

Practical Issues For A Lonely User Of The Consumer Protection Act

by

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PRACTICAL ISSUES FOR A LONELY USER OF THE CONSUMER PROTECTION ACT

A look at the practical implications in implementing the Consumer Protection Act
with reference to practical examples from the fitness industry

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PRACTICAL IMPLEMENTATION OF THE CONSUMER PROTECTION ACT

1 INTRODUCTION

- 1.1 The Consumer Protection Act 68 of 2008 (hereafter referred to as the Act and/or the CPA) has and will continue to fundamentally change the way business is done in South Africa. When the Act became fully operational on 1 April 2011 businesses across the country were forced to reconsider and re-evaluate the way they do business.
- 1.2 One industry that is often signalled out when consumer rights' abuses are discussed is the fitness industry. Many of the abuses the fitness industry has been guilty of in the past, such as long fixed term contracts which could be almost impossible to get out of, annoying direct marketing campaigns, false promises and dangerous equipment, to name but a few, have now been outlawed by the Act.
- 1.3 The Act is a complex and often confusing piece of legislation that tries to be everything to everyone. Unfortunately, because its scope and application are so wide, it often creates uncertainty. There is currently very little guidance available to attorneys and businesses as to just what they need to do in order to comply with the Act.
- 1.4 Given the confusion created by the Act and the urgent need businesses face to comply with the Act, I have opted to look at the practical dilemmas a firm within the fitness industry faces when implementing this essential piece of legislation. I make a number of suggestions on how to implement the provisions of the Act rather than looking at a more traditional academic interpretation of the Act. It is even more baffling to the lonely intended beneficiary of the rights codified in the Act.

2 BACKGROUND

- 2.1 In the last two decades there has been an awakening around the world to the need for Consumer Protection legislation and regulation¹. The need internationally to enhance consumer protection has grown from the realisation that consumers are increasingly exposed to dangerous or substandard products and unscrupulous business practices.
- 2.2 There has been increased awareness that the traditional rules of contract are out-dated, in some respects. When individual consumers transact with big business, the contracting parties are more often than not, in an unequal bargaining position. In reality individual consumers have very little bargaining power to negotiate the terms of the contract, even if they do, they may have limited or no knowledge of the inadequacy of the product or service, of the potential dangers that the product or service in question might pose, or what the risks inherent to the service they are purchasing may be.
- 2.3 Traditional legal remedies have often been of cold comfort to consumers who cannot match the deep pockets of industry and commerce. As such consumers are often in a significantly disadvantaged position. When consumers do choose to litigate, even in circumstances where legal remedies were available to them they often could not afford a lengthy legal battle.
- 2.4 Interestingly, given the backdrop of consumer exploitation, consumers have turned to Competition Authorities for protection from unscrupulous industry players, both to protect their rights as consumers e.g. acting as whistleblowers to expose price fixing and cartel operations, and in the case of small business owners who have been exploited by suppliers for assistance for protection for exploitative practices. However, although Competition Law plays an important role in protecting consumer welfare, its role in this regard remains limited to the enforcement of competition policy and regulations.

¹ Examples of such legislation includes Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) in the United Kingdom and the establishment of the Australian Competition and Consumer Commission (ACCC) in 1995 and the proclamation of the Competition and Consumer Act 2010 in Australia

2.5 South Africa joined the international consumer protection revolution of the last 15 years by radically changing its regulatory framework. First by the introduction of the new Competition Act² ("Competition Act"), followed a few years later by the National Credit Act³ ("NCA") and most recently, the Consumer Protection Act⁴ ("CPA") which become fully operational on 1 April 2011⁵. With further consumer legislation such as The Protection of Personal Information Bill⁶ ("Popi"), in the pipeline. Popi aims to regulate how companies process and store people's personal information. Popi further aims to maintain a fair balance between an individuals the right to privacy and other important business interests such as the free flow of information within and across the borders of South Africa.⁷

3 CONSUMER PROTECTION ACT BACKGROUND

3.1 The Aim of the Consumer Protection Act is:

"To promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements, to establish the National Consumer

2 89 of 1998.

3 Act 34 of 2005.

4 Act 68 of 2008.

5 Previously South Africa had a patchwork of consumer related legislation such as the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988) and numerous others, the majority of which were repealed by the CPA, however the enforcement framework did not allow for robust enforcement and these were often ignored by both business and consumers. What set the CPA apart from its predecessors is that for the first time South Africa has legislation which creates one standard for consumer protection across the entire purchasing cycle, i.e. from the marketing stage through to when goods are already in the possession of the consumer and need to, for example, either be recalled, repaired or returned. Importantly its product liability framework radically changes the common law and has serious implications for participants in the supply chain such as manufacturers, distributors and importers. See Karin Rathbon "The Changing Regulatory Environment: The Consumer Protection Act" July/August 2010 KPMG TAXtalk: 15 available at http://0-search.sabinet.co.za/innopac.up.ac.za/WebZ/images/ejour/taxtalk/taxtalk_n23_a11.pdf;sessionid=0:bad=http://search.sabinet.co.za/ejour/ejour_badsearch.html;portal=ejournal:

6 Bill 9 of 2009.

7 Farzana Bada: "The Changing Regulatory Environment: The Protection of Personal Information Bill" July/August 2010 KPMG TAXtalk: 15.

*Commission....*⁸

- 3.2 The Act is directed at regulating the relationship between business and consumers; however it is widely acknowledged that the impact of the Act will be felt beyond the traditional business-consumer relationship. The Act has already started to make its mark on business-to-business commercial practices and relationships, as suppliers who deal with consumers start to seek protection against their own upstream suppliers and consumers⁹ (see the discussion about product liability in chapter 21 below) and as they update their standard terms in compliance with the provisions of the CPA.
- 3.3 The intention of the CPA is to address the fragmented and outdated consumer protection measures scattered across various statutes and the common law¹⁰. The Act in its final form can be described as the culmination of decades of debate and legal development in the field of consumer protection in South Africa.¹¹
- 3.4 The Act has transformed the regulation of market practices in South Africa. Van Eeden points out that the Act has provided for the following major departures from the traditional South African legal framework¹²:
- 3.4.1 Control of unfairness of contracts, as the concept of fairness of contract is introduced¹³;
- 3.4.2 Modified liability in respect of products or services which caused death or injury, as the Act introduces controls over product safety and a new product liability regime;

8 Aim of the Consumer Protection Act.

9 Van Eeden (2009) 2 A Guide to the Consumer Protection Act Durban : Lexis Nexis².

10 Green Paper on Consumer Protection, 2004, 9 available at <http://www.dti.gov.za/parliament/consumergaz.pdf> see also footnote 5 above.

11 Van Eeden (2009) 23.

12 Van Eeden (2009) 23-24.

13 Prior to the implementation of the Act, South African Courts would not readily interfere with a contract or a term of a contract on the grounds that it was unreasonable unless it was contrary to public policy see Christie R. "The Law of Contracts in South Africa, 4th edition, 2006, at page 14.

- 3.4.3 A complete consumer goods and services sales regime, a wholesale revision of the law of sale has been effected by the Act and allowances have been made for consumers to exit from certain contractual commitments where it was not possible to do so previously;
- 3.4.4 Attempts at a well-resourced and soundly structured regulatory framework, which is comparable to the successful competition law regime;
- 3.4.5 Participation by courts in the realisation of consumer rights.
- 3.5 Although the provisions of the Act amounts to a major departure from South African common law, the approach it takes is hardly novel¹⁴. The new sales law regime it creates is closely modelled on the new sale of goods and services regimes in the English speaking legal world while the new product liability regime draws on the EU model and the UK Consumer Protection Act of 1987 and developments in numerous other jurisdictions.¹⁵
- 3.6 What sets the CPA apart from the patchwork of law that it replaced is its comprehensive and coherent treatment of a wide range of consumer protection issues set within an overall legal framework of international standard. The Act not only changes the law itself, it also sets new rules of conduct and transforms the operation of the mechanisms and processes of the law with regard to consumer transactions – the net effect of the law is therefore to create an elaborate legal and administrative machinery which will allow for continuous reform of the substantive law.¹⁶
- 3.7 The Act provides a comprehensive framework in which both the rights and the duties of consumers and suppliers are entrenched. In theory it creates a fair, accessible and sustainable market place by: “prohibiting unfair market and

14 Van Eeden (2009) 24.

15 *Supra*.

