

The influence of the Consumer Protection Act on Promotional Activities in South Africa

by

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For years, promotional activities in South Africa have been subject to regulation by various industry-specific regulatory bodies, such as *inter alia*, the Advertising Standards Authority, the Direct Marketing Association of South Africa and the Independent Communications Authority of South Africa. In addition, various legislative pieces including the Consumer Affairs (Harmful Business Practice) Act 71 of 1988, the Tobacco Products Control Act 83 of 1993, and the Electronic Communications and Transactions Act 25 of 2002 have regulated important aspects pertaining to promotional activities. Following the promulgation of the Consumer Protection Act 68 of 2008 (hereafter referred to as the CPA or the Act) all forms of promotional activities in South Africa are now regulated under this single piece of legislation, or are they? The potential problems that arise from the application of the provisions pertaining to promotional activities in the CPA are the threefold: namely, the possible redundancy of these pre-existing regulatory bodies; the over-regulation of promotional activities in South Africa; and the interplay between the provisions of the CPA, as well as the legislation and Codes pertaining to promotional activities, that have not been repealed by the Act. The investigation into these three major concerns will be conducted with reference to the regulation of promotional activities in terms of other South African statutes and existing Codes. In addition a comparative analysis with the regulation of promotional activities in the United Kingdom will be carried out.

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Chapter 1: General introduction

1.1. Introduction

For years, promotional activities in South Africa have been subject to regulation by various industry-specific regulatory bodies, such as *inter alia*, the Advertising Standards Authority,¹ the Direct Marketing Association of South Africa² and the Independent Communications Authority of South Africa.³ Various legislative pieces such as the Consumer Affairs (Harmful Business Practice) Act,⁴ the Tobacco Products Control Act,⁵ and the Electronic Communications and Transactions Act⁶ also contribute to the regulation of promotional activities. Following the enactment of the Consumer Protection Act,⁷ it is apparent that all forms of promotional activities in South Africa are now regulated under this statute. As will be shown in the following contribution, the provisions on promotional activities make up a substantial portion of the CPA. This seems to be a commendable step owing to the legal certainty that it should give to businesses and consumers.

The research attempts to identify possible and potential problems that arise from the application of the CPA provisions pertaining to promotional activities. These are the threefold: Firstly, the possible redundancy of the pre-existing regulatory bodies; secondly the over-regulation of promotional activities in South Africa; and thirdly the interplay between the provisions of the CPA (as well as applicable legislation) and codes pertaining to promotional activities.⁸ It is therefore necessary to give a brief background to the CPA and its relevant provisions.

¹Hereafter referred to as the ASA.

²Hereafter referred to as the DMASA.

³Hereafter referred to as the ICASA.

⁴71 of 1988. Hereafter the Consumer Affairs Act. For the sake of clarity, the name of this Act changed from the Harmful Business Practices Act to the Consumer Affairs (Unfair Business Practices) Act, 1988 in terms of section 13 of the Harmful Business Practices Amendment Act 23 of 1999, published in GG notice no/20043/585/14May13. Therefore, this Act under its changed name commenced on 14 May 1999.

⁵83 of 1993.

⁶25 of 2002. Hereafter referred to as ECTA.

⁷68 of 2008. Hereafter referred to as CPA or the Act.

⁸The codes referred to are restricted to the regulatory codes that are enforced by regulatory bodies such as the Advertising Standards Authority and the Direct Marketing Association of South Africa as discussed fully to in chapter 3 below.

1.2. Background to the CPA and relevant provisions

The CPA was assented to on 24 April 2009 and came into full effect, including its regulations on 1 April 2011.⁹ The provisions of the CPA relating to promotional activities in their various forms came into effect on 31 March 2011, which is known as the “general effective date” of the CPA. The preamble to the CPA provides that granted the background of South Africa and the fact that “discriminatory laws of the past have burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality” it is necessary to “develop and employ innovative means” in order to place the consumer at a greater advantage by levelling the unequal playing fields that exist between consumers and suppliers and creating a culture of informed consumerism.¹⁰ The overarching purpose of the CPA coincides with the provisions in the preamble and can be summarised as being the promotion and the advancement of the “social and economic welfare of consumers in South Africa” through various mechanisms.¹¹ There are a number of provisions in the CPA that have bearing on promotional activities, but the focus of this discussion will be on the most important provisions in the CPA which will be discussed in detail, whilst other relevant provisions will only be referred to briefly.¹²

Furthermore, in terms of the scope of application of the Act on the area of promotional activities, section 5(1)(b) provides that the CPA applies to the promotion of any goods or services within the Republic. Therefore, the Act will apply to a transaction unless it is exempt in terms of sections 5(2), (3) or (4) of the Act. Although the application of the Act appears to be clearly demarcated, there are overlaps that exist between the CPA and other statutes including the National Credit Act¹³ and the ECTA which will be discussed further in chapter 3 below.

⁹Nagel (2011) 705.

¹⁰Preamble to the CPA.

¹¹Section 3(1) of the CPA.

¹²See par 1.7 below.

¹³34 of 2005. Hereafter referred to as the NCA.

1.3 Motivation

Prior to the enactment of the CPA, South African promotional activities had been regulated by various industry-specific bodies and industry-specific legislation and codes of practice. The obvious implication was that these regulatory measures were designed in the interest of the industry concerned. However, with the introduction of the CPA, the underlying focus became the protection of the consumer. Therefore, it is submitted that it is necessary to investigate the various aspects of promotional activities in terms of CPA and to examine how the CPA has changed the legal dispensation within this area of the law. Furthermore, it ought to be considered whether it was necessary to bring all promotional activities under the scope of the Act, given the effectiveness of bodies such as the ASA. This investigation will be conducted with reference to the regulation of promotional activities in South Africa and the United Kingdom,¹⁴ in terms of the applicable statutes, directives and codes. This comparative analysis as contained in chapter 4 is necessary owing to the fact that the Act is essentially an alignment of South African consumer law with that of the United Nations and the European Community.¹⁵ It is important to contemplate whether the South African legislature is following the correct approach by aligning our laws with those in the international sphere; or whether it would be more appropriate to formulate unique and indigenous regulatory measures designed to suit promotional activities as they occur in South Africa.

Furthermore, there is the risk that the increased regulation of promotional activities may have an opposite effect.¹⁶ In this regard, the increasing cost burden of compliance that is placed on the supplier could lead to less vigorous promotional activities and ultimately less competition. As a result, only the most well-established suppliers would be able to survive and “compete” in the markets, which would be to the detriment of consumers and small businesses. Undoubtedly, this would be contrary to the purpose of CPA as a whole.¹⁷

¹⁴Hereafter referred to as the UK.

¹⁵Du Preez (2009) *TSAR* 62.

¹⁶*Idem* 63. See also Du Preez (2009) *TSAR* 75 where the writer remarks that “the attempt by the Bill to convert what it considers to be best marketing practices into law will result in retailers/marketers having to conduct a complete review of their marketing strategies and processes”.

¹⁷Section 3 CPA.

1.4 Research aims

The purpose of this discussion is to investigate and to establish how promotional activities were regulated in South Africa prior to the enactment of the CPA. Furthermore, this discussion aims to establish how the regulation of promotional activities in South Africa have been influenced by the CPA; and whether it was necessary for the legislature to introduce regulatory measures for promotional activities in terms of the CPA.

1.5 Hypothesis

Promotional activities are an integral part of business transactions. Often the promotional activity leads to the eventual the conclusion of a transaction. There is a need therefore to protect the consumer from unfair promotional activities that can exploit the naivety of uninformed and disadvantaged persons. In this regard, it seems as if it would thus be necessary for promotional activities to be regulated in one body of legislation, as is the case with the CPA, in order to offer legal certainty for consumers and businesses. Furthermore, codifying this area of the law into a single source will surely facilitate the development of an era of informed consumerism and awareness.

1.6 Research methodology

Throughout this discourse, an analytical and critical approach will be followed. A comparative analysis in respect of the regulation of promotional activities in the UK will also be carried out only with reference to the promotional activities that are governed by the CPA and discussed in chapter 3.

1.7 Delineations and limitations

For interpretation purposes, unless the context indicates otherwise, any reference in this discussion to “he or him” should be construed as a reference to “she or her” respectively. Furthermore, all the definition set out in chapter 3 will have the meaning provided unless the context indicates otherwise.¹⁸ Owing to the nature of this

¹⁸See par 3.1.1.

discussion, only the most important aspects of promotional activities will be discussed; whilst other relevant aspects of promotional activities will merely be referred to briefly. In this regard brief references will be made to the various provisions in the Act that give effect to the general standards of advertising, whilst the core promotional activities will be discussed in greater detail.¹⁹

1.8 Focus of the discussion

Firstly, the background on promotional activities will be analysed and critically discussed in detail in chapter 2 with reference to the origins of promotional activities, promotional activities in context of the law of contract, as well as the need for the regulation of promotional activities. The main focus of the discussion will be on the contractual aspects relating to promotional activities.²⁰ Secondly, the CPA will be critically discussed in greater detail in chapter 3 with reference to the general standards that are in place for the marketing of goods and services;²¹ the right to equality in the consumer market;²² the right to information in plain and understandable language;²³ price disclosures;²⁴ direct marketing;²⁵ bait marketing;²⁶ negative option marketing;²⁷ catalogue marketing;²⁸ trade coupons and similar promotions;²⁹ customer loyalty programmes;³⁰ promotional competitions;³¹ alternative work schemes;³² and referral selling.³³ Furthermore, the interplay between the CPA and other statutes and regulatory bodies will be critically discussed. Lastly, in chapter 4 a comparative analysis will be conducted with reference to the general standards of marketing in the UK; the self-regulation of the advertising industry; as well as specific aspects of marketing in the UK namely price

¹⁹See chapter 3 below.

²⁰Woker (1999) 49.

²¹Section 29 and section 41 CPA.

²²Section 8 CPA.

²³Section 22 CPA.

²⁴Section 23 CPA.

²⁵Sections 32, 16 and 21 CPA.

²⁶Section 30 CPA.

²⁷Section 31 CPA.

²⁸Section 33 CPA.

²⁹Section 34 CPA.

³⁰Section 35 CPA.

³¹Section 36 CPA.

³²Section 37 CPA.

³³Section 38 CPA.

disclosures,³⁴ direct marketing,³⁵ unsolicited goods and services,³⁶ and catalogue marketing.³⁷The contribution and research ends in chapter 5 with a conclusion followed by the bibliography.

³⁴Price Indications Directive 98/6/EC; and Part III of the UK CPA 1987.

³⁵Doorstep Selling Directive 85/577/EEC; Distance Marketing of Financial Services Directive 2002/65/EC; and Consumer Credit Act 1974.

³⁶Unsolicited Goods and Services Act 1971; and Consumer Protection (Distance Selling) Regulations 2000.

³⁷Distance Selling Directive 97/7/EC; Directive on Distance Marketing of Consumer Financial Services 2002/65/EC.

Chapter 2: Promotional activities: Background

2.1 Promotional activities

2.1.1 Origins

Throughout this discussion, the term “promotional activities” will be used as an umbrella term to encompass the marketing-related provisions in the CPA as well as the additional statutes that will be discussed in relation thereto. The adoption of this term is important to the extent that not all the marketing-related provisions in the CPA are strictly “marketing practices” as understood in the ordinary sense.³⁸ Whilst Part E of Chapter 2 of the Act pertains to the right to fair and responsible marketing, the provisions that have bearing on promotional activities are spread throughout the Act and will be discussed accordingly in chapter 3 below.

In terms of the origins of promotional activities, Woker submits that the concept of advertising as we know it today has its origins in the Victorian era³⁹ and that the innovations of the industrial revolution helped to create a wide range of products priced within the reach of working class people.⁴⁰ Furthermore, the author submits that owing to the industrial revolution, manufacturers were producing in vast quantities which thus created the need to develop bigger markets in order to dispose of the goods.⁴¹ In addition, the author submits that the production of so many similar products meant that the product with the best packaging or slogan would win the attention of the consumer; and it was at this point when advertising was born.⁴²

³⁸In Soanes and Hawker (2005) 623, “marketing” is defined as advertising or promoting something. In this sense, unsolicited goods would not ordinarily constitute a marketing practice as they are not directly a form of advertising or promoting the goods involved; however, sending a consumer unsolicited goods does, indirectly, constitute the promotion of those goods, and ultimately, a promotion of that particular brand or business.

³⁹1987 to 1901. <http://www.Faculty.univ.edu/kirshen/handouts/Victorian.html> [Accessed: 15 July 2013].

⁴⁰Woker (1999) 1.

⁴¹*Ibid.* See Tungate (2007) 11.

⁴²Woker (1999) 2.

2.1.2 The definition of advertising.

There are various definitions of advertising which differ from writer to writer, depending on the particular attitude and stance of the writer towards advertising.⁴³ Amongst others, Woker endorses the definition provided by Koekemoer which brings forward the main aim of advertising which is to sell a product.⁴⁴ In this regard, Koekemoer defines advertising as a “paid form of mass presentation of ideas, goods and services... addressed to carefully selected target audiences with the objective of informing, reminding, influencing and persuading them to buy the product or services or to be favourably inclined towards these ideas, products or services”.⁴⁵

Woker highlights that what is interesting about this definition is the fact that it indicates that advertising now has a specific focus and “targets very specific audiences”.⁴⁶ The author attributes this to the increased sophistication of consumers as well as the development of goods and services to meet the specific “needs of definite segments of the population rather than... consumers as a whole”.⁴⁷

Furthermore, Jefkins defines advertising as a “means by which we make known what we have to sell or what we want to buy”.⁴⁸ Woker submits that Jefkins’ simple definition emphasizes that advertising is also about making the product known to the general consumer.⁴⁹ On the other hand, Sinclair and Barenblatt define it as “any paid form of non-personal communication, designed to influence or modify the mental-mind set of users and potential users of products and services”,⁵⁰ Woker submits that this definition indicates that the authors believe that advertising is only capable of changing the beliefs of consumers or encouraging them to try out certain goods or services and is mainly limited to informing and delivering messages to identifiable target audiences and educating them accordingly.⁵¹

⁴³*Idem* 3.

⁴⁴*Ibid.*

⁴⁵*Ibid.* See McQuoid-Mason (1997) 261- 262.

⁴⁶Woker (1999) 3.

⁴⁷*Ibid.*

⁴⁸*Ibid.*

⁴⁹*Ibid.*

⁵⁰*Ibid.*

⁵¹*Ibid.*

Furthermore, according to the Advertising Standards Authority,⁵² advertising refers to “[a]ny visual or aural communication, representation, reference or notification of any kind which is intended to promote the sale, leasing or use of any goods or service, or which appeals for or promotes the support of any cause”.⁵³ It is submitted that this definition encompasses the crux of what advertising entails. From the definitions of advertising provided by various authors, it can be derived that the main aim of advertising is to provide information to the consumer on a product or service in order to persuade the consumer to purchase the good or pay for the service as the case may be.⁵⁴ Furthermore, advertising aims to facilitate competition within various industries.⁵⁵ It is submitted that the ASA code is simply a regulatory framework for the advertising industry and is not a consumer protection code.

