



GUIDE ON THE CONSUMER PROTECTION ACT

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PREFACE

This guide has been developed by The South African Institute of Chartered Accountants (SAICA) primarily to give guidance to members and associates on the Consumer Protection Act, which was passed by Parliament on 24 April 2009 and signed into law on 31 March 2011.

The purpose of the Consumer Protection Act is to promote fair business practices; protect consumers from unfair, unreasonable and unjust trade practices; improve consumer awareness; promote consumer confidence; and provide an efficient and effective system of consensual resolution of disputes arising from consumer transactions.

The Standards Division of SAICA in association with the Legal Compliance Committee has prepared the guide.

Every effort has been made to ensure that the advice given in this guide is correct. Nevertheless that advice is given purely as guidance to members of SAICA to assist them with particular problems relating to the subject matter of the guide and SAICA will have no responsibility to any person for any claim of any nature whatsoever which may arise out of or relate to the contents of this guide.

1. General

The Consumer Protection Act, No. 68 of 2008 (“CPA”) was passed by Parliament on 24 April 2009 and signed into law on 31 March 2011. The Act became effective in two phases. The provisions dealing with the establishment of the new consumer protection bodies and those authorising the Minister of Trade and Industry to make regulations became effective on 24 April 2010. All other provisions came into effect on 31 March 2011.

The purpose of the CPA is to promote fair business practices; protect consumers from unfair, unreasonable and unjust trade practices; improve consumer awareness; promote consumer confidence; and provide an efficient and effective system of consensual resolution of disputes arising from consumer transactions.

This guide is based on SAICA’s interpretation of the CPA. Our current interpretation may not necessarily be supported by future decisions of the Consumer Commission or Consumer Tribunal and may have to be updated in future.

The CPA affects a wide range of consumers and transactions. The CPA applies to all transactions that occur within the Republic of South Africa (the Republic) – this means that the CPA will provide protection to a consumer where a product is purchased in the Republic, even if it is manufactured outside of the Republic.

The definition of a “consumer” includes not only the person (either a natural or a juristic person) to whom goods or services are promoted or supplied but also the actual user of the goods (irrespective of whether the user was a party to the transaction) or the recipient or beneficiary of the services. In other words, a consumer may be a person other than the person who entered into an agreement with a supplier and paid for the goods or services. In practice this would mean that if, for example, if you are given a gift voucher as a birthday gift you are entitled to the consumer protection measures of the Act, even though you are not the original purchaser of the voucher.

With regard to juristic persons, the CPA will only provide protection to small businesses (in other words, where the consumer is a juristic person with an asset value or annual turnover of below a threshold determined by the Minister – the threshold is currently two million rand (R2million). This approach aligns with that of the National Credit Act, No. 34 of 2005. It should be noted, however, that whereas the CPA provides consumer protection to a juristic person with an asset value or annual turnover of less than two million rand (R2million), the National Credit Act only protects juristic persons with an asset value or annual turnover of less than one million rand (R1million).

2. Exemptions

The Minister of Trade and Industry determined in Government Gazette, Notice No. 34116 on 14 March 2011 that the CPA's application to municipalities, other than high capacity municipalities, would be deferred until further notice.

This deferment in relation to sections 1 to 7, sections 11 to 13, sections 15 to 52 and 62 to 122 of the CPA was revoked by Government Notice No. 34724 on 31 October 2011, which means that consumers can now apply the CPA to transactions entered into with small and medium capacity municipalities. The deferment granted in relation to sections 8 to 10 and sections 53 to 61 for medium capacity municipalities was effective up to 31 December 2012, subject to the findings of a joint review by the Minister of Trade and Industry and Cooperative Governance and Traditional Affairs. The deferment granted in relation to sections 8 to 10 and sections 53 to 61 will remain effective for low capacity municipalities until 30 June 2014, subject to the findings of a joint review by the Minister of Trade and Industry and the Minister of Cooperative Governance and Traditional Affairs.

In the Reportable case of *Afriforum v Minister of Trade and Industry and Others* 2013 (4) SA 63 (GNP) Judge Victor set aside Government Notice 898 of 31 October 2011 published in Government Gazette 34724 with effect of 30 days from 28 February 2012. The effect of this court order is that deferments granted in relation to the sections mentioned will not be effective and that the CPA will apply to medium and low capacity municipalities.

The Minister of Trade and Industry gave notice on 27 June 2011 in the Government Gazette on the following exemptions:

- banks will be exempt from section 14 of the Act, which deals with the expiry and renewal of fixed-term agreements (Government Notice No. 34399);
- the pension fund industry will be exempt from certain sections of the Act for a period of 18 months from 1 April 2011 (Government Notice No. 34400);
- the collective investment scheme industry will be exempt from certain sections of the Act for a period of 18 months from 1 April 2011 (Government Notice No. 34400); and
- the security services industry will be exempt from certain sections of the Act indefinitely (Government Notice No. 34400).

At the date of the release of this Guide there have been no further developments or updates on the exemptions.

3. Interpretation of the Act

Section 2 of the CPA provides that the Act must be interpreted in a way that gives effect to the purposes as set out in section 3, which is to promote and advance the social and economic welfare of consumers in South Africa. In case of any inconsistencies between Chapter 5 of the CPA and the Public Finance Management Act, No. 1 of 1999 or the Public Service Act, No. 3 of 1994 then these Acts will prevail.

If an inconsistency exists between any provision of the CPA and any other Act (other than the abovementioned), the provisions of both Acts will apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second. If, however, it is not possible to comply with both Acts simultaneously, the provision that extends the greater protection to a consumer prevails.

No provision of the CPA must be interpreted so as to prevent a consumer from exercising any rights afforded in terms of the common law.

4. Application of the Act

The Act covers both goods and services supplied within the Republic unless the goods or services have been exempted. The Act applies to providers of professional services, including accountants. Parties that are protected in terms of this Act are all natural persons, as well as small businesses (juristic persons with an asset value or annual turnover of less than two million rand (R2million)). See Schedule 1 for the method of calculation of the asset value or annual turnover.

The Act does not apply to transactions:

- with juristic persons with a turnover that exceeds the threshold as determined by the Minister, therefore a juristic person with a turnover or asset value of above R2million (this is the current threshold amount and may be subject to change);
- that are a credit agreement as defined under the National Credit Act. However, the goods and services that are the subject of the credit agreement are not excluded from the protection of the CPA;
- regarding goods or services promoted or supplied to the State;
- pertaining to services to be supplied under an employment contract;
- giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act;
- giving effect to a collective agreement as defined in section 213 of the Labour Relations Act;
- that are exempted by section 5(3) and 5(4) of the Act, which deals with exemptions agreed to by the Minister; and
- relating to advice that is regulated by the Financial Advisory and Intermediary Services Act, No. 37 of 2002.

It must be noted that section 60 and section 61 will, however, apply to goods supplied in the Republic, even though they might have been exempted. If these goods were supplied to a juristic person that exceeds the threshold, the importer, producer, distributor and retailer will be subject to section 60 and section 61.

5. Definitions

Certain definitions are of importance to accountants. These are provided below as defined in the CPA.

““consumer”, in respect of any particular goods or services, means—

- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e);”

A “consumer” includes a customer to whom goods or services are marketed, a customer who enters into a transaction with a supplier, or – if the context requires or permits – a user, recipient or beneficiary of the goods or services (irrespective of whether the consumer was a party to the transaction concerning the actual supply of the goods or services).

Accountants’ clients are consumers. It will need to be determined where the consumer is a juristic person, whether it is exempted from the Act. Depending on the circumstances, a third party with whom the accountant has not contracted may also be a consumer.

““consideration” means anything of value given and accepted in exchange for goods or services, including—

- (a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object;
- (b) labour, barter or other goods or services;
- (c) loyalty credit or award, coupon or other right to assert a claim; or
- (d) any other thing, undertaking, promise, agreement or assurance,

irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer;”

The definition of “consideration” includes anything of value given and accepted in exchange for goods or services. It is not limited to money and includes any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent intrinsic value, or whether it is transferred directly or indirectly or involves only the supplier and consumer or other parties in addition to the supplier and consumer.

““goods” includes –

- (a) Anything marketed for human consumption;
- (b) Any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
- (c) Any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;

- (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section; and
- (e) gas, water and electricity;"

The term "goods" refers to: (i) any tangible object, which includes any medium on which anything is written or encoded; and (ii) any information. Accountants supply "goods" when they supply information, or any tangible object (for example, a written opinion, or written financial statements). In the circumstances, "goods" are the end result of the "services" rendered.

