

THE REGISTERED AUDITOR'S GUIDE TO THE CONSUMER PROTECTION ACT

PRESENTED BY EUNICE VAN ZYL

WHAT IS THE CPA?

- CONSUMER PROTECTION ACT, 68 of 2008
- Heralds the era of the consumer
- Repeals outdated consumer legislation
- Forms part of a suite of new consumer protection legislation

IMPORTANT DATES

- 24 April 2009 – Signed by President
- 24 April 2010 –
 - Chapter 1 (Interpretation, Purpose and Application)
 - Chapter 5 (National Consumer Protection Institutions)
 - Section 120 (Regulations)
 - Transitional Provisions
- 31 March 2011 – remaining provisions

WHY THE CPA?

- The need for reform:
 - Discriminatory and unfair market practices
 - Proliferation of low-quality and unsafe products
 - Lack of awareness of rights
 - Limited redress for consumers
 - Inadequate protection for consumers
 - Weak enforcement capacity
- Purposes of the Act

WHY IS THE CPA IMPORTANT TO YOU?

- Registered Auditors (RA) are service providers and the CPA will apply to transactions entered into by RAs.
- Every RA is a consumer who enjoys the protection of the CPA.
- Agreements which do not comply with the Act will be void.
- The CPA provides consumers with various new rights, and suppliers and service providers with various new obligations.
- RAs must know whether the CPA applies to their clients' business and what impact it has on financial statements.
- The fines are huge.

WHO AND WHAT DOES THE CPA APPLY TO?

- The CPA has a wide application
- There are exemptions
- CPA is prescriptive and potential liability great – it is also new and application uncertain

Application of the Act

- The Act applies to:
 - most **transactions** in South Africa concerning the supply of goods or services;
 - the **promotion** of goods and services or of the supplier thereof in South Africa; and
 - to the **goods and services** supplied or performed in terms of the transaction.

What is a transaction?

- An **agreement** to supply; or
- The **supply** of goods or the performance of services

for **consideration** and

in the ordinary course of business.

- The Act also mentions a number of transactions specifically (eg the supply of goods or services by a club or trade union to its members and franchise agreements).

Exemptions from application

- The Act **does not apply** to:
 - transactions with juristic persons with an asset value or annual turnover of R2 million or more as consumer
 - transactions with the State as consumer
 - credit agreements under the NCA, however, goods and services supplied on credit are still governed by Act
 - advice or intermediary services regulated by the FAIS Act
 - services regulated in terms of the Long-term Insurance Act or the Short-term Insurance Act
- Provisions dealing with liability for unsafe goods will apply to all goods introduced to the market, even if the transaction is exempt from the application of the Act

Industry-wide exemption may be granted by Minister

- May be granted on application by a regulatory authority
- Grounds for exemption: that those provisions from which exemption is sought overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of:
 - any other national legislation; or
 - any treaty, international law, convention or protocol.

What about existing agreements?

- As a general rule, the CPA does not apply to any marketing done, agreements entered into or goods or services supplied before 31 March 2011.
- Certain provisions of the CPA apply to certain fixed-term agreements.

Consumer

- A person to whom goods or services are **marketed**
- A person who has entered into a **transaction** with a supplier
- A **user** of the goods or a recipient or beneficiary of the services
- A franchisee in terms of a franchise agreement

Goods

- Anything marketed for human consumption
- Any other tangible object
- 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
- Land ownership
- Gas, water and electricity

Services (1)

- Any work or undertaking performed by one person for the direct or indirect benefit of another
- The provision of any education, information, advice or consultation, except advice that is subject to regulation ito the FAIS Act
- 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, but not:
 - advice or intermediary services that is subject to regulation ito the FAIS Act or a service regulated by the Long-term or Short-term Insurance Acts

Services (2)

- The transportation of an individual or any goods
- The provision of accommodation or sustenance
- The provision of entertainment, access to an event, premises, activity, facility
- The provision of access to any electronic communication infrastructure
- The provision of access to or use of any premises or other property in terms of rental
- A right of occupancy of, or a power or privilege over or in connection with any land or other immovable property, other than in terms of rental
- Rights of a franchisee in terms of a franchise agreement

SUPPLIER

- A person who:
 - promotes; or
 - suppliesany goods or services

WHAT SHOULD RAs DO?