In summation, regardless of which definition is favoured, it is clear that apart from providing valuable information to the consumer, advertising is about selling products, services or ideas; and as such, must be designed to influence consumer opinions.⁵⁶ If advertisers are to be successful they ought to “reach [the] minds of the consumers and “play on their emotions”.⁵⁷ This indicates manipulation that vulnerable consumers are often prone to. These consumers may be naïve and become victims of misleading and unfair promotional activities. Hence it is necessary to follow the development of consumer protection laws in the context of promotional activities.

2.2 Promotional activities and the law of contract

The common law principles of offer and acceptance; puffing, warranties and representations; as well as inertia selling and unsolicited goods are all relevant to promotional activities and will be referred to throughout this discussion insofar as they relate to these activities.

⁵²Hereafter referred to as the ASA.

⁵³Section i, clause 4 ASA code. See also Woker (1999) 4 and McQuoid-Mason (1997) 262.

⁵⁴Woker (1999) 3-4.

⁵⁵*Ibid.*

⁵⁶McQuoid-Mason (1997) 262.

⁵⁷*Ibid.*

2.2.1 Offer and acceptance

Firstly, in terms of the common law position on the principles of an offer and acceptance, the case of *Watermeyer v Murray*⁵⁸ held that “every contract consists of an offer made by one party and accepted by the other”.⁵⁹ It is submitted that advertisements, auction sales and offers for rewards fall under the broader category of offers to the public.⁶⁰ The general rule is that an offer is directed at an individual; however, the aforementioned offers are exceptions to this rule.⁶¹ One of the requirements of a valid offer is that the offer must be firm.⁶² For an offer to be a firm one, it must be made *animo contrahendi*, i.e. with the intention that its acceptance will create a binding contract.⁶³ In this regard, Gibson submits that “the offeror must mean business”; and thus it must not merely be a statement indicating a willingness to do business.⁶⁴

Generally, it is accepted that advertisements are not regarded as binding offers, but merely invitations to do business.⁶⁵ Therefore, the buyer makes the offer and the contract comes into existence once the offer is accepted by the seller.⁶⁶ In this regard Woker submits that the customer who occupies the position of the offeror is open to abuse, for example, in situations where the seller may wish to entice the buyer into the store by using “bait and switch” tactics, i.e. advertising at attractive

⁵⁸1911 AD 61.

⁵⁹1911 AD 61 at 70. See Gibson (2003) 29. The Author submits that doubt has been cast on this proposition but that for practical purposes it is accepted.

⁶⁰Hutchison and Pretorius (2012) 50.

⁶¹*ibid.*

⁶²Gibson (2003) 29. See also Hutchison and Pretorius (2012) 48, other requirements of a valid offer are that the offer must be complete, clear and certain. It is important to take note that the CPA has introduced further requirements in respect of offers which will be discussed fully in chapter 3.

⁶³Hutchison and Pretorius (2012) 48.

⁶⁴Gibson (2003) 30.

⁶⁵*Crawley v Rex* 1909 TS 1105, Hutchison and Pretorius (2012) 51; McQuoid-Mason (1997) 274. Woker (1999) 52-53: Woker submits that the general rule that an advertisement constitutes an invitation to do business has important practical implications owing to the fact that it allows advertisers to choose whom they would like to contract with and to negotiate additional terms to the other party prior to the conclusion of the contract. Furthermore, if an advertisement were to be considered as a binding offer, then the sellers would be bound to sell items even when these items are out of stock. Furthermore, Woker submits that this view was maintained in the English case of *Timothy v Simpson* (1834) the writer submits that a display of goods with their prices in a store is a prime example of an invitation to do business that does not create contractual obligations. See discussion by Khan (1988) 79-83. See also Sharrock (2011) 54-56.

⁶⁶McQuoid-Mason (1997) 274.

prices with no intention to sell at that price.⁶⁷ A case which demonstrates the vulnerability of consumers is the English case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*⁶⁸ where the Court of Appeal held that in “self-service” stores, the offer and acceptance took place when the customer tendered the price to the cashier and not when the customer took the item off the shelf and put it in his basket, even though such a price is marked on the shelf.⁶⁹ Nonetheless, deliberate advertising of a false price would, prior to the CPA, be considered harmful advertising in terms of the Harmful Business Practices Act.⁷⁰

However, a problem that continued to persist prior to the implementation of the CPA was that consumers had no contractual right to insist that the goods be sold at the price mentioned.⁷¹ In this regard, McQuoid-Mason submits that this approach ignores the moral rights of consumers and that sellers should be bound by their advertised prices, which would be a powerful incentive to ensure that they maintain the strictest scrutiny of their advertisements.⁷² This would protect the interests of the consumers as they would be able to hold advertisers to their promises.⁷³

On the other hand, Gibson submits that an advertisement can actually amount to an offer, in instances of a so-called “general offer”, where an offer is made to do business with any person who performs a certain act.⁷⁴ Adopting a more subjective approach, Hawthorne and Hutchison submit that the underlying intention of the statement and the impression created in the mind of the person to whom it was

⁶⁷*Ibid.* See Sharrock (2011) 55, the author submits that if this happens to a consumer, then the consumer is entitled to complain to the ASA or file a complaint with the National Consumer Commission in terms of the CPA.

⁶⁸[1953] 1 QB 401 (CA). See Hutchison and Pretorius (2012) 52. See Khan (1988) 83-85. See also Sharrock (2011) 54. See also *Harvey v Facey* [1893] AC 552.

⁶⁹[1953] 1 QB 401 (CA) at 404. Gibson (2003) 30.

⁷⁰71 of 1988, McQuoid-Mason (1997) 274. This practice is now a prohibited marketing practice in terms of section 30(1) of the CPA known as “bait marketing”.

⁷¹McQuoid-Mason (1997) 275.

⁷²*Ibid.*

⁷³*Ibid.*

⁷⁴Gibson (2003) 30. See *Bloom v The American Swiss Watch Co* 1915 AD 100. Hutchison and Pretorius (2012) 52. See also Sharrock (2011) 55.

Carlill v Carbolic Smoke Ball [1983] 1 QB 256 (CA). Hutchison and Pretorius (2012) 50, discuss this case. Furthermore, Woker (1999) 51 submits that the effect of the *Carlill* decision on the “history of advertising” is twofold: On the one hand, the case illustrated that an advertisement may constitute a general offer and acceptance; and on the other hand, the case served as a warning to advertisers and agencies to be more cautious in their advertising claims. See discussion by Khan (1988) 74-76. See also *Steyn v LSA Motors* 1994 (1) SA 49 (A); Sharrock (2011) 55; and Gibson (2003) 30-31.

directed is decisive when deciding whether or not a statement constitutes an offer.⁷⁵ Woker submits that there is no hard and fast rule that a declaration in an advertisement cannot amount to an offer, as this will depend on the intention of the particular advertisement to constitute an offer.⁷⁶ Although looking at the underlying intention is the general rule, in the case of advertisements, tenders and auctions, the courts tend to apply pre-determined rules.⁷⁷ It is submitted that using the intention to determine the true nature of the statement is preferable, otherwise advertisers, manufacturers, distributors or even consumers may manipulate the rules for determining whether a statement constitutes an offer or not if the underlying intention of the statement is not the point of departure.

Interestingly, Monty submits that an entry form in respect of a competition constitutes an offer to enter into an agreement (which is the competition); and by completion and submission of the entry form, a valid and binding contract is entered into between the participant and the competition promoter.⁷⁸ It is submitted that the submission made by Monty is not without merit as the promotion of a competition would be considered as an invitation to enter into a competition.⁷⁹ However, in light of the submissions made by Hawthorne and Hutchison, it is my submission that the point of departure should be whether or not the underlying intention of that specific promotional competition should constitute an offer.

2.2.2 Puffing, warranties and misrepresentation

In terms of the common law principles pertaining to puffing, warranties and representations, it is submitted that pre-contractual statements and warranties refer to when one of the parties makes a statement about the terms or the nature of the contract that is going to be entered into.⁸⁰ The distinction between warranties and

⁷⁵Hutchison and Pretorius (2012) 51.

⁷⁶Woker (1999) 51. In this regard, Woker submits that the intention of the parties will be established by way of inference from the declaration and the surrounding circumstances, and not merely from the advertisers' denials.

⁷⁷Sharrock (2011) 53.

⁷⁸Monty (2012) WP 57.

⁷⁹Especially in context of *Crawley v Rex* 1909 TS 1105; *Watermeyer v Murray* 1911 AD 61; *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401 (CA); and *Harvey v Facey* 1893 AC 552. and the respective submissions of Woker and Gibson.

⁸⁰McQuoid-Mason (1997) 21.

representations is important because the remedies are different.⁸¹ Furthermore, both these actionable statements should be distinguished from a puff where the consumer has no remedy at all.⁸²

A warranty has many different meanings which may, at times, lead to confusion. McQuoid-Mason submits that a warranty refers to a statement made before, or at the time of contracting, which forms part of the contract.⁸³ Failure to comply with the warranty is considered to be a breach of contract in terms of which the consumer is entitled to damages.⁸⁴ However, the extent of the remedy is dependent on the express terms of the warranty.⁸⁵

A puff constitutes sales talk in terms of which no reasonable person would consider it to be a serious statement.⁸⁶ Lawson submits that as long as the advertiser confines himself to the general praise of the goods, he should be safe.⁸⁷ A representation however, refers to a statement which will cease to be a puff and become a representation when it turns into a credible statement.⁸⁸ A representation must be a statement of fact and not opinion.⁸⁹ Although it does not form part of the contract, if it is incorrect, the consumer may in certain instances set aside the contract (which he may not have otherwise entered into) and claim damages.⁹⁰ Mere expression of an opinion does not usually give rise to remedies but a deliberate misstatement which induces a contract will give rise to actionable misrepresentation.⁹¹

⁸¹*Ibid.*

⁸²*Ibid.* See Gibson (2003) 62 and Hutchison and Pretorius (2012) 119.

⁸³McQuoid-Mason (1997) 21 The word “guarantee” is often used when a consumer is provided with a warranty. See also Hutchison and Pretorius (2012) 117.

⁸⁴McQuoid-Mason (1997) 22.

⁸⁵*Ibid.*

⁸⁶*Idem* 21. Sharrock (2011) 137-138.

⁸⁷Lawson (1978) 16. Hutchison and Pretorius (2012) 119, authors submit that laudation (puffery) by one of the contracting parties does not amount to a misrepresentation if the party limits himself “indiscriminate puffing and pushing and does not condescend to the particulars’: *simplex commendation non obligat*”.

⁸⁸Lawson (1978) 16. See also McQuoid-Mason (1997) 275 where Woker submits that this distinction is not always easy to make.

⁸⁹Lawson (1978) 16.

⁹⁰McQuoid-Mason (1997) 22. See Lawson (1978) 17, the author submits that compensation depends on whether the misrepresentation is innocent or fraudulent.

⁹¹McQuoid-Mason (1997) 22. Hutchison and Pretorius (2012) 119, the authors also refer to a *dictum et promissum*, which amounts to a form of representation, and refers to “a material statement made by the seller to the buyer during negotiations on the quality of the *res vendita* and going beyond mere praise and commendation”. See *Phame v Paizes* for the principles on a *dictum et promissum*.

2.2.3 Inertia selling and unsolicited goods

Inertia selling refers to a promotional activity in terms of which unsolicited goods are sent through the mail with the indication that the sender will assume that the recipient has the intention to purchase the goods, unless they are returned within a specified time.⁹² The general rule is that “silence does not mean consent”.⁹³ Woker submits that when unsolicited goods are sent to consumers by means of mail it creates confusion and frustration for them, and they “are often deceived into believing (incorrectly) that they are bound to pay for the goods”.⁹⁴ Furthermore, the author submits that this may be regarded as an invasion of the privacy of consumers.⁹⁵ The seller does not intend for the recipient to become the owner of the goods until the goods have been paid for.⁹⁶ Nonetheless, the author submits that there is no obligation on the recipient either to pay the sender, to return the goods to the sender, nor to inform the sender that he will not be accepting the goods.⁹⁷ However, recipients cannot become the owners of the goods through acquisitive prescription.⁹⁸ Woker therefore submits that there may still be a duty of safekeeping on the recipient as well as the duty to prevent negligent or intentional loss or damage to the unsolicited goods.⁹⁹ The CPA changes this position on unsolicited goods.¹⁰⁰ and is discussed further in chapter 3

2.3 The need for the regulation of promotional activities

Prior to the enactment of legislation on the subject of promotional activities only the common law, as discussed above, was applicable.¹⁰¹ It is clear that there was a lacunae in the common law in terms of which the consumer was not adequately protected and was open to abuse by the seller.¹⁰² It has been submitted that it is

⁹²Woker (1999) 56.

⁹³*Idem* 57. See also *Felthouse v Bindley* [1892] 11 CB (NS) 86 (142 ER 1037) as discussed by Woker at 57.

⁹⁴Woker (1999) 57.

⁹⁵*Ibid.*

⁹⁶*Ibid.*

⁹⁷*Idem* 58.

⁹⁸*Ibid.* Section 21(6) of the CPA changes this position on unsolicited goods. This will be discussed in Chapter 3 below.

⁹⁹Woker (1999) 58.

¹⁰⁰See discussion in chapter 3 below.

¹⁰¹Lawson (1978) 21-24. See McQuoid-Mason (1997) 266. The common law is still applicable in instances where the CPA does not apply to a particular set of facts.

¹⁰²Par 2.2.1 above.

often not a question of whether advertising should be regulated or not, but rather to what extent it should be regulated.¹⁰³ McQuoid-Mason submits that the regulation of advertising is an essential component of consumer protection, as there are damaging social consequences if advertising is not controlled and the interests of the consumer are not protected.¹⁰⁴ Although the competition created by advertising allows consumers more freedom of choice, it can be manipulative unless there is strict regulation of the market place.¹⁰⁵

Before the enactment of the CPA, Woker made the submission that the regulation mechanisms to be implemented should develop advertising standards that ought to be complied with before advertisements are released and make advertisers aware of these standards; provide a mechanism for monitoring compliance with standards; set up a mechanism for handling complaints from consumers, competitors and other interested parties and establish a means of penalizing bad behaviour in violation of the standards.¹⁰⁶

Although advertising has been subject to much criticism,¹⁰⁷ it plays a valuable role in modern developed society otherwise consumers would not know what was available or where to get it.¹⁰⁸ Furthermore, advertising allows for the dissemination of new products, ideas and technology.¹⁰⁹ However, the main problem facing advertising regulators is drawing the line between regulation, freedom of enterprise and deciding who should enforce the restraints.¹¹⁰ The three main methods of regulating and enforcing advertising that warrant a discussion are self-discipline, statutory regulation and self-regulation.¹¹¹

¹⁰³McQuoid-Mason (1997) 265.

¹⁰⁴*Idem* 261.

¹⁰⁵*Idem* 264. Promotional activities also have Constitutional implications in terms of which advertising is associated with the freedom of expression, for purposes of limiting the scope of this discussion, this element will not be discussed any further. *See* McQuoid-Mason (1997) 277.

¹⁰⁶McQuoid-Mason (1997) 265.

¹⁰⁷*Idem* 262-263. McQuoid-Mason submits that economists have argued that advertising is a frivolous expense which can be reduced at the first sign of trouble in the economy; it encourages a wasteful increase in consumption; and its enormous costs deters new competitors from entering into the marketing, ultimately resulting in monopolies.