"juristic person" includes –

- (a) a body corporate;
- (b) a partnership or association; or
- (c) a trusts as defined in the Trust Property Act, 1988 (Act No 57 of 1988);"

"service" includes, but is not limited to—

- (a) any work or undertaking performed by one person for the direct or indirect benefit of another;
- (b) 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, 2002 (Act No. 37 of 2002);
- (c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service—
 - (i) constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); or
 - (ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), or the Short-term Insurance Act, 1998 (Act No. 53 of 1998);
- (d) the transportation of an individual or any goods;
- (e) the provision of—
 - (i) any accommodation or sustenance;
 - (ii) any entertainment or similar intangible product or access to any such entertainment or intangible product;
 - (iii) access to any electronic communication infrastructure;
 - (iv) access, or of a right of access, to an event or to any premises, activity or facility; or
 - (v) access to or use of any premises or other property in terms of a rental;
- (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and
- (g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e), irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service;"

"services" includes: (i) any work performed by one person for the direct or indirect benefit of another; and (ii) the provision of any information, advice or consultation, except advice that is regulated by the Financial Advisory and Intermediary Services Act, No. 37 of 2002. The work performed by accountants clearly constitutes a "service". It should be noted that information constitutes both a "good" and a "service".

"supplier" means a person who markets any goods or services"

As professionals who promote or supply goods and/or services, accountants are "suppliers" under the CPA.

“transaction” means—

- (a) in respect of a person acting in the ordinary course of business—
 - (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
 - (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
 - (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or
- (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a); “”

“Transaction” includes an agreement between a person acting in the ordinary course of his business and another person for the supply or potential supply of goods or services in exchange for consideration. It is clear that the transactions between accountants and their clients fall within this definition and are therefore regulated by the CPA.

6. Fundamental consumer rights

The Act identifies nine fundamental rights of the consumer, which are further discussed in Chapter 2 of the CPA. All references in the discussion of the consumer rights refer to references in the CPA.

6.1. Right of equality in consumer markets

Reference: Section 8 and 9

Section 8 prohibits the supplier from unfairly discriminating against any person or category of persons:

- by excluding them from accessing any goods or services offered by the supplier;
- by granting them exclusive access to any goods or services offered by the supplier;
- by assigning priority of supply of any goods or services to any person or category of persons;
- by supplying a different quality of goods or services to any person or category of persons;
- by charging different prices for any goods or services to any persons or category of persons;
- by targeting particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or
- by excluding a particular community, district, population or market segment from the supply of any goods or services offered by the supplier.

The Act provides for a number of exemptions where it may be reasonable to treat consumers different:

- a supplier can refuse to supply or provide access to any particular goods or services to a minor and can request the consent of a parent or guardian before supplying certain goods or services;
- a supplier can designate and advertise a facility or service for the exclusive use of minors or adults above 60 years of age, or a kids club for children under 12;
- a supplier can supply any goods or services at a discounted price to minors or adults above 60 years of age.

These should be carefully considered, as it may be difficult to decide in the circumstances whether or not particular action may be classified as discriminatory. As these cases may be complex, the Act assigns responsibility for all such cases to the Equality Court.

6.2. Right to privacy

6.2.1. Right to restrict unwanted direct marketing

Reference: Section 11, section 12, Regulation 4 and Notice in the Regulations (Prohibited time for contacting consumers)

Every consumer has a right to restrict unwanted direct marketing.

The CPA provides the consumer with a right to restrict unwanted direct marketing through mail or electronic communication and approaches in person.

Electronic communication is further defined in the CPA to include communication by means of electronic transmission, including by telephone, fax, sms, wireless computer access, email or any similar technology or device.

The privacy of the consumer is protected by restricting direct marketing on Sundays, public holidays, Saturdays before 09h00 and after 13h00 and other days between the hours of 20h00 and 08h00 the following day. Consumers may refuse to accept; require another person to discontinue; or pre-emptively block any direct marketing approaches from any person. Therefore, suppliers of goods and services may be requested by consumers not to contact them. If the consumer receives the marketing material during the restricted period, the direct marketer will have to prove that the direct marketing material was dispatched during the allowed period.

The Regulations provide consumers with the mechanism to block unwanted direct marketing by doing the following:

- informing the direct marketer; or
- placing any communication or sign on a postal box, post office box or other container for mail that indicates that they do not wish to receive any material for direct marketing; e.g. displaying a “no adverts” sign.

The direct marketer administrator must make available the pre-emptive block register to all persons in the Republic. The register must accommodate all the persons of the Republic and the block becomes effective after 30 days of registering. Businesses that are involved in direct marketing must ensure that the customers they contact have not registered on an opt-out register.

Businesses need to ensure that they have permission from consumers before engaging in any direct marketing approaches. With pre-emptive blocking, businesses will first have to ensure that consumers have not registered a pre-emptive block against their product or service before approaching them; otherwise these businesses will be in contravention of the CPA.

6.3. Right to choose

6.3.1. Right to select suppliers

Reference: Section 13

Section 13 of the Act imposes various restrictions on the bundling of products. Bundling occurs where the supplier offers a number of different products in combination (e.g. a couch, coffee table and a rug – all sold as a package deal). A supplier is not permitted to require a consumer to enter into a contract with that supplier (or a specific third party) for the supply of bundled goods or services, unless the supplier can show that the convenience to the consumer in having the bundled goods or services outweighs the limitation of the consumer's choice, the economic benefit of the additional goods or services can be proved or the goods or services are also offered separately and at individual prices. Refer to 9.2.2 below for further details on section 13.

6.3.2. Expiry and renewal of fixed-term agreements

Reference: Section 14 and Regulation 5

This section pertaining to the expiry and renewal of fixed term contracts do not apply to transactions between juristic persons regardless of their annual turnover or asset value. This is particularly of interest in fixed term contracts such as rental agreements. Where a juristic person rents a property from another juristic person the fixed term can therefore be longer than the 24 months prescribed by the Minister.

A fixed-term agreement may not be longer than 24 months unless the consumer and the supplier can agree otherwise and the financial benefits of a longer agreement can be shown to the consumer. Section 14 of the CPA addresses the consumer's right to cancel a fixed-term contract on/after the expiry date without incurring any penalties by giving notice of 20 business days. The consumer will still be liable for the amounts owed to the supplier on the date of cancellation.

The consumer can also give the supplier 20 business days notice of the cancellation of the fixed term agreement. In this case the consumer will still be liable for the amounts owed to the supplier on the date of cancellation and the supplier may also impose a reasonable cancellation penalty.

The supplier must consider the following when determining the cancellation charges:

- the amount which the consumer is still liable for to the supplier up to the date of cancellation;
- the value of the transaction up to cancellation;
- the value of the goods that will remain in the possession of the consumer after cancellation;
- the value of the goods that are returned to the supplier;
- the duration of the consumer agreement as initially agreed;
- losses suffered by or benefits accrued to the consumer as a result of the consumer entering into the agreement;
- the nature of the goods or services;
- the length of notice of cancellation provided by the consumer;

- the reasonable potential for the service provider, acting diligently, to find an alternative consumer; and
- the general practice of the relevant industry.

A supplier may extend a fixed-term contract on a month-to-month basis in the event that the consumer does not cancel the agreement when it expires.

The fixed-term agreement must not exceed the maximum period as prescribed by the Minister, which is 24 months or as provided for in industry codes.

The impact of section 14 on contract-based businesses is that contracts will be limited to a maximum period; therefore, one cannot lock consumers into unreasonably long contracts. At the expiry of the term of a fixed-term agreement, the contract will automatically continue on a month-to-month basis, until the consumer either cancels the contract or renews the agreement for another fixed term. The CPA requires the supplier to remind the consumer of the expiry date at least 40 business days and not more than 80 business days prior to the expiry date of the fixed term.

6.3.3. Cooling-off period

Reference: Section 16

Section 16 provides the consumer with a right to cancel a transaction or agreement that has resulted from direct marketing without reason or penalty. The cancellation can be done by a notice to the supplier in writing – or another recorded manner and form – within five business days after, or the later of the date on which the transaction or agreement was concluded and the date on which the goods were delivered to the consumer. The supplier must reimburse the consumer within 15 business days of the cancellation of that transaction if the goods have not been delivered or, if the goods have been delivered, within 15 business days of receiving the supplied goods back.

In this case the consumer does not need to provide a reason for return of the goods obtained as a result of a direct marketing transaction, irrespective if the goods are defective or not. The consumer can simply return the goods at his or her own instance.

