be reasonably expected of a person responsible for managing any property belonging to another person. The supplier is liable to the owner of the property for any loss resulting from a failure to discharge this obligation.<sup>144</sup> It is therefore debatable as to whether such property, in the event that the property is money, be held in trust for the benefit of the consumer, in terms of the Trust Property Act No 57 of 1988. If so, this would mean that monies held for consumers in trust for at least 40 business days will earn interest at a rate in accordance with the Prescribed Rates of Interest Act.

The supplier's duty to hold and account for consumer's property extends to any prepayment, deposit, membership fee, or other money or any other property belonging to or ordinarily under the consumer's control.<sup>145</sup>

### **11.4 Deposits paid for Containers or similar Objects<sup>146</sup>**

The Minister may prescribe regulations regarding a minimum or maximum deposit that a supplier must or may require a consumer to pay. Such a deposit will be paid by the

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<sup>143</sup> Section 65(2)

<sup>144</sup> Section 65(2)(a) –(c)

<sup>145</sup> Section 65(2)

<sup>146</sup> Section 66



consumer to the supplier in respect of a bottle, container, pallet, reel, or similar object and will be paid back to the consumer upon the consumer's return of such an object. Any supplier that sells any of the objects shall refund the consumer the deposit upon the consumer's return of that object irrespective of whether the person returning that object paid the deposit to that particular supplier.

### **11.5 Return of Parts and Materials**<sup>147</sup>

If a supplier performs any services to a consumer's goods or property, the supplier must return any parts or components removed to the consumer. The parts or components must be returned in a reasonably clean container. The supplier is exempt from having to do so if the consumer has declined the return of the parts or materials.

Parts or material that have to be returned to a manufacturer or distributor in terms of a warranty or disposed of in terms of an insurance claim or disposed in a safe manner do not have to be returned to the consumer.

## **Chapter 12: Protection of Consumer's Rights**

### **12.1 Consumers Right to Be heard and Obtain Redress**<sup>148</sup>

The fact that a consumer exercise a right in terms of the CPA, cannot result in that cannot result in that consumer being discriminate against or penalized or an agreement of which the consumer is a party be altered to the consumer's detriment. Similarly, a supplier is prohibited from altering or proposing to alter, the terms or conditions of a transaction or agreement with the consumer, to the detriment of the consumer, merely because the consumer exercises or seeks to exercise a right entrenched in the CPA. Suppliers cannot take any action to accelerate, enforce, suspend or terminate an agreement with a consumer merely because a consumer has exercised, asserted or sought to uphold any right entrenched in the CPA or in the agreement.<sup>149</sup>

Where an agreement or provision contained in an agreement is found to be void, the supplier cannot as a result directly or indirectly penalize any other party to that agreement or

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<sup>147</sup> Section 67

<sup>148</sup> Section 68

<sup>149</sup> Section 68(1)(a) – (d)

transaction. The supplier cannot alter the terms or conditions of the agreement except to the extent necessary to correct the unlawful void provision.<sup>150</sup>

## **12.2 Enforcement of the CPA**

The persons detailed in section 4(1) are the persons that have the *locus standi*, or legal right, to enforce any right entrenched in the CPA. Such persons may:<sup>151</sup>

- (a) Refer the alleged contravention directly to the National Consumer Tribunal, provided direct referral to the Tribunal in the particular instance is permitted in terms of the CPA;
- (b) Refer the alleged contravention to the applicable ombud with jurisdiction if the supplier is subject to the jurisdiction of the ombud;
- (c) Where the matter is not subject to the jurisdiction of a particular ombud, the matter may be referred to the applicable industry ombud accredited in terms of section 82(6) if the supplier is subject to any such ombud;
- (d) Apply to the consumer court of the province with jurisdiction over the matter, if such consumer court has been established;
- (e) Refer the matter to another alternative dispute resolution agent contemplated in section 70;
- (f) File a complaint with the National Consumer Commission in accordance with section 71;

Alleged contraventions may also be referred to a court with jurisdiction over the matter provided all other remedies have been exhausted.<sup>152</sup>

## **12.3 Initiating Complaints to the National Consumer Commission**

Section 71 deals with initiating complaints to Commission. It provides that any person may file a complaint with the Commission in the prescribed manner and form, alleging that a person has acted in a manner inconsistent with this Act. The Commission may directly initiate a complaint concerning any alleged prohibited conduct on its own motion, or:

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<sup>150</sup> Section 68(2)

<sup>151</sup> Section 68(a) – (c)

<sup>152</sup> Section 69(d)

- (a) when directed to do so by the Minister in terms of section 86(b); or
- (b) on the request of –
  - a provincial consumer protection authority;
  - another regulatory authority; or
  - an accredited consumer protection group

Group or collective action via a consumer protection body accredited by the Commission is therefore possible.

