

An overview of promotional activities in terms of the Consumer Protection Act in South Africa

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I Introduction

Promotional activities in general include all the activities carried out by a supplier to promote its product, service or brand. Promotional activities include advertising or marketing (on television, radio, and websites), personal sales (door-to-door selling) or promoting products, services or brands by way of public relations (using newspapers, media or sponsoring events). Ultimately the goal of any promotional activity is to increase the sales of goods and services as well as creating brand awareness among consumers. The main purpose of this contribution is to provide a comprehensive overview of the promotional activities in terms of the Consumer Protection Act 68 of 2008.¹ This is done by first highlighting relevant promotional activities and the regulation thereof prior to the implementation of the CPA which includes certain common-law principles, existing legislation and identifying the main methods of regulating promotional activities. Even though the consumer is granted the fundamental consumer right to fair and responsible marketing² it is important to recognise that other provisions within the CPA also govern promotional activities and therefore also warrant discussion. The interplay between the CPA and other pieces of relevant legislation will also be discussed, including the interplay between the CPA and pre-existing regulatory bodies.

Many of the aspects and issues identified within this contribution have already been extensively and critically investigated and although these contributions will be referenced, a repetition thereof would be superfluous. The aim is therefore rather the establishment of a holistic

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view on promotional activities to consumers in South Africa with the CPA as the premise.

McQuoid-Mason correctly argues that it is not a question of whether promotional activities (such as advertising) should be regulated or not, but rather to what extent they should be regulated.³ The regulation of promotional activities in South Africa is not only governed by relevant common-law principles but has also been governed by industry-specific regulatory bodies for years, such as, inter alia, the Advertising Standards Authority,⁴ the Direct Marketing Association of South Africa⁵ and the Independent Communications Authority of South Africa.⁶ In addition, the legislature took steps to regulate different aspects of promotional activities through legislation such as the Consumer Affairs (Unfair Business Practices) Act,⁷ the Tobacco Products Control Act,⁸ and the Electronic Communications and Transactions Act.⁹ Though industry-specific regulation provided some protection, a more comprehensive framework was needed to protect and inform consumers. In this regard it seems that all forms of promotional activities are now governed by the CPA, which will afford certainty to consumers and businesses (suppliers) alike.¹⁰

Throughout this discussion, the term 'promotional activities' will be used as an umbrella term to encompass the marketing-related provisions in terms of the CPA and the principles, legislation and industry codes discussed in relation thereto.¹¹ 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.¹² Apart from providing valuable information to the consumer,

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promotional activities aim to sell products, services or ideas, and as such are designed to influence consumer opinions. ¹³ As a result, it is important to have consumer protection measures in place to protect vulnerable, naïve and uneducated consumers (which is also one of the main purposes in terms of s 3(1)(b) of the CPA).

II Relevant promotional activities and the regulation thereof prior to the implementation of the CPA

(a) Offer and acceptance

In terms of our common law the first requirement for the conclusion of a valid contract is that it must consist of a valid offer and a valid acceptance. ¹⁴ The court held in *Watermeyer v Murray* that 'every contract consists of an offer made by one party and accepted by the other'. ¹⁶ Auction sales and offers for rewards fall under the broader category of offers to the public and are considered to be 'special offers'. ¹⁷ The general rule is that an offer is directed at an individual; however, the aforementioned offers are exceptions to this rule. ¹⁸ One of the requirements of a valid offer is that the offer must be firm. ¹⁹ For an offer to be a firm one, it must be made *animus contrahendi* (with the intention that its acceptance will create a binding contract). ²⁰ In this regard, Gibson submits that 'the offeror must mean business,' and the offer must therefore not merely be a statement indicating a willingness to do business. ²¹

It is generally accepted that advertisements are not regarded as binding offers, but merely invitations to do business. ²² Therefore, the

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buyer makes the offer and the contract comes into existence once the offer is accepted by the seller. ²³ Christie and Bradfield refer to advertisements, circulars, catalogues and price tickets and state that the nature of such a publication, the terms in which it is contained and the surrounding circumstances generally must all be considered. ²⁴ If the wording is fairly capable of two interpretations the presumption is that it does not constitute an offer and the onus is therefore on the party who maintains that it is an offer to prove it. ²⁵ The writers state that the public is aware that advertisements, trade circulars, catalogues and (to a lesser extent) price tickets on goods displayed in shops serve the same purpose so it would be reasonable to expect no action to be allowed on a possible offer published in one of these ways if the would-be offeree ought to have treated it as a mere puff ²⁶ and not as a firm offer. ²⁷ However, this line of reasoning cannot be employed when the wording of the advertisement is sufficient to show that it is not a mere puff. ²⁸ Christie and Bradfield argue with merit that the practical result of treating a publication as an offer should not be ignored, because it could not be ignored by the reasonable person and no member of the public is entitled to treat a public notice (such as an advertisement) as an offer unless he is acting reasonably in doing so. ²⁹

(b) Advertisement of price and price tickets

Prior to the implementation of the CPA, the advertisement of a price in a publication (including price tickets) directed at particular individuals or to the public in general, as well as price displays, have been the subject of

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much discussion. On the one hand case law ³⁰ and legal writers ³¹ argue that in general a price ticket should be treated as an offer and that any difficulties surrounding a price ticket should be covered by reading the appropriate tacit terms in the price ticket. On the other hand Christie and Bradfield argue that this interpretation pushes the concept of tacit or implied terms in the price tickets to unjustified lengths. ³² It is argued that the attachment of a price ticket to goods exposed for sale creates no necessary inference of a firm offer of those goods for sale. ³³

In the English case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*, regarding a false advertisement of price, 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.³⁵ Nonetheless, deliberate advertising of a false price would, prior to the CPA, be considered harmful advertising in terms of the Consumer Affairs Act.³⁶ 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.³⁷ 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.³⁸

(c) Puffing ('sales talk'), warranties and misrepresentation

In terms of the common-law principles, pre-contractual statements and warranties refer to a situation where one of the parties makes a statement about the terms or the nature of the contract that is going to be entered

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into.³⁹ The distinction between warranties and representations is important because the remedies are different.⁴⁰ Furthermore, both these actionable statements should be distinguished from a puff where the consumer has no remedy at all.⁴¹

A warranty has many different meanings which may, at times, lead to confusion.⁴² McQuoid-Mason submits that a warranty refers to a statement made before or at the time of contracting, which forms part of the contract.⁴³ Failure to comply with the warranty is considered to be a breach of contract in terms of which the consumer is entitled to damages.⁴⁴ However, the extent of the remedy is dependent on the express terms of the warranty.⁴⁵

A puff constitutes sales talk which no reasonable person would consider to be a serious statement and is not, as a general rule, actionable.⁴⁶ Lawson submits that as long as the advertiser confines himself to the general praise of the goods, he should be safe.⁴⁷ However, a statement ceases to be a puff and becomes a representation when it turns into a credible statement.⁴⁸ A representation must be a statement of fact and not opinion.⁴⁹ 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.⁵⁰ 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.⁵¹

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(d) Bait marketing

Prior to the implementation of the CPA, bait marketing was also referred to as a 'bait-and-switch' tactic by suppliers. Bait-and-switch advertising is in many countries considered to be a type of deceptive advertising.⁵² This kind of advertising occurs when a business (supplier) advertises a cheaper product (the bait) to lure consumers to its store with no intention to sell at that price, then tries to sell them a more expensive product once they are in the store (the switch).⁵³

It seems that bait marketing was primarily governed by our common law, the Consumer Affairs Act and rulings by the ASA. Melville and Woker correctly argue that where the common-law position with regard to bait marketing is discussed it should include an analysis of the advertising of goods and services, associated contracts of sale, fraudulent misrepresentations and whether or not an advertisement is a valid offer.⁵⁴ Woker submits that the consumer who occupies the position of the offeror in the case of consumer contracts is open to abuse in situations where the trader may wish to entice the consumer into the store by using bait-and-switch tactics.⁵⁵ The trader would furthermore have been guilty of an unfair business practice in terms of the now repealed Consumer Affairs Act.⁵⁶ Murphy et al state that the growth of the internet has increased the use of bait marketing and unfortunately due to the nature of this form of advertising it is often difficult to definitively prove that bait marketing occurred.⁵⁷ Bait marketing is now primarily governed by s 30 of the CPA.⁵⁸

(e) Inertia selling, negative option marketing and unsolicited goods

An unfair business practice that has been in existence for a long time is the phenomenon of so-called 'inertia selling', which occurs when a supplier, in an attempt to increase his profits, supplies goods or services

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to a consumer without the consumer having requested them and then relies on the inertia of the consumer in order to enforce payment.⁵⁹ Examples of inertia selling that have crystallised in practice are negative option marketing and the supply of unsolicited goods and services. Negative option marketing is where the supplier makes an offer on the basis that an agreement will automatically come into existence unless the consumer declines the offer.⁶⁰ Even prior to the implementation of the CPA, negative option marketing was prohibited in terms of s 74(1) read together with s 89 of the National Credit Act⁶¹ and any credit agreement resulting from such marketing is treated as void.