Businesses should be mindful of the potential implications of the cooling-off period as the possibility exists of transactions being cancelled within five business days. When this occurs at year-end, it might be that sales could be overstated. Commissions to sales people will also be impacted by the cooling-off period.

It is important to note that this section only applies to direct marketing. Where goods were purchased and the consumer wants to return it for no specific, the return is not subject to section 16 but in terms of other provisions relating to the return of goods in the CPA. The supplier in the latter instance apply its own policy in deciding whether to accept a return, in most cases a policy of not returning cash, but providing a credit note is quite acceptable under the circumstances.

6.3.4. Right to cancel advance reservation

Reference: Section 17

Section 17 provides the consumer with a right to cancel any advance reservation, booking or order for a reasonable charge at the discretion of the supplier. A cancellation fee may not be

charged if the consumer has cancelled due to the death or hospitalisation of the person to whose benefit the booking was made.

6.3.5. Consumer's right to return goods

Reference: Section 20

Section 20 refers to the right to return goods in addition to the right to return unsafe or defective goods as stated in section 56 and any other right in law between a supplier and consumer to return goods and receive a refund. The consumer may return goods in the following instances:

- goods are delivered as a result of direct marketing transaction where cooling off right are exercised as per section 16; or
- a mixture of goods are delivered and consumer has refused delivery of any of those goods as per section 19(8);
- goods intended to satisfy a particular purpose communicated to supplier in terms of section 55(3), and within 10 business days after delivery the goods are found to be unsuitable for that particular purpose;
- the consumer did not have opportunity to examine goods before delivery and goods rejected for any of the following reasons (section 19(5)):
 - in the case of special-order agreement, goods do not reasonably conform to the material specifications of the special order; or
 - goods are not of a type and quality reasonably contemplated in the agreement
 - goods do not meet the tests set out in sections 18(3) and (4).

Goods returned based on the above instances must be returned within 10 days. Goods delivered as a result of direct marketing must be returned at the consumer's risk and costs. Goods returned as a result of the other instances must be returned at the supplier's risk and costs.

Where the goods have been returned by the supplier in terms of this section the supplier must refund the consumer the price paid for the goods less a charge for the restoration costs to return the goods to the original packaging to be able to sell it again. Should the consumer return the goods in its original **packaging** without having opened it the supplier may not charge the consumer. If the goods were repackaged in its original packaging the supplier may charge a reasonable amount for the time the goods were in the possession of the consumer or for any consumption of the goods.

6.3.6. Unsolicited goods

Reference: Section 21

The consumer does not have to pay the supplier for goods that have been delivered erroneously by the supplier. The supplier may collect the goods within 20 business days of notifying the customer of the error and have to reimburse the customer the money already paid for such goods with interest. The consumer has a right to return these goods at the risk and expense of the supplier or retain them if they have been in his possession for a period that exceeds 20 business days.

6.4. Right to disclosure and information

6.4.1. Right to information in plain and understandable language

Reference: Section 22

The consumer has a right to receive any notice, document or visual representation in a language that is plain and understandable. A notice is considered to be in plain language if it is written in a way that a person with average literacy skills could be expected to understand.

6.4.2. Disclosure of price of goods or services

Reference: Section 23

Section 23 of the Act makes reference to the display of prices for goods and services that are for sale. This section is not applicable to transactions where estimates for the performance of certain services are given or to transactions where section 43 of the Electronic Communications and Transaction Act, No. 25 of 2002 (ECTA) applies.

Suppliers must clearly display the price of any products that they are displaying for sale to consumers. The price displayed must be in South African Rand. The adequacy of the display of the price must be as per the requirements in the CPA.

A supplier may not require a consumer to pay a price higher than the one that is displayed for the product. Should a supplier display two different prices for a single product, the lower of the two prices is what must be charged to the consumer.

If a supplier announces (by display of placards or similar medium) a discount (whether in monetary amount or percentage) on the displayed price of any product, the displayed price is deemed to be the price displayed for the product less the announced discount.

Businesses, particularly suppliers of retail products, must take care when displaying prices. This will require that when prices increase suppliers ensure that they change the displayed prices immediately so as to avoid losses or decreased profit margins. When announcing discounts, as suppliers must be careful to be clear about whether the discount is on the displayed price or the displayed price is the new discounted price. Should consumers be aware of the provisions of this section, they will be able to enforce their rights as per the Act and suppliers will no longer be able to force consumers to pay a higher price than what is displayed.

6.4.3. Product labelling and trade descriptions

Reference: Section 24 and 25

The supplier must not apply a trade description or label that is misleading to the consumer or cover any trademark or label to mislead the consumer.

If a supplier reconditions goods that bear a trademark of the original suppliers, he must apply a conspicuous notice that states that the goods have been reconditioned. If the reconditioned goods have been imported, the label must state clearly:

- the country in which they were manufactured, produced and adapted;
- that such goods conform to the South African national standards for fibre content and care labelling;

- that the goods have been reconditioned after the goods have been reconditioned, adapted, rebuilt, or remade anywhere else within the Republic. A trade description should be applied to such goods in a conspicuous manner, which indicates that the goods have been reconditioned; and
- “Made in South Africa” if the goods have been made or assembled in the Republic.

If the goods supplied contain at least 5% of genetically modified organisms, the label must state in plain language that the goods contain genetically modified organisms.

A supplier of goods and services with the exception of hawkers must provide a written record for the purchase of such goods or services supplied as set out in section 26 of the CPA (discussed in further detail in 6.4.4 below).

Deliverers and installers must visibly wear a name badge or carry any form of identity that satisfies the prescribed standards and must provide these when requested by the consumer.

Businesses will have to ensure that they label their products in plain language to comply with the provision of the Act.

6.4.4. Sales records

Reference: Section 26 and Notice in the Regulations (Exemption for certain categories of goods or services, or circumstance of trade from providing sales record)

Section 26 of the CPA does not apply to a transaction if section 43 of the ECTA applies to that transaction or the transaction has been exempted by the Minister. Section 26 states that 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.

Section 26(3) of the CPA prescribes that the sales record must include at least the following information:

- supplier’s full name (if not a registered trading name, company or close corporation, then the individual’s name as per their identity document), or registered business name, and VAT registration number, if any;
- address of the premises at which, or from which, the goods or services were supplied;
- date on which the transaction occurred;
- name or description of any goods or services supplied or to be supplied;
- unit price of any particular goods or services supplied or to be supplied;
- quantity of any particular goods or services supplied or to be supplied;
- total price of the transaction, before any applicable taxes (such as VAT);
- amount of any applicable taxes (such as VAT); and
- total price of the transaction, including any applicable taxes.

Suppliers should take note of the level of information required from a sales document for any goods or services provided or sold to a consumer and ensure that their current point-of-sale invoices or till-slips comply with the requirements. The requirement to provide the name or description of any goods or services means that an abbreviation or general description will not suffice.

For the purposes of section 26(4) any person trading as a hawker is exempted from providing 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 public places or spaces where all members of the public enjoy unrestricted and unconditional access, subject only to law.

6.5. Right to fair and responsible marketing

6.5.1 General standards for marketing of goods and services

Reference: Section 29

A producer must not market goods in a way that is false or misleading to a consumer or in a manner that is misleading or fraudulent in any way.

6.5.2 Bait marketing

Reference: Section 30

The CPA prohibits a supplier from advertising goods or services available at a specified price, in a manner that may mislead consumers about the actual availability of the goods or services at that advertised price. If a supplier advertises the goods or services as being available at a specified price, and the advertisement expressly states a limitation in respect of the availability of the goods or services from that supplier at that price, the supplier must make the goods or services available at that price to the extent of the expressed limits.

The provisions of bait marketing apply to advertisements. The purpose of the prohibition is to prevent advertisements that will entice consumers to contact or visit a supplier under misleading circumstances. The CPA widely defines advertisements, *inter alia*, as communication or a representation by which the supplier is brought to the attention of the public, or where the existence, nature, availability, price, properties, advantages or uses of goods or services, or supply conditions are brought to the attention of the public, or where the purpose is to promote any cause.

The supplier will have a defence for a contravention of the bait marketing provisions if he offered to procure another person to supply the consumer with the same or equivalent goods or services of the kind advertised, within a reasonable time, in a reasonable quantity, and at the advertised price and the consumer unreasonably refused that offer, or accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted.

6.5.3 Negative option marketing

Reference: Section 31

Negative option marketing requires that a supplier must not promote any goods or services or offer to enter into any agreement for the supply of goods or services on the basis that the goods are to be supplied unless the consumer declines such an offer.