The Commission may issue a notice of non-referral to the complainant, in the prescribed form, if the complaint appears to be frivolous or vexatious. A notice of non-referral may also be issued where the facts alleged in the complaint do not constitute grounds for a remedy under the CPA or where the complaint is made more than three years after the alleged contravention.<sup>153</sup>

Where the Commission finds that there is “merit” in the complaint, the Commission may refer the complaint to an alternative dispute resolution agent, a provincial consumer protection authority or to a consumer court in a bid to have the parties to the complaint resolve the dispute by way of alternative dispute resolution.<sup>154</sup> The complaint can also be referred to another regulatory authority with jurisdiction over the matter or to an inspector from the National Consumer Commission’s office with the task of investigating the complaint as quickly as practicable.<sup>155</sup>

Regulation 35(1) read with section 71 of the Act provides that any person may submit information concerning an alleged contravention or instance of non-compliance in terms of or under the Regulations to the Commission. Such submission can be made in any manner and form.

Complaints regarding alleged contraventions or instances of non-compliance can also be submitted on the form contained in Annexure “E”, together with certified copies of any documents that the Commission should consider, by mailing it to or delivering it by hand to, or filing it electronically or e-mailing it to the Commission.

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<sup>153</sup> Section 72(1) read with Section 116

<sup>154</sup> Section 72(1)(b)

<sup>155</sup> Section 72(1)(c) and (d)

The Commission may also initiate its own investigation into an alleged contravention or non-compliance of the Act.

Upon receiving a complaint, the Commission must direct an inspector to investigate the complaint as quickly as practicable. The Commissioner may appoint one or more persons to assist the inspector at any time during the investigation.

The Commission must as often as may be reasonable inform the complainant of progress or other developments in the investigation and, upon completion of the investigation, the Commissioner must give a written account of the outcome of the investigation. If the Commissioner is not taking the matter further, then the reasons for its decision not to do so must also be included in the written account.

#### **12.4 Outcome of Investigation by the Commission**

Dispute resolution may result in a consent order, that is, the dispute is resolved by means of an agreement and the parties consent to the agreement being made an order. The agreement would then be submitted to a Court or the National Consumer Tribunal to confirm that agreement as a consent order.<sup>156</sup>

Upon receipt of the agreement, the Tribunal or court may make an order as agreed to and proposed by the Commission and the respondent or indicate any changes that must be made in the draft order before making the order. The Tribunal or Court may refuse to make the agreement an order.<sup>157</sup>

With the complainants consent, a consent order may include an award of damages to the complainant.<sup>158</sup>

#### **12.5 Investigation by the Commission**

Section 73 details the various outcomes of investigation that the Commissioner may give. The Commission may issue a notice of non-referral to the complainant in the prescribed form. Alternatively, the Commission may refer the matter to the National Regulatory Authority if the Commission alleges that after its investigation, it is apparent or evident that an offence in terms of the CPA has been committed.

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<sup>156</sup> Section 74(1)

<sup>157</sup> Section 74(2)(a) –(c)

<sup>158</sup> Section 74(3)

Where the Commission believes that the offence concerned entails an infringement of the consumer's right of equality in the consumer market (that is, the right set out in Part A of Chapter 2), then the Commission may refer the matter to the Equality Court.

In other instances of an alleged contravention of the Act, the Commission may propose a draft consent order in terms of section 74. Consent orders are a possible resolution of a dispute where a matter has been investigated by the Commission, and the Commission and the respondent agree to certain terms that can be deduced to an agreement and subsequently, formalized as a consent order issued by the National Consumer Tribunal or a court (N.B: the CPA defines a "court" as follows a "court does not include a consumer court."