The supply of unsolicited goods and services refers to promotional activities where goods (or services) are marketed or supplied to consumers by way of, for example, door-to-door sales, or via mail without prior request by consumers and without the supplier arranging for payment of the goods. The general rule is that 'silence does not mean consent'.⁶² 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'; this may be regarded as an invasion of the consumer's privacy.⁶³ The seller does not intend for the recipient to become the owner of the goods until the goods have been paid for.⁶⁴ 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.⁶⁵ However, recipients cannot become the owners of the goods through acquisitive prescription and thus there may still be a duty of safekeeping on the recipients as well as the duty to prevent negligent or intentional loss or damage to the unsolicited goods.⁶⁶ Prior to the implementation of the CPA, s 45 of ECT Act regulated unsolicited goods, services and communications and in particular spam and unsolicited electronic communications. As will

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be shown below, this position has now been amended in terms of the CPA as well the Protection of Personal Information Act.⁶⁷

III Main methods of regulating promotional activities

Due to technological advancements such as the internet and cell phones, it became clear that the common-law provisions were not sufficient to govern promotional activities directed at consumers. As a result, various pieces of legislation, industry bodies and codes in relation to promotional activities were implemented to bring the parties into equal bargaining positions.⁶⁸ McQuoid-Mason submits that the regulation of the promotional activities of suppliers is an essential component of consumer protection, as there are damaging social consequences if it is not controlled and the interests of consumers are not protected.⁶⁹ Although the competition created by advertising allows consumers more freedom of choice, it can be manipulative unless there is strict regulation of the marketplace.⁷⁰

Prior to the implementation 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.⁷¹ These regulative mechanisms should make advertisers aware of these standards; provide a mechanism particularly aimed at the monitoring of compliance with standards; set up a mechanism for handling complaints from consumers, competitors and other interested parties; and establish a means of penalising bad behaviour in violation of the standards.⁷²

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Although advertising, in its methods and forms, has been the subject of much criticism,

⁷³ it plays a valuable role in modern developed society; without it, consumers would not know what was available or where to get it. ⁷⁴ Furthermore, advertising allows for the dissemination of new products, ideas and technology. ⁷⁵ However, the main problem facing advertising regulators is drawing the line between regulation, freedom of enterprise and deciding who should enforce the restraints. ⁷⁶ The three main methods of regulating and enforcing promotional activities that warrant discussion are: self-discipline; statutory regulation; and self-regulation. ⁷⁷

Self-discipline ⁷⁸ 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. ⁷⁹ 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. ⁸⁰ 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. ⁸¹ Furthermore, the writer correctly 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. ⁸² The establishment of a standard regulatory framework to prevent the occurrence of false advertising is preferable as not doing so would be akin to relying on the self-discipline

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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. ⁸³ However, the criminal penalties contained in consumer-related statutes did not act as effective deterrents as the courts are overburdened with criminal matters; therefore, the matters concerning misleading advertisements do not receive much priority. ⁸⁴ The Consumer Affairs Act was one of the main statutes enacted to protect the public from unlawful business practices as well as those that are lawful yet unfair or harmful to consumers. ⁸⁵ However, it seems as if even legal practitioners were unfamiliar with its provisions. ⁸⁶

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. ⁸⁷ Woker submits that the advertising industry in South Africa prefers self-regulation to government intervention, which is why the ASA was established in 1969. ⁸⁸ The ASA, being the watchdog of the advertising industry, has adopted a code of conduct based on the British Code of Advertising Practice. ⁸⁹ The ASA administers the Code of Advertising Practice (the ASA Code) on behalf of the advertising and

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marketing industry. ⁹⁰ The Code itself defines its purpose by stating in Clause 12 of the Preface that it is there to protect the consumer and ensure professionalism amongst advertisers. ⁹¹ In this regard, the standing of the ASA and the system of self-regulation set up by the industry is recognised by the Electronic Communications Act ⁹² in terms of which the Code of Advertising Practice is the accepted standard to which all broadcast advertising in South Africa must conform. ⁹³ Regardless of whether the broadcasting licensee is a member of the ASA, if it is found to have breached the code, it is dealt with in terms of the Independent Communications Authority of South Africa Act. ⁹⁴ Thus the ASA Code enjoys statutory backing. ⁹⁵ However, the ASA itself works on a system of membership and one of the disadvantages of the ASA is that it cannot impose sanctions if the offender is not a member. ⁹⁶

IV Promotional activities in terms of the CPA

Lake correctly submits that the provisions governing promotional activities in terms of the CPA are only applicable where the subsequent supply of goods or services would fall under the Act. ⁹⁷ Hutchison et al correctly state that the CPA has introduced additional requirements and standards regarding promotional activities. ⁹⁸ Some of these requirements and standards include the requirement that the notice (valid offer) must be in plain and understandable language; ⁹⁹ negative option marketing is prohibited; ¹⁰⁰ the consumer has the right to a cooling-off period when the goods are directly marketed; ¹⁰¹ and catalogue marketing is now regulated. ¹⁰² These so-called 'additional requirements', as well as some of the significant promotional activities regulated by the CPA, are discussed below.

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It is important to recognise that the CPA protects the consumer throughout the course of the supply of goods and services, starting with the way in which goods and services are marketed to consumers. ¹⁰³ Section 1 of the Act provides certain relevant definitions which must be kept in mind when discussing promotional activities in terms of the CPA. 'Advertisement' means 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 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; or promote the supply of any goods or services; or promote any cause. ¹⁰⁴

'Direct marketing' means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or requesting the person to make a donation of any kind for any reason. ¹⁰⁵ 'Display', in relation to the display of a price, mark, notice or other visual representation, 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. ¹⁰⁶ 'Market' when used as a verb in terms of s 1 means to promote or supply any goods or services. 'Promote' 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. ¹⁰⁷ It also includes the making of any 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. ¹⁰⁸ A 'supplier' markets goods and services in the ordinary course of business. ¹⁰⁹

The consumer has a fundamental consumer right to fair and responsible marketing which is contained in Part E, Chapter 2 of the Act. As will

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be discussed below, Part E contains many forms of marketing including prohibited forms of marketing such as negative option marketing. There are however other relevant provisions which do not form part of the consumer's fundamental right to fair and responsible marketing but are closely related thereto, all of which should be regarded as promotional activities in terms of the CPA. ¹¹⁰

(a) Part E: The consumer's fundamental right to fair and responsible marketing

(i) General standards for the marketing of goods and services

The core provision that lays down the general standards of marketing in terms of the CPA is contained in s 29, which falls under Part E of the Act. ¹¹¹ According to Naudé, and Eiselen, ¹¹² s 29 has a general application and will apply to any marketing regardless of whether the CPA has a specific provision on that type of marketing practice or not. However, it is not the only section in the Act that has bearing on the standard of

marketing as a whole. Provisions that form part of other fundamental consumer rights, such as s 40, which prohibits unconscionable conduct; and s 41, which prohibits false, misleading or deceptive representations, are also relevant in respect of the general standard of marketing.

In terms of s 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 s 41. Furthermore, goods and services must not be marketed in a manner that is misleading, fraudulent or deceptive in any way. ¹¹³

Interestingly, Jacobs, Stoop and Van Niekerk submit that although sales talk or puffery has no binding effect, the provisions contained in s 41 of the Act pertaining to false, misleading and deceptive representations may affect or even prohibit such conduct. ¹¹⁴ Bearing in mind the provision of s 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

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fact is now statutorily prohibited. ¹¹⁵ In addition, where court proceedings are involved in terms of s 41 of the CPA, s 51, which governs prohibited transactions, agreements and terms or conditions, applies. ¹¹⁶ This is significant as it indicates the seriousness with which false, misleading and deceptive representations are treated in terms of the CPA.

The general standards for marketing in terms of s 29 should also be taken into account in situations where a consumer's right to equality in the consumer market (Part A of the CPA) and the prevention of discriminatory marketing (s 8 in particular) are applicable. Barnard and Kok ¹¹⁷ state that the provisions of Part A of the CPA are unique in the sense that the test for unfair discrimination in the consumer market is based on one or more of the grounds of unfairness in terms of either s 9 of the Constitution of the Republic of South Africa, 1996 (hereinafter 'Constitution') or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act. ¹¹⁸ A supplier will be guilty of discriminatory marketing where persons are unfairly excluded in a promotional activity and the writers argue that this inevitably excludes them from accessing the goods or services as well. ¹¹⁹ Jacobs, Stoop and Van Niekerk submit that the protection against discriminatory marketing 'is important in South Africa's new constitutional dispensation, in which the state is committed to the goal of achieving equality'. ¹²⁰ To this effect, the CPA also gives effect to this core value enshrined in the Constitution.