16 *Supra*.

business practices; promoting responsible consumer behaviour; and harmonising the laws that currently govern the protection of the consumer”.¹⁷

3.8 The Act aims to establish a culture in which consumer rights and responsibilities are strengthened and business and innovation are enhanced¹⁸.

3.9 The Act is however silent on the inevitable rise in transaction costs, which the regime envisaged by the Act will introduce. It is merely a matter of time before this rise in costs works its way through the system, in higher prices, or ironically in lesser quality of goods and/or services, to the detriment of the lonely consumer. Suppliers are inevitably forced to raise the price of the product or service, to compensate for the increased risks they face and to pass on the additional costs to consumers, or to cheapen the product or service to stay within the original price bracket. In extreme cases suppliers may elect to stop supplying the services which may be seen as to high risk. A predicament which has not, as yet, received adequate attention.

3.10 Contracts between consumers and suppliers, the manner in which suppliers interact with consumers including, “market-related communications, liability of suppliers, suppliers’ accountability to consumers, and the administration of suppliers and practices, have all been impacted upon by the Act”.¹⁹

4 IMPLEMENTATION OF THE CPA

4.1 After numerous delays and extensions the Act became fully operational on 1 April 2011. Due to the large scale implications of its scope and magnitude it 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, came into effect on 24 April 2010 while all of the other provisions came into force on 31 March 2011.²⁰

17 Meyer C “Section 13: An Overview of Consumer Protection in South Africa” (2010) Webber Wentzel Investing in South Africa 153 .

18 Meyer (2010) Webber Wentzel Investing in South Africa 153.

19 Meyer (2010) Webber Wentzel Investing in South Africa 153.

20 Webber Wentzel A Guide to the new Consumer Protection Act 15 April 2011:2.

- 4.2 As with the majority of amendments to the law of South Africa, the Act has limited retrospective effect. It does not apply to marketing which took place, agreements which were concluded or goods or services which were supplied before 31 March 2011²¹. However, there are two important exceptions; it does apply to fixed term agreements entered into before 31 March 2011 which will expire after 31 March 2013, which would have been subject to the Act if it had been in effect at the time the agreement was made. The second exception is that the new liability provisions for damage caused by goods apply to all goods that were first supplied to the consumer from 24 April 2010 onward.²²
- 4.3 The National Consumer Commission (hereafter referred to as “the Commission or the NCC”), the body tasked with the enforcement of the provisions of the Act, got off to a slow start, in April 2011, with the final Consumer Protection Regulations only being published for the first time in their final form on 31 March 2011 and its website not being activated for a few weeks thereafter.
- 4.4 The Commission has since its inception been inundated with consumer complaints and requests. Since April it has made quite an impact on the South African marketplace. According to the NCC progress report, on the work done since inception in April 2011, to parliament on 7 September 2011, the Commission reported that “Since its establishment in April, its call centre has received an average of 8 000 calls a month, 616 e-mails, faxes or letters a week (9 939 written complaints and requests for advice had been received to date), and 101 “walk-ins” per month”. The NCC breakdown provided parliament the analysis of their work to date “showed most of the complaints (2 189) were levelled at the retail sector, followed by the motor industry (1 221), mobile and telecom (1 120), property, timeshare and financial (1 100), government and municipalities (450), travel and tourism (185), fitness centres (237) and education and medical services (110).”²³

21 Webber Wentzel A Guide to the new Consumer Protection Act 15 April 2011:2.

22 Webber Wentzel A Guide to the new Consumer Protection Act 15 April 2011:2.

23 National Consumer Commission progress report on the work done since inception in April 2011, 7 September, 2011, available <http://www.pmg.org.za/report/20110907-national-consumer-commission-its-progress-report-work-done-its-incept>.

- 4.5 The Commission has, over and above dealing with the complaints as listed above "initiated proactive investigations into three sectors – Information and Communications Technology (ICT), Retail and Manufacturing, and Medical and Pharmaceuticals."²⁴
- 4.6 Other areas of where its investigations have made news headlines were²⁵ -
- 4.6.1 The cell phone sector, where complaints about exorbitant international roaming charges, SMS peak and off-peak costs, network call costs, and "per second" versus "per minute" charges, were being looked at.²⁶
- 4.6.2 The "bundling" of broadcasting channels by Multichoice. Section 13 of the CPA required bundled services to be able to be sold individually, or if bundled, to provide an economic benefit to the consumer.²⁷
- 4.6.3 The high level of non-compliance with the CPA in the retail sector, particularly in respect of returns and refunds, and the labelling and pricing of products.²⁸
- 4.7 The Commission also initiated talks with Virgin Active (Pty) Ltd ("Virgin Active") and other firms in the fitness industry during the course of July and August of 2011. However no formal investigation has been launched and no compliance notices have been issued.
- 4.8 In examples of contract terms and the suggested application of specific sections of the Act, I use examples from Virgin Active contracts (both old and

24 National Consumer Commission progress report on the work done since inception in April 2011, 7 September 2011, available <http://www.pmg.org.za/report/20110907-national-consumer-commission-its-progress-report-work-done-its-incept>.

25 National Consumer Commission progress report on the work done since inception in April 2011, 7 September 2011, available <http://www.pmg.org.za/report/20110907-national-consumer-commission-its-progress-report-work-done-its-incept>.

26 See also Tech Central, Tech sector to face consumer watchdog probe, 6 April 2011 available at <http://www.techcentral.co.za/tech-sector-to-face-consumer-watchdogprobe/22384/>.

27 THABISO MOCHIKO Consumer body orders new pay-TV contracts Business Day, 2011/10/21 07:14:54 AM available at <http://www.businessday.co.za/articles/Content.aspx?id=156651>.

28 National Consumer Commission progress report on the work done since inception in April 2011, 7 September 2011, available <http://www.pmg.org.za/report/20110907-national-consumer-commission-its-progress-report-work-done-its-incept>.

new) as it appears that the Commission is satisfied with the approach taken by Virgin Active in its implementation of the CPA.

5 GENERAL APPLICATION OF THE CPA

5.1 The Consumer Protection Act regulates the activities of suppliers, who are defined as "the makers of goods and services, and creates rights for consumers" by the Act.²⁹

5.2 The CPA applies to all transactions between consumers and suppliers unless such a transaction has been exempted by the Act. The Act contains various definitions which must be noted in order to properly comprehend the operation and scope of application of the Act.³⁰

5.3 Section 1 of the CPA furthermore contains the following relevant definitions which should be noted for the purposes hereof -

5.3.1 "**consumer**", in respect of any particular goods or services, means-

5.3.1.1 a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;

5.3.1.2 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);

5.3.1.3 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

29 Melville 5.

30 Van Heerden paragraph 8.

5.3.1.4 a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e);

5.3.2 "**service/s**" includes, but is not limited to -

5.3.2.1 any work or undertaking performed by one person for the direct or indirect benefit of another; and

5.3.2.2 the transportation of an individual or any goods

irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service;

5.3.3 "**service provider**" means a person who promotes, supplies or offers to supply any service and "**supplier**" means a person who markets any goods or services;

5.3.4 "**transaction**" means -

5.3.4.1 in respect of a person acting in the ordinary course of business -

5.3.4.2 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

5.3.4.3 the supply by that person of any goods to or at the direction of a consumer for consideration; or

5.3.4.4 the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or

5.3.4.5 an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a).

5.3.5 "**consideration**" means anything of value given and accepted in exchange for goods or services, including -

- 5.3.5.1 money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object;
 - 5.3.5.2 labour, barter or other goods or services;
 - 5.3.5.3 loyalty credit or award, coupon or other right to assert a claim; or
 - 5.3.5.4 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.
- 5.4 As a general rule and based on the above, the CPA applies to the supply of goods and services and to suppliers/service providers who supply such goods and services to consumers within South Africa in the ordinary course of their business. "**Consumers**" for purposes of the CPA include-
- 5.4.1 any natural persons who carries or has carried on any trade, business or profession, but only in such capacity;
 - 5.4.2 a partnership which carries or has carried on any trade, business or profession; or
 - 5.4.3 any former or existing juristic person.
- 5.5 As an exception to this general rule in terms of section 5(2) of the CPA the following transactions are exempted –
- 5.5.1 where the goods or services are supplied to the state;
 - 5.5.2 where the consumer is a juristic person with an asset value or turnover which equals and exceeds the thresholds value determined by the Minister;

- 5.5.3 in respect of transactions which are specifically exempted by the Minister;
- 5.5.4 that constitutes a credit agreement under the National Credit Act 34 of 2005 (but the goods or services which forms the subject of a credit agreement shall nevertheless be subject to the CPA); and
- 5.5.5 that constitutes services supplied under an employment contract or collective agreement.