The Commission may also refer an alleged contravention to the consumer court of the provinces in which the supplier has its principal place of business if there is a consumer court in that particular province (section 73(2)). The Commission is likely to refer matters to the consumer court where it believes that the matter can be dealt with "expeditiously and fully by such referral".<sup>159</sup>

Where a matter is referred to a consumer court, any party to that referral may apply to the Tribunal in the prescribed manner and form and within the prescribed time, for an order that the matter be referred to the Tribunal. The Tribunal may then order that the matter be referred to it instead of the consumer court "if the balance of convenience or interests of justice so require".<sup>160</sup>

Consumer courts are obliged to conduct their proceedings in a manner consistent with the requirements applicable to hearings of the Tribunal and may make any order that the Tribunal could have made after hearing that matter.<sup>161</sup> Orders issued by a consumer court have the same force and effect as orders issued by the Tribunal.

If the Commission finds a complaint is frivolous or vexatious, or the complaint does not allege any facts which if true would be grounds for a remedy under the CPA, the Commission may issue a notice of non-referral in the prescribed form. The form has been prescribed and is contained in Annexure F of the Regulations. Such a notice is also issued

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<sup>159</sup> Section 73(2)(a)(ii)

<sup>160</sup> Section 73(4)

<sup>161</sup> Section 73(5)

where the act or omission that is the cause for the complaint is more than three years after the occurrence of the act or omission.<sup>162</sup>

Where the Commission issues a notice of non-referral in response to a complaint (other than the instances where the notice of non-referral was issued due to the 3 year lapse), then the complainant may refer the matter directly to the consumer court, if any, in the province within which the complainant resides, or in which the respondent has its principal place of business, Alternatively, the complainant may refer the matter to the National Consumer Tribunal, with the leave of the Tribunal.

Where a notice of non-referral has been issued and the complainant has elected to refer the complaint to a consumer court, the respondent concerned may apply to the Tribunal for an order that the matter be referred to the Tribunal. Such referral must be in the prescribed form. In fact, all referrals to the Tribunal whether from the respondent or the Commission, must be in the prescribed form.

Instances of alleged contravention may also be referred directly to the National Consumer Tribunal by the Commission.<sup>163</sup>

## **12.6 Consumer Protection Groups**

Accredited consumer protection groups may protect individual consumer interests or the interest of consumers collectively in any matter or before any forum contemplated in the CPA. Such groups may intervene in any matter before any forum contemplated in the Act, if the interests of consumers represented by that group are not adequately represented in that forum.

Accredited consumer protection groups may direct a generally stated concern or complaint to the Commission in respect of any matter within the purposes of the CPA.

The National Consumer Commission may accredit a consumer protection group if that person or association:

- (1) functions predominantly to protect or represent the interests of all or a specified category of consumers generally;
- (2) is committed to achieving the purposes of the CPA and

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<sup>162</sup> (section 72(1)(a)(ii) read with section 116)

<sup>163</sup> Section 73(2)(b)

(3) engages in, or makes a realistic proposal to engage in actions to promote and advance consumer's interests.

The Commission is obliged to monitor the effectiveness of any accredited consumer protection group and may reasonably require any such group to provide information necessary for the purposes of monitoring the group's effectiveness. The Act provides that the Minister may prescribe the standards, procedures and related matters for the Commission to follow in assessing whether an applicant for accreditation meets the requirements of this section.

### **Regulation 38**

In deciding whether to accredit an applicant as a consumer protection group, the purposes and policy of the Act must be considered by the NCC. As previously considered, one of the main purposes of the Act is to reduce and ameliorate the disadvantages experienced by low-income consumers when assessing any supply of goods or services. It is also envisaged that the Act shall reduce the disadvantages experienced by potential consumers who live in remote, isolated or low-density population communities as well as to protect consumers that are minors, seniors or other similarly vulnerable consumers (Section 3).

Therefore when deciding whether to accredit a group, the Commission shall consider the group's ability to sustainably provide a service to historically disadvantaged, low-income consumers in rural or peri-urban areas and the efficiency and effectiveness of the applicant in promoting the consumers interests. The applicant's infrastructure and support mechanisms to function and fulfill its intended purposes shall also be considered. The applicant to such an application must also detail the procedures and processes it shall employ to determine whether to litigate on behalf of consumers and any other relevant factors. If the applicant has a potential conflict of interest in establishing and running such a group, then the applicant must detail its strict policy on conflict of interest and, must further stipulate if it has or holds any interest of whatever nature, whether directly or indirectly, in any company operating in the industry within which the applicant operates or intend to operate.