(ii) Bait marketing

The provision on bait marketing is contained in s 30 of the Act and prohibits the supplier from misleading or deceiving the consumer by advertising 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. ¹²¹ Therefore, the provision aims to ensure that suppliers always make their

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goods and services available as advertised. ¹²² The section furthermore provides that where the supplier advertises specific goods and services as being available at a specific price, and specifically states a limitation in respect thereof, then the supplier is required to make those goods available at that price. ¹²³ The section also provides defences to suppliers in certain instances. 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 and will not be guilty of bait marketing. ¹²⁴ Bearing in mind the manner in which consumers have become victims to conduct such as the bait-and-switch tactic, s 30 is a welcome provision.

Melville and Woker correctly state that the wording of s 30 seems deceptively simple. ¹²⁵ The writers argue that s 23 (price display) should be read in conjunction with s 30 and

conclude that both sections govern the advertisement of goods and services at a specified price. ¹²⁶ It is further averred that the only way to give effect to both sections is to hold that s 23 generally requires that all displayed goods (whether in an advertisement or on a shelf) must also display a price, while s 30 applies to the availability of goods that are advertised other than by means of display. ¹²⁷ The writers, after a thorough comparative discussion with the United Kingdom, Australia and the United States, conclude that s 30 applies not only to the practice known as bait marketing but also to any situation where the consumer may be misled. ¹²⁸ This means that it is not necessary to show a specific intention to deceive. ¹²⁹ In order to establish whether goods have been advertised in a manner that may result in consumers being misled or deceived, the reasonable consumer test should be used as a reasonable consumer would not be deceived or misled by a gross error. ¹³⁰

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(iii) Negative option marketing

Section 31 of the CPA prohibits negative option marketing, also known as a form of 'inertia selling'. 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. An agreement or modification entered into in this manner is void. Van Eeden correctly states that the essence of the prohibition in s 31 is to prevent any marketing in terms of which a consumer will receive goods or services, or be deemed to have concluded an agreement, on the basis that he has failed to reject an offer or any inducement.

Similarly, s 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 s 89 of the Act, while s 89 essentially provides for the entire contract to be declared void. 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.

(iv) Catalogue marketing

Catalogue marketing is regulated by s 33 of the CPA. ¹³¹ 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. ¹³²

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In addition, the section provides that the supplier has to disclose certain information to the consumer. ¹³³

Jacobs, Stoop and Van Niekerk submit that s 33 ensures that the consumer is provided with enough information before concluding a transaction based on the catalogue marketing. ¹³⁴ The authors indicate that there may be instances where conduct by the supplier can constitute both direct marketing and catalogue marketing. ¹³⁵ 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. ¹³⁶ 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. ¹³⁷ When interpreting the provisions of s 33, it is important to also take note of the provisions of s 23 with regards to price display in any type of catalogue marketing. ¹³⁸

(v) Trade coupons and similar promotions

Section 34 regulates trade coupons and similar promotions. ¹³⁹ Van Eeden gives the example of a certificate or voucher entitling the consumer to a price reduction or other benefit, a premium in the form of a benefit, or a prize. ¹⁴⁰ The Act provides that a *person* must not make a promotional offer without the intention of fulfilling it other than as offered. ¹⁴¹ In addition, the section prescribes what the document containing the promotional offer must state in clear terms, ¹⁴² as well as the duties of the person who makes or sponsors the promotional offer. ¹⁴³ 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

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applicable to s 34, do not at any point refer to what a trade coupon is. Furthermore, the section makes reference to persons and not suppliers.

(vi) Customer loyalty programmes

Customer loyalty programmes are regulated in terms of s 35 of the CPA. Naudé, and Eiselen correctly argue that a trade coupon is essentially a promotional tool that is used as an incentive to induce consumers to buy the supplier's product. ¹⁴⁴ 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. ¹⁴⁵ 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 s 48 of the CPA. ¹⁴⁶ In this regard it is submitted that businesses are entitled to include terms and conditions into their customer loyalty programmes 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 the token, point or credit concerned. A balance should be sought between establishing equal bargaining positions in consumer agreements on the one hand and making such agreements excessively one-sided in favour of the consumer.

In addition, similar to the trade coupons and similar promotions provision discussed above, a person must not offer participation in a loyalty programme or offer any loyalty credit or award without the intention of providing it or providing it in a manner other than as offered. ¹⁴⁷ The contents of the document as well as the duties of the sponsor or supplier are prescribed in terms of the Act. ¹⁴⁸ The same 'grounds of justification' that exempt a supplier from liability in bait marketing apply to customer loyalty programmes. ¹⁴⁹ 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 20 business days prior to the implementation of such restriction. ¹⁵⁰

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(vii) Promotional competitions

Prior to the enactment of the CPA, promotional competitions were unlawful unless they fell within the ambit of s 54 of the Lotteries Act. ¹⁵¹ However, s 121(1) of the CPA has now repealed s 54 of the Lotteries Act. Initially, the definition of promotional competition in the Lotteries Act was substituted by the definition of the same term contained in the CPA. ¹⁵² Subsequently, the Lotteries Amendment Act ¹⁵³ deleted the definition of promotional competition from the Lotteries Act.

At present, an anomaly exists with regard to certain provisions of the Lotteries Act in their current form. In this regard, the repealed s 54 is referred to in s 56 of the Lotteries Act, which provides for unlawful lotteries and competitions. Furthermore, the definition of 'lottery', ¹⁵⁴ as well as s 56 and Chapter I of Part 2 of the Lotteries Act, make reference to promotional competitions. Naudé, and Eiselen rightfully submit in this regard that given the repeal of s 54 by the CPA, any reference thereto in s 56 should be disregarded as 'it is trite that the legislature does not intend to make purposeless or meaningless legislation'. ¹⁵⁵ The writers furthermore correctly argue that any promotional competitions that fall within the scope of s 36 of the CPA are deemed to be lawful and are excluded from the field of application of the Lotteries Act. ¹⁵⁶ Considering the recent deletion of the definition of promotional competition by the Lotteries Amendment Act with effect from 14 April

2015, it is submitted that promotional competitions that do not fall within the scope of the CPA will be unlawful as they are no longer regulated by the Lotteries Act at all. The references to promotional competitions in the current provisions of the Lotteries Act should be rectified by the legislature.

Section 36 of the CPA regulates *promotional competitions* and should be read together with reg 11 to the CPA. Van Eeden states that from a marketing communication perspective, competitions are generally designed to create interest in a product or service, and often to encourage brand switching.¹⁵⁸ There are particular definitions set out in s 36(1) that only apply in the interpretation of promotional competitions and s 36 as a whole.¹⁵⁹ The section extensively attempts to govern the duties of a supplier (promoter) and the rights of a consumer who takes part in promotional competitions. Suppliers (promoters) who promote a promotional competition

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will also be liable in terms of s 36(1) and there are particular requirements with regard to an offer to participate in a promotional competition (s 36(5)). The monetary threshold for competitions with low-value prizes is R1,00 as set out in reg 11(4). Regulation 11(1) provides that the reasonable cost of electronically transmitting an entry shall not exceed R1,50.¹⁶⁰ Regulation 11 further governs the use of the consumer's image in marketing material, the conducting and auditing of the promotional competition, and the retention of records.¹⁶¹

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.¹⁶² 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 from whom the winner of the competition may receive the results from.¹⁶³ The Act also places limitations on the acceptance of the prizes and participation in the competition.¹⁶⁴ Monty submits that this legislation has a widespread application in respect of all dealings with consumers.¹⁶⁵ Thus, suppliers should ensure that the manner in which they conduct their competitions is in compliance with the provisions of the Act.¹⁶⁶ It should further be noted that because considerable personal information is collected from the competition entrant (consumer), either to verify their identity or age or for future marketing and promotion, competitions now raise serious issues about how promoters handle personal information collected during the competition. The provisions of the PPI Act will also be applicable to promotional competitions in terms of the CPA. As a result,

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competition rules need to make certain disclosures and undertakings as regards personal information collected during the scope of the competition to comply with both the CPA and the PPI Act.