- Treat all clients equally
- Respect clients' privacy
- Allow client to choose his auditor
- Disclose information plainly and clearly
- Market fairly and responsibly
- Be fair and honest when dealing with clients
- Ensure that their contracts with clients are fair, just and reasonable
- Comply with IRBA Rules, Code and applicable standards of accounting
- Where applicable, register a business name

KEY PROVISIONS (1)

- Client agreements
 - Plain language
 - Unjust, unfair and unreasonable contract terms prohibited
 - Exclusions of liability

UNFAIR, UNREASONABLE OR UNJUST CONTRACT TERMS

- Excessively one-sided
- Terms inequitable
- Consumer relied on a false or misleading representation
- Unfair limitation of liability or limitation was not drawn to consumer's attention
- Such terms are void

HOW MUST ONE DETERMINE WHAT IS REASONABLE?

- Section 52
- Fair value of goods / services
- Nature and relationship of parties
- Bargaining position of parties and whether there was any negotiation
- Plain language followed?
- Whether consumer ought to have known about the term
- Could consumer have used a different supplier?
- Was consumer required to do anything not necessary for the supplier's legitimate interests?

EXCLUSIONS OF LIABILITY

- The fact, nature and effect of an exclusion of liability must be drawn to the attention of the consumer
- It must be in plain language
- In a conspicuous manner and form
- Prior to entering into the transaction
- Consumer must have adequate opportunity to receive and comprehend the provision
- No exclusion for gross negligence permitted

Key provisions (2)

- Marketing should not be misleading, false, fraudulent or deceptive
 - Different types of marketing forms prohibited or regulated
- Consumers may terminate transactions resulting from direct marketing, without reason or penalty
 - Direct marketing is to approach a person personally or by mail or electronically to promote goods or services

Key provisions (3)

- Service provider may not charge more than the displayed price
- Service provider must supply a sales record
- Service provider must perform services timely and service should be of a quality that persons are generally entitled to expect

Key provisions (4)

- Register a business name (ss 79 – 81)
 - These sections are not yet in effect!
 - Person may do business either in his full name or his registered business name
 - Full name must still be disclosed to consumer
 - Commission may issue compliance notice
 - Except if person has been using the (unregistered) business name for more than 1 year before section 79 came into effect

Key provisions (5)

- Franchise agreements
 - Subject to CPA regardless of asset value or annual turnover of franchisee
 - Disclosure document to be handed to prospective franchisee
 - Going concern
 - Franchisor can meet liabilities and financial commitments
 - Financial statements in accordance with generally accepted accounting standards, consistent with previous years, in accordance with Companies Act and applicable laws and fairly reflects financial position

Key provisions (6)

- Promotional competitions
 - Prizes are distributed by lot or chance
 - No payment required for participation
 - Promoter must prepare competition rules
 - Independent accountant, RA, attorney or advocate must oversee and certify the conducting of the competition

Key provisions (7)

- Fixed-term agreement may not exceed the prescribed time period and may be cancelled at any time by the consumer (20 business days' notice) (s14)
- Implied provision of each transaction that goods comply with requirements and standards of the Act (s56)
- The producer or importer, distributor or retailer of any goods is liable for any harm (including economic loss) occasioned by the supply of unsafe goods, a product failure, defect or hazard in any goods or inadequate instructions or warnings provided (s61)

How does a consumer obtain redress?

Ombud with jurisdiction

Consumer

Applicable industry ombud

Arbitration, mediation or conciliation

Commission

Consumer court

Tribunal

Court

Enforcement of the CPA

- Enforcement by Commission
 - Receives and deals with complaints
 - Refers matters to Competition Commission
 - Refers matters to Tribunal
 - Refers matters to NPA
 - Compliance notices may be issued
- Failure to comply with compliance notice
 - Commissioner may either:
 - apply to the Tribunal for the imposition of an administrative fine
 - OR
 - refer the matter to the NPA for prosecution

Offences

- Breach of confidence
- Hindering the administration of the Act
- Offences relating to the Commission and the Tribunal
- Offences relating to prohibited conduct

Penalties

- Contravention of section 107(1) (Breach of confidence):
 - fine or imprisonment for a period not exceeding 10 years, or both
- Any other case:
 - fine or imprisonment for a period not exceeding 12 months, or both
- Magistrate's Court has jurisdiction to impose these penalties

Administrative fines

- The Tribunal may impose an administrative fine
- It may not exceed the greater of:
 - 10% of the respondent's annual turnover during the preceding financial year
 - OR
 - R1 000 000
- Must be paid into the National Revenue Fund

The end

Eunice van Zyl
Van der Westhuysen Attorneys
eunice@westlaw.co.za
081 432 1012