6 SCOPE OF APPLICATION OF THE ACT

6.1 The Consumer Protection Act applies to:

- 6.1.1 each transaction occurring within the Republic (unless the transaction is excluded in terms of section 5(2) or 5(3) and 5(4) of the Act as discussed hereinafter);
- 6.1.2 the promotion of any goods or services, or of the supplier of any goods or services, within the Republic unless those goods or services could not reasonably be the subject of a transaction to which the Act applies or the promotion of those goods or services has been exempted in terms of section 5(3) or (4) of the Act;
- 6.1.3 goods or services that are supplied or performed in terms of a transaction to which the Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services; and
- 6.1.4 goods that are supplied in terms of a transaction that is exempt from the application of the Act, but then only to the extent that those goods and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to the provisions of the Act relating to safety monitoring recall and strict product liability as set out in section 60 and 61 of the Act respectively.^{31 32}

31 Section 5(1).

32 Van Heerden:4.

7 EXEMPT TRANSACTIONS

- 7.1 The Consumer Protection Act does not apply to any transaction -
- 7.1.1 in terms whereof goods and services are promoted or supplied to the State;
 - 7.1.2 in terms whereof the consumer is a juristic person whose asset value or annual turnover, at the time of the agreement, is equal to or exceeds R2 million;³³
 - 7.1.3 if the transaction falls within an industry wide exemption granted by the Minister to a particular industry;
 - 7.1.4 that constitutes a credit agreement under the National Credit Act 34 of 2005, but the goods and services that are the subject of the credit agreement are not excluded from the ambit of the Act;
 - 7.1.5 pertaining to services to be supplied under an employment contract;
 - 7.1.6 giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution 1996; or
 - 7.1.7 giving effect to a collective agreement as defined in section 213 of the Labour Relations Act, 66 of 1995.^{34 35}
- 7.2 A regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of the Act on the ground that those provisions overlap or duplicate a regulatory scheme administered by that

³³ For instance an if an asset such as a family home, worth more than R2 million, is owned by a trust, and the trust for instance, contracts with an electrician then on the face of it, the owner, as a trustee acting on behalf of the trust, will become a very lonely consumer as the Act will not apply.

³⁴ C Van Heerden:11-12

³⁵ Section 5(2)

regulatory authority in terms of any other national legislation or any treaty, international law, convention or protocol^{36, 37}.

8 BASIC CONSUMER RIGHTS

8.1 The Act creates a number of fundamental consumer rights, which can be summarised as follows:

8.1.1 **The right to equality in the marketplace:** all consumers have the right to equal access to goods and services – consumers may not be discriminated against on arbitrary grounds.³⁸ In contrast to the competition law regime, which contains similar provisions admonishing market players who deny other players access to the market, in which instance the law protects the collective theoretical market from harm suffered due to unequal access. The CPA in contrast protects individual consumers from being excluded and denied equal access in the market to a particular good or service on an arbitrary basis and does not look at the impact of the market as a whole.

8.1.2 **The right to privacy:** all consumers now have the right to accept, refuse or block direct marketing³⁹ approaches (such as marketing SMSes and emails, for instance);⁴⁰

8.1.3 **The right to choose:** all consumers have the right to select goods or services on the basis of having examined the goods and compared prices ("you break it, you buy it" no longer applies);⁴¹

8.1.4 **The right to disclosure and information:** consumers must be able to understand the terms and conditions of any transaction or agreement

36 Section 5(3) of the Act

37 Van Heerden: 12

38 Sections 8 and of the Act.

39 In terms of section 1 of the CPA "direct marketing" means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting or offering to supply, in the ordinary course of business, any goods or services to the person or requesting the person to make a donation of any kind for any reason.

40 Section 11 read with section 12 of the Act.

41 Section 18 of the Act.

they enter into, and must be able to make informed choices about the products and services they choose to consume;⁴²

8.1.5 **The right to fair and responsible marketing:** the Act prohibits misleading or deceptive marketing;⁴³

8.1.6 **The right to fair and honest dealings:** There are provisions against false, misleading or deceptive representations and fraudulent schemes⁴⁴;

8.1.7 **The right to fair, reasonable and just terms and conditions:** the courts are given powers to ensure that agreements and actions between themselves and consumers amounts to fair and just conduct;⁴⁵ and

8.1.8 **The right to fair value, good quality and safety:** there is an implied warranty of quality in any transaction or agreement we may make.⁴⁶

9 CHANGES REQUIRED TO ENSURE COMPLIANCE WITH THE CPA

9.1 As stated above, the new legal framework of the consumer market, as established by the CPA, differs in a number of material respects from the old private law legal framework.⁴⁷ Other than a general requirement of equity and fairness which has now been “imported” into our law of contract, a number of contractual rules which were previously considered *sacra saint* have been deliberately moved away from in agreements between consumers and suppliers.

9.2 One of the major departures from the long standing common law approach is the relegation of the strict *caveat subscriptor* rule, the general rule that there is no duty on a contracting party to inform his opposite party about the contents of their agreement – and a person who signs a document without

42 Section 22 of the Act.

43 Section 29 - 33 of the Act.

44 Section 40 – 43 of the Act.

45 Section 48 read with regulation 44(3)

46 Part H of the Act

47 Van Eden:58.

reading it does so at their own risk.⁴⁸ As discussed in further detail below, it has now become the duty of a supplier to ensure that a consumer is able to understand the terms of a contract and that their attention is brought to any term which they may find unusual or surprising.⁴⁹

- 9.3 The use and scope of exception clauses, a favourite in standard terms agreements, has also been curtailed by the Act. Damage resulting from negligence in respect of goods or any act or omission which results in death or personal injury can no longer be contracted out of.⁵⁰
- 9.4 The departure from the parol evidence rule / whole agreement / non-variation clauses, which have the effect that when a contract is in writing (for example standard form contracts) the document evidencing it will be accepted as the sole evidence of the contents of the agreement⁵¹, is another marked departure from the common law which has required the amendment of standard term contracts.⁵²
- 9.5 The effect of the abovementioned changes to the common law has meant that businesses that deal with consumers have had to start their CPA compliance programmes by redrafting their standard terms of their contracts.

10 REDRAFTING TERMS AND CONDITIONS

- 10.1 To get a sense of the difference between pre- and post – CPA standard term contracts in the fitness industry, Virgin Active’s pre-CPA Membership Application Form has been attached hereto, marked “Annexure A” (hereafter referred to as “pre-CPA terms and conditions”).
- 10.2 When looking at the pre-CPA terms and conditions you will immediately notice that the writing on the contract is almost illegibly small and although there are

48 Van Eden:69.

49 See part G of the Act (Sections 48-52).

50 See sections 51 and 61 of the Act read with Regulation 44.

51 Van Eden, 71 also see generally Van der Merwe et al 173-178

52 Section 51(g) of the Act.

different signature points dispersed across the two pages, the contract is supremely un-user friendly.

- 10.3 Once one passes the initial observations, you will notice that Section G contains a “no liability and indemnity clause” which requires a consumer and their estate, to indemnify and hold Virgin Active (and all related parties) harmless against any claim, by any person for damage caused or contributed to by any act or omission by Virgin Active. How the CPA has changed supplier’s liabilities and how these standard “no liability” clauses have had to be redrafted is discussed in below in paragraph 21.
- 10.4 Clause H of the pre-CPA terms and conditions contains a catch all provision in which a consumer is required to sign within the body of the agreement to agree to an “irrevocable agreement” that they want to become a member and that they have further read and understood the terms and conditions contained in the document, they are further reminded that they “*cannot cancel this agreement prior to the expiry of the Commitment Period*”. On the other side of the page the terms and conditions continue and the fixed period / commitment period is explained in further detail. The pre-CPA contract is for a minimum period of 12 months (or 24 month) after which the contract rolls over on a month to month basis. (See “Annexure B” for an example of the post-CPA fixed term agreement, which illustrates the difference between the pre- and post- CPA circumstances).
- 10.5 Interestingly, the pre-CPA terms and conditions contain a “Cooling Off Period” in terms of which the consumer/ member may cancel the membership agreement within 5 days of entering into it – provided that such notice of cancelation had to be in writing.

11 REQUIREMENTS LAID DOWN BY THE CPA

- 11.1 To give effect to the consumer rights created by the CPA, a number of provisions of the Act contain detailed rules about how a supplier must interact with a consumer. What follows is an analysis of the requirements laid out by the Act which have application on agreements between consumers and suppliers, specifically those which find application in the fitness industry.