(viii) Alternative work schemes

Alternative work schemes are regulated by s 37 read together with reg 12 to the CPA. Section 37 prohibits any person from making false representations in respect of the availability, actual or potential profitability, risk or any material aspect of work, business or an activity involved in any arrangements for gain.¹⁶⁷ Jacobs, Stoop and Van Niekerk give the example of an advertisement stating 'Work from home: R25 000 guaranteed', which would be prohibited in terms of s 37 unless it contains the minimum required information.¹⁶⁸ Any arrangement for gain are arrangements in terms of which a person invites, solicits or requires persons to conduct work or business from their homes, represents to others as being practicable to conduct the business or work from their homes, or invites, solicits or requires persons to perform work or business or invest money from their homes.¹⁶⁹ Regulation 12 provides that advertisements promoting arrangements contemplated in s 37 must be accompanied by a cautionary statement in the prescribed wording and form and must disclose the uncertainty of the extent of the work, business or activity and the income or benefit to be derived from it. A consumer

may not be charged fees, except to the extent that the supplier performed the work or business activity, or made or received the contemplated investment. ¹⁷⁰ Van Eeden refers to the Report of the Consumer Affairs Committee in 2006 where an investigation into 'work from home opportunities' was published in the *Government Gazette* for public comment. ¹⁷¹ Though the report was very cryptic, any advertisement in which a *work from home opportunity* was offered in newspapers, magazines, other print and electronic media and by way of any other advertising method was regarded an unlawful business practice and any person who did not comply committed a criminal offence liable on conviction to a fine or imprisonment. ¹⁷² The wording of s 37 seems

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similar to the wording of the report and also perhaps explains why 'person' rather than 'supplier' is used. ¹⁷³

(ix) Referral selling

Section 38 governs referral selling and provides that a person must not promote, offer, supply, agree to supply, or induce a consumer to accept any goods or services on the representation that the consumer will receive a rebate, commission or other benefit if the consumer subsequently gives the supplier the names of consumers; or otherwise assists the supplier to supply goods or services to other consumers; and that rebate, commission or other benefit is contingent upon an event occurring after the consumer agrees to the transaction. ¹⁷⁴ It would not be a defence on the part of the supplier where the consumer made a statement where it is declared that the consumer was motivated to enter into a consumer transaction predominately for the value of the goods or services, rather than for the rebate, commission or benefit. ¹⁷⁵ Section 38 does not apply to franchise agreements. ¹⁷⁶ Referral selling is typically practiced in the insurance industry, in the supply of certain types of accommodation and in the beauty industry. Difficulty with the wording and application of s 38 may however arise if the aim of the section is to protect the consumer's right to privacy as well. ¹⁷⁷ This may be the case when the provisions of the PPI Act are taken into account with the additional duties conferred upon suppliers to protect the personal information of consumers.

In this regard, one of the primary purposes of the PPI Act is to give effect to the constitutional right to privacy. The processing of personal information of individuals and juristic persons is comprehensively regulated in terms of the provisions of the PPI Act. ¹⁷⁸ In so far as a supplier falls within the definition of a responsible party as defined in the PPI Act, ¹⁷⁹ the provisions of the PPI Act will be applicable to such a supplier, who will need to ensure that during the process of referral selling, any information that is gathered or collated is in compliance

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with the PPI Act in general, and specifically, with the conditions set out in Chapter 3, Part A of the PPI Act. ¹⁸⁰ In addition, the PPI Act places a prohibition on processing of special personal information ¹⁸¹ and the processing of the personal information of children ¹⁸² subject to the necessary authorisations or consents. ¹⁸³

(x) Agreements with persons lacking legal capacity

This is indeed a peculiar section and also does not completely fit into the framework for the fundamental right to fair and responsible marketing governed by Part E of the CPA. Section 39 distinguishes between consumer transactions that will either be regarded as void or voidable. A consumer transaction will be regarded as void if the supplier knew, or reasonably could have known, that it was dealing with a mentally unfit person (as declared by an order of court). ¹⁸⁴ This shifts the common-law burden of proof and it is argued that this would be an unreasonably unfair burden on suppliers and also their representatives (employees, for example) to reasonably know whether or not a person is mentally unfit.

In terms of s 39(1)(b) a consumer transaction will be declared voidable (at the option of the consumer) if the consumer was an unemancipated minor (at the time of conclusion of the transaction), contracting without the consent of an adult responsible for that minor; and the agreement has not been ratified by either an adult responsible for that minor; or the emancipated minor. Bhana and Visser argue that the legislature does seem to place

greater emphasis on the need to empower the minor to participate in the consumer market in so far as the unassisted contract (which subsequently is not ratified) is rendered voidable. ¹⁸⁵ The writers further correctly argue that the section in itself

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is ambiguous and uses terminology that is unfamiliar to the South African common law. ¹⁸⁶

Section 39(2) sets out defences and provides that a supplier will not be liable where a consumer (or any person acting on behalf of the consumer) induces a supplier to believe that the consumer had an unfettered legal capacity to contract; or attempted to obscure or suppress the fact that the consumer did not have an unfettered legal capacity to contract. Bhana and Visser correctly argue that it is unclear whether the legislature purports to hold the minor consumer liable in terms of contract or delict or neither. ¹⁸⁷

(b) Direct marketing to consumers

Section 32 governing direct marketing to consumers should be read in conjunction with the definition of direct marketing as contained in s 1 of the CPA as well as ss 11, 16 and 21 respectively. Section 32 provides that a person who directly markets any goods or services, and who concludes a transaction with a consumer, must inform the consumer, in the prescribed manner and form, of the right to rescind that agreement (cooling-off right), as set out in s 16. ¹⁸⁸ If a supplier directly marketed any goods and left such goods with the consumer without requiring or arranging payment for them, those goods are unsolicited goods, to which s 21 applies. ¹⁸⁹

Naudé, and Eiselen argue that s 32 is the only section in the CPA which requires that a supplier must inform consumers of a particular right and that suppliers may, as a result of this, argue that there is no duty on them to inform consumers of their other rights. ¹⁹⁰ It is however doubtful whether an intentional non-disclosure by suppliers is in line with the purpose and application of the Act as set out in Chapter 5 thereof. Much has been written about direct marketing in terms of the CPA, how it relates to the consumer's right to privacy in terms of s 11, the cooling-off right in terms of s 16, ¹⁹¹ as well as how it relates to unsolicited goods in

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terms of s 21. ¹⁹² This includes comparative research with similar provisions in other pieces of relevant legislation. ¹⁹³ Each of the sections as set out directly above (ss 11, 16 and 21) have content and application issues that reach far beyond the focus of direct marketing per se. An in-depth discussion thereof is therefore not relevant and only a brief overview for purposes of completeness will be given.

(i) Direct marketing and the cooling-off right

In essence a consumer (in terms of the CPA) will only be entitled to exercise his cooling-off right where goods were supplied in terms of *direct marketing*. This requirement reduces the scope of application of s 16 significantly. A consumer is entitled to be duly informed of his cooling-off right in the prescribed manner or form. ¹⁹⁴ Although the consumer is granted the right to return the goods in instances where the agreement arose from direct marketing, ¹⁹⁵ the goods are returned at the risk and expense of the consumer. ¹⁹⁶ Jacobs, Stoop and Van Niekerk point out that the Act provides that should a person (not only a supplier) directly market goods or services and as a result conclude an agreement or enter into a transaction, the person then has a duty to, in the prescribed form and manner, inform the consumer of his/her cooling-off right in terms of the CPA. ¹⁹⁷ Otto ¹⁹⁸ argues that the definition of direct marketing should be interpreted restrictively and although it would be hard to pinpoint exact examples in practice, an advertisement in a newspaper, a road sign or even a pamphlet in the post should not be included in the definition of direct marketing. The writer further argues that direct marketing should include some kind of an 'approach' aimed at the consumer. It is submitted that direct marketing should include telephone calls, cell phone messages, electronic mail or a letter directly addressed and sent to the particular consumer. It should further include

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the handing out of pamphlets at a traffic light or at a shopping centre and would most probably also include practices by suppliers to directly approach consumers within a particular store to draw their attention to particular goods.

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 s 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.

Electronic transactions that are brought about by electronic communications are not regulated by s 16 of the CPA and the cooling-off provisions in terms of s 44 of the ECT Act will apply.²⁰⁰

(ii) Direct marketing and the right to privacy

The right to privacy is enshrined in s 14 of the Constitution.²⁰¹ Kirby submits that the CPA contains the most comprehensive set of consumer rights that relate to privacy in terms of s 11.²⁰² 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 Jacobs, Stoop and Van Niekerk are of the opinion that a consumer has a right to block the receipt of flyers or brochures in his letterbox or unsolicited phone calls pre-emptively and consider the forms of marketing to fall under the definition of direct marketing in terms of the CPA.²⁰⁴ In order to ensure that the direct marketing provisions are complied with, effective mechanisms must be put into place.²⁰⁵ Such mechanisms are contained in reg 4 of the CPA.²⁰⁶ Furthermore, s 11(3) gives the National Consumer Commission the power to establish a registry in order to allow any person to register a

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pre-emptive block against any communication that is primarily direct marketing.²⁰⁷ The fact that this registry is yet to be established is disconcerting.

With regard to the protection of personal information of consumers the provisions of the PPI Act also need to be taken into account. Though the implementation of the PPI Act has been postponed, it has been enacted and is therefore relevant. The definition of 'direct marketing' in terms of s 1 of the PPI Act is a verbatim repetition of the definition of direct marketing in terms of the CPA. The provisions of the PPI Act will apply to the processing of personal information of consumers and seems to have a very wide application.²⁰⁸

(iii) 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 s 21 of the Act.²⁰⁹ The provision on unsolicited goods and services is aimed at prohibiting the practice of inertia selling.²¹⁰ Barnard correctly argues that due to the wording of s 21, the legislature has introduced various situations in which a supplier may be guilty of the supply of unsolicited goods even where direct marketing is not present.²¹¹ The writer further argues that the practice of doorstep selling will amount to direct marketing for purposes of s 21.²¹² (The discussion that follows will however only focus on the supply of unsolicited goods in the case of direct marketing.)