The aim of the prohibition on negative option marketing is to prevent marketing practices in terms of which a consumer is deemed to have concluded an agreement if he fails to return unsolicited goods or services received, or fails to reject an offer expressly.

In the past this practice was popular, for example, with suppliers who sent books or other goods via post box to consumers. The onus was then on the consumer to return the goods, failing which he or she was automatically obliged to pay for the goods received. This practice is now prohibited in terms of the CPA.

On the basis that goods or services are supplied, or that an agreement or modification will automatically come into existence, unless declined by the consumer, the CPA prohibits a supplier from:

- promoting goods or services;
- offering to enter into or modify an agreement for the supply of any goods or services; or
- inducing a person to accept any goods or services or to enter into or modify such an agreement.

An agreement or modification induced within the meaning of negative option marketing is void.

6.5.4 Trade coupons and similar promotions

Reference: Section 34

The provisions of the Act that relate to trade coupons and similar promotions do not apply to franchise agreements, loyalty programmes, loyalty credit or award programmes, or promotional competitions. For the purpose of this discussion and in the context of trade coupons a “promotional offer” is regarded, inter alia, as an offer of a prize or reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, irrespective of whether or not acceptance of the offer is conditional on the offeree entering into any other transaction.

The CPA prohibits a person from making a promotional offer with the intention of not fulfilling it or of fulfilling it other than as offered.

A document that sets out a promotional offer must clearly state:

- the nature of the prize or reward, gift, free goods or service, price reduction or concession, enhancement of quantity or quality of goods or services, other discounted or free things being offered;
- the goods or services to which the offer relates;
- the steps required by a consumer to accept or to receive the benefit of the offer; and
- the particulars of any person from whom, any place where, and any date and time on or at which the consumer may receive the prize or reward, gift, free goods or service, price reduction or concession, enhancement of quantity of quality of goods or services, other discounted or free things.

A person who makes or sponsors a promotional offer must:

- ensure that the supply of the particular prize or capacity thereof is sufficient to accommodate all reasonably anticipated demands that result from the offer;
- not limit or restrict capacity to supply any such goods or services in response to the acceptance of the offer on any basis other than that the offer applies to such a supply in exchange for any other form of consideration;
- not require the consumer to accept an inferior quality of goods or services than those generally available to any other consumer on the same date who tenders a different form of consideration; and
- not impose any monetary charge for the administration, processing or handling of a transaction in respect of which the consumer tenders a trade coupon.

The supplier will have a defence for failure to comply, if he offers to supply another person to supply a consumer with comparable goods or services to satisfy the consumer’s acceptance of the promotional offer, and the consumer has accepted the supplier’s offer and the supplier

has supplied or procured another person to supply the goods or services so offered and accepted; or the consumer has unreasonably refused the supplier's offer.

6.5.5 Customer loyalty programmes

Reference: Section 35

Section 35 of the Act determines that a sponsor of a consumer loyalty programme, or a supplier of goods and services who accepts loyalty credits or awards as consideration in exchange for goods or services (for example, frequent flyer miles), may impose a partial or complete restriction on the availability of such goods or services during any specific period provided that the programme sponsor has directly or indirectly given notice in writing to the members of that programme at least 20 days before the beginning of that period. However, the total of all such periods may not exceed 90 days within a calendar year.

A supplier must not offer participation in any loyalty programme, or offer any loyalty credit or award without the intention of providing it or providing it in a manner other than as offered.

Any document that offers the loyalty programme or offers any loyalty credit or award must clearly state:

- the nature of the programme, credit or award being offered;
- the goods or services to which the offer relates;
- the steps required by consumers to participate in the programme or receive any benefits in terms of the programme; and
- the details of any person from whom, and the date, place and time where consumers may gain access to the programme or to any loyalty credit or awards in terms of the programme.

This means that a supplier that offers a loyalty programme, such as an airline, may restrict the use of frequent flyer miles during certain periods of the year (not exceeding 90 days). However, at any other time of the year, the airline must accept loyalty credits in return for a service as if the consumer had offered any other form of consideration (such as cash). The supplier may not benefit consumers who offer to pay cash over consumers who use loyalty credits.

The Act provides for possible defences of a supplier when a consumer alleges that the supplier did not have sufficient goods or services available in return for loyalty credits. In essence, it will be a defence where the supplier offers to supply comparable goods or services to the consumer and the consumer either accepts the offer or unreasonably refuses the offer.

6.5.6 Promotional competitions

Reference: Section 36, Regulation 11

The term "*Promotional competitions*" refers to any competition, game, scheme, arrangement, system, plan or device for distributing prizes by a lot or chance if it is conducted in the ordinary course of business and any prize offered exceeds the threshold prescribed (currently being one Rand).

A person must not directly or indirectly inform another person that he has won a competition if no competition has been conducted, the person has not in fact won the competition, if a prize is subject to a previously undisclosed condition, or the person is required to offer further consideration for the prize after the results of the competition has been announced.

Further, a person must not directly or indirectly inform another person that a participant has a right to a prize to which the person does not in fact have a right; or if, becoming eligible to receive the prize was generally available or offered to all similarly situated persons or class of persons; or, if before becoming eligible to receive the prize, the person is required to offer further consideration for the prize or to purchase any particular goods or services.

The Regulations provide that the cost of electronically transmitting an entry must not exceed R1.50; this cost includes the cost of subsequent electronic communication to the consumer. The consumer has the right to decline:

- use of his image in any marketing material;
- participation in any marketing; and
- to be present when the draw takes place or when the winners are announced.

Any such provision shall be null and void.

The promoter must ensure that an independent accountant, registered auditor, attorney or advocate oversees and certifies the conducting of the competition and must report this through the promoter's internal audit reporting or other appropriate validation or verification procedures. As the CPA or the Regulations do not state the process or the type of report required SAICA recommends that members use the International Standard on Related Services (ISRS) 4400 - Engagement to perform agreed-upon procedures regarding financial information as this standard can also be applied for procedures on non-financial information.

The full details of the promoter must be retained for a period of at least three years by a person conducting the promotional competition. The promoter must make such details available to the National Consumer Commission on written request.

A person who conducts a promotional competition must retain –

- Full details, including identity or registration numbers, addresses and contact numbers of the promoter;
- Rules of promotional competition;
- Copy of offer to participate in promotional competition;
- Names and identity numbers of persons responsible for conducting the promotional competition;
- Full list of prizes offered in promotional competition;
- a representative selection of materials marketing the promotional competition;
- list of all instances when the promotional competition was marketed, including dates, medium used and places where marketing took place;
- Names and identity numbers of persons responsible for conducting the selection of prize winners in the promotional competition;
- acknowledgement of receipt, identity number and the date of receipt of the prize by the prize winner;
- Declarations or affirmation that prize winners are not employees, directors, agents, or consultants who directly controls or is controlled by the promoter, or the spouses, life partners, business partners or immediate family members;
- basis of determining the prize winners;
- summary describing the proceedings to determine the winners;
- whether an independent person oversaw the determination of the prize winners;
- the means by which the prize winners were announced and frequency;
- list of name and identity numbers of prize winners;
- list of dates when prizes were handed over to the prize winners;
- steps taken by the promoter to contact the winner;
- reasons for prize winner not receiving or accepting the prize and steps taken by promoter to hand over the prize

6.5.7 Alternative work schemes

Reference: Section 37

The provisions relating to alternative work schemes regulate marketing practices where persons are invited or solicited to conduct work from home. An advertisement to promote work from home practices must disclose:

- a cautionary statement regarding uncertainty of the extent of work;
- income or other benefit to be derived;
- the full name, or registered business name, of the person promoting the matter and the address and contact numbers of that person's primary place of conducting the business; and
- the nature of the work.

The CPA prohibits false representations regarding the availability, actual or potential profitability, risk or other material aspect of the work.

[Note: Sections 38 and 39 of the CPA have not been dealt with.]

6.6 Right to fair and honest dealing

6.6.1 Unconscionable conduct

Reference: Section 40

A supplier or the supplier's agent is prohibited from using physical force against consumers, coercion, undue influence, pressure, duress, harassment, unfair tactics or any other similar conduct in connection with any:

- marketing of goods or services;
- supply of goods or services;
- negotiation, conclusion, execution or enforcement of agreements to supply goods or services;
- demand for, or collection of payment of goods or services by a consumer; and
- recovery of goods or services from a consumer.