- 11.2 Suppliers are required by law to change their written agreements when dealing with consumers as well as the way they interact with consumers in general, be it through written communication or in any other format.

12 RIGHT TO INFORMATION IN PLAIN AND UNDERSTANDABLE LANGUAGE

- 12.1 Section 22 of the CPA, requires that all information given to consumers in respect of products or services must be in plain and understandable language. This particular right is set out in Part D of the CPA and is described as part of the consumer's "right to the disclosure of information".⁵³
- 12.2 Section 22 of the Act provides that the producer of a notice, document or visual representation that is required, in terms of the CPA or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation in the form prescribed in terms of the CPA or any other legislation, if any, for that notice, document or visual representation; or in plain language, if no form has been prescribed for that notice, document or visual representation.
- 12.3 For the purposes of the CPA a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and importance of the notice, document or visual representation without undue effort, having regard to-
- 12.3.1 the context, comprehensiveness and consistency of the notice, document or visual representation;
- 12.3.2 the organisation, form and style of the notice, document or visual representation;

⁵³ Kirby "Clearly Clear? Plain and understandable language in terms of the Consumer Protection Act" Werksmans Legal Brief August 2011:1.

- 12.3.3 the vocabulary, usage and sentence structure of the notice, document or visual representation; and
- 12.3.4 the use of any illustrations, examples, headings or other aids to reading and understanding.
- 12.4 The CPA and section 22's requirement that all consumer facing information be written in plain and understandable language heralds a new age in legal drafting in South Africa. "The averagely literate and minimally experienced consumer is the new animal in South African law. The experience of this consumer will dictate whether or not a particular supplier is able to achieve the obligations imposed by section 22(2)"⁵⁴ of the Act.
- 12.5 In a sense South Africa has come late to the "plain language" party, as most English speaking jurisdictions around the world have been moving towards plain language and away from legalese in their drafting over the last few decades.⁵⁵ We still have a way to go before the legal fraternity fully embraces the plain language movement but the requirements of plain language contained in both the National Credit Act (section 64) and the CPA, indicate that the legislature has decided it is about time to force lawyers to cater for the averagely literate non lawyer, also known as the average citizen, rather than their professional peers.
- 12.6 From an implementation point of view, it is a very challenging exercise to "translate" standard legal terms into lay-man's English and it presents an even bigger challenge to cater for the "averagely literate" South African consumer. The greatest difficulty is that the legal terms, in standard term agreements, have definite meanings and specific interpretations as interpreted by the courts over the years. Currently there is no clear guidance as to how to "translate" these standard terms into everyday language, and we will have to wait for the courts to interpret these new consumer friendly agreements.

54 Kirby, 2011:2.

55 In fact it started in the United States in the 1970's with the introduction of the Paperwork Reduction Act in 1976. In the United Kingdom the plain language movement has been gaining traction since the 1940's (according to Wikipedia.com) and in 1999 the Unfair Terms in Consumer Contracts regulations mandate "plain and intelligible" language.

13 COOLING OFF RIGHT

- 13.1 Section 16 of the Act provides for a so called cooling off period, which only applies to a transaction that occur as a result of direct marketing campaigns.⁵⁶ The consumer may exercise this cooling off right, if they have a change of heart in respect of the transaction in question. This cooling off right is in addition to and not in substitution of any right to cancel a transaction or agreement, that may otherwise exist in law between a supplier and a consumer, however such consumer rights are coupled with a supplier's malperformance or a defect in the product, whereas the transaction cancelled in terms of the cooling off right relates only to a change of heart on the part of a consumer.^{57 58}
- 13.2 Section 16 specifically allows consumers to exercise their cooling-off right a transaction resulting from any direct marketing campaign without them having to provide any reason, nor can a supplier force them to pay a penalty. The consumer may cancel the resulting transaction by notice to the supplier in writing, or another recorded manner and form, within five business days after the later of the date on which the transaction or agreement was concluded or the goods that were the subject of the transaction were delivered to the consumer.^{59 60}
- 13.3 In terms of section 16(4)(a) of the Act, a supplier must return any payment received from the consumer in terms of the transaction, in the event of a change of heart in the cooling off period, within 15 business days after:
- 13.3.1 if no delivery has taken place, receipt of the notice from a consumer rescinding the transaction⁶¹; or

⁵⁶ Section 16 of the CPA only applies to direct marketing communication to which section 44 of the Electronic Communications and Transactions Act does not apply [section 16(1) of the CPA].

⁵⁷ Section 16(2) of the Act.

⁵⁸ Van Heerden: 19.

⁵⁹ Section 16(3) of the Act.

⁶⁰ Van Heerden:19.

⁶¹ See section 16(a)(i) of the Act.

- 13.3.2 if delivery has taken place, within 15 days from the date on which the consumer returned the goods to the supplier.^{62 63}
- 13.4 Such supplier who directly markets goods or services and who concludes a transaction or agreement with a consumer, must notify the consumer of their cooling-off right in terms of section 16 of the Act and which steps the consumer needs to follow in order to act in accordance with this right should they so wish.^{64 65}
- 13.5 In Annexure A we can see that Virgin Active already had a 5 day cooling-off period in their pre-CPA terms and conditions, therefore it appears that such a provision therefore made business sense, in order to ensure that there was a genuine commitment to honour the contract, and thereby lessen the risk of default.
- 13.6 The cooling-off right given to consumers allows vulnerable consumers to escape transactions they may not be able to afford. However it creates some difficulty for suppliers, as they may not know, if they are running various marketing campaigns, one of which might be a direct marketing campaign, whether or not it was in response to such a campaign that the consumer signed up. My recommendation would be that if any uncertainty exists, suppliers should make provision for the cooling off period in their standard term agreements.

14 WRITTEN CONSUMER AGREEMENTS

- 14.1 Section 50 of the Act provides that if a consumer agreement between a supplier and a consumer is in writing, irrespective of whether or not the consumer signs the agreement⁶⁶, the supplier must provide the consumer with a free copy, or free electronic access to a copy, of the terms and conditions of that agreement. Such terms and conditions must be in plain and

62 See section 16(a)(ii) of the Act.

63 Supra:19.

64 Section 32(1) of the Act.

65 Van Heerden: 19.

66 Section 50(2)(a) of the Act.

understandable language in accordance with the requirements of section 22 of the Act. The supplier must further provide the consumer with an itemised break-down of the consumer's financial obligations under such agreement.⁶⁷

- 14.2 If a consumer agreement between a supplier and a consumer is not in writing, a supplier must keep a record of transactions entered into over the telephone or any other recordable form as prescribed.^{68 69} When such information is recorded, a supplier must be careful to comply with the terms of the Regulation of Interception of Communications and Provision of Communication Related Information Act ("RICA").⁷⁰ RICA requires that a person be informed if a conversation they are a party to is being recorded. The provisions of the POPI and its requirements regarding the storage of personal information must also be considered when a supplier stores consumer agreements, which necessarily contain personal information of the individual concerned.

15 TERMS WHICH ARE UNFAIR UNREASONABLE OR UNJUST

- 15.1 In terms of section 48 of the CPA a supplier may not offer to supply, or enter into an agreement to supply, any goods or services at a price that is unfair, unreasonable or unjust; or on terms that are unfair, unreasonable or unjust.⁷¹
- 15.2 Section 48 introduces the concept of reciprocity between suppliers and consumers placing them in a more equal bargaining position, in an attempt to level the playing field. Generally speaking the unfairness of non-reciprocity is dealt with by way of the so-called grey and black lists, dealt with in more detail below. An example of unfairness, resulting from such non-reciprocity is for instance that the supplier may cede the agreement but the consumer may not, or the supplier may levy heavy penalty provisions for non performance, but the consumer may not.

67 Section 50(2)(b) of the Act.

68 Section 50(3) of the Act.

69 Van Heerden paragraph 6.3.

70 The Regulation of Interception of Communications and Provision of Communication Related Information Act, 70 of 2002, section 4.

71 Van Heerden:40.

- 15.3 A supplier may not require a consumer, to waive any rights; assume any obligation; or waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.^{72 73}
- 15.4 Section 48 of the Act contains a so-called “black list” of unfair, unjust or unreasonable transactions, agreements, terms or conditions or notices. Such terms will be unfair, unjust or unreasonable if:⁷⁴
- 15.4.1 it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
 - 15.4.2 the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
 - 15.4.3 the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
 - 15.4.4 the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49(1), and the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.^{75 76}
- 15.5 In addition to the above, Regulation 44(3) contains a so-called “grey” list of contract terms that are presumed not to be fair and reasonable. This list is indicative that a term listed therein may be fair, dependant on the circumstances of a specific case. The list is not meant to be an exhaustive list

72 section 48(1) of the Act.