One of the more controversial issues surrounding the wording of s 21 is where it provides that where goods are (or become) unsolicited, the goods may be lawfully *retained* by the consumer, which has the effect that the property in those goods passes unconditionally to the consumer (subject only to any right or valid claim that an uninvolved third party may have with respect to those goods).²¹³ The question becomes whether or not this implies a transfer of ownership. Gouws makes a

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number of submissions in this regard with reference to s 25(1) and (2) of the Constitution and concludes that s 21 of the CPA is unconstitutional in so far as it specifically excludes

compensation which is a material requirement for expropriation by the state in terms of s 25(2)(b) of the Constitution. ²¹⁴ Furthermore, the author submits that if s 21(5) is held to be a deprivation, then it falls short of the elements of arbitrariness. ²¹⁵ It is submitted that interpreting s 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 s 3(1)(c), takes into account the interests of both the consumer and the supplier. ²¹⁶ 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* be entitled to recover the goods from the consumer who retains goods that are clearly misdelivered without informing the supplier. ²¹⁸ However, the fact that s 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. ²¹⁹

Melville submits that although it is unfortunate that the Act places no obligation 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

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prosecution for the theft of doing so. ²²⁰ In this regard Van Heerden submits that as an alternative to laying a theft charge, the supplier may recover the goods using the *rei vindicatio*. ²²¹ 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. ²²²

Barnard comprehensively discusses the common-law position regarding obligatory and real agreements, the common-law position regarding the transfer of movable goods, as well as the essentialia of a contract of sale, and argues that an unconditional transfer of ownership in the case of unsolicited goods is unlikely. ²²³ The writer argues however that if the purpose of the legislature is to bring the South African position in line with international practice (where unsolicited goods supplied by *mala fide* suppliers become *unconditional gifts* in favour of the consumer), ²²⁴ an amendment to the wording of s 21 is needed.

Even though the title of s 45 of the ECT Act is 'Unsolicited goods, services or communications', it does not focus on the goods *per se* but rather on the unsolicited communication thereof to consumers. This section therefore does not provide guidance as to the position of unsolicited *goods* prior to the CPA. Section 45 of the ECT Act will furthermore be replaced with Chapter 8 ²²⁵ of the PPI Act, entitled 'Rights of data subjects regarding *direct marketing* by means of unsolicited electronic communications, directories and automated decision making' (emphasis added). Hamann and Papadopoulos correctly point out that in the case of direct marketing by means of electronic communication, a distinction should be made between direct marketing and spam. ²²⁶ The writers further argue that the fragmented approach by the legislature will result in inadequate protection for consumers and an inability to effectively control spam or regulate online direct marketing. ²²⁷ The writers state that in trying to enforce the regulatory framework

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in an online environment the enforcer will have to consider: the different fields of application for each Act (the ECT Act, CPA and PPI Act); the different definitions for terms; and the overlapping and sometimes conflicting web of legislative provisions applicable to direct marketing or unsolicited commercial electronic communications. ²²⁸

(c) Additional consumer rights relating to the promotional activities of suppliers

(i) The right to information in plain and understandable language

Section 22 provides that a notice, document or visual representation produced by a supplier must be in plain language. ²²⁹ Such a 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. ²³⁰

The right to plain and understandable language is not just a right that forms part of the consumer's fundamental right to disclosure and information but also forms part of the minimum requirements of various other rights within the CPA. Thus, the promotional activities of suppliers must also comply with the provisions governing plain and understandable language and the test for plain language contained therein. Unfortunately an in-depth and critical analysis of the plain language requirement warrants a separate contribution of its own. Fortunately this has been done comprehensively and these contributions are referred to with merit. ²³¹

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(ii) Price disclosure

The price of goods and services is regulated by s 23 of the CPA. Retailers are required to show the price of the goods that are being displayed. ²³² The section provides the manner in which a display is considered as being adequate. ²³³ 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. ²³⁴

With regards to price disclosure as part of advertisements, Du Plessis makes the interesting argument that although a general rule exists at common law in favour of advertisements being regarded as invitations to do business, no such general rule exists in respect of the physical display of goods at a certain price. ²³⁵ The writer further argues that s 23 requires that the display of goods at a certain price generally would be viewed as an offer and even though the CPA has not amended the common-law rule in respect of advertisements, it has improved the consumer's position by prohibiting misleading advertisements and by placing certain obligations on a supplier if it cannot fulfil the promises in its advertisements. ²³⁶

Clearly the provisions regarding price display in terms of the CPA have far-reaching implications on the common-law position. Melville and Woker comprehensively discuss the common-law position regarding price display (particularly in the scenario of a 'self-service' setting). ²³⁷ The writers argue that the CPA empowers the Tribunal and the courts to make innovative orders and align the common law to the objects of the CPA, which will in turn enable the courts to hold that the display of goods in a self-service setting equates to a binding offer on the part of the seller to sell at the price displayed. ²³⁸ It is argued by Melville and Woker that the Act even enables the courts to dispense with the

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outdated concepts of offer-and-acceptance and place 'store' rather on the form of the transaction. ²³⁹ It is further argued that the transaction reaches the stage of perfecta or conclusion when the consumer reaches or places the goods on the check-out counter, and at that point the sale at the advertised price is binding even if the price is an inadvertent and obvious error, but not if reasonable steps had already been taken to inform the consumer of the error or if the price was altered without authorisation or wholly obscured with a new price. ²⁴⁰

V Interplay between the CPA and other legislation

It is clear from the discussion of promotional activities above that the provisions of the CPA cannot be interpreted in isolation and will more often than not overlap with other pieces of legislation. As mentioned earlier, the most prominent pieces of legislation that will need to be interpreted in conjunction with the CPA seem to be the ECT Act, the NCA and the PPI Act. These Acts and their relevant provisions have been referred to throughout the discussions of the particular promotional activity within the CPA as indicated in the discussions above. ²⁴¹ Perhaps it is necessary to highlight the importance of s 2, which governs the interpretation of the CPA. Section 2(9) provides that if there is an inconsistency between any provision within the CPA and a provision of any other Act the provisions of both Acts apply concurrently, to the extent that it is possible to apply and

comply with one of the inconsistent provisions without contravening the second. If the provisions of the Acts (CPA and any other Act) cannot apply concurrently, the provision that extends the greater protection to a consumer prevails.

For purposes of completeness the interplay between the CPA and the ASA Code is discussed below due to the fact that the ASA Code not only provides guidance in the marketing of goods and services under its jurisdiction but also provides guidance at the redress stage to consumers. A brief overview of the CPA and other regulatory bodies is also given.

(a) The CPA and the ASA Code

The South African advertising industry voluntarily formed the ASA in 1969 and adopted a Code as discussed above. The effectiveness of the

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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. ²⁴²

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. ²⁴³ 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. ²⁴⁴ Schimmel's former submission 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. ²⁴⁵ However, from the critical discussion above it appears as if the CPA is not the overarching framework for consumer protection that it was originally intended to be. ²⁴⁶ A further problematic situation is the fact that the avenues of redress available to consumers in terms of s 69 of the CPA are not yet in place and this currently frustrates the consumer's access to justice. Therefore, it is submitted that the ASA Code will still have its place in the advertising industry.

(b) The CPA and other regulatory bodies

There are various associations which are role players in the wide range of promotional activities governed by the CPA, such as the DMASA, ICASA, and the Marketing Association of South Africa. For purposes of

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this discussion only the DMASA will be discussed as it relates directly to the promotional activity of direct marketing as governed by the CPA.

The DMASA is a s 21 company dedicated to the protection and development of the Interactive and Direct Marketing industry. ²⁴⁷ As part of its mission statement to create an environment that fosters the responsible growth of interactive and direct marketing in South Africa, the DMASA aims to establish and promote ethical standards of practice for direct marketing and take an active role in ensuring compliance. ²⁴⁸ In this regard, the association has its own Code of Practice designed in a comprehensive manner and recognised by the ASA. ²⁴⁹ 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. ²⁵⁰

The Code of Practice defines direct marketing as 'a set of business practices designed to plan for and present an organisation'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. Clearly the Code of Practice which ensures that the business sector conduct their affairs in an ethical manner is advantageous but the consumer protection provisions in terms of the CPA are still necessary as they are focused on protecting the consumer.

The Code of Practice also addresses unsolicited goods. ²⁵¹ In this regard marketers are prohibited from sending unsolicited products or services to consumers or businesses and thereafter demanding payment. This provision is in keeping with the provisions governing unsolicited goods and direct marketing in terms of the CPA. 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. ²⁵² 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 and purposes of the CPA.