The CPA also states that it is unconscionable conduct if the supplier knowingly takes advantage of the fact that the consumer was unable to protect their interest due to the fact that they were physically or mentally disabled, illiteracy, ignorant, not able to understand the language or any other similar factors.

6.6.2 False, misleading or deceptive representation

Reference: Section 41

In relation to the marketing of any goods or services, a supplier must not, by words or conduct;

- directly or indirectly express a false, misleading or deceptive representation concerning a material fact to the consumer;
- use exaggeration, innuendo or ambiguity to a material fact or fail to disclose a material fact; or
- fail to correct an apparent misapprehension on the part of the consumer, amounting to a false, misleading or deceptive representation on behalf of the supplier.

For more information on false, misleading or deceptive information please refer to section 41 of the Act.

[Note: section 41 gives examples of false/ misleading information]

[Note: sections 42 to 46 have not been dealt with]

6.6.3 Overselling or overbooking

Reference: Section 47

In terms of this section of the CPA, a supplier may not accept payment or other consideration for goods or services where the supplier has no reasonable intention of supplying the goods or services or where it intends to supply goods or services that are materially different to the goods or services for which the consumer has paid.

If the supplier receives money for the supply of any goods or services and fails to provide the goods or services because of insufficient stock, the supplier must refund the consumer for any amount paid together with the interest at a prescribed rate from the date the amount was paid until the date of the reimbursement.

With regard to damages suffered as a result of a supplier's inability to supply goods or services due to overbooking or overselling, the Act provides for a refund of the amount paid plus interest (usually, this would be the deposit plus interest), as well as payment for any consequential damages that directly resulted from the breach of contract.

In practical terms, this would mean that where you

- booked a flight from Cape Town to Durban for which you paid a deposit of RX,
- booked and paid for a rental car in Durban in the amount of RY, and
- set up a meeting with a business associate in Durban to sign a contract valued at RZ, after which the business associate would leave for India, and

you are removed from the flight as a result of overbooking, you will be entitled to claim

- RX plus interest for the deposit you paid for the flight, and
- RY plus interest for the rental car, which amounts to a consequential loss that *directly* results from the overbooking.

However, the fact that you suffered a loss because you were not able to sign the contract before your business associate left for India amounts to loss of *anticipated* use or enjoyment, for which the Act does not provide.

It is a defence to an alleged failure to supply any goods or services if:

- the supplier offered to supply or procure another person to supply a consumer with comparable goods or services of the relevant kind to satisfy the consumer's request; and
- either the consumer accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted, or the consumer unreasonably refused that offer.

A shortage of stock or capacity 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 carry out any ordinary or routine matter pertaining to the supplier's business adequately and diligently.

6.7 Right to just, fair and reasonable terms and conditions

6.7.1. Unfair, unreasonable or unjust contract terms

Reference: Section 48 and Regulation 44

Generally, a supplier is precluded from offering to supply, supplying, or entering into an agreement to supply goods or services at a price that is unfair, unreasonable or unjust or on terms that are unfair, unreasonable or unjust. Suppliers are also precluded from marketing any goods or services or negotiate or enter into or administer a transaction or an agreement for the supply of goods or services in a manner that is unfair, unreasonable or unjust.

A supplier must not require a consumer to waive any rights, assume any obligation or waive any liability of the supplier on conditions that are unfair, unreasonable or unjust or impose any such terms as a condition of entering into the transaction.

The CPA lists examples of a number of terms and conditions that are considered unfair, unjust and/or unreasonable in section 48(2), which might be considered void if included in an agreement with a customer. The possibility also exists that the agreement may be declared void in its entirety.

Terms that will be considered to fall foul of the CPA include:

- terms that require the consumer to waive any rights, to assume any obligation or waive any liability of the supplier, on terms that are unfair, unreasonable or unjust;
- terms that make a transaction excessively one-sided in favour of the supplier;
- terms so adverse to the consumer as to be inequitable;
- false, misleading or deceptive representations or statements made to the detriment of the consumer; and
- terms that are unfair, unreasonable, unjust or unconscionable, or where the fact, nature and effect of that term were not properly drawn to the attention of the consumer, as required by section 49, where applicable.

Regulation 44 contains a list of terms that are presumed to be unfair for the purposes of section 48 (the "Grey List"). The Grey List is indicative only, so that a term listed therein may be justifiable in the circumstances. Importantly, the Grey List only applies to consumer agreements between suppliers acting on a for-profit basis, wholly or mainly for purposes related to their business, and individual consumers who enter into these agreements for purposes wholly or mainly unrelated to their business or profession. This suggests that the Grey List is not intended to apply in circumstances where the consumer is a juristic person or a natural person acting for business purposes. It does not however necessarily follow that the terms in the Grey List are fair, reasonable and just in circumstances where the consumer is a juristic person or a natural person acting for business purposes. In our view, where the consumer is a juristic person, or a natural person acting for business purposes, the Grey List terms will still be subject to scrutiny under section 48, and it therefore remains a possibility that they could still be considered to be unfair, unreasonable or unjust in light of the specific circumstances of the case.

Examples of Grey List terms include those which:

- restrict the consumer's rights or remedies in the event of breach of contract by the supplier;
- limit the supplier's vicarious liability for its agents;
- force the consumer to indemnify the supplier against liability incurred by it to third parties;
- modify the normal rules for the distribution of risk to the consumer's detriment;

- enable the supplier to alter the terms of the agreement unilaterally, which include the characteristics of the product or service;
- give the supplier the right to determine whether the goods or services supplied are in conformity with the agreement;
- allow the supplier an unreasonably long time to perform; or
- impose a burden of proof on the consumer that should lie with the supplier.

6.7.2. Notice required for certain terms and conditions

Reference: Section 49

Notices to consumers, or provisions of a consumer agreement, that purport to:

- limit the risk or liability of the supplier or any other person;
- constitute an assumption of risk or liability by the consumer;
- impose an obligation on the consumer to indemnify the supplier or any other person for any cause;
- constitute an acknowledgment of fact by the consumer, or
- concern any activity or facility that is subject to certain specified risks

must comply with the requirements below:

- the notice or provision must be drawn to the attention of the consumer in plain language as described in section 22;
- the fact, nature and effect of the notice or provision must be drawn to the attention of the consumer:
 - in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and
 - before the earlier of the time at which the consumer enters into the transaction or agreement or begins to engage in the activity or enters or gains access to the facility or is required or expected to offer consideration for the transaction or agreement; and
- the consumer must be given an adequate opportunity in the circumstances to receive and comprehend the notice or provision.

If a notice or provision concerns any activity or facility that is subject to any risk of an unusual character or nature that could result in serious injury or death then the supplier must satisfy the above requirements and the consumer must agree to the notice or provision by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of risk and acceptance of the provision.

6.7.3. Written consumer agreements

Reference: Section 50

The Act contains no general requirement for agreements to be in writing. However, the Act allows the Minister to require certain categories of agreements to be in writing.

Section 50 requires that where an agreement is set out in writing (whether this is required in terms of this Act or voluntary) it applies irrespective of whether or not the consumer signs such agreement and the supplier must provide the consumer with one free copy (or access to an electronic copy) of the terms and conditions; that the agreement must be in plain and understandable language and contain an itemised breakdown of the consumer's financial obligations under the agreement.

However, if a consumer agreement between a supplier and a consumer is not in writing, the supplier is obliged to keep a record of the transactions entered into over the telephone or in any other recordable form.

6.7.4. Prohibited transactions, agreements or conditions

Reference: Section 51

A supplier must not make a transaction or agreement subject to any term or condition if:

- its general purpose or effect is to:
 - defeat the purposes and policy of the CPA;
 - mislead or deceive the consumer;
 - subject the consumer to fraudulent conduct;
- directly or indirectly purports to:
 - waive or deprive a consumer of a right in terms of the CPA;
 - avoid the supplier's obligation or duty in terms of the CPA;
 - set aside or override the effect of any provision of the CPA;
 - authorise the supplier to do anything that is unlawful in terms of the CPA, or fail to do anything that is required in terms of the CPA;
- it purports to:
 - limit or exempt the supplier from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier;
 - constitute an assumption of risk or liability by the consumer for any such loss.
 - impose an obligation on a consumer to pay for damages or accept the risk of handling any goods displayed by the consumer unless the loss or damage results from gross negligence, recklessness, malicious behaviour or criminal conduct of the consumer;
- it results from an offer prohibited in terms of section 31, dealing with negative option marketing;
- purports to cede to any person, set off against a debt or alienate a right of the consumer to any claim against the Guardian Fund;
- falsely expresses an acknowledgement by the consumer that before the agreement was made no representation or warranties were made in connection with the agreement by the supplier or that the consumer has received goods or services or a document that is required by the Act to be delivered to the consumer;
- it requires the consumer to forfeit any money to the supplier if the consumer exercises any right in terms of the Act or to which the supplier is not entitled in terms of the Act or any other law;
- it expresses on behalf of the consumer:
 - an authorisation for any person acting on behalf of the supplier to enter any premises for the purposes of taking possession of goods to which the agreement relates;
 - undertakes to sign in advance any documentation relating to the enforcement of the agreement, irrespective of whether the documentation is incomplete at the time of signing;
 - a consent to a predetermined value of costs relating to enforcement of the agreement;
- it expresses an agreement by the consumer to deposit with the supplier or another person an identity document, credit or debit card or other similar document or provide a personal identification code or number to access an account.