73 Van Heerden: 41.

74 Van Heerden:42.

75 Section 48(2).

76 Van Heerden:42.

and as such terms that have not been included therein may also be considered unfair dependant on the circumstances.^{77 78} The regulation specifically states that the list applies only in the circumstances where a consumer entered into the agreement for purposes “wholly or mainly unrelated to his or her business or profession is presumed to be unfair”.⁷⁹

- 15.6 Please refer to Regulation 44(3) for a list of contract terms which are presumed to be unfair in consumer agreements.⁸⁰
- 15.7 Regulation 44(3) further stipulates that if a supplier reserves the right to unilaterally alter the conditions of an open-ended agreement, the supplier must inform the consumer thereof and the consumer is then free to dissolve the agreement immediately, without penalty.⁸¹
- 15.8 What we can see from the above is that a term in a contract that requires a consumer to waive their rights may be viewed as a presumed unfair term. The difficulty in the fitness industry is that, by its very nature the industries is fraught with risks, as people often use equipment incorrectly, or overestimate their own strength and fitness level and put themselves in physical danger, for these reasons it is not possible to avoid every risk.
- 15.9 From a business perspective it is difficult to foresee how the provision of section 48(1)(c) of the Act which stipulates that a supplier may not require a consumer, to waive any rights; assume any obligation; or waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction⁸². It is very difficult at this point in time to interpret whether section 48(1)(c) forbids waivers of liability in general or whether something more is required for such a waiver to be unfair unreasonable or unjust.

77 Regulation 44(2)(a) and (b).

78 Van Heerden:42.

79 Regulation 44(1).

80 Regulation 44(3) (a) – (bb).

81 Regulation 44(4)(c).

82 Section 48(1) of the Act.

- 15.10 Van Eeden⁸³ suggests that each case or clause will have to be judged on a case by case basis and no hard and fast rule can be formulated to stipulate when or if such a waiver or additional obligation is unfair or unjust in the circumstances. Van Eeden further proposes that the test is a subjective one. Unfortunately the vagueness of this section simply creates further interpretational difficulty and creates uncertainty amongst those required to apply the provisions of the Act in everyday transaction.
- 15.11 Such an attempt at the imposition of an obligation or the requirement to waive rights may simply be a pretence to avoid providing the service or good to a consumer so as to obfuscate a denial of a service or sale of a good or service in an attempt to obfuscate the fact that the supplier is in fact unfairly discriminating against the consumer. As such the denial will lead to a breach of a consumers fundamental right to be treated equally, and would therefore amount to a contravention of section 8 of the Act.

16 NOTICE REQUIRED FOR CERTAIN TERMS AND CONDITIONS

- 16.1 Section 49 of the Act requires that consumers be notified of provisions in consumer agreements that:
- 16.1.1 purports to limit the risk or liability of a supplier or any other person, in any way;
- 16.1.2 constitute an assumption of risk or liability by the consumer; and/or
- 16.1.3 impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of section 49(3) to (5).⁸⁴

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⁸³ Van Eeden, 184.

⁸⁴ Section 49(1) Of the Act.

⁸⁵ Van Heerden: 43-44.

- 16.2 This means that, such provision and condition must be written in plain language.⁸⁶ The fact, nature and effect of the provision or notice 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. These conditions must be drawn to the consumer before they can be bound by the transaction or before they are required to pay any form of consideration.⁸⁷ The consumer must further be given an adequate opportunity to receive and comprehend the provision or notice.^{88 89}
- 16.3 The notice requirement relates to any and all activities or facilities that is subject to any risk that is:
- 16.3.1 of an unusual character or nature;
 - 16.3.2 the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or
 - 16.3.3 that could result in serious injury or death.
- 16.4 Suppliers must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of section 49(3) to (5) of the Act. The consumer must agree to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.⁹⁰
- 16.5 A practical difficulty around this provision is that many suppliers appear to have gone overboard in their attempts to draw consumer's attention to provisions in their standard terms agreements. By putting text in bold

86 Section 49(3) of the Act.

87 Section 49(4) of the Act.

88 Section 49(5) of the Act.

89 Van Heerden:44.

90 Section 49(2) of the Act.

lettering, requiring consumers to sign every second line in an agreement or printing three quarters of the provisions in red ink⁹¹. One might cynically interpret their over exuberance as following the form rather than the substance of the law, whilst attempting to hide the exact details which the Act requires be brought to the attention of consumers. By going overboard in drawing a consumers attention to every aspect of an agreement – the same problem that existed before – i.e. hidden contract terms – is likely to occur again, if everything in an agreement is highlighted a consumer is just as unlikely to notice or to take note of the unusual terms contained therein.

- 16.6 A serious problem with the signature points, bold and highlighted lettering which have become a familiar sight in many post-CPA standard form agreements, is that this could constitute an attempt to bamboozle consumers into believing that suppliers are entitled to ask them to waive their CPA rights, and that this procedure is an acceptable practice, because it has been brought to the consumer's attention – even though it may be in stark contravention of the provisions of the black and grey lists section 48 and Regulation 44(3) and section 51 (which is dealt with in more detail below in paragraph 17).
- 16.7 A further question that arises when implementing the requirements of the section is, as that as the notice requirement relates to any and all activities or facilities, to what extent does the law now require that we move over to the American (undesirable) system of sticking warning labels on everything, from a cup of coffee to heavy duty machinery?
- 16.8 In the fitness industry, most equipment, if it malfunctions or is used incorrectly, presents a risk of an unusual character or nature, which may result in serious injury or death. I submit that an ordinarily alert consumer could reasonably be expected to notice or contemplate this risk posed by the equipment in the circumstances. However the question that arises here is whether in order to ensure compliance with the Act it is necessary to put warning labels on everything that could potentially be dangerous?

91 The standard term agreements of some of the cell phone companies or those of banks come to mind.

- 16.9 I would suggest that it is a supplier's duty to ensure that equipment is as safe as possible and to ensure that consumers are educated about the correct way to use equipments. In my view the Act does not impose or require that every possible item which may cause harm be labelled as such – by expressly stipulating that the notice requirement relates to risks “the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances”. The Act places an equal obligation on the consumer to alert and to notice possible risks and dangers inherent in certain kinds of products.
- 16.10 In respect of the question of who or what a reasonable consumer is or an an ordinarily alert consumer should be, I suggest we look to the famous words of Judge van der Heever when referring to the *bonus paterfamilias* the reasonable man “is not a timorous faint heart always in trepidation lest he or others suffer some injuries; on the contrary he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise”.⁹²
- 16.11 In order to comply with the notice requirements as set out above, right of entry sign / terms of entry signs should be redesigned and placed in prominent positions to ensure that they attract a consumer's attention and are clear and legible. It can no longer be permissible to have verbose warning signs hidden in dark corners of buildings, indemnifying a supplier from all possible harm suffered by a consumer. The terms of such waivers must be narrowed, these signs simplified and placed in prominent positions to comply with the requirements of the Act.

17 PROHIBITED TRANSACTIONS, AGREEMENTS, TERMS OR CONDITIONS

- 17.1 It has to be noted that it would not be possible for a supplier to contract out of the provisions of the CPA. In this respect section 51 specifically provides that a

⁹² HERSCHEL v MRUPE 1954 (3) SA 464 (A) at page 490.