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VI Conclusion

From the above contribution, it is evident that the CPA has had a significant impact on the regulation of promotional activities with reference to the common-law principles in relation thereto, as well as pre-existing codes and statutes. The industry-specific regulation of promotional activities prior to the implementation of the CPA was highlighted above. Prior to the implementation of the CPA, the regulatory framework for promotional activities could be described as somewhat incoherent and unsystematic. Various aspects of promotional activities were 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, and merely addressed the laws that they were aware of.

The CPA has brought about a more holistic view of promotional activities and addresses the most prevalent practices. This is done by either prohibiting the promotional activity (such as negative option marketing in terms of s 30) or governing the promotional activity (customer loyalty programmes in terms of s 35). What is also clear is that the legislature attempted to bring the South African position regarding promotional activities more in line with international practices and regulation. Importantly, the CPA has also incorporated constitutional principles such as the right to equality, as well as the right to privacy through the direct marketing provisions of the Act. 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.

It has also become clear throughout the discussion above that the CPA cannot be interpreted or applied in isolation. The common law, pre-existing legislation, as well as particular industry bodies still have important roles to play. It is suggested that promotional activities aimed at consumers should first and foremost be addressed from the stance of the CPA, and any common-law principles, provisions in terms of other pieces of legislation or industry codes should be viewed through the 'looking glass' of the CPA. Keeping in mind that the interpretation most beneficial to the consumer should be followed.

It is clear that there are certain grey areas of interpretation with regards to the provisions on promotional activities. 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

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necessary, the most problematic provisions should be clarified. 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.

- * LLB (UP) LLM (Unisa) LLD (UP).
- ** LLB LLM (UP).
- 1 Hereinafter referred to as 'the CPA' or 'the Act'.
- 2 Chapter 2, Part E of the CPA.
- 3 McQuoid-Mason (ed), *Consumer Law in South Africa* (Juta 1997) 265.
- 4 Hereinafter referred to as 'the ASA'.
- 5 Hereinafter referred to as 'the DMASA'.
- 6 Hereinafter referred to as 'ICASA'.
- 7 Act 71 of 1988. Hereinafter referred to as the Consumer Affairs Act. (Formerly the Harmful Business Practices Act and repealed by s 121 of the CPA from the 'general effective date' of 31 March 2011).
- 8 Act 83 of 1993.
- 9 Act 25 of 2002. Hereinafter referred to as 'the ECT Act'.
- 10 Christie & Bradfield, *Christie's The Law of Contract in South Africa* 6 ed (LexisNexis 2011) 41.
- 11 For purposes of convenience the terms 'promotional activities' and 'advertising' will be used interchangeably throughout.
- 12 In Soanes & Hawker, *Compact Oxford English Dictionary for Students* (OUP 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.
- 13 McQuoid-Mason (Juta 1997) 262.
- 14 Christie & Bradfield (LexisNexis 2011) 30. See also Nagel et al, *Commercial Law* (LexisNexis 2011) para 4.13–4.27 & 4.37–4.42 for a general overview of the requirements for a valid offer and valid acceptance.
- 15 1911 AD 61.
- 16 1911 AD 61 at 70. See Gibson et al, *South African Mercantile and Company Law* (Juta 2003) 29 where the author submits that doubt has been cast on this proposition but that for practical purposes it is accepted.
- 17 Hutchison et al (eds), *The Law of Contract in South Africa* (OUP 2012) 50; See also Nagel et al (LexisNexis 2011) paras 56–68.
- 18 Hutchison et al (OUP 2012) 50.
- 19 Gibson et al (Juta 2003) 29. See also Hutchison et al (OUP 2012) 48; other requirements of a valid offer are that the offer must be complete, clear and certain.
- 20 Hutchison et al (OUP 2012) 48.
- 21 Gibson et al (Juta 2003) 30.
- 22 *Crawley v R* 1909 TS 1105; Hutchison et al (OUP 2012) 51; McQuoid-Mason (Juta 1997) 274. See Woker, *Advertising Law in South Africa* (Juta 1999) 52–53, where the author 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. Woker submits that this view was maintained in the English case of *Timothy v Simpson* (1834). She also 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 Kahn, *Contract and Mercantile Law* (Juta 1988) 79–83. See also Sharrock, *Business Transactions Law* (Juta 2011) 54–56.
- 23 McQuoid-Mason (Juta 1997) 274.
- 24 Christie & Bradfield (LexisNexis 2011) 41.
- 25 Christie & Bradfield (LexisNexis 2011) 42.
- 26 See discussion of puffing and sales talk directly below.
- 27 Christie & Bradfield (LexisNexis 2011) 42.
- 28 Christie & Bradfield (LexisNexis 2011) 42.
- 29 Christie & Bradfield (LexisNexis 2011) 42.
- 30 *Crawley v R* 1909 TS 1105; *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401; *Hottentots Holland Motors (Pty) Ltd v R* 1956 (1) PH K22 (C).
- 31 Wessels, *The Law of Contract in South Africa* 2 ed (Butterworths 1951) 189–191; Kahn (Juta 1988) 81–82.
- 32 Christie & Bradfield (LexisNexis 2011) 43.
- 33 Christie & Bradfield (LexisNexis 2011) 43.
- 34 [1953] 1 QB 401. See Hutchison et al (OUP 2012) 52. See Sharrock (Juta 2011) 54. See also *Harvey v Facey* [1893] AC 552.
- 35 [1953] 1 QB 401 at 404. See Gibson et al (Juta 2003) 30.
- 36 McQuoid-Mason (Juta 1997) 274. The practice of 'bait marketing' is now a prohibited in terms of s 30(1) of the CPA.
- 37 McQuoid-Mason (Juta 1997) 275.
- 38 McQuoid-Mason (Juta 1997) 275.
- 39 McQuoid-Mason (Juta 1997) 21. An in-depth discussion of price display and price determination go

beyond the scope and purpose of this contribution.

40 McQuoid-Mason (Juta 1997) 21.

41 McQuoid-Mason (Juta 1997) 21. See Gibson et al (Juta 2003) 62 and Hutchison et al (OUP 2012) 119.

42 Christie & Bradfield (LexisNexis 2011) 162.

43 McQuoid-Mason (Juta 1997) 21. The word 'guarantee' is often used when a consumer is provided with a warranty. See also Hutchison et al (OUP 2012) 117.

44 McQuoid-Mason (Juta 1997) 22.

45 McQuoid-Mason (Juta 1997) 22.

46 Voet 21 1 3. See also McQuoid-Mason (Juta 1997) 21; Sharrock (Juta 2011) 137–138.

47 Lawson, Advertising Law (Macdonald & Evans 1978) 16. In Hutchison et al (OUP 2012) 119, the 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'.

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

49 Lawson (Macdonald & Evans 1978) 16.

50 McQuoid-Mason (Juta 1997) 22. See Lawson (Macdonald and Evans 1978) 17, in which the author submits that compensation depends on whether the misrepresentation is innocent or fraudulent.

51 McQuoid-Mason (Juta 1997) 22. In Hutchison et al (OUP 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 (Pty) Ltd v Paizes 1973 (3) SA 397 (A) for the principles on a dictum et promissum.

52 Murphy et al, Ethics in Marketing: International Cases and Perspectives (Routledge 2012) 11.

53 Murphy et al (Routledge 2012) 11. See Woker (Juta 1999) 55.

54 Melville & Woker, 'Bait marketing and beyond? The import of s 30 of the Consumer Protection Act 68 of 2008' (2015) De Jure (to be published).

55 Woker (Juta 1999) 55.

56 Act 71 of 1988.

57 Murphy et al (Routledge 2012) 11.

58 See discussion of the relevant section and contents of s 30 of the CPA below.

59 Nagel et al (LexisNexis 2011) para 41.54.

60 Nagel et al (LexisNexis 2011) para 22.16.

61 Act 34 of 2005. Hereinafter referred to as 'the NCA'.

62 Woker (Juta 1999) 57. See also Felthouse v Bindley [1862] 142 ER 1037) as discussed by Woker (Juta 1999) 57.

63 Woker (Juta 1999) 57.

64 Woker (Juta 1999) 57.

65 Woker (Juta 1999) 58.

66 Woker (Juta 1999) 58. Section 21(6) of the CPA changes this position on unsolicited goods.

67 Act 4 of 2013. Hereinafter referred to as 'the PPI Act'. The PPI Act was enacted in terms of GN 912 in GG 37067 of 26 November 2013. In accordance with s 115, the PPI Act will commence on a date determined by the President by proclamation in the GG, which has to date not transpired. The last proclamation was made by the president on 7 April 2014 in GG 37544 in GN 25 of 11 April 2014. In terms of this proclamation, s 1 (definitions), Part A of Chapter 5 (Supervision, the information regulator), s 112 (regulations) and s 113 (procedures for making regulations) of the Act came into operation on 11 April 2014.