Further, the supplier may not direct or permit any other person to do anything referred to in section 51 on behalf of or for the benefit of the supplier. A supplier may not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document that contains a prohibited term or condition as listed in section 51(1) of the CPA.

A purported transaction or agreement, provision, term or condition of a transaction or agreement, or notice to which a transaction or agreement is purported to be subject is void to the extent that it contravenes section 51.

6.8. Right to fair value quality and safety

6.8.1. Right to demand quality service

Reference: Section 54

Section 54 states that when a supplier undertakes to perform any service for or on behalf of consumer, consumers have the right to:

- the timely performance and completion of those services and timely notice of any unavoidable delay in the performance of the services;
- the performance of the services in a manner and quality that consumers are generally entitled to expect; and
- the use, delivery or installation of goods that are free of defects and of a quality that consumers are generally entitled to expect, if any such goods are required for the performance of the services; and
- the return of any property or control over any property of the consumer in at least as good a condition as it was when made available to the supplier for the purpose of performing such services,

whilst having regard to the circumstance of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.

If a supplier fails to perform a service to the aforementioned standards, the consumer may require the supplier to:

- remedy any defect in the quality of the services performed; or
- refund to the consumer a reasonable portion of the price paid for the services performed, having regard to the extent of the failure.

These consumer rights are interpreted with regard to the circumstances of the supply and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services. In other words, a supplier and a consumer may in all probability contract out of section 54, provided this is achieved in a manner that does not contravene the CPA (for example, a supplier cannot contract out of section 54 on terms that are unfair, unreasonable or unjust (and therefore contrary to section 48) and cannot contract out of the implied warranty that the goods will be free of defects (as this is contrary to sections 55 and 56).

6.8.2 Right to demand quality goods

Reference: Sections 55, 56 and 57

Section 55 read with section 56 provides the consumer with a right to demand goods that are of good quality, safe and free of defects and an implied warranty of quality unless the consumer has been informed of the defects and has agreed to accept the goods in that condition. Failure by the supplier to provide goods at the standard demanded by the consumer may require the supplier to remedy any defects in the quality of the service performed or goods supplied or refund the consumer a reasonable portion of the price paid. This section does not apply to goods that are sold at an auction.

These sections imply the following warranties in all transactions for the supply of goods:

- the goods are reasonably suitable for their generally intended purposes;
- the goods are of good quality, in good working order and free of defects;
- the goods will be usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all surrounding circumstances of their supply;
- the goods comply with any applicable standards under the Standards Act, No. 29 of 1993, or other public regulation; and
- if a consumer has specifically informed the supplier of a particular purpose for which the consumer wishes to acquire any goods or the use to which the consumer intends to apply those goods, and the supplier ordinarily offers to supply such goods or acts in a manner consistent with being knowledgeable about the use of those goods, the goods are reasonably suitable for that specific purpose.

In addition to section 20, which provides the consumer with the right to return goods, section 56 allows the consumer to return the goods to the supplier within six months of delivery without incurring any penalties and at the supplier's risk and expense if the goods fail to satisfy the requirements and standards mentioned above. This section also allows a warranty of three months on repaired goods. The consumer may request that the supplier either repair or replace the goods or refund the consumer the price paid for the goods by the consumer. This is not applicable to goods that have been altered contrary to the instructions or after leaving the control of the producer, importer, distributor or retailer.

A service provider warrants every new or reconditioned part installed during any repair or maintenance work and the labour required to install it for three months after the date of installation or a longer period as stipulated by the supplier in writing. This warranty will be void if the installed part or the goods or property in which it was installed have been subjected to abuse or misuse and does not apply to ordinary wear and tear. This warranty is also concurrent with any other deemed, implied or express warranty.

A consumer can institute a claim against anyone on the supply chain, manufacturer, supplier or distributor, or the retailer of goods.

6.8.3 Liability for damage caused by goods

Reference: Section 61

This section applies to all transactions entered into by accountants. In all probability, the parties to a transaction cannot contractually agree to exclude the application of this section.

Section 61 does not require fault on the part of a supplier to be proved in a claim for loss or harm arising from certain goods. Section 61 is sometimes erroneously referred to as creating “strict liability”. Given that section 61 sets out various statutory defences, it does not create “strict liability” but rather “no fault” liability. It provides that the producer, importer, distributor or retailer of any goods is liable for any “harm” caused wholly or partly as a result of:

- supplying “*unsafe*” goods;
- a product “*failure, defect or hazard*” in any goods; or
- inadequate instructions or warnings provided to the consumer in respect of any “*hazard*” arising from the use of the goods,

irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer as the case may be.

The above terms are broadly defined:

“defect” means “(i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods... less acceptable than persons generally would be entitled to expect in the circumstances; or (ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances”;

“failure” means “the inability of the goods to perform to the intended purpose or to the intended effect”;

“hazard” is defined to include a characteristic that “presents significant risk of personal injury to any person, or damage to property, when the goods are utilised”; and

“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 other persons”.

The “harm” for which a supplier may be liable includes:

- death of, injury to, or illness of a natural person;
- the loss of or damage to any property whether movable or immovable; and
- any economic loss that results from the harm.

A “producer” includes a person who produces goods within the Republic or causes them to be produced, with the intention of making them available for supply in the ordinary course of business. A “retailer” is a person who supplies goods to consumers in the ordinary course of business. Accountants are likely to be both producers and retailers for the purposes of the CPA.

A supplier of services that, in conjunction with the supply of those services, applies, supplies or provides access to any goods must be regarded as a supplier of goods for the purposes of section 61.

Although the CPA now imposes liability on all the suppliers in the supply chain irrespective of fault, the liability imposed is not absolute. A consumer will still have to prove the other elements necessary to sustain a claim against a supplier in terms of common law; for example, wrongfulness, causation, and the loss suffered.

Section 61 also provides for the following defences, which – if proved by a supplier – will exonerate the supplier from liability or limit the liability of the supplier under this section. Save for the prescription defence, it does not seem that these defences will typically be available to accountants in the ordinary course of their duties:

- the unsafe product characteristic, failure, defect or hazard that results in harm was attributable to compliance with any public regulation;
- the unsafe product characteristic, failure, defect or hazard did not exist at the time that the goods were supplied by a supplier to another supplier (“the second supplier”) in the supply chain;
- the unsafe product characteristic, failure, defect or hazard was wholly attributable to compliance by the second supplier with the instructions of the supplier who supplied the goods to the second supplier, irrespective of whether the harm resulted from any negligence on the part of the producer, importer or distributor.
- it is unreasonable to expect the retailer or distributor to have discovered the unsafe product characteristic, failure, defect or hazard, taking into account the supplier’s role in the marketing of the goods to consumers; or
- the claim for damages has been prescribed in terms of the CPA (generally, this occurs after three years).

The onus is on the consumer to prove that the goods were defective, hazardous, unsafe, or that they failed, or that inadequate warnings or instructions pertaining to their use were provided. The consumer also bears the onus of proving that harm was suffered that was wholly or partly caused by the defective, hazardous, unsafe or failed goods. The onus will be on the supplier to prove that the defect was not the material or substantial cause of the harm, alternatively, to prove any one of the above defences.

Proper warnings and instructions regarding the correct use of the goods will be important to any defence.

Section 61 provides that if more than one supplier in the supply chain is liable in terms of this section, their liability will be joint and several. In practice this means that a consumer may seek to hold one supplier liable for the entire loss caused. That supplier will in turn have a claim against the other suppliers in the supply chain for that portion of the loss that is attributable to them.

The section also provides for the apportionment of liability between the various suppliers in the supply chain by a court. This means that each supplier may be held accountable for a certain amount of the loss to the consumer (i.e. not necessarily equally liable), depending on the extent to which their conduct (an act or failure to act) contributed to the harm in question.