¹⁰⁸McQuoid-Mason (1997) 264.

¹⁰⁹*Ibid.*

¹¹⁰*Idem* 265.

¹¹¹*Ibid.*

Firstly, self-discipline¹¹² refers to a system where there are no formal controls and advertisers are kept in check by their competitors who may run better advertisements; and by their consumers who refuse to be misled by deceptive advertising. Honest traders are thus guided by their own consciences, ethical business practices or by the fear of attaining a bad reputation, but these guidelines are not always sufficient. The advocates of this approach argue that the courts can be approached to remedy the effects of false advertising.¹¹³ McQuoid-Mason submits that it is true that in some instances protection is available in terms of the common law, but the reality is that consumers are often reluctant to take matters further.¹¹⁴ A primary characteristic of the common law is that consumers must initiate proceedings, which is based on the belief that consumers are aware of their rights and are willing to pursue them.¹¹⁵ Furthermore, the writer submits that it is also very difficult for a consumer to judge in some instances whether the advertisement conveys a misrepresentation in respect of the product.¹¹⁶ In this regard, the submissions that McQuoid-Mason are referred to with merit. The establishment of a standard regulatory framework to prevent the occurrence of false advertising is thus preferable. Not doing so would be akin to relying on the self-discipline of people not to commit crimes, instead of implementing laws to prevent the commission of the crime.

Secondly, statutory regulation has been introduced in the past to control practices which are regarded as dubious where “businesses cannot be trusted to monitor” themselves and where consumers and competitors lack the required will and means to challenge abuses by traders.¹¹⁷ However, not even the criminal penalties contained in consumer-related statutes could act as deterrents.¹¹⁸ Furthermore, McQuoid-Mason submits that the courts are overburdened with criminal matters;

¹¹²*Ibid.*

¹¹³*Idem* 266.

¹¹⁴*Ibid.*

¹¹⁵*Ibid.*

¹¹⁶*Ibid.* Woker also submits in this regard that it is difficult for a consumer to judge whether an advertisement which states that a product contains additives which are known to be beneficial to the consumer when in fact it does not.

¹¹⁷*Ibid.*

¹¹⁸*Ibid.*

therefore, the matters concerning misleading advertisements do not receive much priority.¹¹⁹

The Consumer Affairs Act was enacted to protect the public from unlawful business practices as well as those that are lawful yet unfair or harmful to consumers.¹²⁰ However, it seems as if even legal practitioners were unfamiliar with its provisions.¹²¹

Lastly, self-regulation occurs where the industry itself assumes responsibility for controlling advertising by peer group pressure to develop standards, together with the sanction of withholding advertising rights.¹²² Woker submits that the advertising industry in South Africa prefers self-regulation to government intervention which is why the ASA¹²³ was established in 1969.¹²⁴ The ASA, being the watchdog of the advertising industry, has adopted a code of conduct based on the British Code of Advertising practice.¹²⁵ In this regard, the standing of the ASA and the system of self-regulation set up by the industry is recognized by the Electronic Communications Act.¹²⁶ in terms of which the Code of Advertising Practice is the accepted standard to which all broadcast advertising in South Africa must conform.¹²⁷ Regardless of whether the broadcasting licensee is a member of the ASA, if it is found to have breached the code, such is dealt with in terms of the Independent Communications Authority of South Africa Act.¹²⁸ The effect of this recognition is that while the ASA has an independent status as an independent body,

¹¹⁹*Ibid.* See discussion on *S v Pepsi* and *Tobler v Durban Confectionery Works* on 266-267.

¹²⁰Woker (2001) *SA Merc LJ* 316. Certain provisions of this Act were found to be unconstitutional in *Janse van Rensburg NO v Minister of Trade & Industry* 2001 (1) SA 29 (CC). See also Woker (2001) *SA Merc LJ* 319.

¹²¹Woker (2001) *SA Merc LJ* 315.

¹²²McQuoid-Mason (1997) 265-268. See Lawson (1978) 21-24.

¹²³Hereafter referred as the ASA.

¹²⁴The objects of the ASA include promoting and encouraging the highest standards of advertising in all media; to encourage adherence to the code; to persuade all persons and organizations involved in advertising to belong to the ASA; to ensure mutual co-operation and consultation; and to consult with & advise appropriate government, statutory, provincial, civic and other authorities. McQuoid-Mason (1997) 268. See also Woker (2010) *Obiter* at 222 where the (ASA) is put forward as an example of an effective self-regulatory body for the advertising industry in South Africa. The effectiveness of an industry body requires proper monitoring and sanction.

Author submits that in carrying out these objects the ASA believes that it is serving the interests of the public and establishing & maintaining the highest standards of advertising at 269.

¹²⁵McQuoid-Mason (1997) 268. This code will be discussed further in Chapter 4 below.

¹²⁶36 of 2005. Hereafter referred to as the "ECA". The ECA repealed the Independent Broadcasting Authority Act 153 of 1993 which contained similar provisions on the control of advertisements in terms of section 57. See. McQuoid-Mason (1997) 268.

¹²⁷Section 55(1) ECA.

¹²⁸13 of 2000. See section 55(3) ECA.

its code enjoys statutory backing.¹²⁹ One of the disadvantages of the ASA is that it cannot impose sanctions if the offender is not a member.¹³⁰ As a result of the provisions in the Independent Broadcasting Authority Act, there is a statutory duty on electronic broadcast media to uphold the code; therefore an unsatisfactory advertisement will be dealt with by the Independent Broadcasting Authority in terms of the licensing conditions of that medium.¹³¹ However, where advertisements are carried by a small independent printer (where the printer or publisher is not a member of the ASA) the sanctions could not be enforced.¹³² It is my submission that such a gap undoubtedly leaves consumers in a vulnerable position.

2.4 Conclusion

In summation, when following the developments of the regulation of promotional activities from the common law to the implantation of industry-specific self-regulation of the advertising industry,¹³³ it is evident that the golden thread throughout the dispensation prior to the implementation to the CPA was that the protection of the consumer was not always paramount, leaving vulnerable consumers open to abuse and manipulation. Therefore, there was a need for promotional activities to be brought under the umbrella of one holistic piece of consumer protection legislation.

¹²⁹McQuoid-Mason (1997) 269.

¹³⁰*Idem* 271.

¹³¹*Ibid.*

¹³²*Ibid.*

¹³³*Idem* 265-268. See Woker (2010) *Obiter* 222 where the ASA is put forward as an example of an effective self-regulatory body for the advertising industry.

Chapter 3: Promotional activities in terms of the CPA

3.1 Introduction

The focus of this discussion is on the regulatory provisions in the CPA that relate to promotional activities. Lake correctly submits that the provisions pertaining to promotional activities are only applicable where the subsequent transaction would fall under the Act.¹³⁴ Hutchison and Pretorius submits that the CPA has added additional requirements for an offer to be considered as valid, namely that the notice must be in plain and understandable language;¹³⁵ that negative option marketing is prohibited;¹³⁶ that the consumer has the right to a cooling-off period when the goods are directly marketed;¹³⁷ that catalogue marketing is prohibited;¹³⁸ and that the offer must disclose whether the goods are reconditioned or grey market goods.¹³⁹ Amongst other areas of promotional activities regulated by the CPA, the first four of the so-called “additional requirements” will be discussed below in this chapter. Owing to the limited nature of this discussion, provisions pertaining to promotional activities with the greatest impact on this area of the law will be discussed.

3.1.1 CPA Definitions

Certain definitions in terms of the CPA deserves mentioning and are relevant to this discussion the details of which are mentioned below.

An *advertisement*¹⁴⁰ refers to any direct or indirect visual or oral communication transmitted by any medium, or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to bring to the attention of all or part of the public the existence or identity of a supplier; or the existence, nature, availability, properties, advantages or uses of any goods or services that are available for supply, or the conditions on, or prices at, which any goods or services are available for supply. Furthermore, it

¹³⁴Lake (2011) *DR* 51.

¹³⁵Section 22 CPA. Hutchison and Pretorius (2012) 49.

¹³⁶Section 31 CPA. *Idem* 49-50.

¹³⁷Section 16 CPA. *Idem* 50.

¹³⁸Section 32 CPA. *Idem* 49.

¹³⁹Section 25 CPA. *Ibid.*

¹⁴⁰Own emphasis.

refers to when a person seeks to promote the supply of any goods or services; or to promote any cause.¹⁴¹ Du Preez submits that the definition of an advertisement is relatively wide.¹⁴² In this regard, it is submitted that the legislature intended to afford the consumer the widest possible protection by widening the scope of what constitutes an advertisement.

A *consideration*¹⁴³ refers to anything of value given and accepted in exchange for goods and services, including money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object; labour, barter or other goods or services; loyalty credit or award, coupon or other right to assert a claim; or any other thing, undertaking, promise, agreement or assurance. This is irrespective of its apparent or intrinsic value, or whether it is transferred directly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer

A *consumer*¹⁴⁴ refers to a person to whom those particular goods or services are marketed in the ordinary course of business; or 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 the Act in terms of section 5(2) or 5(3)¹⁴⁵; or 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; or a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6) (b) to (e).¹⁴⁶ A consumer also includes both natural and juristic persons. Juristic persons with an asset value or annual

¹⁴¹Section 1 CPA.

¹⁴²Du Preez (2010) TSAR 75.

¹⁴³Own emphasis.

¹⁴⁴Own emphasis.

¹⁴⁵Importantly, no transaction can be exempt from the application of sections 60 and 61 of the CPA.

¹⁴⁶Section 1 CPA. See McQuoid-Mason (1997) 1 where the author distinguishes between a consumer in the wide sense and a consumer in the narrow sense. In the broad sense, a consumer refers to everyone in society. This includes citizens entering into exchange relationships with institutions such as hospitals, libraries and police forces and various government agencies and businesses. Whilst in the narrow sense, a consumer refers to any person who buys or hires goods and services or any person who uses such goods and services. However, this distinction was made prior to the implementation of the CPA and has not been incorporated into the definition of a consumer.

turnover of more than R3 million will however not be regarded as consumers in terms of the CPA.¹⁴⁷

*Direct marketing*¹⁴⁸ occurs when a person is approached, either in person or by mail or electronic communication, for the direct or indirect purpose of either promoting or offering to supply any goods or services to the person in the ordinary course of business; or requesting the person to make a donation of any kind for any reason.¹⁴⁹

*Display*¹⁵⁰ when used in relation to any goods, means placing, exhibiting or exposing those goods before the public in the ordinary course of business in a manner consistent with an open invitation to members of the public to inspect, and select, those or similar goods for supply to a consumer; or in relation to a price, mark, notice or other visual response. In addition *display* means to place or publish anything in a manner that reasonably creates an association between that price, mark, notice or other visual representation and any particular goods or services.¹⁵¹ In this regard, it is submitted that the diction in this definition, particularly with reference to the words “in a manner consistent with an open invitation”, is in keeping with the common law principle that the display of a price is not an offer, but merely an invitation to do business.¹⁵²

*Goods*¹⁵³ include anything marketed for human consumption; any tangible object which is not marketed for human consumption, including any medium on which anything is or may be written or encoded; any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium or a license to use any such intangible product; a legal interest in or any land other than immovable property, other than an interest in land

¹⁴⁷ A *juristic person* includes a body corporate; a partnership or association; or a trust, as defined in the Trust Property [Control] Act 57 of 1988. See section 6 CPA read with GG No 33621/912/11Oct10 concerning the threshold determination of a juristic person.

¹⁴⁸ Own emphasis.

¹⁴⁹Section 1 CPA.

¹⁵⁰Own emphasis.

¹⁵¹Section 1 CPA.

¹⁵²See par 2.2 above.

¹⁵³Own emphasis.

that falls within the definition of *service* in section 1 of the Act; and gas, water and electricity.¹⁵⁴

Market,¹⁵⁵ when used as a verb means any visual representation, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or other sign capable of being represented graphically, or any combination of those things, but does not include a trade mark.¹⁵⁶

*Promote*¹⁵⁷ means to advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration; make a representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.¹⁵⁸ This definition is especially important for purposes of this discussion which is focused on promotional activities. It is evident from this definition that although this is a focused discussion, it has multifaceted and thus has bearing on various areas of importance pertaining to promotional activities.

Irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service, a *service*¹⁵⁹ includes but is not limited to 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 in terms of the Financial Advisory and Intermediary Services Act;¹⁶⁰ any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service firstly, constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act; or secondly, is

¹⁵⁴Section 1 CPA

¹⁵⁵Own emphasis.

¹⁵⁶Section 1 CPA.

¹⁵⁷Own emphasis.

¹⁵⁸Section 1 CPA. See also Nagel (2011) 726 – 727 and Woker (1999) 3 - 4.

¹⁵⁹Own Emphasis.

¹⁶⁰37 of 2002.

regulated in terms of the Long-term Insurance Act¹⁶¹ or the Short-term Insurance Act;¹⁶² the transportation of an individual.¹⁶³ Furthermore, a service includes the provision of any accommodation or sustenance; any entertainment or similar intangible product or access to any such entertainment or intangible product; access to any electronic communication infrastructure; access, or of a right of access, to an event or to any premises, activity or facility; or access to or use of any premises or other property in terms of a rental. It also includes a right of occupancy of or power or privilege over or in connection with any land or other immovable property, other than in terms of a rental; as well as rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5 (6)(b) to (e).

A *supplier*¹⁶⁴ refers to a person who markets any goods or services. Whilst *supply* when used as a verb in relation to goods, includes to sell, rent, exchange and hire in the ordinary course of business for consideration; or in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises in the ordinary course of business for consideration.¹⁶⁵

*Supply chain*¹⁶⁶ refers collectively to all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as a producer, importer, distributor or retailer of goods, or as a service provider.

3.1.2 The right to fair and responsible marketing and related consumer rights: A critical overview and analysis

3.1.2.1 The general standards for marketing of goods and services

The core provision that lays down the general standards of marketing in terms of the CPA is contained in section 29 of the CPA which falls under Part E of the Act.¹⁶⁷ However, it is not the only section in the Act that has bearing on the standard of marketing as a whole. Sections such as section 40, which prohibits unconscionable

¹⁶¹52 of 1998.

¹⁶²53 of 1998.

¹⁶³Section 1 CPA.

¹⁶⁴ Own emphasis.

¹⁶⁵Section 1 CPA.

¹⁶⁶Own emphasis.

¹⁶⁷The right to fair and responsible marketing. See Lake (2011) *DR* 51; Altini (2012) *WP* 35.

conduct; and section 41, which prohibits false, misleading or deceptive representations, are also relevant in terms of the general standard of marketing. Although these are important provisions in the Act, owing to the nature of this discussion, the sections are referred to in passing.

In terms of section 29, a producer, importer, distributor, retailer, or service provider must not market any goods or services in a manner that is reasonably likely to imply false or misleading representation concerning those goods or services, as contemplated in section 41. Furthermore, goods and services must not be marketed in a manner that is misleading, fraudulent or deceptive in any way.¹⁶⁸

Interestingly, Jacobs, Stoop and Van Niekerk submit that although sales talk or puffery has no binding effect, the provisions contained in section 41 of the Act pertaining to false, misleading and deceptive representations, may affect or even prohibit such conduct.¹⁶⁹ Bearing in mind the provision of section 41(1)(b), it is submitted that the contention made by these authors is correct and indicates an alteration of the common law position on puffery and representations as puffing regarding a material fact is prohibited.¹⁷⁰ It is submitted that this is a development of the common law stance on puffery and sales talk.