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

- 17.1.1 its general purpose or effect is to defeat the purposes and policy of the CPA, mislead or deceive the consumer, or subject the consumer to fraudulent conduct;
- 17.1.2 it directly or indirectly purports to-
 - 17.1.2.1 waive or deprive a consumer of a right in terms of the CPA;
 - 17.1.2.2 avoid a supplier's obligation or duty in terms of the CPA;
 - 17.1.2.3 set aside or override the effect of any provision of the CPA; or
 - 17.1.2.4 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;
- 17.1.3 it purports to -
 - 17.1.3.1 limit or exempt a supplier of services 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;
 - 17.1.3.2 constitute an assumption of risk or liability by the consumer for a loss contemplated in 17.1.3.1, or
- 17.1.4 it results from an offer prohibited in terms of section 31 (negative option marketing);
- 17.1.5 it requires the consumer to enter into a supplementary agreement, or sign a document which contains prohibited provisions;
- 17.1.6 it purports to cede to any person, charge, set off against a debt, or alienate in any manner, a right of the consumer to any claim against the Guardian's Fund;

- 17.1.7 it falsely expresses an acknowledgement by the consumer that-
 - 17.1.7.1 before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier; or
 - 17.1.7.2 the consumer has received goods or services, or a document that is required by the CPA to be delivered to the consumer;
- 17.1.8 it requires the consumer to forfeit any money to the supplier-
 - 17.1.8.1 if the consumer exercises any right in terms of the CPA; or
 - 17.1.8.2 to which the supplier is not entitled in terms of the CPA or any other law;
- 17.1.9 it expresses, on behalf of the consumer-
 - 17.1.9.1 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;
 - 17.1.9.2 an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed; or
 - 17.1.9.3 a consent to a predetermined value of costs relating to enforcement of the agreement, except to the extent that is consistent with the CPA.
- 17.1.10 Note that any 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.
- 17.2 Section 48, 49 and 51 of the Act appear to contain conflicting provisions, as section 48 and 51 prohibit a supplier from requiring that a consumer, waive

any rights granted to them by the CPA; assume any obligation; or waive any liability of the supplier.^{93 94} While 49 states that a consumer's attention must be drawn to any provisions which amounts to a waiver of their rights. It can be interpreted that the as long as a consumer's attention is drawn to a waiver, and as long as liability for gross negligence is not waived (in terms of section 51(c)(i)), a waiver or liability is permissible as long as a consumers attention is drawn to it – be it through a signature point and/or otherwise drawing a consumers attention to such a provision in an agreement. Unfortunately this is one of the examples of conflicting provisions contained in the act and we will simply have to wait and see how the courts interpret this provision. In my view it cannot be permissible that a substantial or material waiver of rights can flow from an interpretation of sections 48, 49 and 51 of the CPA. Otherwise it would mean that these rights are not accruing through the law (i.e. *ex lege*) but are discretionary and mostly at the choice of the more powerful supplier in relation to the lonely consumer.

18 PROVISIONS RELATING SPECIFICALLY TO FIXED TERM CONTRACTS

- 18.1 One of the provisions in the Act which has the most direct impact on the fitness industry, in my view is the introduction of significant changes to the expiry and renewal of fixed-term agreements. The Act itself does not define the concept of "fixed-term agreements" as such. The Act's use of the phrase "fixed-term agreements" may in principle refer to any consumer agreement that was concluded for a fixed term.⁹⁵
- 18.2 The provisions relating to fixed term agreements do not apply to transactions between any juristic persons regardless of their annual turnover or asset value.⁹⁶
- 18.3 In terms of section 14 of the Act a consumer agreement, which has a stipulated fixed term, may not exceed a prescribed maximum period of 24

93 Section 48(1) of the Act.

94 Van Heerden:43.

95 Van Heerden: 16.

96 Supra.

months from date of signature by the consumer (the so called maximum period) unless:⁹⁷

- a) a longer period is expressly agreed with the consumer and the supplier can show a demonstrable financial benefit to the consumer;
- b) unless otherwise provided by regulation in respect of a specific type of agreement, type of consumer, sector or industry; or
- c) as determined in an industry code contemplated in section 82 of the Act in respect of a specific type of agreement, consumer, sector or industry.⁹⁸

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18.4 The Act stipulates that despite any provision of agreement itself to the contrary, a consumer may terminate the fixed term agreement on expiry of the fixed term, without penalty or costs to the consumer. The consumer will only be liable to the supplier for amounts owing in terms of the agreement up to the date of cancellation.¹⁰⁰

18.5 A fundamental departure from the common law is a consumers right to terminate a fixed term agreement at any time. In terms of the CPA a consumer now has a right to terminate the agreement prior to the expiry thereof by giving the supplier 20 business days notice in writing, or in any other recorded form.¹⁰¹ In exchange for the right to terminate a fixed term agreement early, a supplier in turn may charge the consumer reasonable cancellation penalty in respect of goods supplied or services performed or discounts granted to the consumer and the supplier must credit the consumer with any amount that remains the property of the consumer as at the date of cancellation. The consumer will further remain liable to the supplier for any moneys owing in terms of the agreement up to the date of cancellation.^{102 103}

⁹⁷ Section 14(2)(a) of the Act.

⁹⁸ Regulation 5(1).

⁹⁹ Van Heerden:17.

¹⁰⁰ Section 14(2)(b)(i)(aa) read with section 14(3)(a) of the Act.

¹⁰¹ Van Heerden:17.

¹⁰² Section 14(2)(b)(i)(bb) read with Section 14(3)(a) and (b) of the Act.

¹⁰³ Van Heerden:17.

- 18.6 Initially the draft Consumer Protection Act Regulations, prescribed a flat fee, which was set at the equivalent of 10% of the remaining value of the contract. This requirement led to an uproar from businesses who felt that it was fundamentally unfair to and irrational to levy a flat fee, irrespective of the cost involved in providing the service or the loss they would suffer if consumers were able to simply terminate the agreement at a whim. The 10% cancellation fee did not, as a result of the successful lobbying and comments from businesses, find its way into the final Regulations.
- 18.7 The final Consumer Protection Act and the Regulations thereto, published on 1 April 2011, stipulate that a "reasonable cancellation fee" may be charged by a supplier on the cancellation of a fixed term contract.
- 18.8 The Act itself does not specify what exactly is meant by "a reasonable cancellation penalty". The Regulations do however list a number of factors, which should not be considered a complete list, which should be taken into account by a supplier when determining the "reasonable cancellation penalty" due by a consumer in the particular circumstance. The following factors must be taken into account in accordance with Regulation 5:
- 18.8.1 the amount which the consumer is still liable for to the supplier up to the date of cancellation;
 - 18.8.2 the value of the transaction up to cancellation;
 - 18.8.3 the value of the goods which will remain in the possession of the consumer after cancellation;
 - 18.8.4 the value of the goods that are returned to the supplier;
 - 18.8.5 the duration of the consumer agreement as initially agreed;
 - 18.8.6 losses suffered or benefits accrued by the consumer as a result of the consumer entering into the consumer agreement;
 - 18.8.7 the nature of the goods or services that were reserved or booked;

- 18.8.8 the length of notice of cancellation provided by the consumer;
- 18.8.9 the reasonable, potential for the service provider, action, diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation, and
- 18.8.10 the general practice of the relevant industry.¹⁰⁴
- 18.9 Regulation 5(3) further stipulates that a supplier may not charge a cancellation penalty, which would have the effect of negating the consumer's right to cancel a fixed term consumer agreement.¹⁰⁵
- 18.10 The Act provides a Supplier with a reciprocal right, to terminate the fixed-term agreement. In accordance with the CPA, a supplier, despite any provision to the contrary in the agreement, may cancel such agreement by giving 20 business days written notice to the consumer of a material failure by the consumer, to comply with the agreement unless the consumer has rectified the failure within that time.¹⁰⁶
- 18.11 In addition to the above, a supplier must give the consumer written notice of the impending expiry of the agreement between a maximum of 80 and minimum of 40 days, prior to the impending expiry of the agreement. The pre-expiry notice must indicate whether any material changes that will apply to the renewed agreement.¹⁰⁷
- 18.12 Section 14(d) of the Act states that "on the expiry of a fixed term contract it will be automatically continue on a month-to-moth basis" unless expressly terminated by the consumer. As such it appears that all fixed term contracts must go into what is referred to in the fitness industry as an "auto-renewal" however it is in fact an automatic extension, and not a renewal, of the term of the contract.

¹⁰⁴ Regulation 5(2)(a)-(j).

¹⁰⁵ Van Heerden: 17.

¹⁰⁶ Section 14(2)(b)(ii) of the Act.

¹⁰⁷ Section 14(c) of the Act.

18.13 While in the automatic continuation phase the contract continues on the same basis as it did prior to the expiry of the fixed term agreement, subject to any material change, of which the supplier has given notice (such as a price increase) but will continue rolling forward until expressly terminated by either party to the agreement. This consequence of the wording of the Act may come as a surprise to many consumers who expect a fixed term agreement to terminate on a pre-determined date. As such I would recommend that this provision must always be brought to the attention of consumers – although it is a requirement of the Act – my submission is that this will remain a surprising and unusual contract term. It would appear that a supplier may be in contravention of the Act if it does not allow for a so called auto-extension.