6.9 Suppliers' accountability to consumers

6.9.1 Lay-bys

Reference: Section 62

If a supplier agrees to supply particular goods to his customers and to accept payment in periodic instalments and to hold those goods until the consumer has paid the full price of the goods, the goods will remain at the risk of the supplier until they have been delivered.

If the supplier is unable to deliver the goods he must at the option of the consumer:

- supply the consumer with the equivalent quantity of goods that are comparable or superior in description, design and quality;
- refund the money paid by the consumer with interest at the prescribed rate if the inability to supply the goods is due to circumstances beyond the supplier's control; or
- refund double the amount paid by the consumer as compensation for breach of contract in any circumstances that are not beyond the supplier's control.

If a customer terminates a lay-bye agreement before fully paying for the goods or fails to complete payment of the goods within 60 days after the anticipated completion date, the supplier may charge a termination penalty and after deducting such termination penalty must refund the customer the balance of what was paid in. A termination penalty may not be charged if the customer's failure to complete payment was due to the death or hospitalisation of the customer or if the supplier failed to notify the customer of the termination penalty before the customer entered into the lay-bye agreement.

6.9.2 Pre-paid certificates, credits and vouchers

Reference: Section 63

The Act determines that gifts or similar vouchers expire either on redemption for the full value or after three years after the date on which it was issued (unless the supplier extends the period). This would have an impact on a gift certificate given to you by a friend. The company that the certificate was bought from can no longer state that the certificate will expire within six months, but rather the maximum period of three years needs to be stated.

6.9.3 Supplier to hold and account for consumer's property

Reference: Section 65

When a supplier has in his possession the prepayments, deposits, membership fee or other money or any property that belongs to or is under the control of the consumer, he:

- must not treat the property as his own;
- must exercise a degree of care and skill when utilising, handling or safeguarding the property; and
- is liable for any loss from failure to treat the property as his own.

7. Protection of consumers' right and consumers' voice

The Act provides for the establishment of the National Consumer Commission, the main objective of which is to investigate consumer complaints and enforce the Act, as well as the National Consumer Tribunal, established in terms of the National Credit Act, No. 34 of 2005, the jurisdiction of which body has been expanded to enforce the CPA.

Dispute Resolution

A consumer may seek to resolve a dispute with a supplier by referring the matter to:

- the National Consumer Tribunal, if permitted by the Act in the case of a particular dispute;
- an ombud in the jurisdiction of the supplier;
- an applicable industry ombud (accredited under the Act) in the jurisdiction of the supplier;
- the National Consumer Commission by filing a complaint;
- a person providing conciliation, mediation and arbitration to assist in the resolution of the dispute; or
- the consumer court in the province with jurisdiction over the matter.

If the dispute has been resolved the dispute resolution agent must record the resolution into an order and with the consent of the parties submit it to the Tribunal or High Court to be made a consent order. The consent order may include damages to the complainant.

8. Business names and Industry Codes of Conduct

Reference: Sections 79-81

Section 79 prohibits a supplier from carrying on a business, advertising, promoting, offering to supply or supplying goods or services or entering into a transaction or an agreement with a consumer under any name except;

- under that person's full name
 - as it appears on the identity document of the individual; or
 - registered in terms of public regulation in the case of a juristic person; or
- a business name as registered to and for the use of that person.

The Act prohibits the use of "trading as" names to prevent businesses registering under one name but "trading as" under another name, which means that the actual company / close corporation / business cannot be traced. The Act requires all businesses to register their business names with the Companies Intellectual Property Commission (CIPC). If a person operates his business under a trading name that is not its registered name, the National Consumer Commission may issue a compliance notice to such a company by requiring that it cease trading under that name until the name has been registered.

The name of a business can be in any language and may include letters, numbers, punctuation marks, any symbols (+, &, #, @, %, =) and round brackets to isolate any part of the name alone or in combination.

An entity cannot register any business name that is the same or confusingly similar to any trademark that is already registered or to a registered company or close corporation. The name must not mislead anyone into thinking that the business is part of or associated with any other business. Likewise, it may not falsely suggest that the business is owned, managed or conducted by person having any particular educational designation or who are regulated persons or entities.

These sections (sections 79, 80 and 81) will only become effective on a date that will still be determined by the Minister which must be at least one year from the general effective date, which is one year from 31 March 2011. This means that these sections will become effective on any date as proclaimed after 31 March 2012.

The Commission may not take any action to enforce section 79(1) at any time against a person for the use of a business name if that person:

- had registered that business name before 31 March 2011 in terms of any public regulation other than a repealed law; or
- was actively conducting business under that business name for a period of at least one year before the date on which section 79 took effect.

It is, however, recommended that the business name is registered either as a business name with the Commission or as a defensive name, which must be renewed every two years to ensure protection and future use of that name.

At the time of compiling this guide, the Minister of Trade and Industry had not yet proclaimed a date and therefore these sections were not yet effective.

9. Franchise agreements

Reference: Sections 7, Regulation 2

In the past, franchise agreements were not subject to regulation by specific legislation core to the industry. The industry is subject to a Code of Ethics administered by the Franchising Association of South Africa and secondary legislation that also apply to other industries.

The CPA regulates franchise agreements to a limited degree. Certain provisions apply solely to franchise agreements whilst other provisions apply generically to both consumer transactions and franchise agreements. Certain provisions in the CPA are completely excluded from application to franchise agreements.

9.1 Provisions solely applicable to franchise agreements

9.1.1 The franchise agreement

The franchise agreement is concluded between the franchisor and the franchisee. The agreement is recognised by the following characteristics as more fully defined in the CPA:

- Consideration is paid or to be paid by the franchisee to the franchisor for the franchisee's right to carry on business within all or a specific part of the Republic under a system or marketing plan substantially determined or controlled by the franchisor or its associate.
- The business of the franchisee is substantially or materially associated with advertising schemes or programmes or one or more trademarks, commercial symbols or logos or any similar marketing, branding, labelling or devices, or any combination of such schemes, programmes or devices that are conducted, owned, used or licensed by the franchisor or an associate of the franchisor.
- The agreement governs the business relationship between the franchisor and the franchisee, which includes the relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisor or an associate of the franchisor.

9.1.2 Formalities of the franchise agreement

Reference: Section 7, 22 and Regulation 2

Section 7 of the CPA provides that a franchise agreement must:

- be in writing and signed by or on behalf of the franchisee;
- include any prescribed information or address any prescribed categories of information; and
- comply with the requirements of section 22, which relates to the right to information in plain and understandable language.

Every franchise agreement must contain a clause at the top of the first page of the agreement that "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".

Regulation 2 requires that each franchise agreement must contain the provisions that will prevent:

- unreasonable or overvaluation of fees, prices or other direct or indirect consideration;
- conduct that is unnecessary or unreasonable in relation to the risks to be incurred by one party; and
- conduct that is not reasonably necessary for the protection of the legitimate business interests of the franchisor, franchisee or franchise system.

Regulation 2 also sets out what further information needs to be included in the franchise agreement. Further requirements may be prescribed by the Minister.

9.2 Provisions that apply generically to both consumer agreements and franchise agreements

9.2.1 Relationship between franchise agreements and consumer agreements

Reference: section 5(6) (b)-(e)

The consumer agreement is distinguished from the franchise agreement in the CPA. The consumer agreement is defined as “*an agreement between a supplier and a consumer other than a franchise agreement*”. However, for the purposes of section 5(6) (b)-(e) a consumer includes a franchisee in terms of a franchise agreement to the extent applicable. This means that, for the purposes set out below, the franchisee is a consumer and the transactions are concluded between supplier and consumer within the meaning of the Act. The franchisee will have the same rights and protection afforded by the Act in the following arrangements:

- a solicitation of offers to enter into a franchise agreement;
- an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;
- a franchise agreement or an agreement supplementary to a franchise agreement; and
- the supply of any goods or services to a franchisee in terms of a franchise agreement.

9.2.2 Right to select suppliers

Reference: Section 13

In terms of section 13 a supplier must not require, as a condition of offering to supply or supplying any goods or services or as a condition of entering into an agreement or transaction that the consumer must:

- purchase any other particular goods or services from that supplier,
- enter into an additional agreement or transaction with the same supplier or a designated third party; or
- agree to purchase any particular goods or services from a designated third party,

unless the supplier offers bundled goods or services separately and at individual prices, or the supplier can show that the convenience to the consumer in having those goods or services bundled outweighs the limitation of the consumer’s right to choice, or that the bundling of those goods or services results in economic benefit for consumers.