In addition, where court proceedings are involved in terms of section 41 of the CPA, section 51, which provides for the prohibited transactions, agreements and terms or conditions applies.¹⁷¹ This is significant as it indicates the seriousness with which false, misleading and deceptive representations are treated in terms of the CPA.

Furthermore, section 8 of the CPA contains the protection against discriminatory marketing in line with section 9 of the Constitution of the Republic of South Africa,¹⁷² as well as the Promotion of Equality and Prevention of Unfair Discrimination Act.¹⁷³ Jacobs, Stoop and Van Niekerk submit that the protection against discriminatory marketing “is important in South Africa’s new constitutional dispensation, in which

¹⁶⁸See section 29(b)(i)-(v) CPA.

¹⁶⁹Jacobs *et al* (2010) *PER* 335. See section 41 (1) (a) – (c) CPA.

¹⁷⁰Kelly-Louw and Stoop (2012) 564.

¹⁷¹Section 41(5) CPA.

¹⁷²1996. Hereafter referred to as the Constitution. Section 8 and 9 of the CPA must be read together in this regard.

¹⁷³4 of 2000.

the state is committed to the goal of achieving equality”.¹⁷⁴ To this effect, the CPA also gives effect to a core value enshrined in the Constitution. Furthermore, section 76 of the NCA provides generally for advertising practices relating to the provision of credit.

3.1.2.2 The right to information in plain and understandable language

Section 22 provides that the producer must ensure that a notice, document or visual representation, that ought to be produced in terms of the CPA, must be in the prescribed form in terms of the Act or in plain language.¹⁷⁵ Furthermore, the section provides that the notice, document or visual representation will be considered as being in plain language if the ordinary consumer of the class of consumers to which the notice, document or visual representation is directed with average literary skills and minimal experience as a consumer of the goods and services concerned, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort..¹⁷⁶ Jacobs, Stoop and Van Niekerk submit that the section will compel many suppliers to redraft their contracts in order to meet the requirements of plain language which is in line with international practice.¹⁷⁷

It is argued that this provision is subject to abuse by suppliers to the extent that it provides that the notice, document or visual concerned will be considered as being in plain language where the ordinary consumer in the *class of consumers*¹⁷⁸ to which the notice is directed could be expected to understand its content. In this regard, suppliers could easily argue that they have complied with this provision on their own terms, when in fact they have not catered for the entire class of consumers to which the good or service is directed. A supplier could for example, stipulate that a particular hair product that is being advertised is directed towards black females. However, within the class of black females, there are females who are educated, uneducated or illiterate as the case may be. Therefore, the advertisement of the

¹⁷⁴Jacobs *et al* (2010) *PER* 318.

¹⁷⁵Section (1) CPA. See Monty and Hurwitz (2012) *WP* 58 and Melville (2010) 42.

¹⁷⁶In determining whether undue effort was taken, the factors included in section 22 (2)(a) –(d) CPA must be considered.

¹⁷⁷Jacobs *et al* (2010) *PER* 331.

¹⁷⁸Own emphasis.

product may be understandable to the educated black female, whilst the uneducated black female does not understand the content of the advertisement. Therefore, it is submitted that the test for compliance with section 22 is vague and ought to be revisited by the legislature.

3.1.2.3 Price disclosure

The price of goods and services is regulated by section 23 of the CPA and does not apply to instances where a supplier has provided an estimate; where the consumer had waived his right in terms of section 15 of the CPA or where section 43 of the ECTA applies to a transaction.¹⁷⁹ Retailers are required to show the price of the goods that are being displayed.¹⁸⁰ The section provides the manner in which a display is considered as being adequate.¹⁸¹ Furthermore, when a display is made for the purpose of advertising, or should the goods be in an area to which the public does not normally have access, the supplier will not be required to display the price.¹⁸²

In addition, Jacobs, Stoop and Van Niekerk succinctly highlight that a supplier is not allowed to demand a higher price than the price that is displayed; and in instances where more than one price is displayed, the lowest price applies.¹⁸³ In terms of the common law, the supplier is allowed to sell the goods at any price regardless of the price displayed because a price is only an invitation to do business and not an offer. Therefore, it is submitted that section 23 alters the common law position in this regard.

Furthermore, Du Plessis submits that the CPA has had a major effect on the common law rule of unilateral determination of price.¹⁸⁴ Furthermore, insofar as the CPA binds the retailer to the lower price that is displayed, the author submits that this seems to exclude the determination of the price by means of the seller

¹⁷⁹Section 23(1) CPA. See Jacobs *et al* (2010) *PER* 331 and Melville (2009) 42 – 43. Product labelling and trade descriptions are regulated by section 24 CPA and will not be discussed further.

¹⁸⁰Jacobs *et al* (2010) *PER* 302 at 331. Section 23(3) CPA. A *retailer* refers to “a person who, in the ordinary course of business, supplies those goods to a consumer”. Du Plessis (2013) *THRHR* 232 submits that upon closer inspection, “the definition of a ‘retailer’ and a ‘supplier’ could refer to the same person”.

¹⁸¹Jacobs *et al* (2010) *PER* 331. Section 23(5) CPA.

¹⁸²*Ibid.* Section 23(4) CPA.

¹⁸³*Ibid.* Section 23(6) CPA.

¹⁸⁴Du Plessis (2013) *THRHR* 234.

exercising “an objective and reasonable discretion”.¹⁸⁵ Du Plessis submits that the CPA has also altered the common law in respect of the common law rules that prohibit the unilateral determination of prices in contracts of sale.¹⁸⁶ Seeing that the consumer can insist that the goods be sold at the price displayed, the possibility of “the seller exercising an objective or reasonable discretion” seems to be eliminated.¹⁸⁷ Thus the price must be fixed by the seller prior to the sale being concluded.¹⁸⁸ Furthermore, Du Plessis submits that the discretion of the retailer to determine the price of the goods could be attacked as constituting an unfair, unreasonable and unjust term within the meaning of section 48(1)(c). Essentially this would mean that in such instances a consumer would not waive his right to have the price of the goods displayed.¹⁸⁹ The author is referred to with merit.

3.1.2.4 Direct marketing

Direct marketing and the cooling-off right

A consumer to whom the goods or services have been directly marketed is entitled to be duly informed of his cooling-off right in the prescribed manner or form.¹⁹⁰ Although the consumer is granted the right to return the goods in instances where the agreement arose from direct marketing,¹⁹¹ the goods are returned at the risk and expense of the consumer.¹⁹² In addition, Jacobs, Stoop and Van Niekerk point out that the CPA refers to a “person” who directly markets the goods and service, thus not restricting such person only to the supplier.¹⁹³ Therefore it appears that this section broadens the scope of accountability of the various role players in the supply chain to the consumer.

However, section 16(3) allows the consumer to rescind a transaction resulting from any direct marketing, without any reason or penalty, by giving notice to the

¹⁸⁵Du Plessis (2013) *PER* 100.

¹⁸⁶Du Plessis (2013) *THRHR* 227.

¹⁸⁷*Idem* 235.

¹⁸⁸*Ibid.*

¹⁸⁹Du Plessis (2013) *PER* 100.

¹⁹⁰Section 32(1) and 16 CPA. See Lake (2011) *DR* 51, Melville (2010) 64-65 and Van Eeden (2009) 120 – 121.

¹⁹¹Section 20(2)(a) CPA.

¹⁹²Section 20(4)(a) CPA.

¹⁹³Jacobs *et al* (2010) *PER* 338.

*supplier*¹⁹⁴ in writing, or any other recorded manner or form, within five business days after the later of the date on which the transaction was concluded; or the goods subject to the transaction were delivered to the consumer.¹⁹⁵ The fact that the consumer is required to give notice to the *supplier*¹⁹⁶ of the goods and services and not the *person*¹⁹⁷ who directly marketed the goods or services by means of direct marketing to the consumer raises concerns as to whether the section is as wide as it *prima facie* appears to be. In reality, the consumer may not be familiar with whom the supplier is which is problematic: to whom shall the consumer address this notice in such instances? Furthermore, Jacobs, Van Niekerk and Stoop submit that enforcing the cooling-off right in respect of donations may also be difficult in practice, particularly in instances where the person who makes the request for donations is not known to the consumer.¹⁹⁸

Section 75 of the NCA regulates the marketing and sales of credit at home and work. Although the provision does not refer to “direct marketing” *per se*, it is evident from the content of this section that it regulates aspects of direct marketing. The section places a number of restrictions on how credit may be marketed.¹⁹⁹ Of particular importance, in the context of promotional activities, is section 75(1) which prohibits the credit provider from harassing a person in attempting to persuade him to apply for credit or to enter into a credit agreement or related transactions.

Furthermore, electronic transactions that are brought about by electronic communications are not regulated by section 16 of the CPA and the cooling-off provisions in terms of section 44 of the ECTA will apply.²⁰⁰

¹⁹⁴Own emphasis.

¹⁹⁵Own emphasis. Section 16(3) CPA. Jacobs *et al* (2010) *PER* 338, the authors point out that it is uncertain whether this provision caters for instances in which perishable goods are purchased as a result of direct marketing.

¹⁹⁶Own emphasis.

¹⁹⁷In terms of section 1 of the CPA, a *person* includes a juristic person. Nonetheless it appears to be wider than specifically limiting it to the supplier, retailer, distributor *et cetera*.

¹⁹⁸Jacobs *et al* (2010) *PER* 338.

¹⁹⁹Section 75(1), (3) and (4) NCA.

²⁰⁰See also Timothy and Burger (2010) *WP* 34 and Papadopoulos and Snail (2012) 65.

Direct marketing and the right to privacy

The right to privacy is enshrined in section 14 of the Constitution.²⁰¹ Kirby submits that the CPA contains the most comprehensive set of consumer rights that relate to privacy.²⁰² This is not a far-fetched assertion as a consumer is afforded the right to either refuse or accept direct marketing advances; and to require another person to discontinue unwanted direct marketing.²⁰³ In order to ensure that the direct marketing provisions are complied with, effective mechanisms must be put into place.²⁰⁴ Such mechanisms are contained in regulations 4 of the CPA.²⁰⁵ Furthermore, section 11(3) gives the commission the power to establish a registry in order to allow any person to register a pre-emptive block against any communication that is primarily direct marketing.²⁰⁶ The fact that this registry is yet to be established is disconcerting.

Direct Marketing and unsolicited goods and services

Section 32(2) provides that where a person has been directly marketed any goods and no arrangements for payment have been made, those goods will be considered as unsolicited goods in terms of section 21 of the Act.²⁰⁷ The provision on unsolicited goods and services is aimed at prohibiting the practice of inertia selling.²⁰⁸

Gouws has an interesting take on the provisions relating to unsolicited goods.²⁰⁹ The author makes a number of submissions in this regard with reference to section 25(1) and (2) of the Constitution and concludes that section 21 of the CPA is unconstitutional insofar as it specifically excludes compensation which is a material requirement for expropriation by the state in terms of section 25(2)(b) of the Constitution²¹⁰. Furthermore, the author submits that if section 21(5) is held to be a

²⁰¹Jacobs *et al* (2010) *PER* 320.

²⁰²Kirby (2009) *WP* 28.

²⁰³Jacobs *et al* (2010) *PER* 320-321. Section 11(a) – (b) CPA.

²⁰⁴Lake (2011) *DR* 51.

²⁰⁵*Ibid.*

²⁰⁶Section 11 (3) CPA.

²⁰⁷Section 32(2). See Melville (2010) 65 – 67 and Stadler (2010) *DR* 49-50.

²⁰⁸Van Heerden (2011) *Int J Private Law* 534. Inertia selling is discussed in par 2.2.3 above.

²⁰⁹Gouws (2009) *DR* 16-19.

²¹⁰*Ibid.* See section 25 Constitution.

deprivation, then it falls short of the elements of arbitrariness.²¹¹ It is submitted that interpreting section 21 in context of the purpose of the CPA will not lead to such an extreme result owing to the fact that *fairness*, as contained in section 3(1)(c), takes into account the interests of both the consumer and the supplier.²¹² With reference to the submissions of Gouws, Van Heerden submits, *inter alia*, that the fact that the consumer does not have an obligation to inform the supplier that the goods were misdelivered, does not have the effect that those goods become unsolicited and that the supplier would *always*²¹³ be entitled to recover the goods from the consumer who retains goods that are clearly misdelivered without informing the supplier.²¹⁴

However, the fact that section 21(2)(a) sets time limits within which the supplier must inform the consumer that the goods were misdelivered, indicates that the supplier will not continually be entitled to recover its goods.²¹⁵ From the section it appears that if the supplier did not inform the consumer of the misdelivery within 10 business days, the supplier loses the right to recover the misdelivered goods. The goods then become unsolicited where the requirements of subsection (1) are complied with, following which the consumer can choose to retain such goods. Therefore, Gouws' submission that the determination of whether or not the goods are unsolicited does to a large extent depend on the exercise of the consumer's "free will" is referred to with merit.²¹⁶ This is undoubtedly unfair to *bona fide* supplier.

Gouws submits *inter alia* that the Bill "affords the consumer the right to choose at the expense of the supplier". In addition the author submits that where there is a deprivation it should be in line with procedures that are clear and fair. In this regard, section 21(5) confers discretionary powers upon the recipient of the misdelivered goods to decide whether to retain the goods or to inform the supplier of the misdelivery. The decision is thus not based on any legal criteria or prescribed procedure. "It is simply based on the possessor exercising his free will". Furthermore, he submits that the Bill fails to distinguish between a *mala fide* and a *bona fide* supplier. However, he does provide solutions to this dilemma, namely that section 21(2) should be amended to provide for the institution of proceedings within 20 business days, rather than to recover the goods within that period, or for the state to compensate the supplier, see Gouws (2009) DR 16-19. Interestingly, the provisions of the Bill were not amended, suggesting that the legislature does not hold the view that the provisions may be unconstitutional.

²¹¹*Ibid.*

²¹²Section 3(1)(c) CPA: to "promote and advance the social and economic welfare of consumers in South Africa by – promoting fair business practices".

²¹³ Own emphasis.

²¹⁴Van Heerden (2011) *Int J Private Law* 540.

²¹⁵Section 21(2)(a) Despite subsection (1), if – within 10 business days after delivery of any goods to a consumer the supplier informs the consumer that the goods were delivered in error, those goods become unsolicited only if the supplier fails to recover them within 20 business days after so informing the consumer.

²¹⁶Gouws (2009) DR 18.