19 RIGHT TO CANCEL

19.1 Agreements Entered Into Prior To The General Effective Date

19.1.1 As discussed in more detail above, Section 14 of the CPA allows all consumers who have entered into a fixed term to contracts. The NCC has in the last year forwarded a number of complaints to suppliers requiring pre-1 April contracts to be cancelled in terms of section 14 of the CPA. Contracts entered into pre-1April were signed prior to the general effective date of the CPA. In general the CPA does not apply to any transaction or agreement entered into before 1 April 2011 that would not endure after the second anniversary of the general effective date of the CPA (being 1 April 2013), irrespective of whether the CPA would have otherwise been applicable to the contract.

19.1.2 In terms of the transitional provisions outlined in Schedule 2 of the CPA, suppliers are under no obligation to afford these consumers the right to early termination of their contracts. It may however, in the interest of fostering a good working relationship with the NCC be worth considering applying the provisions of the CPA to all consumers a supplier does business with not only those who entered into agreements after the general effective date of the CPA.

20 **A PRACTICAL LOOK AT THE CALCULATION OF A REASONABLE PENALTY IN TERMS OF SECTION 14(3)(B) AND 14(4)(C) READ WITH REGULATION 5(2)**

- 20.1 Suppliers who provide services which are accessible in return for consumers taking out a fixed term agreement, or on the payment of a subscription have to invest considerable amounts in order to make such a service available to consumers. When determining what a reasonable cancellation penalty would be in a particular circumstance the factors set out in Section 14(3)(b) and 14(4)(c) read with Regulation 5(2) must be considered.
- 20.2 In order to understand how a supplier may go about determining what a reasonable cancellation penalty may be I thought an example taken from one of the biggest players in the fitness industry may be enlightening. The firm in the example shall be referred to as Firm A.
- 20.3 Each of Firm A's fitness clubs requires a substantial upfront capital investment to build it (between R85million and R120million) and then a predictable revenue stream to fund the ongoing costs, including staffing, utilities, rental, maintenance and a periodic equipment renewal programme - without the certainty of fixed term agreements it would be very difficult to raise the investment required. When consumers apply to join Firm A, they have the choice to take out a 1-month membership, 12-month membership or 24-month membership. As you would expect, the membership fees charged for a 12-month and 24-month membership are appropriately less than a 1-month membership as a firm is able to discount the fees for these longer-term products by having determinable revenue projections.
- 20.4 Section 14(2)(b) of the CPA affords consumers the right to cancel their fixed-term contracts at any time on 20 business days written notice to Firm A and in those instances, subject to the factors set out in regulation 5(2) to the CPA, Firm A is entitled to charge a "reasonable cancellation fee" in accordance with section 14(3)(b) of the CPA. In calculating the reasonable cancellation fee Regulation 5(2) states, amongst others¹⁰⁸, that a supplier should take into account:

¹⁰⁸In setting our cancellation fee we have looked carefully at Regulation 5(2) and would point out that many of the parameters set out do not apply to a service industry such the fitness industry where there is no consumable that is being returned. Instead, I have focused on the value received by the consumer in

- 20.4.1 the amount which the consumer is still liable for to the supplier up to the date of cancellation;
- 20.4.2 the value of the transaction up to cancellation;
- 20.4.3 the duration of the agreement as initially agreed.
- 20.5 I do not believe that in this example of a firm in the fitness industry a supplier should take Regulation 5(2)(i) which states that suppliers should take into account the "*reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation*" into consideration when calculating the reasonable charge.
- 20.6 Regulation 5(2)(i) refers specifically to a "cancelled reservation" and in my opinion this Regulation is not applicable to the health and fitness industry but rather applies to those industries where "reservations" are cancelled for a specific event and not a fixed-term services agreement.
- 20.7 Industries in which the concept of a reservation is relevant are those industries that generally provide services that are linked to a finite number of available "places". This Regulation implies that by adding an additional member a supplier will objectively be able to determine that the firm has replaced the member who has cancelled and implies that the firm has a finite number of memberships available and can replace like with like. In most cases Firm A does not have a limit on the number of members per fitness club and it would therefore be impossible to objectively determine if the departing member has been replaced by a new member.
- 20.8 The nature of the business of Firm A, is such that a consumer is not required to make a reservation to make use of the services offered at a fitness club under the fixed term membership contract.

signing up to a fixed-term contract with a view to ensuring that a firm in the fitness industry does not fall foul of Regulation 5(3).

- 20.9 If this Regulation 5(2)(i) is applicable to the fitness industry, it would be impossible to determine whether acting diligently, a supplier has located an alternative consumer to replace the member between the time of receiving the cancellation notice and the early termination date as there are on average 1,000 new members joining Firm A daily.
- 20.10 Taking as an example the airline industry where the application of this Regulation is logical because the price of a seat is readily ascertainable. The airline generally has a policy and process in place to make the cancelled seat available to other consumers that may wish to take up the reservation, to ensure that the cost to the airline is mitigated and if it is thereafter unable to fill the seat the cost to the airline and therefore the penalty is objectively ascertainable. The nature of the service rendered by Firm A simply does not allow for this analogy to be applied to it, as different to the airline, whose available seats are finite in a particular aircraft, the space (number of memberships) available in one of Firm A's fitness clubs is not as easily determined, and much more flexible.
- 20.11 The number of new members is subject to seasonal fluctuations and the state of the economy. In the circumstances it is impossible to determine whether a supplier's diligent efforts resulted in an additional member joining and replacing the member who wishes to cancel early. This serves as another example of how, practically speaking and from what appears to be the intention of the legislature, this provision was not meant to be applied to the health and fitness industry. Again as an example, the airline industry would easily be capable of determining whether the cancelled seat was taken up by another consumer as this is reasonably determinable in the instance.
- 20.12 In light of the above and in order to calculate a reasonable cancellation fee for a member who requests to cancel a 12 or 24-month contract early, Firm A has to look at the fees that the member would have paid if he or she had taken out successive 1-month contracts against the discounted rate they received because they signed a longer-term contract.
- 20.13 In other words, if a member cancels his or her month-to-month membership the member will be liable to pay the monthly fee for the month in which the

member wishes to cancel the contract. On the other hand, an established firm policy in the fitness industry, since 1 April 2011 is that a member who wishes to cancel a membership under a fixed-term contract must pay a cancellation fee equal to 30% of the remaining monthly instalments payable under the fixed term agreement. A suggested approach is to compare the monthly amounts payable (for a month-to-month membership) to the 30% cancellation fee payable by a member under a fixed-term agreement over the relevant time period.

- 20.14 In order to set a fixed amount as a reasonable cancellation penalty an in depth analysis of the available data must be undertaken and the data must demonstrate that the monthly instalment payable by the member on a month-to-month contract for the remaining period of the contract is generally more than 30% of the remaining instalments left on the contract for both 12 and 24-month contracts, but given the need for certainty it has been concluded that, on balance, 30% is a reasonable amount for a member to pay to exit a contract early.
- 20.15 Although it is clear that the final regulation requires that an individual approach be taken when determining a reasonable penalty in the circumstances, it is my submission that in order for a penalty to be fair and reasonable it must be clear from the moment an agreement is entered into what the consequences of cancellation may be. Staff and the Call Centre operators need to be able to communicate to consumers what the cancellation fee will be if that member wishes to cancel their contract early.
- 20.16 In my opinion it serves the consumer best if a supplier is able to communicate what the cancellation penalty will be (or is likely to be) at point of sale as the consumer at that point can decide whether to opt for a month-to-month contract and therefore have maximum flexibility or sign-up for a longer-term (but cheaper) contract with a fixed penalty if they wish to cancel early.
- 20.17 Further as it is a requirement of section 22 of the CPA that the price of an item must be fully disclosed to consumers at point of sale, and in my submission the cost of cancellation must be an aspect of price, the CPA itself requires that the scope of a cancellation penalty be disclosed to consumers when they enter into a fixed term agreement. As such it is not practical or in the best of interests of

the consumer to have a cancellation fee based only on individual circumstances. Of course, if a consumer is able to offer a compelling reasons as to why a supplier should allow early cancellation (eg, permanent incapacity or retrenchment), I would suggest that if the circumstances call for it a supplier must allow cancellation without penalty.

20.18 The illustrations above does not deal with the consequences of scale, but aims to reflect what is fair in the circumstance where a single consumer wants to cancel a fixed term agreement, however the consequences of a large number of consumers cancelling their agreements en-masse may have a very different impact on a suppliers business. In which case the determination of what is reasonable in the circumstances will be very different.