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

69 McQuoid-Mason (Juta 1997) 261.

70 McQuoid-Mason (Juta 1997) 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 (Juta 1997) 277.

71 Woker (Juta 1999) 57.

72 McQuoid-Mason (Juta 1997) 265.

73 McQuoid-Mason (Juta 1997) 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.

74 McQuoid-Mason (Juta 1997) 264.

75 McQuoid-Mason (Juta 1997) 264.

76 McQuoid-Mason (Juta 1997) 265.

77 McQuoid-Mason (Juta 1997) 265.

78 McQuoid-Mason (Juta 1997) 265.

79 McQuoid-Mason (Juta 1997) 266.

80 McQuoid-Mason (Juta 1997) 266.

- 81 McQuoid-Mason (Juta 1997) 266.
- 82 McQuoid-Mason (Juta 1997) 266. Woker (Juta 1999) gives the example of an advertisement which states that a product contains additives which are known to be beneficial to the consumer when in fact it does not.
- 83 McQuoid-Mason (Juta 1997) 266.
- 84 McQuoid-Mason (Juta 1997) 266. See discussion on *S v Pepsi-Cola (Pty) Ltd & others* 1985 (3) SA 141 (C) and *Tobler v Durban Confectionery Works (Pty) Ltd* 1965 (4) SA 497 (C) on 266–267.
- 85 Woker, 'Business Practices and the Consumer Affairs (Harmful Business Practices) Act 71 of 1988' (2001) 13(2) SA Merc LJ 315 at 316 and 319. 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).
- 86 Woker (2001) 13(2) SA Merc LJ 315 at 315.
- 87 McQuoid-Mason (Juta 1997) 265–268. See Lawson (Macdonald and Evans 1978) 21–24.
- 88 The objects of the ASA are to promote and encourage the highest standards of advertising in all media; to encourage adherence to the code; to persuade all persons and organisations involved in advertising to belong to the ASA; to ensure mutual co-operation and consultation; and to consult with and advise appropriate government, statutory, provincial, civic and other authorities. See McQuoid-Mason (Juta 1997) 268. See also Woker, 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' (2010) 31(2) *Obiter* 217 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. Woker (222) submits that in carrying out these objects the ASA believes that it is serving the interests of the public and establishing and maintaining the highest standards of advertising.
- 89 McQuoid-Mason (Juta 1997) 268.
- 90 Schimmel, *Advertising Law: A Guide to the Code of Advertising Practice* (Juta 2014) 1.
- 91 Schimmel (Juta 2014) 2.
- 92 Act 36 of 2005. The Electronic Communications Act repealed the Independent Broadcasting Authority Act 153 of 1993 which contained similar provisions on the control of advertisements in terms of s 57 thereof. See McQuoid-Mason (Juta 1997) 268.
- 93 Section 55(1) of the Electronic Communications Act.
- 94 Act 13 of 2000. See s 55(3) of the ECA.
- 95 McQuoid-Mason (Juta 1997) 269.
- 96 McQuoid-Mason (Juta 1997) 271.
- 97 Lake, 'Marketing practices under the CPA' (August 2011) DR 51 at 51.
- 98 Hutchison et al (OUP 2012) 49–50.
- 99 Section 22 of the CPA. Hutchison et al (OUP 2012) 49.
- 100 Section 31 of the CPA. Hutchison et al (OUP 2012) 49–50.
- 101 Section 16 of the CPA. Hutchison et al (OUP 2012) 50.
- 102 Section 32 of the CPA. Hutchison et al (OUP 2012) 49.
- 103 Sections 2 and 4 of the CPA.
- 104 Section 1 of the CPA.
- 105 Section 1 of the CPA.
- 106 Section 1 of the CPA.
- 107 Section 1 of the CPA.
- 108 Section 1 of the CPA, definition of 'promote'.
- 109 Section 1 of the CPA. The terms 'supplier', 'trader' and 'business' are used interchangeably throughout this contribution.
- 110 For example, unsolicited goods as a marketing technique, governed by s 21 of the CPA.
- 111 'The right to fair and responsible marketing'. See Lake (August 2011) DR 51; Altini, 'Please don't be alarmed if a scorpion wanders across the menu' (2012) 12(7) WP 33 at 35.
- 112 Naudé, & Eiselen, *Commentary on the Consumer Protection Act* (Juta 2014) 29–1.
- 113 See s 29(b)(i)–(v) of the CPA.
- 114 Jacobs, Stoop & Van Niekerk, 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis' (2010) 13(3) PER 302 at 335. See s 41(1)(a)–(c) of the CPA.
- 115 Kelly-Louw & Stoop, *Consumer Credit Regulation in South Africa* (Juta 2012) 564.
- 116 Section 41(5) of the CPA.
- 117 Barnard & Kok, 'A consumer's fundamental right to equality in terms of the Consumer Protection Act and the role of the Promotion of Equality and Prevention of Unfair Discrimination Act' (2015) 78:1 THRHR 1 at 1.
- 118 Act 4 of 2000.
- 119 Barnard & Kok (2015) 78:1 THRHR 1 at 8.
- 120 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 318.
- 121 Section 30(1) of the CPA. See Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 336.
- 122 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 336. See also the discussion in Naudé, & Eiselen (Juta 2014) 30–1 and 30–2.
- 123 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 336. Section 30(2) of the CPA.
- 124 Section 30(3) of the CPA. See Altini (2012) 12(7) WP 33 at 35.

125 Melville & Woker (2015) De Jure (to be published).
126 Melville & Woker (2015) De Jure (to be published).
127 Melville & Woker (2015) De Jure (to be published).
128 Melville & Woker (2015) De Jure (to be published).
129 Melville & Woker (2015) De Jure (to be published).
130 Melville & Woker (2015) De Jure (to be published).
131 The section does not apply where the consumer protection provisions in terms of Chapter VII of the ECT Act apply. It does not apply to franchise agreements either. See s 33(1) of the CPA; Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 339–340; and Lake (August 2011) DR 51 at 51.
132 Section 33(2) of the CPA.
133 Section 33(3)(a)–(h) of the CPA.
134 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 339. See also Naudé, & Eiselen (Juta 2014) 33–1 to 33–5.
135 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 339; for example, where a person is approached by post or electronic communication.
136 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 339.
137 An information society has been described as a society in which information becomes a core economic, cultural and social resource; see Papadopoulos & Snail, *Cyberlaw@SA III: The Law of the Internet in South Africa* (Van Schaik 2012) 1.
138 Section 23(5)(c) of the CPA.
139 See s 34 of the CPA for the definition of a 'promotional offer'. Trade coupons are not defined in the Act.
140 Van Eeden, *Consumer Protection Law in South Africa* (LexisNexis 2013) 174.
141 Section 32(3) of the CPA.
142 Section 32(4)(a)–(d) of the CPA.
143 Section 34(5)(a)–(d) of the CPA.
144 Naudé, & Eiselen (Juta 2014) 34–2.
145 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 341.
146 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 341.
147 Section 35(2) of the CPA. Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 341.
148 Section 35(3)(a)–(d) of the CPA and s 35(4)(a)–(f) of the CPA respectively.
149 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 342.
150 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 342. In addition, the restriction must not exceed a period of 90 days per annum.
151 Act 57 of 1997. Section 54 also provided for, inter alia, the regulations under the Lotteries Act in respect of promotional competitions.
152 Section 121(1) of the CPA.
153 Act 32 of 2013; commencement date: 14 April 2015.
154 Section 1 of the Lotteries Act.
155 Naudé, & Eiselen (Juta 2014) 36–8.
156 Naudé, & Eiselen (Juta 2014) 121–5.
157 See s 36(1) of the CPA.
158 Van Eeden (LexisNexis 2013) 169.
159 See s 36(1) of the CPA, definitions of 'promoter', 'participant' and 'prize'.
160 Read together with s 36(3)(a) of the CPA.
161 Regulation 11(3), (5) and (6) of the CPA.
162 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 342.
163 Section 36(5)(a)–(f) of the CPA. See Monty, 'The money or the box—getting competition rules straight' (2012) 12(4) WP 57 at 57.
164 Section 36(2), (3)(a)–(b) of the CPA. Monty (2012) 12(4) WP 57 at 57.
165 Monty (2012) 12(4) WP 57 at 57.
166 Monty (2012) 12(4) WP 57 at 57.
167 Section 37(1) of the CPA.
168 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 344.
169 Section 37(1) of the CPA.
170 Regulation 12 of the CPA.
171 Van Eeden (LexisNexis 2013) 170 fn 532.
172 R200 000 or imprisonment for a period not exceeding five years.
173 Although Jacobs, Stoop and Van Niekerk (2010) 13(3) PER 302 at 344 argue the word 'person' is used to provide wider application and thus protection.
174 Section 38(1) of the CPA.
175 Section 38(2) of the CPA.
176 Section 38(3) of the CPA.
177 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 345.