In any transaction between a franchisee and franchisor in terms of their franchise agreement, it is a defence to an allegation that the franchisor (as supplier of the franchisee) has contravened this section, if any goods or services that the franchisee was required to purchase from or at the direction of the franchisor are reasonably related to the branded products or services that are the subject of the franchise agreement.

9.2.3 Other provisions

Except for the exclusions listed below, the provisions of the CPA apply to franchise agreements and, as a result, the provisions pertaining to the control of market practices and unfairness in contracts.

The table below indicates the sections that do not apply to franchise agreements.

Table 1: Sections in CPA that do not apply to franchise agreements

Section	Provisions in section
Section 14(2) read with the definition of "consumer agreement"	Expiry and renewal of fixed-term agreements
Section 19	Consumer's rights regarding the delivery of goods or the supply of services
Section 33	Catalogue marketing
Section 34	Trade coupons and similar promotions
Section 38	Referral selling
Section 47	Overselling and overbooking
Section 49(1)	Consumer agreement
Section 50	Consumer agreement

The Act has changed the relationship between the franchisor and the franchisee and the way the franchise businesses are regulated in South Africa. Consumers who are affected by these changes should make the necessary changes to their franchise agreements to bring them in line with the requirements of this Act.

10. Non-compliance

If a consumer exercises his rights in terms of the CPA, a supplier is prohibited from discriminating against the consumer, penalising the consumer, altering or proposing to alter the terms or conditions of a transaction or agreement with the consumer to the detriment of the consumer, or taking any action to accelerate, enforce, suspend or terminate an agreement with the consumer.

If a consumer has a complaint against a supplier, he can refer the complaint to the Commission or the Tribunal, or take the supplier to court. Prior to approaching a court for relief, a consumer must exhaust all remedies provided in the CPA. The complaint may be initiated by an individual, or a company, or the Commission itself. The Commission may direct that the complaint be investigated or reject the complaint as being frivolous or vexatious.

After investigation, the Commission may:

- issue a compliance notice that indicates the time period required within which to comply with the notice, as well as the penalties which will be imposed for non-compliance. The supplier may object to the compliance notice within 15 days after receipt of the notice;
- refer the matter to the National Prosecuting Authority if an offence has been committed;
- refer the matter to the Equality Court or the Consumer Court; or
- propose a draft consent order, which will be confirmed by the Tribunal. This consent order may include an amount for damages.

The Commission has the power to issue summons, interrogate a supplier's employees under oath, and to search and inspect the supplier's business premises with a warrant.

Any person issued with the compliance notice may apply to the Tribunal in the prescribed manner and form to review that notice within:

- 15 business days of receiving the notice; or
- such longer period as prescribed by the Tribunal.

After considering every representations made by the applicant and any other relevant information, the Tribunal may cancel, modify or confirm all or part of the notice.

The Tribunal and/or court may also make any other innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights. The Tribunal may also:

- award damages;
- impose imprisonment not exceeding 10 years, and/or a fine, for breach of confidence and, in all other cases, imprisonment for a maximum of 12 months, and/or a fine; and/or
- impose an administrative fine not exceeding 10% of a supplier's annual turnover during the preceding financial year or R1million, whichever is greater, payable to the National Revenue Fund.

In addition to the aforementioned remedies and the ordinary remedies allowed by the law, a court may order the restoration of money or property of the consumer, award compensation for loss or expenses incurred in concluding the transaction, and/or require a supplier to cease in a particular practice, form or document that does not comply with the provisions of the CPA.

11. Penalties

Any person convicted of an offense in terms of section 107 (1) (that is a breach of confidence) of this Act is liable to a fine or imprisonment not exceeding a period of 10 years or both or in any other case, to a fine or to imprisonment for a period not exceeding 12 months or to a fine or both.

The Tribunal may impose an administrative fine in respect of prohibited or required conduct.

An administrative fine imposed in terms of this Act may not exceed the greater of:

- 10% of the annual turnover during the preceding financial period; or
- R1 000 000.

Disclosure of any personal information obtained when conducting the affairs of this Act will be considered a breach of confidence.

The following will be considered by the Tribunal when determining an appropriate administrative fine:

- the nature, duration, gravity and extent of the contravention;
- any loss or damage suffered as a result of the contravention;
- the behaviour of the respondent;
- the market circumstances in which the contravention took place;
- the level of profit derived from the contravention;
- the degree to which the respondent has cooperated with the Commission and the Tribunal; and
- whether the respondent has previously been found in contravention of this Act.

12. Application of the Consumer Protection Act to pre-existing transactions and agreements prior to 31 March 2011

The Act does not apply to:

- marketing of goods and services before 31 March 2011;
- any transactions concluded or an agreement entered into before 31 March 2011; or
- any goods supplied or services provided to a consumer before 31 March 2011.

The following sections of the Act will, however, apply to the extent as included in the table where the agreement would have been subject to the Act if it was in effect at the time the agreement was concluded and contemplates that the parties will be bound for a fixed term until a date that is on or after two years after 31 March 2011.

Section of Act and extent of application to pre-existing agreement

14	Only subsections (1)(b) to (d) and (2) apply with respect to the expiry and possible renewal of the agreement, on or after the general effective date.
18-21	Apply only with respect to goods that are deliverable or delivered to the consumer in terms of the agreement, on or after the general effective date.
22	Applies only to a notice, document or visual representation that is required to be produced, provided or displayed to the consumer, on or after the general effective date.
25	Applies only with respect to any goods supplied to the consumer in terms of the agreement, on or after the general effective date.
26	Applies only with respect to any transactions occurring in terms of the agreement, on or after the general effective date.
31	Applies only to any purported amendment to the agreement made, on or after the general effective date.
44	Applies only with respect to any goods supplied to the consumer in terms of the agreement, on or after the general effective date.
53-58	58 applies only with respect to any goods or services supplied to the consumer in terms of the agreement, on or after the general effective date.
64(1) and (2)	Apply only to an amount paid or payable by the consumer in terms of the agreement, on or after the general effective date.
64(3) and (4)	Apply only with respect to any closure of a facility contemplated in those provisions, if it will occur on or after the effective date.
65	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.

Schedule 1 - Threshold determination's method of calculation

The method for the calculation of the asset value or annual turnover was stated in the Government Gazette number 34181, Notice No. 294 published on 1 April 2011.

1. Financial Reporting Standards Applicable

The notice states that for the purposes of section 6 of the Act, the assets, and the turnover, of a juristic person must be calculated in accordance with South African generally accepted accounting standards. There is no specific South African generally accepted accounting standards, save for what is referred to in the Companies Regulation, 2008 which is South African Statements of Generally Accepted Accounting Practice, SA GAAP, which has been withdrawn with effect of 1 December 2012. The most practical approach would be that companies and close corporations would use the Companies Act, 71 of 2008 specified frameworks. Other juristic persons would be able to use the framework adopted by them.

2. Valuation of Assets

The asset value of a juristic person at any time is based on the gross value of the juristic person's assets, subject to:

- (a) the asset value must equal the total assets less any amount shown on that balance sheet for depreciation or diminution of value;
- (b) the assets are to include all assets on the balance sheets of the juristic person, including any goodwill or intangible assets included in their balance sheets;
- (c) no deduction may be taken for liabilities or encumbrances of the juristic person; and
- (d) "assets in the Republic" includes all assets arising from activities in the Republic.

This section only includes assets arising from activities in the Republic and it is not certain what would happen should the juristic person have assets outside the Republic.

3. Calculation of annual turnover

The annual turnover of a juristic person at any time is the gross revenue of that juristic person from income in, into or from the Republic, arising from the following transactions and events as recorded on the juristic person's income statement:

- (a) the sale of goods;
- (b) the rendering of services; and
- (c) the use by others of the juristic persons' assets yielding interest, royalties and dividends.

The following may be excluded in the calculation:

- (i) any amount that is properly excluded from gross revenue in accordance with South African generally accepted accounting standards;
- (ii) 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, may be deducted from gross revenue;
- (iii) revenue excludes gains arising from noncurrent assets and from foreign currency transactions; and

(iv) 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, but excluding those amounts noted in (iii).

4. Form of financial statements

The financial statements that is used as a basis for calculating assets or turnover of juristic persons must be the juristic persons' audited financial statements, if they are required to produce audited financial statements or if the juristic person has audited financial statements, otherwise the statements must be prepared in accordance with the South African generally accepted accounting standards

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