Melville submits that although it is, unfortunate that the Act places no obligation is placed on the mistaken recipient of the misdelivered goods to inform the supplier of the error; it is nonetheless clear that a person who is not legally entitled to keep such goods (the recipient) may be liable for prosecution for the theft of doing so.²¹⁷ Furthermore, Van Heerden submits that as an alternative to laying a theft charge, the supplier may recover the goods using the *rei vindicatio*.²¹⁸ From a practical viewpoint, it is submitted that it is unlikely that a theft case for the recipient of misdelivered goods would be dealt with seriously in our criminal justice system.²¹⁹ Owing to the wide interpretation of the section it is submitted section 21(2) should be amended accordingly.²²⁰

In addition, section 45 of the ECTA regulates unsolicited goods, services and communications and is not repealed by the CPA.²²¹ Therefore, Papadopoulos and Snail submit that the two Acts concurrently regulate spam and unsolicited electronic communication and the provision that affords the consumer the greatest protection will be applicable.²²² The implementation of the Protection of Personal Information Act²²³ will change this position and repeal section 45 of the ECTA.²²⁴

3.1.2.5 Bait marketing

The provision on bait marketing is contained in section 30 of the Act and prohibits the supplier from misleading or deceiving the consumer by advertising that that any goods or services are available at a specific price simply to lure or persuade the consumer to enter a specific place or shop to purchase something other than the marketed goods or services.²²⁵ Therefore, the provision aims to ensure that

²¹⁷Melville (2010) 67.

²¹⁸Van Heerden (2011) *Int J Private Law* 539.

²¹⁹See Woker (2010) *Obiter* 220, where the author refers to the *S v Pepsi-Cola (Pty) Ltd* 1985 3 SA 141 (C) in indicating that owing to the overload in criminal, consumer issues do not receive the attention that they deserve. Furthermore, the author submits that there is an attitude that issues relating to consumer matters are not important.

²²⁰Jacobs *et al* (2010) *PER* 328, also submit that there is some uncertainty regarding there provisions of section 21(2) CPA. They raise a number of points including whether the goods will become unsolicited should the consumer not inform the supplier of misdelivery.

²²¹See Papadopoulos and Snail (2012) 85.

²²²Section 2(9) CPA.

²²³4 of 2013. Hereafter referred to as the "PPI Act".

²²⁴PPI Act, Schedule. Chapter VIII section 66 to 68 of the PPI Act will replace section 45 ECTA. See Papadopoulos and Snail (2012) 89.

²²⁵Section 30(1) CPA. See Jacobs *et al* (2010) *PER* 336.

suppliers always make their goods and services available as advertised.²²⁶ Furthermore, the section provides that where the supplier advertises specific goods and services as being available at a specific price, and specifically states that a limitation in respect thereof, then the supplier is required to make those goods available at that price.²²⁷ Where the supplier offered to supply or procure someone else to supply the consumer with the same goods and services as those advertised within a reasonable time, in a reasonable quantity and at the price advertised; and the consumer unreasonably refused the offer; or accepted the offer and the supplier has accordingly supplied and procured someone else to supply those goods and services as offered and accepted, then the supplier is precluded from liability.²²⁸ Bearing in mind the manner in which consumers became victims to conduct such as “bait and switch tactics” section 30 is a welcome provision.²²⁹

3.1.2.6 Negative option marketing

Section 31 of the CPA prohibits negative option marketing also known as “inertia selling”.²³⁰ In other words, the Act prohibits the seller from, *inter alia*, promoting any goods or services on the basis that the goods or services will be supplied to the consumer; or that the agreement or modification will automatically come into existence, unless the consumer declines such an offer or inducement.²³¹ An agreement or modification entered into in this manner is void.²³²

Similarly, section 74 of the NCA prohibits this practice in respect of credit and provides that a credit provider must not make an offer to enter into an agreement or induce a person to enter into a credit agreement on the basis that the credit agreement will come into existence automatically unless the consumer declines the offer. Credit agreements purportedly entered into as a result of negative option marketing are unlawful and void to the extent provided for in section 89 of the Act; whilst section 89 essentially provides for the entire contract to be declared

²²⁶Jacobs *et al* (2010) *PER* 336.

²²⁷*Ibid.* Section 30(2).

²²⁸Section 30(3) CPA. See Altini (2012) *WP* 35.

²²⁹Par 2.2.1 above.

²³⁰Bait and switch tactics are discussed in 2.2.3 above.

²³¹Section 31(1) CPA. See Lake (2011) *DR* 51.

²³²Section 31(2) CPA. See Jacobs *et al* (2010) *PER* 337.

void.²³³ It is submitted that these are laudable provisions as they will force suppliers to ensure compliance, as non-compliance may result in economic loss to the supplier. Furthermore, the fact that negative option marketing is regulated in terms of two pieces of legislation indicates that the legislature is intent on affording the consumer more protection against well-resourced suppliers, marketers and credit providers who often take advantage of consumers who are in a vulnerable position.

3.1.2.7 Catalogue marketing

Catalogue marketing is regulated by section 33 of the CPA.²³⁴ It applies to agreements for the supply of goods and services which are not entered into in person, including those by telephone, fax and postal order, where the consumer does not have the opportunity to inspect goods that are the subject of the transaction before concluding the agreement.²³⁵ In addition, the section provides that the supplier has to disclose certain information to the consumer.²³⁶

Jacobs, Stoop and Van Niekerk submit that section 33 ensures that the consumer is provided with enough information before concluding a transaction based on the catalogue marketing.²³⁷ The authors indicate that there may be instances where conduct by the supplier can constitute both direct marketing and catalogue marketing.²³⁸ Nonetheless, the authors submit that the underlying difference between the two is that in the case of catalogue marketing, the consumer does not have the opportunity to inspect the goods.²³⁹ This is an important contemporary provision in the Act owing to the fact that our world has evolved into an information society where more transactions are concluded by means of facilities such as catalogue marketing.²⁴⁰

²³³Section 74(4) NCA.

²³⁴The section does not apply where the consumer protection provisions in terms of Chapter VII of the ECTA apply. It does not apply to franchise agreements either. See section 33(1) CPA; Jacobs *et al* (2010) *PER* 339-340; and Lake (2011) *DR* 51.

²³⁵Section 33(2) CPA.

²³⁶Section 33(3)(a) – (h) CPA.

²³⁷Jacobs *et al* (2010) *PER* 339.

²³⁸*Ibid*, for example, where a person is approached by post or electronic communication by post or electronic communication.

²³⁹*Ibid*.

²⁴⁰An *Information society* has been described as a society in which information becomes a core economic, cultural and social resource, see Papadopoulos and Snail (2012) 1.

3.1.2.8 Trade coupons and similar promotions

Section 34 regulates trade coupons and similar promotions.²⁴¹ The Act provides that a *person* must not make a promotional offer without the intention of fulfilling it other than as offered.²⁴² In addition, the section prescribes what the document containing the promotional offer must state in clear terms;²⁴³ as well as the duties of the person who makes or sponsors the promotional offer.²⁴⁴ Interestingly, although the section purportedly pertains to trade coupons and similar promotions, the Act does not define a *trade coupon* and the subsections of the provision, which contain other definitions applicable to the section, do not at any point refer to what a trade coupon is. Furthermore, the section makes reference to persons and not suppliers. This choice of words is, however, fully discussed above and will not be reiterated.²⁴⁵

3.1.2.9 Customer loyalty programmes

Customer loyalty programmes are regulated in terms of section 35 of the CPA. Jacobs, Stoop and Van Niekerk submit that it is not clear whether it is possible for the loyalty credits or awards to expire and whether the agreement may make provision for an expiry date.²⁴⁶ The authors suggest the possibility that a provision which states that loyalty credits or awards expire after a certain period of time could constitute an unfair contractual term in terms of section 48 of the CPA.²⁴⁷ In this regard it is submitted that businesses are entitled to include terms and conditions into their customer loyalty programs and similar promotions; and such terms and conditions may include an expiry date as long as the expiry date does not make it impractical for the consumer to exercise the benefit or to use to token, point or credit concerned. We ought to guard against making all transactions excessively one-sided in favour of the consumer.

In addition, similar to the trade coupons and similar promotions provision, a person must not offer participation in a loyalty programme or offer any loyalty credit or

²⁴¹See section 1 for definition of a promotional offer. Trade coupons are not defined in the Act.

²⁴²Section 32(3) CPA.

²⁴³Section 32(4)(a) – (d) CPA.

²⁴⁴Section 34(5)(a) – (d) CPA.

²⁴⁵Par 3.1.2.5.

²⁴⁶Jacobs *et al* (2010) *PER* 341.

²⁴⁷*Ibid.*

awards without the intention of providing it or providing it in a manner other than as offered.²⁴⁸ The contents of the document as well as the duties of the sponsor or supplier are prescribed in terms of the Act.²⁴⁹ The same “grounds of justification” that exempt a supplier from liability in bait marketing apply to customer loyalty programs.²⁵⁰ Furthermore, the goods available in terms of a customer loyalty programme may be restricted by the supplier where the consumer under the programme has received a written notice of twenty business days prior to the implementation of such restriction.²⁵¹

3.1.2.10 Promotional competitions

Section 36 of the CPA regulates *promotional competitions*.²⁵² In this regard, Jacobs, Stoop and Van Niekerk submit that the fact that a promotional competition is conducted in the ordinary course of business means that a once-off promotional competition will fall outside the scope of application of the provision.²⁵³ The CPA provides that the basic information that any entry form must set out includes the benefit with regard to the offer to participate; the steps to be taken to participate in the competition the medium through which the results will be made known; the date, time, place and person from whom a copy of the competition rules may be obtained and the winner of the competition may receive the results from.²⁵⁴ The Act also places limitations on the acceptance of the prizes and participation in the competition.²⁵⁵ Monty submits that this legislation has a widespread application in respect of all dealings with consumers.²⁵⁶ Thus, suppliers should ensure that the manner in which they conduct their competitions is in compliance with the provisions of the Act.²⁵⁷

²⁴⁸Section 35(2) CPA. *Ibid.*

²⁴⁹Section 35(3)(a) – (d) CPA and Section 35(4)(a) – (f) CPA respectively.

²⁵⁰Jacobs *et al* (2010) *PER* 342.

²⁵¹*Ibid.* In addition, the restriction must not exceed a period of ninety days per annum.

²⁵²See section 1 CPA.

²⁵³Jacobs *et al* (2010) *PER* 342.

²⁵⁴Section 36 (a)-(f) CPA. See Monty (2012) *WP* 57.

²⁵⁵Section 36(2), (3) (a)–(b) CPA. *Ibid.*

²⁵⁶*Ibid.*

²⁵⁷*Ibid.*

3.2 Interplay between the CPA and the NCA

In terms of the CPA, credit agreements are excluded from the application of the Act, but the goods and services that result from these credit agreements are still subject to the CPA.²⁵⁸ Seemingly the legislature tried to avoid an overlap between the two pieces of legislation by providing that the CPA would only apply to the goods and services that are subject to the credit agreement.²⁵⁹ However, this arrangement is not as simple as it *prima facie* appears to be, as promotional activities do not fall into the category of either goods, services, or the agreement. Various authors have pointed out the interplay that exists between the provisions of the two Acts.²⁶⁰ Melville and Palmer interpret section 5(2)(d) pertaining to the application of the CPA to credit agreements regulated by the NCA.²⁶¹ *Inter alia*, the authors point out that the promotion of goods and services is not included in the CPA definition of a transaction in terms of the NCA, indicating that the promotion of goods is not excluded from the scope of the CPA.²⁶² Furthermore, the authors submit that the provisions on promotional activities make up the bulk of the CPA.²⁶³ The authors are referred to with merit in this regard. Section 5(1)(b) of the CPA specifically makes

²⁵⁸Section 5(2)(d) CPA. See Du Preez (2009) *TSAR* 79.

²⁵⁹Melville (2010) 12.

²⁶⁰Otto and Otto (2013) 144-146 refer to the provisions of section 2(2)(d). The first step in establishing whether both Acts apply is to ascertain whether a particular agreement constitutes a transaction in terms of both the NCA and the CPA. Although it is not clear which provisions would apply to a credit agreement when interpreting section 5(2)(d) of the CPA, the authors submit that the sections in Part H Chapter 2 (the right to fair value, good quality and safety) are probably some of the provisions the legislature intended to be applicable.

²⁶¹Section 5(2)(d) provides that this Act does not apply to any transaction that constitutes a credit agreement under the NCA, but the goods or the services that are the subject of the credit agreement are not excluded from the ambit of this Act. See also Otto and Otto (2013) 274 where the authors refer to the definition of a transaction and indicate that the definition contains three discrete aspects of which they elaborate on two. In respect of a person acting in respect of a person acting in the ordinary course of business a transaction refers to an *agreement* between or among that person and one or more other persons for the supply or potential supply of goods or services in exchange for consideration; or the *supply* by that person of any goods or at the direction of a consumer for consideration; or the *performance* by, or at the direction of, a consumer for consideration; or an interaction contemplated in section 5(6) of the Act. In this regard, the authors submit that a transaction firstly, it pertains to an “agreement” which is defined as “an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them”. The authors indicate that this definition is identical to that given for an “agreement” in the NCA. See Melville and Palmer (2010) *SA Merc LJ* 273. Secondly, to a “supply” which is used in the section in the sense of the sale, renting, exchange and hire of goods or the sale or performance of services or the granting of access to any premises, event, activity or facility.

²⁶²Melville and Palmer (2010) *SA Merc LJ* 276.

²⁶³*Ibid.*

the CPA applicable to the promotion of goods or services.²⁶⁴ In this regard the authors submit that section 5(2)(d) lacks clarity as numerous sections in the CPA do not pertain directly to goods and services but other matters, such as marketing.²⁶⁵ Therefore, the legislature must intervene.²⁶⁶

Kelly-Louw and Stoop refer to the marketing provisions of the CPA and the NCA and the fact that they should be applied concurrently if possible. Where this is not possible, the Act affording the consumer with the greatest protection should prevail.²⁶⁷ The authors submit that although the CPA does not apply to credit agreements in terms of the NCA, the right to fair and responsible marketing in terms of the CPA may apply to the marketing of credit products or the marketing of goods or services that are available on credit.²⁶⁸ In addition, Jacob, van Niekerk and Stoop also submit that both the CPA and NCA should apply to credit marketing and advertising.²⁶⁹ These authors suggest that in order to avoid duplication in regulation, the National Credit Regulator could apply, in terms of section 5(3) of the NCA, for the credit industry to be exempted from the marketing provisions of the CPA.²⁷⁰

It is submitted that an industry-wide exemption would not be in the interests of consumers in credit agreements as not all of the promotional activities regulated by the CPA are covered by the NCA. Therefore, it would not be in the interests of consumers who purchase using credit not to be afforded the same protection as those who buy using cash.

²⁶⁴*Idem* 276-278. The authors further submit that section 2(1) of the CPA provides that the Act must be interpreted in a manner that gives effect to the provisions of section 3.

²⁶⁵Melville and Palmer (2010) *SA Merc LJ* 278. Thus this oversight could lead to absurdities.

²⁶⁶*Ibid.* The authors submit that “Without this clarification, the present uncertainties will lead to protracted litigation, unnecessary expense and much commercial inconvenience”.

²⁶⁷Section 2(9) CPA. Kelly-Louw and Stoop (2012) 559. Furthermore, the authors refer to the section 2(1) of the interpretation clause of the CPA and stipulate that effect must be given to the purpose of the CPA as set out in section 3 of the Act. Jacobs *et al*(2010) *PER* 302 at 334: The authors also reiterated the importance of applying section 2(9) of the CPA in the case of conflict.

²⁶⁸Kelly-Louw and Stoop (2012) 563. In terms of the general standard for marketing of goods and services the authors refer to section 29 (read with and section 41).

²⁶⁹Jacobs *et al*(2010) *PER* 334.