The NCC is obliged to publicise on its website all relevant information concerning the requirements in respect of an application for accreditation, including the criteria it shall utilize to assess the application.

An accreditation is valid for a period of five years after which the accreditation expires and a previously accredited consumer protection group must then re-apply for accreditation.<sup>164</sup>

Accredited consumer groups are issued a certificate of accreditation with a unique number, signed by the Commissioner. The group must then display the certificate in a prominent place at its main office. The Commission shall then maintain a list of all accredited consumer groups on its website. In turn, consumer protection groups are obliged to submit a full report to the Commission within 30 business days of completing each year of accreditation, unless the Commission has agreed otherwise in writing.

Accredited consumer groups may not charge consumers any fee other than out of pocket expenses.

## **Chapter 13: National Consumer Protection Institutions**

### **13.1 Provincial Consumer Protection Authorities**<sup>165</sup>

A provincial consumer protection authority has jurisdiction within its province to:

1. Process license applications for direct marketers. The Provincial Consumer Protection Authority must maintain a register of the activities permitted under each license, the address at which the activities shall be conducted. This information must be reported to the Registrar.
2. Register business names
3. Issue compliance notices to businesses that exclusively carry on business within its province
4. Facilitate mediation and conciliation of disputes between persons resident or carrying on business exclusively within that province
5. Refer mediation and conciliation disputes to the provincial consumer court within its province
6. Request the NCC to initiate a complaint in respect of any apparent prohibited conduct or offence in terms of this Act arising within that province

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<sup>164</sup> Regulation 38(10)

<sup>165</sup> Section 84



### **13.2 Establishment of the National Consumer Commission (NCC)**

The NCC has jurisdiction throughout South Africa. It is a juristic person and is independent and subject only to the Constitution and the law. Its functions must be performed in a transparent manner without fear or prejudice.<sup>166</sup> The Minister may issue policy directives to the Commission with respect to the application, administration and enforcement of the Act. The Minister may also direct the Commission to investigate an alleged contravention of the Act. The Minister shall appoint a Commissioner who shall then be responsible for all matters pertaining to the functions of the Commission and shall be in office for a period not exceeding 5 years.<sup>167</sup>

The Commission is financed from money appropriated by Parliament, any fees payable to the Commission in terms of the CPA, and income derived from its investment and deposit of such money received.

### **13.3 The Board of the NCC**

The Board of the NCC consists of the following members:

- A member appointed by the Cabinet Minister responsible for education
- A member appointed by the Cabinet Minister responsible for transportation
- A member appointed by the Cabinet Minister responsible for housing
- A member appointed by the Cabinet Minister responsible for health
- A Chairperson and Deputy Chairperson appointed by the Minister
- Not more than 6 members appointed by the Minister

The Board of the NCC is responsible to guide the strategic development of the NCC; ensure efficient and effective use of the NCC's resources; and ensure that the NCC is legally compliant. In carrying out its functions, the NCC may have regard to international developments in the field of consumer protection.<sup>168</sup>

### **13.4 General Functions of the NCC**

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<sup>166</sup> Section 85

<sup>167</sup> Section 87

<sup>168</sup> Section 92

In essence, the Commission is tasked with the development of codes of practice relating to the CPA. For example, codes of practice in respect of plain language in documents, alternative dispute resolution or how prices of goods or services are to be displayed and product labeling and trade descriptions.

The Commission must also promote legislative reform in relation to laws that govern matters affecting consumers, promote consumer protection within organs of state and implement education and information measures to develop public awareness of the provisions of the CPA.

### **13.5 Enforcement Functions of National Consumer Commission**

The enforcement functions of the Commission are set out in section 99.

The NCC is empowered to enforce compliance with the CPA by: -

- Promoting informal resolution of any dispute between a consumer and a supplier. The NCC is not however responsible to intervene in or directly adjudicate any such dispute
- Receive complaints concerning alleged prohibited conduct or offences. Basically the “watchdog” of consumer protection
- Monitoring the consumer market to ensure prohibited conduct and offences are prevented, or detected or prosecuted
- Investigating and evaluating alleged prohibited conduct and offences
- Issuing and enforcing compliance notices
- Negotiating and conducting undertakings and consent orders
- Referring to the Competition Commission any market share, anti-competitive behaviour or conduct that is prohibited in terms of the Competition Act
- Referring matters to the National Consumer Tribunal
- Referring alleged offences to the National Prosecuting Authority

### **13.6 Compliance Notices**

The Commission may issue compliance notices to a person or association of persons whom the Commission on reasonable grounds believes has engaged in prohibited conduct.<sup>169</sup> Where the entity is regulated, the Commission must first consult with the regulatory authority that issued a licence to that regulated entity.