20.19 Important Factors To Consider For a Supplier in Setting a Reasonable Cancellation Penalty

20.19.1 An important consideration to take into account in formulating a reasonable cancellation fee and the policy around it is that the right of cancellation that all consumers now enjoy in respect of fixed-term contracts governed by the CPA, should not injure to the detriment of the relevant consumer body as a whole. In other words suppliers have traditionally made investment decisions based on the security of having fixed-term contracts in place, which guaranteed annuity income over time, (ie, support the sustainability of each facility on offer) and membership fees were set taking this into account. Now, suppliers have to consider the fact that consumers may exercise their rights under section 14 of the CPA which will impact on revenue generated for the facility concerned. At the same time, the facility must remain operative for members who continue with their contracts and, in so doing, maintain a consistent level of quality service without increasing the prices levied to those remaining as members.

20.19.2 The accounting treatment and the uncertainty around how the incomes should be handled, also has significant consequences on the profitability, forecasted income and the valuation of these contracts as assets on the balance sheet – as such it may have a material impact on the balance

sheet. It therefore also has a consequence for debt conversance ratios and therefore the funding of enterprises.

21 EXTENDED LIABILITY FRAMEWORK INTRODUCED BY THE ACT

- 21.1 According to Candice Meyer of Weber Wentzel "One of the fundamental changes introduced by the Act, is the imposition of a reverse onus on the producer, importer, distributor and retailer, who will be liable for harm caused by any unsafe goods, or any failure, defect or hazard in any goods or, inadequate warnings or instructions relating to any hazard associated with any goods unless such person can successfully raise one of the listed defences to such a claim."¹⁰⁹
- 21.2 The reverse onus does not only apply to products but extends to any person who installs or provides access to such goods¹¹⁰, e.g. a fitness club that provides access to fitness equipment. Under the new extended liability framework created by the CPA - liability will arise irrespective of whether or not the supplier is negligent – and all the suppliers in the supply/ distribution chain will be jointly and severally liable.^{111 112}
- 21.3 Section 61 of the Act imposes strict liability on suppliers where goods result in harm to the consumer. The imposition of strict liability by section 61 of the CPA brings about a clear paradigm shift in South African consumer law. This shift requires suppliers to ensure that the goods they supply are adequately described: both to highlight the potential dangers a consumer may be faced with should he or she use the goods and the supplier must supply enough information for the consumer to avoid harm when using the goods.¹¹³ Under the common law, distributors, retailers and manufacturers only applied to those who professed to have skill and knowledge.¹¹⁴

¹⁰⁹ Meyer: 158.

¹¹⁰ Section 61(2) of the Act.

¹¹¹ Meyer:158.

¹¹² Section 61(1) and (3) of the Act.

¹¹³ Kirby N "Consumer Protection Act No. 68 of 2008- Compliant Goods: been there done that? Werksmans Legal Brief, December 2010: 2.

¹¹⁴ Meyer 158.

21.4 Harm for which a supplier may be held liable in terms of section 61 of the Act includes the death of, or injury to, any natural person; an illness of any natural person; any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and any economic loss that results from the aforementioned harm.^{115 116} Nothing in this section limits the authority of a court to assess whether any harm has been proven and adequately mitigated; determine the extent and monetary value of any damages, including economic loss; or apportion liability among persons who are found to be jointly and severally liable.^{117 118}

21.5 Section 61(4) does list certain specific defences which a supplier will be able to raise in defence of any product liability claims in terms of the section, namely if:

- (a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;
- (b) the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time it was supplied by that person to another person alleged to be liable;
- (c) the alleged unsafe product characteristic failure, defect or hazard was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person;
- (d) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers; or
- (e) the claim for damages is brought more than three years after the
 - (i) death or injury of a person;
 - (ii) earliest time at which a person had knowledge of the material facts about an illness; or
 - (iii) earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property; or

¹¹⁵ Section 61(5) of the Act.

¹¹⁶ Van Heerden:49.

¹¹⁷ Section 61(6) of the Act.

¹¹⁸ Van Heerden:49.

(iv) the latest date on which a person suffered any economic loss.

21.6 For suppliers to manage their exposure and liability I would suggest that they get undertakings, warranties and indemnities in turn from their suppliers as far as possible to limit their own exposure to risk and to ensure that the products they are receiving are CPA compliant and do not pose a risk to their customers.

22 ENFORCEMENT AND PENALTIES

22.1 In terms of section 100 of the Act, the NCC may issue a compliance notice in the prescribed form to a person or association of persons whom the commission on reasonable grounds believes has engaged in prohibited conduct. A compliance notice is issued by the commission and sets out a contravention or alleged contravention of the CPA by a supplier. The compliance notice is the first step in an investigation into an apparent contravention of the CPA.

22.2 If a person to whom a compliance notice has been issued fails to comply with the notice, the commission may either—

22.2.1 apply to the Tribunal for the imposition of an administrative fine; or

22.2.2 refer the matter to the National Prosecuting Authority for prosecution as an offence in the CPA.

22.3 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—

22.3.1 10 per cent of the respondent's annual turnover during the preceding financial year; or

22.3.2 R1 000 000.

22.4 When determining an appropriate administrative fine, the Tribunal must consider the following factors:

- 22.4.1 the nature, duration, gravity and extent of the contravention;
 - 22.4.2 any loss or damage suffered as a result of the contravention;
 - 22.4.3 the behaviour of the respondent;
 - 22.4.4 the market circumstances in which the contravention took place;
 - 22.4.5 the level of profit derived from the contravention;
 - 22.4.6 the degree to which the respondent has co-operated with the Commission and the Tribunal; and
 - 22.4.7 whether the respondent has previously been found in contravention of this Act.
- 22.5 The annual turnover of a supplier at the time when an administrative fine is assessed, is the total income of that supplier during the immediately preceding year, as determined in the prescribed manner.

23 CONCLUSION

- 23.1 The CPA heralds a paradigm shift in the South African legal environment – for instance it imports the concepts, which previously had limited import in the common law, of fairness, reciprocity and equality, with the consumer rights into the law of contract.
- 23.2 The CPA marks a huge step forward in the development of South Africa's consumer protection law, as well as a marked development to South African private law. With the implementation of the Act and the creation of the enforcement bodies which have been given the power, and importantly the resources to enforce the legislation, the disenfranchised lonely individual consumer has been given a voice.
- 23.3 In my view the Act does not, as many in the business world suggests it might, reverse the David and Goliath battle which has been waged between individual

consumers and big business for many years – it does however level the playing field. Consumers are now in an equal position and with the NCC and the fundamental rights enshrined in the CPA behind them are now in a more equal bargaining position than ever before. There is however a caution that should be sounded, in respect of a consumer’s right to terminate any fixed term agreement by merely giving 20 business days notice¹¹⁹ – which may result not only in abuses by consumers to the disproportionate detriment to suppliers but also a reduction in certainty to the commercial community.

- 23.4 One hopes and trusts that our law will not develop to mirror the sometimes illogical, irrational excess associated with American liability law. However, given our common law background, I would suggest that South African common law will be more prudently developed by our courts – to ensure that the rights enshrined by the consumers and obligations imposed on suppliers are enforced, but that new imbalance are not created over time.
- 23.5 It is likely to take many years for some of the more uncertain provisions and apparent contradiction, contained in the Act to become clear. One hopes that the uncertainty surrounding waivers especially is dealt with relatively quickly.
- 23.6 The success of a suppliers compliance programme will depend not only with how they redraft their consumer facing written communication, or how they insure and mitigate their risk in respect of the extended liability provisions introduced by the Act. Importantly it will also depend on how they train their staff to interact with consumers. So that they buy into the provisions of the Act to ensure broad level compliance.
- 23.7 The lonely consumer should no longer be a timorous faintheart lest he or others should suffer some injury, on the contrary he ventures out into the world, takes reasonable risks and reasonable precautions¹²⁰ and now can expect others to do likewise.

¹¹⁹ In terms of section 14 of the Act.

¹²⁰ Liberty taken to paraphrase Judge van der Heever’s definition of the reasonable man from *Herschel v Mrupe* 1954 (3) SA 464 (A) at page 490.

24 LIST OF REFERENCES

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ANNEXURE A - VIRGIN ACTIVE'S PRE-CPA MEMBERSHIP APPLICATION FORM

ANNEXURE B - VIRGIN ACTIVE NEW TERMS AND CONDITIONS

ANNEXURE C - DECLARATION OF ORIGINALITY