²⁷⁰*Ibid.* See Kelly-Louw and Stoop (2012) 560.

3.3 The interplay between the marketing provisions of the CPA and other legislation and industry-specific regulatory bodies.

3.3.1 The CPA and ECTA

Another significant interaction is that between the CPA and the ECTA. Both the CPA and the ECTA contain provisions concerning cooling-off periods.²⁷¹ However the amount of days provided for in the cooling-off provisions differs. It is submitted by Timothy and Burger that the cooling-off provisions in terms of the CPA, will only apply to individual electronic approaches, for example by means of SMS marketing or emails, as opposed to public electronic approaches (through television or press).²⁷² In this regard, the CPA expressly excludes transactions to which section 44 of ECTA applies.²⁷³ Furthermore, the cooling-off provisions in the CPA are restricted to transactions that result from direct marketing.²⁷⁴ Therefore, there should be no overlaps insofar as the provisions relating to cooling-off periods are concerned. In instances where both pieces of legislation apply, the section that affords the greatest protection to the consumer will apply. In this regard section 3 of the ECTA and section 2 of the CPA must be read together.

3.3.2 The CPA and the PPI Act.

An interesting development is that of the PPI Act which was assented to by the President on 19 November 2013 and will commence on a date determined by the President proclamation²⁷⁵ The PPI Act contains provisions pertaining to the rights of data subjects regarding unsolicited electronic communications and automated decision making.²⁷⁶ These provisions may have a direct overlap with the provisions on unsolicited goods and direct marketing in terms of the CPA.²⁷⁷ Effectively, this could result in the concurrent application of three pieces of legislation, namely the

²⁷¹Section 16 CPA and section 44 ECTA.

²⁷²Timothy and Burger (2010) *WP* 34.

²⁷³Section 16(1).

²⁷⁴Section 16(3). Timothy and Burger (2010) *WP* 34-35.

²⁷⁵Act 4 of 2013 published in GG No 37067/912/26Nov13. No. 37067. See Rubenstein (2010) *WP* 34-35.

²⁷⁶Rubenstein (2010) *WP* 35. Chapter 8 of the PPI Act.

²⁷⁷*Ibid*, Rubenstein discusses the operation of the Bill and stipulates the following: the general principle is that if the data subject does not respond to a responsible party's invitation to make use of direct marketing advances, the responsible part will not be allowed to contact the consumer for a second time—contraveners may even be sentenced to a fine or a period of imprisonment.

CPA, the ECTA and the PPI Act. However, such overlap should not exist insofar as unsolicited goods, services and communications are concerned as the PPI Act repeals section 45 of the ECTA.

Another possible interaction between the PPI Act and the CPA is in relation to promotional competitions.²⁷⁸ While this Act regulates how personal information is collected and what can be done with it; the CPA regulates the content of the rules of the competition, the administration of the competition and the retention of records after the competition.²⁷⁹ Of greatest significance is that the PPI Act requires a person to give consent to their personal information being collected or stored.²⁸⁰ The identity number of an entrant is personal information; and the CPA requires that this personal information be stored for a period of three years as a part of the record of the competition.²⁸¹ This inevitably means that a competition ought to be drafted in such a way that the entrant's consent to the storage of his or her personal information is a prerequisite to entering into the competition.²⁸² It is submitted that this interpretation of the interaction between the two legislative provisions is in line with the overall purpose of the CPA.

3.3.3 The CPA and the ASA code

The South African advertising industry voluntarily formed the ASA in 1969 and adopted a code as discussed above.²⁸³ The effectiveness of the ASA code in regulating the advertising industry is demonstrated in various matters in which the Advertising Standards Committee made clear and logical rulings on the marketing practices of various entities.²⁸⁴

²⁷⁸Mncwango (2013) *WP* 82.

²⁷⁹*Ibid.*

²⁸⁰*Ibid.*

²⁸¹*Ibid.* Regulation 11(6) of the CPA.

²⁸²*Ibid.*

²⁸³Par 2.3 above. See Schimmel (2013) *WP* 59 and Schimmel (2008) *WP* 11-12.

²⁸⁴In this regard the matters such as the matter between Chicken Licken and Kentucky Fried Chicken, as discussed by Marcus (2009) *WP* 30-31; the case of *Verimark (Pty) Ltd v BMW AG* [2007] as discussed by Schimmel (2008) *WP* 11-12; the *Natura Laboratorie, SAMAST, Makgato Attorneys and Mediclinic Ad Campaign* as discussed by Schimmel (2012) *WP* 26-27 and the "Price Guarantee" Game matter as discussed by Mohan (2010) *WP* 28-29—are only a few examples of the good enforcement of the code and the effective regulation of the advertising industry.

Importantly, the ASA code has been updated and the provisions that relate to direct sales, unsolicited home visits, inertia selling and non-availability of advertised products have been deleted.²⁸⁵ Schimmel submits that the reasons why these provisions have been deleted are namely that the deleted sections are now covered by the CPA; and the sections have seldom been used in recent years which may be a reflection of the fact that these are problems that are now controlled in the industry.²⁸⁶ Schimmel's former submission²⁸⁷ is agreed with; however, the latter submission is questionable, as the legislature found it necessary to regulate these activities in terms of the CPA suggesting that these activities are still problematic areas in the field of promotional activities as a whole.

It is clear that marketers and retailers will need to increase expenditure in order to ensure compliance with the CPA provisions.²⁸⁷ However, from the above literature review, it appears as if the CPA is not the overarching framework for consumer protection that it was originally intended to be.²⁸⁸ Therefore, it is submitted that the ASA code will still have its place in the advertising industry.

3.3.4 The CPA and other regulatory bodies

There are various associations which are role players in the wide range of promotional activities as regulated by the CPA such as the Direct Marketing Association of South Africa,²⁸⁹ the Independent Communications Authority of South Africa, and the Marketing Association of South Africa. For purposes of this discussion only the DMASA will be discussed as it the most important association seeing that it relates directly to a promotional activity regulated by the Act, namely that of direct marketing.

The DMASA is an independent body which is established and financed by companies that are in the direct marketing industry.²⁹⁰ Its purpose is to ensure that an effective system of self-regulation is in place.²⁹¹ In this regard, the association

²⁸⁵Schimmel (2013) *WP* 59.

²⁸⁶*Ibid.*

²⁸⁷See Timothy and Burger (2010) *WP* 32.

²⁸⁸Melville and Palmer (2010) *SA Merc LJ* 272.

²⁸⁹Hereafter referred to as ICASA.

²⁹⁰<http://www.dmasa.org/about-us> [Accessed: 28 August 2013].

²⁹¹*Ibid.*

aims to protect the direct marketing industry and consumers from unethical, ignorant behaviour by practitioners and to lobby together with government and other regulatory bodies.²⁹² The DMASA has its own Code of Practice designed in a comprehensive manner and recognised by the ASA.²⁹³ Furthermore, the DMASA submits that its code is in full compliance with all existing laws that are relevant to the interactive and direct marketing industry.²⁹⁴

The DMASA argues that their Code of Practice is necessary even though there is legislation in place to protect the consumer from “dishonest and fraudulent trading practices”.²⁹⁵

The Code of Practice defines direct marketing in the code as: “a set of business practices designed to plan for and present an organization’s product in ways that build effective customer relationships. When compared to the definition of direct marketing in terms of the CPA, it is clear that the definition as provided in the DMASA code is more business or commercially orientated. The ultimate goal appears to be to protect the interests of the business rather than the consumer. It refers to building an effective consumer relationship which is essentially the foundation for securing profit in a business. Therefore, it is submitted that there is no problem with having the Code of Practice in place in order to ensure that the business sector conduct their affairs in an ethical manner; however it is clear that the consumer protection provisions in terms of the CPA are necessary as they are focused on protecting the consumer.

Furthermore, the Code of Practice also addresses unsolicited goods.²⁹⁶ In this regard, the clause prohibits marketers from sending unsolicited products or services to consumers or businesses and thereafter demanding payment. This provision is in

²⁹²*Ibid.*

²⁹³*Ibid.*

²⁹⁴*Ibid.*

²⁹⁵Firstly, the association submits that the legal controls that are in place are not adapted in a manner that distinguishes between direct marketing companies which companies have voluntarily adopted the code as they believe that when professional regulations are applied voluntarily, they can ensure the speedy eradication of unwanted practices in a less expensive manner than government legislation, which can also not be easily adapted to a changing economy. Secondly all the members agree to observe the code and not to circumvent it by ingenious means. Thirdly, that the code is able to “maintain standards in an area of communications which defies legal definition—that of good and honest business practices.

²⁹⁶Clause 9.17: Unordered products and services.

keeping with section 21 of the CPA which is also referred to in section 32(1) of the CPA. In addition, the use of the “Do not Contact me service” as well as the opportunity to opt out is also addressed in the Code of Practice.²⁹⁷

It is submitted that having bodies such as the DMASA is in keeping with the purpose of the Act in that it assists in bringing forth and realising the ideals set out in the Act. However, more can be done to align the Code of Practice with the CPA especially with regards to the definition of direct marketing as the fundamental underlying premise should always be the protection of the consumer

3.4 Conclusion

In conclusion, it is evident that the CPA has introduced a number of commendable provisions in an attempt to bring promotional activities under better regulation. The CPA has clearly brought changes to the dispensation prior to its enactment and implementation. It is submitted that all of these changes have been made in the interest of consumers who often find themselves in vulnerable positions and open to abuse by suppliers. However, the CPA provisions pertaining to promotional activities are not without criticism. Furthermore, from the discussion in this chapter pertaining to the interplay between the CPA and various other statutes, it appears as if the CPA is not the overarching framework for consumers that it was intended to be.²⁹⁸

²⁹⁷Clause 10.3 and clause 10.4 respectively.

²⁹⁸Melville and Palmer (2010) *SA Merc LJ* 272.

Chapter 4: Comparative analysis with the United Kingdom

4.1 Introduction

The focus of this chapter is on the regulatory measures that have been put into place in the UK with regard to promotional activities. This comparative analysis will be done with reference to the European Union Directives²⁹⁹ that have a great influence on the legislation in the UK. A number of Directives relate directly or indirectly to promotional activities; however, this discussion will be limited to the most important and relevant Directives, regulations and statutes.

The UK was chosen as the jurisdiction for this comparative analysis because, from a historical point of view, it is one of the jurisdictions that have played a leading role in the development of consumer protection legislation South Africa.³⁰⁰ Furthermore, there are “strong ties of kinship and development between the respective legal systems and traditions in the two countries”.³⁰¹ Although modern South African law has its origins in Roman-Dutch law brought by the settlers, over time, the development of the South African law received much influence from English law, specifically in respect of Mercantile and Company Law.³⁰² Furthermore, the wording of the CPA is generally similar to that of the UK consumer legislation such as the 1987 CPA of the UK. For these reasons, it is fitting to use the UK as the jurisdiction for this comparative analysis on the regulation of promotional activities.

The UK has published a draft Consumer Rights Bill with the purpose of clarifying and simplifying consumer rights.³⁰³ However, owing to the fact that the Bill is still only in its draft form it will not be discussed any further. Therefore, the UK law on promotional activities will be critically discussed in its current form. In this chapter, the general standards that have been set out for marketing in the UK will be discussed and compared to the general standards as provided for in the CPA as discussed in chapter 3. Thereafter, the ASA in the UK and specific aspects of marketing will be discussed and compared with their South African counterparts.

²⁹⁹Hereafter referred to as the EU Directives.

³⁰⁰Van Eeden (2013) 111.

³⁰¹Van Eeden (2013) 111.

³⁰²Gibson (2003) 1.

³⁰³<https://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/consumer-bill-of-rights>. [Accessed: 24 July 2013].

The purpose of this comparative analysis is to critically analyse and compare the two jurisdictions and to see whether there is anything that the South African law on promotional activities can adopt from its English counterpart. Furthermore, this analysis seeks to establish whether the developments in our law are in line with international best practice.

4.2 General standards for marketing in the UK

Firstly, the Misleading and Comparative Advertising Directive³⁰⁴ is a so-called “minimum harmonisation” directive, in that it provides the general guidelines on misleading and comparative advertising, but allows the state to adopt stricter rules in their national laws.³⁰⁵ The purpose of this directive is to harmonise national rules in closely related fields of consumer protection and fair trading in order to protect consumers, traders and public interest as a whole.³⁰⁶ In this regard, the Directive provides that misleading advertising refers to “any advertising which in any way... deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and... is likely to affect their economic behaviour” or cause damage to a competitor.³⁰⁷ The directive provides guidelines on what is misleading and makes provision for comparative advertising.³⁰⁸

Secondly, the Unfair Commercial Practices Directive³⁰⁹ was introduced as a result of the fact that the existing EU consumer protection directives did not constitute a comprehensive regulatory framework for commercial interactions between consumers and businesses.³¹⁰ This was problematic as the relationship between the consumers and businesses is the primary focus of consumer protection.³¹¹

The Unfair Commercial Practices Directive was necessary owing to the lack of uniformity amongst the existing directives which made it difficult to trade within the

³⁰⁴Directive 84/450/ECC.

³⁰⁵Kiersbilck (2011) 70.

³⁰⁶Article 1 Misleading and Comparative Advertising Directive. See Kiersbilck (2011) 71.

³⁰⁷Article 2 Misleading and Comparative Advertising Directive. See Kiersbilck (2011) 70. In terms of article 2 of the Directive, *advertising* refers to “the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations”.

³⁰⁸Articles 3 and 4 Misleading and Comparative Advertising Directive. See Kiersbilck (2011) 70-72.

³⁰⁹Directive 2005/29/EC.

³¹⁰Ramsay (2011) 275.

³¹¹*Ibid.*

internal markets, and made it especially difficult for the “small to medium-sized enterprises” (SMEs).³¹² A fully functional internal market is necessary in order to meet the goals of the EU.

In this regard, the Consumer Protection from Unfair Business Practices Regulation³¹³ and the Business Protection from Misleading Marketing Regulation³¹⁴ give effect to the Unfair Commercial Practices Directive as well as the Misleading and Comparative Advertising Directive. These regulations broadly seek to prohibit misleading information from being provided to the consumer in order to induce a sale.³¹⁵ On the one hand, the Consumer Protection Regulation prohibits “unfair commercial practices”, including those relating to marketing and advertising.³¹⁶ On the other hand, the Business Protection from Misleading Marketing Regulation specifically regulates aspects of misleading and comparative advertising.³¹⁷ In terms of both regulations, it is an offence to engage in prohibited practices and such prohibited conduct is punishable with a fine or a maximum imprisonment of two years.³¹⁸ Furthermore, proceedings in terms of these regulations can only be initiated by those designated with the responsibility of enforcement.³¹⁹ The power of enforcement enforcing rests with the Office of Fair Trade and the local authorities trading standards.³²⁰ Devenney and Kenney submit that this enforcement feature may explain why so far only two cases have been decided in relation to these regulations.³²¹ Nonetheless, the authors submit that the regulations introduced major changes to the pre-existing consumer protection framework.³²² It is submitted

³¹²*Idem* 276.

³¹³2008.

³¹⁴2008.

³¹⁵Devenney and Kenney (2012) 314.

³¹⁶In terms of Regulations 3(3) and 3(4), a commercial practice is considered as being unfair if it contravenes the requirements of professional diligence and materially distorts behaviour of the average consumer with regards to the product.