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<sup>169</sup> Section 100

In terms of Regulation 42, the content and format of a compliance notice has been prescribed in Annexure “L”. From Annexure L, it is clear that the following information must be contained in a compliance notice:

1. The person or entity to whom the notice applies;
2. The provisions of the CPA that are not being complied with;
3. Details of the nature and extent of the non-compliance;
4. Details of any steps that must be taken and the period within which such steps must be taken;
5. Any penalty imposed in terms of the Act in the event of continued non-compliance.

Where a compliance notice is issued, it remains in force and effect until it is set aside by the National Consumer Tribunal or by a court upon review of the Tribunal’s decision concerning the notice or, until the Commission issues a compliance certificate.

Failure to comply with a compliance notice may result in the Tribunal imposing an administrative fine or referring the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 110(2). However, both of the aforementioned punitive measures may not be imposed simultaneously, meaning that the Commission must select either one of the measures when remedying non-compliance.

Where a compliance notice is issued, and a person takes exception to it, an application may be made to the Tribunal in the prescribed manner and form with the aim that the compliance notice be reviewed. Such an application must be made within 15 business days after receipt of the compliance notice or such longer period as may be allowed by the Tribunal on good cause shown. The Tribunal may then confirm the notice, or modify or cancel all or part of the notice.<sup>170</sup>

### **13.7 Offences<sup>171</sup>**

It is an offence for any person to alter, obscure, falsify, remove or omit a displayed price, labeling or trade description without authority.<sup>172</sup> It is also an offence to fail to comply with a compliance order. However, where there has been non-compliance with a compliance order

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<sup>170</sup> Section 101

<sup>171</sup> Section 110

<sup>172</sup> Section 110(1)

and the Commission has applied to the Tribunal for the imposition of an administrative fine, a person may not be prosecuted for such an offence.

### **13.8 Penalties<sup>173</sup>**

Any person convicted of an offence in terms of the CPA is liable –

(a) in the case of a contravention of section 107(1), to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or

(b) in any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

### **13.9 Administrative Fines<sup>174</sup>**

The Tribunal may impose an administrative fine in respect of prohibited or required conduct. Such a fine may not exceed 10 per cent of the respondent's annual turnover during the preceding financial year or R1 000 000 (One Million Rand), whichever is the greater.

### **13.10 Limitations of bringing action<sup>175</sup>**

A complaint in terms of the CPA may not be referred or made to the Tribunal or to a consumer court more than 3 years after the act or commission that is the cause of the complaint; or in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

### **13.11 Standard of Proof<sup>176</sup>**

In any proceedings before the Tribunal, or before a consumer court in terms of the CPA, the standard of proof is on a balance of probabilities.

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<sup>173</sup> Section 111

<sup>174</sup> Section 112

<sup>175</sup> Section 116

<sup>176</sup> Section 117

### **13.12 Vicarious liability**<sup>177</sup>

If an employee or agent of a person is liable in terms of this Act for anything done or omitted in the course of that person's employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person.

### **13.13 Serving Documents**<sup>178</sup>

Unless otherwise provided in the CPA, a notice, order or other document that, in terms of this Act, must be served on a person, will have been properly served when it is either:

- (a) delivered to that person; or
- (b) sent by registered mail to that person's last known address.

In terms of section 92(4), the Minister is obliged to prescribe at least two official languages to be used by the Commission in any documents it is required to deliver in terms of the CPA. The Minister has determined that the two official languages to be used by the Commission are English and isiZulu.<sup>179</sup>

## **Chapter 14: Business Names**

### **14.1 Identification of Suppliers**

Persons who carry on business, advertise, promote, offer to supply or supply any goods or services to consumers must do so under the person's full names as recorded in an identity document or any other recognized identification document. Where the supplier is registered in terms of a public regulation, then the supplier when transacting or entering into any consumer agreement must do so under the supplier's full name as registered in terms of a public regulation, or under the juristic persons registered business name.<sup>180</sup>

### **14.2 Mandatory Obligations of Suppliers**

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<sup>177</sup> Section 113

<sup>178</sup> Section 118

<sup>179</sup> Regulation 41

<sup>180</sup> Section 79

When advertising, promoting, transacting or entering into any consumer agreement, suppliers must disclose the following information in a trade catalogue, trade circular, business letter, order for goods, sales record or statement of account:<sup>181</sup>

- The name, title or description under which the business is carried on;
- The primary place at which, or from which, the business is carried on;
- The name of the person to whom the business name is registered where the activity concerned is carried on under a business name.