178 Naudé, & Eiselen (Juta 2014) Introduction–2.

179 'Responsible party' is defined in s 1 of the PPI Act as a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information.

180 The conditions in terms of the PPI Act relate to accountability, processing limitations, purpose specification, information quality, openness, security safeguards and data subject participations (these conditions are contained in ss 8 to 25 of the PPI Act). These conditions are not applicable to the processing of personal information in the event that such processing is excluded from the application of the PPI Act in terms of ss 6 and 7 of the Act, or exempted in terms of s 37 or 38 of the PPI Act. Furthermore, Chapter 4 of the PPI Act provides for exemptions from the conditions for processing of personal information which should be taken into consideration when determining the application of the PPI Act.

181 Sections 27 to 33 of the PPI Act.

182 Sections 34 and 35 of the PPI Act.

183 See Naudé, & Eiselen (Juta 2014) 11–10.

184 Section 39(1)(a) of the CPA.

185 Bhana & Visser, 'The capacity of a minor to enter into a consumer contract: A reconciliation of section 39 of the Consumer Protection Act and the common law' (2014) 77 THRHR 177 at 191.

186 Bhana & Visser (2014) 77 THRHR 177 at 191, for example the use of 'an adult responsible for that minor', s 39(1)(b) of the CPA.

187 Bhana & Visser (2014) 77 THRHR 177 at 193.

188 Section 32(1) of the CPA.

189 Section 32(2) of the CPA.

190 Naudé, & Eiselen (Juta 2014) 32–3.

191 Otto, 'Die afkoelreg in die Nasionale Kredietwet en die Wet op Verbruikersbeskerming' (2012) 9(1) LitNet Akademies 23 at 40; Barnard, *The Influence of the Consumer Protection Act 68 of 2008 on the Common Law of Sale* (LLD thesis, University of Pretoria, 2013), hereinafter referred to as Barnard LLD, chap 7; Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 338–339; Lake (August 2011) DR 51 at 51; Melville, *The Consumer Protection Act Made Easy* (Crink 2010) 64–65.

192 Melville (Crink 2010) 65–67; Stadler, 'Unsolicited goods and services' (June 2010) DR 49–50; Van Heerden, 'Unsolicited goods or services in terms of the Consumer Protection Act 68 of 2008' (2011) 4(4) Int J Private Law 533 at 534–545; Gouws, 'Unwanted goods: The consumer's right to choose' (April 2009) DR 16 at 16–19; Stoop & Taylor, 'Aspects of unsolicited goods or services in terms of the Consumer Protection Act 68 Of 2008: An analysis' (2014) 77 THRHR 296 at 296–305; Barnard, 'Ongevraagde goedere ingevolge die Wet op Verbruikersbeskerming in regsvergelijkende perspektief' (2015) 2 TSAR 268 at 268–285.

193 Otto (2012) 9(1) LitNet Akademies 23 at 25–42; Barnard LLD 185–187.

194 Sections 32(1) and 16 of the CPA.

195 Section 20(2)(a) of the CPA.

196 Section 20(4)(a) of the CPA.

197 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 338.

198 Otto (2012) 9(1) LitNet Akademies 23 at 40.

199 Section 75(1), (3) and (4) of the NCA.

200 See also Timothy & Burger, 'That cooling-off period' (August 2010) 10(7) WP 34 at 34; Papadopoulos and Snail (Van Schaik) 65.

201 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 320.

202 Kirby, 'The privacy of the consumer' (2009) 9 WP 28 at 28.

203 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 320–321. Section 11(a)–(b) of the CPA.

204 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 320.

205 Lake (August 2011) DR 51 at 51.

206 Lake (August 2011) DR 51 at 51.

207 Section 11(3) of the CPA.

208 Section 1 (definitions) and s 2 (application) of the PPI Act. For a complete discussion see Hamann & Papadopoulos, 'Direct marketing and spam via electronic communications: An analysis of the regulatory framework in South Africa' (2014) 47 De Jure 42 at 42–62.

209 Section 32(2) of the CPA. See Melville (Crink 2010) 65–67 and Stadler (June 2010) DR 49–50.

210 Van Heerden (2011) 4(4) Int J Private Law 533 at 534.

211 Barnard (2015) 2 TSAR 268 at 271–272.

212 Barnard (2015) 2 TSAR 268 at 271–272.

213 Section 21(5) and (6) of the CPA.

214 See s 25 of the Constitution. Gouws submits inter alia that 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, s 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 s 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 (April 2009) DR 16 at 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.

215 Gouws (April 2009) DR 16 at 16–19.

216 Section 3(1) of the CPA: to 'promote and advance the social and economic welfare of consumers in South Africa by [. . .] (c) promoting fair business practices'.

217 Own emphasis.

218 Van Heerden (2011) 4(4) Int J Private Law 533 at 540.

219 Section 21(2)(a) of the CPA: 'Despite subsection (1), if— (a) 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[.]'

220 Melville (Cring 2010) 67.

221 Van Heerden (2011) 4(4) Int J Private Law 533 at 539.

222 See Woker (2010) 31(2) Obiter 217 at 220, where the author refers to *S v Pepsi-Cola (Pty) Ltd & others* 1985 (3) SA 141 (C) in indicating that owing to the overload in criminal matters, 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.

223 Barnard (2015) 2 TSAR 268 at 284.

224 See the comparative discussion on Scotland, Belgium and Germany by Barnard (2015) 2 TSAR 268 at 277–283.

225 Sections 69–71 of the PPI Act.

226 Hamann & Papadopoulos (2014) 47 De Jure 42 at 44.

227 Hamann & Papadopoulos (2014) 47 De Jure 42 at 61.

228 Hamann & Papadopoulos (2014) 47 De Jure 42 at 61.

229 Section 22(1) of the CPA.

230 Section 22(2) of the CPA having regard to sub-s (2)(a)–(d).

231 Gouws, 'A consumer's right to disclosure and information: Comments on the plain language provisions of the Consumer Protection Act' (2010) 22(1) SA Merc LJ 79; Newman, 'The application of the plain and understandable language requirement in terms of the Consumer Protection Act – can we learn from past precedent?' (2012) 33(3) Obiter 637; Stoop & Chürr, 'Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008' (2013) 16(5) PER 514; s 22 of the CPA.

232 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 331. Section 23(3) of the CPA. A retailer refers to 'a person who, in the ordinary course of business, supplies those goods to a consumer'. See Du Plessis, 'Price discretions and consumers' right to disclosure and information in terms of the Consumer Protection Act 68 of 2008' (2013) 76 THRHR 225 at 232, where the author submits that upon closer inspection 'the definition of a "retailer" and a "supplier" could refer to the same person'.

233 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 331. Section 23(5) of the CPA.

234 Jacobs, Stoop & Van Niekerk (2010) 13(3) PER 302 at 331. Section 23(4) of the CPA.

235 Du Plessis, 'Display of goods for sale, advertisements and the Consumer Protection Act' (2015) 132(1) SALJ 150 at 162.

236 Du Plessis (2015) 132(1) SALJ 150 at 169.

237 Melville & Woker, 'In search of perfecta: The conundrum of incorrectly priced goods under the Consumer Protection Act 68 of 2008' (2014) 35(3) Obiter 644 at 644–657.

238 Melville & Woker (2014) 35(3) Obiter 644 at 657.

239 Melville & Woker (2014) 35(3) Obiter 644 at 657.

240 Melville & Woker (2014) 35(3) Obiter 644 at 657.

241 Van Heerden & Barnard, 'Redress for consumers in terms of the Consumer Protection Act 68 of 2008: A comparative discussion' (2011) 6(3) JICLT 131 at 131–144.

242 In this regard the matters such as that between *Chicken Licken* and *Kentucky Fried Chicken*, as discussed by Marcus, 'Harmless parody or fowl play?' (April 2009) WP 30; the case of *Verimark (Pty) Ltd v BMW AG* [2007] as discussed by Schimmel, 'Have the rules changed' (2008) WP 11; the *Natura Laboratoire*, *SAMAST*, *Makgato Attorneys* and *Mediclinic Ad Campaign* as discussed by Schimmel, (2012) WP 26 and the 'Price Guarantee' Game matter as discussed by Mohan, 'Game, set and match to the consumer' (2010) WP 28—are only a few examples of the good enforcement of the Code and the effective regulation of the advertising industry.

243 Schimmel, 'The ASA Code updated' (2013) 13 WP 58 at 59.

244 Schimmel, 'The ASA Code updated' (2013) 13 WP 58 at 59.

245 See Timothy & Burger (August 2010) 10(7) WP 34.

246 Melville & Palmer, 'The applicability of the Consumer Protection Act 2008 to credit agreements' (2010) 22(2) SA Merc LJ 272.

247 DMASA home page, available at <http://www.dmasa.org/>, accessed on 26 August 2015.

248 DMASA home page.

249 DMASA home page.

250 DMASA home page.

251 Clause 9.17: Unordered products and services.
252 Clause 10.3 and clause 10.4 respectively.

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