³¹⁷See Part 1 and 2 of the Regulations. Regulation 6 even goes so far as to make misleading advertising an offence.

³¹⁸Consumer Protection from Unfair Business Practices Regulation 13; Unfair Business Protection from Misleading Marketing Regulation 7. See Devenney and Kenney (2012) 315.

³¹⁹Consumer Protection from Unfair Business Practices Regulation 19; Unfair Business Protection from Misleading Marketing Regulation 13. Devenney and Kenney (2012) 316.

³²⁰Consumer Protection from Unfair Business Practices Regulation 19; Unfair Business Protection from Misleading Marketing Regulation 13. Devenney and Kenney (2012) 316.

³²¹Devenney and Kenney (2012) 316.

³²²*Idem* 317.

that the directives and regulations discussed can be equated to the general standards for marketing of goods and services in the CPA.³²³

Furthermore, the Consumer Credit Act³²⁴ regulates the provision of credit and contains specific provisions regarding the regulation of advertising. In this regard, section 43(1) of the Act provides that the advertising to which Part IV³²⁵ applies is any advertising, published for the purpose of a business that is carried on by the advertiser, indicating that he is willing to provide credit, or to enter into an agreement for the hiring of goods.³²⁶ The Act prohibits false and misleading advertising and makes it an offence.³²⁷ Interestingly, the Consumer Credit Act extends the realm of accountability with regard to false and misleading advertising by providing that if the advertisement is an offence, a like offence is committed by the publisher; by the person who devised the advertisement in the course of business; the person who procured publication of the advertisement where the advertiser did not.³²⁸ This creates an interlinked liability chain.

In the field of consumer credit in South Africa, the NCA prohibits advertising that is misleading, fraudulent or deceptive.³²⁹ In this regard, the NCA has certain limited offences as contained in Part B of Chapter 8 of the Act, of which a contravention of section 76(4)(ii) does not fall a part of. This is emphasised in section 164(1) of the Act which provides, for example, that a credit agreement entered into as a result of misleading advertising will only be void once it is declared unlawful by court.

4.3 Self-regulation of the advertising industry

The ASA in the UK was formed in the early 1960s as a result of the threat of legal controls being recommended by the Molony Committee. The South African ASA was established in the late 1960s, and through its development, the ASA in South Africa was subject to similar threats as discussed in chapter 2 above. Importantly,

³²³See par 3.1.2.1 above.

³²⁴1974.

³²⁵This Part deals with “seeking business”.

³²⁶Section 43(2) of the Consumer Credit Act limits the scope of Part IV and thus includes a number of exclusions and exemptions. The scope of application is similar to that of the NCA.

³²⁷Section 46 Consumer Credit Act.

³²⁸Section 47 Consumer Credit Act.

³²⁹Section 76(4)(ii).

the ASA in South Africa is still considered as one of the most effective self-regulatory bodies to date. In the UK, the current role of the ASA is to investigate complaints concerning advertisements and monitoring compliance with the Advertising Code.³³⁰ The continuous threat of national or EU regulation has provided an incentive for the ASA to prove its effectiveness to the UK government.³³¹ Nonetheless, it is also in the government's interest to avoid the cost of direct regulation in that all the dissatisfaction pertaining to the industry is transferred to a third party.³³² Notably, there have also been major developments in the area of advertising in the European Union.³³³ Thus it is apparent that self-regulation in the advertising industry is a long-standing international trend that is not unique to South Africa.

4.4 Specific aspects of marketing regulation in the UK

4.4.1 Price disclosures

The Price Indications Directive³³⁴ provides the internal market of the European Community with guidelines that ought to be followed only with regard to the indication of prices on goods.³³⁵ Article 3(4) of the Directive provides that any advertisement which mentions the selling price of products referred to in terms of article 1 shall also indicate the unit price subject to article 5 of the Directive.³³⁶ The purpose of the information requirements as prescribed by the Directive is to improve consumer information and facilitate the comparison of prices by the consumer.³³⁷ The underlying principles in the Price Indications Directive have been adopted from

³³⁰Ramsay (2007) 445.

³³¹*Idem* 451.

³³²*Ibid.*

³³³*Idem* 400. These developments include Directives on Misleading Advertising (1984) and Comparative Advertising (1997), the Advertising of Tobacco Products (2001) and Television Without Frontiers (1989). These developments resulted in prohibitions on television advertising for tobacco and prescription drugs; as well as controls for advertising medicine and alcoholic beverages.

³³⁴Directive 98/6/EC.

³³⁵The exclusion of services from this Directive is especially evident from the provision of an exclusion that is provided in terms of article 3(2) in terms of which the Directive provides that member states have the option of deciding not to apply the price indication provisions in respect of the unit price of the product where such products are "supplied during the course of the provision of a service". Furthermore, in terms of article 3(2), the member states can choose not to indicate the unit price in the case of sales by auction and sales of works of art and antiques.

³³⁶Article 5 of the Price Indications Directive provides that member states may waive the obligation to indicate the unit price of a product where such an indication would not be useful owing to the nature of the product or would give rise to confusion.

³³⁷Article 1 Price Indications Directive.

previously existing directives such as the Directive on the Indication of Prices on foodstuff,³³⁸ as well as the Directive on the Indication of Prices on non-food products.³³⁹

Furthermore, Part III of the UK CPA 1987 provides that misleading price indications of goods, services, accommodation and facilities constitute an offence.³⁴⁰ It is submitted that the misleading price provisions have been incorporated into section 23(6) of the CPA.³⁴¹

In South Africa, section 23 of the CPA regulates the disclosure of the prices of goods and services, as discussed in chapter 3 above. On the one hand, article 2(b) of the Price Indications Directive provides that a unit price refers to the final price for one kilogram, one litre, one metre, one square metre or one cubic metre of the product or a different single unit of quantity which is widely or customarily used in the member state concerned in the marketing of a particular product. On the other hand, the CPA provides that a *unit price* refers to a price for any goods or services in relation to a well-known measure such as quantity, weight, volume, duration or other measurable unit by which the goods or services are allocated.³⁴² It is clear that the specification of a unit price in terms of the CPA is merely a simplification of the specifications in the EU Directive. Therefore, it is submitted that the specifications, as contained in the CPA, were developed in line with international standards.

All goods that are displayed must be displayed together with the price thereof.³⁴³ However, the retailer need not display the price of the goods where the goods are predominantly displayed by the retailer as a form of an advertisement for that supplier; or goods and services that are situated in an area in which the consumer does not ordinarily have access.³⁴⁴ This exception appears to be unique to South African consumer law.

³³⁸Directive 79/58/EEC.

³³⁹Directive 88/3/4.

³⁴⁰Section 20 UK CPA 1987.

³⁴¹Subject to section 23 (7)-(10) CPA.

³⁴²Section 1 CPA.

³⁴³Section 23(3) CPA.

³⁴⁴Section 23(4) CPA.

Nevertheless, the general rule with regards to the display of prices is in line with the guidelines that are provided by the Directive on Price Indications. Therefore, it is submitted that our provisions on the disclosure of prices are in line with international best practice. It is in the interests of the consumer to be better informed with regards to the prices of the goods and services prior to entering into a transaction. This is also in line with the purpose of the CPA.³⁴⁵

In this regard, Du Plessis submits that the CPA provisions on price disclosures are a departure from the traditional common law principle of contractual autonomy, towards a “contractual order” that seeks to protect the consumer against unfair trade practices.³⁴⁶ This author is referred to with merit.

4.4.2 Direct marketing

The Doorstep Selling Directive³⁴⁷ protects consumers in respect of contracts negotiated away from the business premises of the supplier as the consumer is unprepared and unable to compare price and quality with other offers.³⁴⁸ The directive remedies these defective characteristics of this selling method by granting the consumer the right to withdraw, allowing the consumer the opportunity to assess the obligations that arise from the contract.³⁴⁹

The Doorstep Selling Directive can be likened to the direct marketing provisions in terms of section 32 of the CPA. As discussed in chapter 3 above the aim of the regulatory measures with regard to direct marketing is to ensure that the consumer who is not adequately prepared to enter into the particular contract is protected. Similar to the right of the consumer in terms of the directive to withdraw from the agreement, the South African CPA contains cooling-off provisions in terms of section 16 of the CPA. It appears as if the legislature drew its inspiration from the Doorstep Selling Directive when drafting section 32 of the CPA. Thus, it is submitted that the CPA provisions with regard to direct marketing are in line with internationally accepted standards.

³⁴⁵Section 3 CPA.

³⁴⁶Du Plessis (2013) *PER* 104.

³⁴⁷Directive 85/577/EEC.

³⁴⁸Kiersbilck (2011) 78. See paragraph 5 of the preamble.

³⁴⁹Article 5 Doorstep Selling Directive. See Kiersbilck (2011) 78.

A *consumer*³⁵⁰ in terms of the Directive refers to a person who is acting for purposes outside of his trade or profession.³⁵¹ In terms of the CPA in South Africa, the definition of a consumer is wide and refers to a person in the wide sense, which includes both a natural and a juristic person.³⁵² The definition goes so far as to include a franchisee.³⁵³ Accordingly, the consumer in South Africa is afforded the best possible protection. The disadvantage of the narrow definition of a consumer in the Directive is that SMEs are not protected. Their deprivation of a withdrawal right in respect of doorstep selling can thus have a detrimental effect on these juristic persons. In this regard, it is submitted that SMEs may be as unprepared as the natural persons and ought to be afforded an opportunity to withdraw from a transaction.³⁵⁴

The cooling-off provision in terms of the CPA ought to be commended further for its clarity they provide. It is clear that the notice from the consumer must be given to the supplier.³⁵⁵ The directive merely provides that the consumer must provide a notice of his intention to cancel within the prescribed period, without specifying to whom the notice must be addressed.³⁵⁶ It is logical to assume that the notice should be given to the trader; however, the lack of clarity on this point may mean that it would not be incorrect for the consumer to provide the notice to anyone else in the supply chain such as the deliverer of the goods, with whom the consumer has direct contact. This may be problematic to the extent that the deliverer may not be an agent of the trader and merely under a contract to deliver the specific goods and is thus under no obligation to forward the cancellation notice from the consumer to the trader. A way in which to avoid such a mishap is for the trader to include a contractual provision in this regard, in order to place such obligation on the deliverer, for instance.

³⁵⁰Own emphasis.

³⁵¹Article 2 Doorstep Selling Directive.

³⁵²Section 1 CPA. The application to juristic persons is subject to the threshold requirements in terms of section 5(2)(b) and section 6 of the CPA.

³⁵³Section 1 CPA.

³⁵⁴See article 4 Directive on Doorstep Selling. Once the consumer has given such notice to withdraw in accordance with his right, he is released from his obligations in terms of the contract.

³⁵⁵Section 16 CPA.

³⁵⁶Article 5 Distance Selling Directive.

Nonetheless, it is submitted that the wide nature of the Doorstep Selling Directive is meant to serve only as a guideline which ought to be adapted in more certain terms into the national law of each of the member states.

Furthermore, the Distance Marketing of Financial Services Directive³⁵⁷ also provides that the consumer has the right to withdraw from a financial services agreement within a period of fourteen calendar days without penalty or reason.³⁵⁸ The period for withdrawal begins on either the day of the conclusion of the distance contract or from the date that the consumer receives the contractual terms and conditions and relevant information.³⁵⁹

In the UK, the Consumer Credit Act 1974 is primary legislation in respect of credit regulation. Although it has been amended a number of times, its provisions in respect of withdrawal periods in terms of the Act have remained unchanged. Interestingly, section 75 of the NCA in South Africa does not include such opting out provision.

4.4.3 Unsolicited goods and services

In chapter 3, unsolicited goods were only discussed in relation to direct marketing in keeping with the scope of this discussion on promotional activities. The Unsolicited Goods and Services Act³⁶⁰ of the UK contains detailed provisions on how unsolicited good and services ought to be handled in terms of the Act as well as the penalties that follow as a result thereof. In terms of the Unsolicited Goods and Services Act 1971 protects persons who receive unsolicited goods.³⁶¹ Goods are considered as being unsolicited where such goods have been sent to the recipient with the view of the recipient acquiring the said goods whilst the recipient himself has no reasonable cause to believe that the goods will be acquired for the purpose of trade or business and the recipient has not agreed to acquire them within the specified time periods.³⁶² However, the Act was amended by the Consumer Protection (Distance Selling) Regulations 2000 which amendment has omitted the rights that the recipient of the

³⁵⁷Directive 2002/65/EC.

³⁵⁸Article 6 Directive on Distance Marketing of Financial Services.

³⁵⁹*Ibid.*

³⁶⁰1971.

³⁶¹Section 1(1) Unsolicited Goods and Services Act.

³⁶²Section 1(2)(a)(b) Unsolicited Goods and Services Act.

goods had.³⁶³ The recipient of the unsolicited goods was entitled to treat the goods as an “absolute gift”.³⁶⁴ However, the time limits that were prescribed by section 1(2) of the Unsolicited Goods and Services Act, with regards to determining the rights of the consumer have been done away with.³⁶⁵ However, it is still considered an offence to demand or make threats in respect of payment in terms of section 2 of the Unsolicited Goods and Services Act. Furthermore, although Van Heerden suggests the imposition of criminal and civil sanctions in respects of unsolicited goods, it is submitted that criminal sanctions would not be suitable in the South African dispensation for the reasons discussed above.³⁶⁶

4.4.4 Catalogue marketing

In terms of the Distance Selling Directive,³⁶⁷ a distance contract refers to any contract, concerning goods or services, concluded between a consumer and a supplier by means of an organised distance communication up to and including the moment of the conclusion of the contract.³⁶⁸ In this regard, distance communication refers to any communication which may be used for the conclusion of the contract without simultaneous physical presence of the supplier and the consumer.³⁶⁹

Catalogue marketing in terms of the CPA applies in instances where the supply of goods and services is not entered into in person.³⁷⁰ This includes instances where the consumer initiates the contract telephonically or by postal order or fax.³⁷¹ It is therefore submitted that the concept of a distance contract as well as distance communications are equivalent to the provisions governing catalogue marketing in the CPA.³⁷²

³⁶³Regulation 22(2) Consumer Protection (Distance Selling) Regulations. In this regard, section 1 of the Unsolicited Goods and Services Act.

³⁶⁴Section 1(1) Unsolicited Goods and Services Act. See Regulation 22(2) Consumer Protection (Distance Selling) Regulations.

³⁶⁵Van Heerden (2011) *Int Priv Law J* 524.

³⁶⁶See par 2.3.

³⁶⁷Directive 997/7/EC.

³⁶⁸Article 2(1) Directive on Distance Selling.

³⁶⁹Article 2 Directive on Distance Selling.

³⁷⁰Section 33 (2) CPA.

³⁷¹Section 33(2)(a) and (b) CPA.

³⁷²Section 33 CPA.

The Distance Selling Directive is a minimum harmonisation directive which is founded on the assumption that an increased risk in distance selling impairs the regular flow of information between the trader and the consumer; and consumers lack information about the trader and cannot assess the quality of the product before concluding the contract.³⁷³ Therefore, the directive requires particular information to be provided “in good time” prior to the conclusion a distance contract.³⁷⁴ In addition, the identity of the supplier as well as the commercial purpose of the conversation must be made clear at the beginning of the conversation.³⁷⁵

The CPA also provides for information that ought to be provided prior to the conclusion of the contract is provided prior to the conclusion of the contract.³⁷⁶ It is submitted that the rationale behind the provision of such information is to ensure that the consumer is given as much information as possible with regards to the supplier and the goods and services to be supplied or provided respectively, in order to afford the consumer better protection.