Where suppliers fail to adhere to the aforementioned mandatory obligations, the Commission may issue a compliance notice in terms of section 100, calling upon the supplier to register the business name within a reasonable time or to discontinue that conduct under that business name.

### **14.3 Registration of Business Names**

Sections 80 and 81 read with regulation 39.

“Registrar” means the Registrar of Companies appointed in terms of the Companies Act of 1973, or the official performing similar functions in terms of any subsequent legislation.

To register a business name, one must file a notice with the Registrar in the prescribed manner and form (see Annexure “H” of the Regulations for a template of the prescribed form). Acceptable forms of filing the notice include:

- mail (to the postal address of Registrar)
- hand delivery (to the physical address of Registrar)
- filing electronically (via the Registrar’s website)
- email (to the Registrar’s email address)

When filing the notice, an application fee of R50 must be paid and such payment may be made in cash at the physical address of the Registrar, or by electronic funds transfer or payment into the Registrar’s account. Unless the original receipt of payment of the application fee accompanies the notice, the Registrar may refuse to accept the notice.

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<sup>181</sup> Section 79(2)

Where an application to register a business name is unsuccessful, the Commission shall call upon the applicant to discontinue any conduct under that name within 40 business days of receiving notice of the failure of the application.<sup>182</sup>

Further, where a supplier is found to be using a business name that is registered to another person, the other person may apply to court for an order directing the guilty party to stop using the business name within a period, and on any terms, that the court considers just, equitable and expedient in the circumstances.<sup>183</sup>

#### **14.4 Cancellation of Registered Business Names**

If a person fails to conduct business under a business name that is registered to that person for a period of at least six months, the Registrar may cancel the registration after affording the person an opportunity to show cause as to why the registration should not be cancelled. A person affected by the Registrar's decision may apply to the National Consumer Tribunal to have the Registrar's determination reviewed.<sup>184</sup>

#### **14.5 Criteria for Business Names**<sup>185</sup>

Business names may be in any language irrespective of whether the words are commonly used or contrived for the purpose. Business names may consist of any letters, marks or punctuation marks; any of the following symbols: +, and, #, @, %, =; or any round brackets used in pairs to isolate any part of the name.

Business names must not be the same as, or confusingly similar to a name of a juristic person incorporated in terms of the Companies Act 61 of 1973, the Close Corporation Act 69 of 1984 or the Co-operatives Act 14 of 2005. Business names must also not be the same as, or confusingly similar to a registered trade mark belonging to another person, or a mark in respect of which an application has been filed for registration. Similarly, the business name must not be similar or the same as a mark, word, or expression, the use of which is restricted or protected by the Merchandise Marks Act 17 of 1941.

Further, business names must also not falsely imply or suggest that the business is part of, or associated with any other person or entity, or that the business is an organ of state or

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<sup>182</sup> Section 79(3)

<sup>183</sup> Section 79(4) read with section 79(3)(c)

<sup>184</sup> Section 80(5)

<sup>185</sup> Section 81

court, or is operated, sponsored, supported or endorsed by the State or by any organ of state.

Business names must not suggest or imply that the business is owned, operated, supported or endorsed by persons with particular educational designations or by persons of any foreign state, head of state, head of government, government or administration or any international organization when such patronage is not in fact the case.

Business names must also not include any words, expression or symbol that, in isolation or in context within the name, falls into the category of expression contemplated in section 16(2) of the Constitution.

### **Amendment of Laws**

The following Acts are repealed by the Consumer Protection Act:

- Consumer Affairs (Unfair Business Practices) Act No. 71 of 1988
- Trade Practices Act No. 76 of 1976
- Sales and Service Matters Act N. 25 of 1964
- Business Names Act No. 27 of 1960
- Business Act No. 71 of 1991
- Price Control Act No. 25 of 1964
- Sections 2 – 13 and sections 16-17 of the Merchandise Marks Act No. 17 of 1941