Interestingly, the Directive on Distance Selling also contains a right of withdrawal consisting of a period of seven working days in terms of which the consumer may withdraw from the contract without penalty or reason.³⁷⁷ Such a right of withdrawal or so-called “cooling-off” right is not provided in terms of the catalogue marketing provisions of the CPA. Furthermore, it appears as if the cooling-off provisions in terms of section 16 do not generally apply in instances of catalogue marketing, as the section expressly provides that the consumer has the right to “rescind a transaction resulting from *any direct marketing* without reason or penalty”.³⁷⁸ Thus, because the cooling-off provisions will not generally be available to consumers making use of catalogue marketing, a cooling-off period that will be applicable to catalogue marketing should be introduced in the CPA to ensure that the consumer has time to thoroughly inspect the goods.

³⁷³Kiersbilck (2011) 78.

³⁷⁴Article 4(1) Distance Selling Directive. Kiersbilck (2011) 78.

³⁷⁵Kiersbilck (2011) 78-79.

³⁷⁶Section 33(3)(a)-(b) CPA.

³⁷⁷Article 6 Directive on Distance Selling.

³⁷⁸Own emphasis.

Furthermore, inertia selling is prohibited in terms of this directive.³⁷⁹ The Directive calls upon member states to prohibit the supply of goods or services to a consumer without having the consumer order them beforehand.³⁸⁰ This is significant as it indicates that the prohibition of negative option marketing and unsolicited goods in terms of the CPA as discussed in chapter 3 above is in line with international standards of consumer protection standards with the aim to protect vulnerable consumers from exploitation. Member states must exempt consumers from the provision of any consideration in the case of unsolicited goods, where there is no consent.³⁸¹ In addition, the Distance Selling Directive protects consumer's right to privacy, particularly in respect of freedom from certain intrusive means of communication, by specifying specific limits to the use of such means as well as the fact such communication may be used where there is no clear objection from the consumer.³⁸²

The Directive on Distance Marketing of Consumer Financial Services³⁸³ sets out rules concerning communication of the contractual terms and prior information.³⁸⁴ A withdrawal right is also available in the case of distance marketing of financial services.³⁸⁵ This directive also prohibits inertia selling and places limits on the use of intrusive means of communication.³⁸⁶

4.5 Conclusion

From the above discussion, it is submitted that it is clear that the South African consumer protection law on promotional activities is in line with international practice. This indicates that South African consumer protection law is growing in the right direction. Nevertheless, it appears as if the consumer protection law of the EU, and the UK in particular, is widely scattered among various statutory pieces which makes it difficult to follow the overall development of the law on promotional activities in the

³⁷⁹Article 9 Directive on Distance Selling. See Kiersbilck (2011) 79 and discussion on negative option marketing in chapter 3 above.

³⁸⁰Article 9 Directive on Distance Selling.

³⁸¹Article 9 Distance Selling Directive, as amended by the Unfair Commercial Practices Directive. See Kiersbilck (2011) 79.

³⁸²See Kiersbilck (2011) 79. Article 10 Distance Selling Directive.

³⁸³*Ibid.* Directive 2002/65/EC.

³⁸⁴*Ibid.* Article 5 Directive of Distance Marketing of Consumer Financial Services.

³⁸⁵*Ibid.* Article 6 Directive of Distance Marketing of Consumer Financial Services

³⁸⁶*Ibid.* Article 9 Directive of Distance Marketing of Consumer Financial Services.

UK. However, the Consumer Protection Bill of the UK, which is still in draft form, is a necessary step by the UK legislature in order to truly harmonise consumer protection laws in the UK. From the discussion in this chapter it is clear that globally, the vulnerable position of the consumer is being acknowledged and the consumer is being protected various unfair commercial practices. Furthermore, the consumer is further provided with a number of statutory remedies such as withdrawal rights or cooling-off rights after entering into potentially prejudicial commercial transactions.

Chapter 5: Final Conclusion and recommendations

5.1 Introduction

At the beginning of this discussion, the aims of the research were clearly set out as being threefold, namely to investigate and to establish how promotional activities were regulated in South Africa prior to the enactment of the CPA; how the regulation of promotional activities in South Africa has been influenced by the CPA; and whether it was necessary for the legislature to introduce regulatory measures for promotional activities in terms of the CPA. Furthermore, it was indicated that the discussion would follow an analytical and critical approach, which would be supplemented with a comparative analysis with regard to the regulation of promotional activities in the UK. This has been the approach throughout the discussion.

Furthermore, the hypothesis of this discussion was that it would indeed be necessary to regulate promotional activities in order to protect vulnerable consumers; to offer legal certainty to businesses and consumers; and to facilitate the development of an era of informed consumerism, which is in the interests of both consumers and businesses. The potential problems raised concerning the regulation of promotional activities in terms of the CPA, included the possible redundancy of pre-existing regulatory bodies; the over regulation of promotional activities; as well as the interplay between the CPA and other statutes and applicable codes.

From the discussion above, it is evident that the CPA has had a significant impact on the regulation of promotional activities with reference to the common law principles on offer and acceptance; puffing, warranties and misrepresentations; as well as inertia selling and unsolicited goods. These concepts were discussed in-depth in chapters 2 and referred to throughout this discussion.

The purpose of this chapter is to conclude the discussion by briefly setting out the developments within the area of promotional activities and concisely addressing the aims of the discussion. In addition, the three concerns raised in connection with the regulation of promotional activities will also be addressed. Thereafter, recommendations and final concluding remarks will be put forth.

5.2 Research aims and concerns

It is important to confirm whether or not the aims of the discussion were achieved and whether the concerns that have been raised with regard to the CPA regulating promotional activities are serious concerns that should be addressed by the law-makers. The research aims and the problematic areas of this discussion will therefore be discussed further.

5.2.1 Research aims

The first research aim, namely the investigation of how promotional activities were regulated in South Africa prior to the enactment of the CPA has been fully addressed in chapter 2 of this discussion. However, the primary characteristic of the era prior to the implementation of the CPA was that the various statutes and codes regulated separate specific aspects of promotional activities, and tended to be industry-specific. Therefore, they were not established in the interests of the consumers, but rather in the interests of the specific industry concerned. This dispensation left consumers vulnerable and without adequate protection.

The second research aim was to establish how the regulation of promotional activities in South Africa has been influenced by the CPA. From this discussion, it is clear that the common law principles relating to promotional activities have all been somewhat influenced by the CPA. The CPA for example seemingly introduces additional requirements for a valid offer as discussed above.³⁸⁷ It is submitted that this is a valid contention as the failure to comply with the “additional requirements” will result in non-compliance with the CPA.

It should further be noted that the common law principles such as puffing, warranties and misrepresentations are now regulated statutorily in terms of the CPA.³⁸⁸ This is beneficial to all the parties involved as it makes provision for legal certainty. In the EU, the Directive on Misleading and Comparative Advertising provides basic

³⁸⁷Hutchison and Pretorius (2012) 51. See Monty (2012) *WP* 57. Above in par 2.2.1 and par 3.1.

³⁸⁸Par 3.2.1 above. This paragraph deals specifically with puffs as well as misleading and deceptive representations.

guidelines on misleading and comparative advertising. It is submitted in this regard that section 41 of the CPA, is therefore in line with international best practices.³⁸⁹

Inertia selling is another longstanding trade practice that has become statutorily prohibited internationally.³⁹⁰ The major difference between the dispensation in the UK and that in South Africa is that in the UK, where a sender wrongfully demands payment or asserts a right to payment; threatens to bring legal action; places the recipient's name on a list of defaulters or threatens such action; or involves or threatens to involve any other debt collection procedure, such conduct constitutes a punishable offence.

In contrast, the CPA creates civil liability where its provisions are contravened. However, granted the fact that our courts are experiencing a backlog and the rate of crime in South Africa is generally accepted as being of a high rate, criminalizing the contravention of the CPA could have the adverse effect of these consumer related issues not being attended to at all.³⁹¹ Therefore, it is submitted that not criminalizing conduct such as negative option marketing and the provision of unsolicited goods is the appropriate approach to follow in South Africa.

Importantly, the CPA has incorporated constitutional principles such as the right to equality,³⁹² as well as the right to privacy through the direct marketing provisions of the Act.³⁹³ This is significant as it indicates an acknowledgement of the import and supremacy of the Constitution by the South African legislature. On the whole, it is clear that the CPA has had a significant impact on the consumer law landscape within the context of promotional activities.

The third and final research aim was to establish whether it was necessary to introduce these regulatory measures for promotional activities. From the above discussion, there is no doubt that the regulatory framework for promotional activities was incoherent and unsystematic. Various aspects of promotional activities were

³⁸⁹Section 41(3)(a) – (k) also provides guidelines on what constitutes a false, misleading and deceptive advertisement.

³⁹⁰See Unsolicited Goods and Services Act, Consumer Protection (Distance Selling) Regulation and sections 21 and 31 of the CPA as discussed above.

³⁹¹Par 2.2.3 and 3.1.2.4 above (see discussion under “Direct marketing and unsolicited goods and services”).

³⁹²Par 3.2.2 above.

³⁹³Par 3.1.2.4 above.

dealt with in isolation which often meant that the consumers and businesses involved did not know the full extent of the law with which they were dealing with, and merely addressed the laws that they were aware of. When one looks at the UK jurisdiction, it is apparent its legislation on consumer protection is generally scattered. Furthermore, in terms of promotional activities, various Directives, statutes and codes apply to very specific aspects of promotional activities. Although the English system of law is undoubtedly more developed with regards to Commercial or Mercantile Law, it is submitted that the system of law in the UK is not succinctly arranged, which is neither in the interest of the consumers nor of the suppliers involved. The current dispensation in the UK explains why the legislature of the UK is introducing the Consumer Rights Bill, with the express purpose of clarifying and simplifying consumer rights.³⁹⁴

Therefore, it is submitted that for the sake of legal certainty and in the interest of all the parties involved or affected by promotional activities, it was indeed commendable for the legislature to include promotional activities within the scope of the CPA. This indicates that South Africa is taking a step in the right direction with regards to its developments on consumer law. Ofcourse, this is not a suggestion that our current dispensation is without fault.

5.2.2 Concerns

The first concern that was raised with regard to this discussion is the possible redundancy of pre-existing bodies. It is submitted that from this discussion it is evident that these bodies are often industry specific bodies, which are not designed specifically to enforce the protection of consumer rights. In contrast, the CPA provisions on promotional activities are specifically formulated in the interest of consumers.³⁹⁵ Therefore, although the various bodies will now need to ensure that their codes are in compliance with the CPA provisions on promotional activities, they will continue to function and play a role within the particular industry and may even be used as a mechanism to ensure that suppliers and marketers comply with the provisions of the CPA.

³⁹⁴Par 4.1 above.

³⁹⁵See Van Eeden (2009) 24.

The second concern that was raised was that of the over-regulation of promotional activities, especially in sectors such as the credit industry where promotional activities are already regulated by statutes such as the NCA. At the crux of the matter is the fact that ensuring compliance has cost implications for the suppliers or marketers involved.³⁹⁶ However, the cost implications of ensuring compliance are an inevitable result of any new regulatory framework. It is contended that owing to the fact that these provisions were necessary and in the interest of all the role players involved, the provisions do not constitute an over-regulation of promotional activities in South Africa. Instead, the provisions attempt to arrange the laws pertaining to promotional activities in a single statute, which is laudable. Furthermore, the CPA makes provision for industry-wide exemptions, which are there to ensure that a particular industry is not over-regulated.³⁹⁷ This is indicative of the fact that the legislature was mindful of this concern. Therefore, concerned industries ought to take proactive steps by applying for exemptions where there are sufficient regulatory measures in place. Such exemption applications will be scrutinised by the minister before being granted in order to ensure that consumer interests are always protected.³⁹⁸ It is doubtful that compliance costs will have an opposite unintended effect, and create monopolies that effectively oust competition. However, only time will tell.

The third and final concern is that of the interplay that exists between the CPA and other legislation and codes.³⁹⁹ Three main legislative pieces were critically discussed with regard to how they overlap with the CPA, namely the NCA, the ECTA and the PPI Act. It is submitted that the interpretation clause of the CPA, as provided for in terms of section 2(9) of the Act, provides a clear procedure to be followed in instances where statutes overlap. Where provisions of two statutes are irreconcilable, the section 2(9)(b) provides that the provision that affords the consumer the greatest provision prevails. However, it is submitted that in instances where the overlap in provisions can be avoided by better drafting, the legislature should intervene. Furthermore, in terms of the codes referred to, namely the ASA code and the DMASA code, it is submitted that the codes do not constitute

³⁹⁶Par 1.3 above.

³⁹⁷See section 5(3) and 5(4).

³⁹⁸Section 5(4) CPA.

³⁹⁹Discussed extensively in par 3.2 above.

legislation per se but may be better described as contracts between the industry regulatory bodies and their members. Thus, the codes need to be in compliance with the Act and may be used as a tool to facilitate the enforcement of the Act.

5.3 Final conclusion

There are certain grey areas of interpretation with regards to the provisions on promotional activities.⁴⁰⁰ For instance, one of these grey areas exists in terms of the provision on negative option marketing,⁴⁰¹ which could be clarified by legislative amendment of the section. This recommendation is drawn on the dispensation in the UK. In the UK, inertia selling, which is the equivalent of our negative option marketing, provides that goods that are sold by means of this promotional technique are treated as unsolicited goods. This provision thus affords the consumer the necessary protective measures that arise where unsolicited goods are involved. Although section 21(1)(e) of the CPA makes provision for unsolicited goods in a situation akin to that of negative option marketing, it does not expressly provide that goods delivered as a result of negative option marketing are unsolicited (as is the case with goods delivered as a result of direct marketing).⁴⁰² Therefore, for the sake of clarity and to eliminate unnecessary litigation, it is recommended that the legislature clarify this matter in order to afford the consumer the best possible protection. Furthermore, the provisions on unsolicited goods in terms of section 21 of the Act should also be amended as to avoid the discrepancies as discussed in 3.1.2.4 above.

In conclusion, it is submitted that the legislature had the ideal opportunity in terms of the CPA to attempt the regulation of all promotional activities in a single statute. However, the fact that this is the first attempt of its nature in South African consumer law means that uncertainties and overlaps are inevitable. As time progresses with the interpretations of the courts and legislative intervention where necessary, the most problematic provisions should be clarified. In addition, it is indeed preferable for South Africa to follow the international model on consumer law granted that this model is adapted to the needs of South African consumers and is not prejudicial to

⁴⁰⁰See discussion in chapter 3.

⁴⁰¹Section 31 CPA.

⁴⁰²Section 21 CPA.

our consumers and small businesses. Nonetheless, in order to ensure the effectiveness of all the provisions pertaining to promotional activities in the CPA, we need consumer education, so that consumers know their rights and how to enforce them. We also need efficient enforcement mechanisms so that consumer rights in respect of promotional activities are given due effect to.

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