

The Consumer Protection Act, No. 68 of 2008 (“the CPA”): Marketing Practices

Suppliers use various marketing practices as methods or channels to supply goods or services to the consumer. The CPA regulates a vast array of these practices including direct and “indirect” marketing practices. This discussion is focussed on the practices other than direct marketing practices.

General provisions relating to marketing

What are the general rules for marketing goods or services in terms of the CPA?

The CPA sets out general marketing standards for producers, importers, distributors, retailers and service providers. Marketing may not be conducted in a manner that is likely to imply a false or misleading representation or in a manner that is misleading, fraudulent or deceptive. This standard also applies to, amongst others, the properties, nature and price of the goods or services, the manner and conditions of supply and the sponsoring of events.

What do false, misleading or deceptive representations mean in marketing terms?

The CPA prohibits the supplier and persons on its behalf, to do the following:

- make a false, misleading or deceptive representation about a material fact to a consumer;
- use exaggeration, innuendo or ambiguity about a material fact, or fail to disclose a material fact that amounts to deception; or
- fail to correct an apparent misapprehension by the consumer that is a false, misleading or deceptive representation.

False, misleading or deceptive representations to the consumer include representing that:

- a person who acts on behalf of a supplier is misrepresenting that he has a sponsorship or approval from the supplier or is affiliated with the supplier;
- goods or services have ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship or approval that they do not have;
- goods or services are of a particular standard, quality, grade, style or model;
- goods are new or unused, if they are not ;
- goods or services have been used for a period to an extent or in a manner that is materially different from the facts;
- goods or services have been supplied in accordance with a previous representation; or
- goods or services are available or can be delivered or performed within a specified time.

The CPA also contains specific prohibitions in respect of false, misleading and deceptive representations relating to land or immovable property.

Provisions and prohibitions relating to specific marketing practices

Discriminatory marketing

A supplier may not treat any person differently from another, on the basis of unfair discrimination contemplated in the Constitution, or the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000. This prohibition applies to all conduct *vis-à-vis* the consumer including the marketing of products and services. The provisions are particularly relevant in instances where target marketing is applied and aimed at, for example, specific gender, race or age groups.

In terms of the CPA a supplier may not on the basis of unfair discrimination:

- exclude any person or category of persons from accessing goods or services offered;
- grant any person or category of persons exclusive access to any goods or services offered;
- assign priority of supply of goods or services offered any person or category of persons;
- supply a different quality of goods or services to any person or category of persons;
- charge different prices for any goods or services to any persons or category of persons;
- target particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or
- exclude a particular community, district, population or market segment from the supply of any goods or services offered.

Bait marketing

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

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

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

Negative option marketing

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

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

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

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

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

Trade Coupons and similar promotions

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

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

A document setting out a promotional offer must clearly state:

- the nature of the prize or reward;
- the goods or services to which the offer relates;
- the steps required by a consumer to accept or to receive the benefit ; and
- the particulars of any person from whom, any place where, and any date and time on or at which, the consumer may receive the prize or reward.

A person who makes or sponsors a promotional offer must:

- ensure that the supply of the particular prize or capacity thereof is sufficient to accommodate all reasonably anticipated demands resulting from the offer;
- not limit or restrict capacity to supply any such goods or services in response to the acceptance of the offer, on any basis other than that it applies to such a supply in exchange for any other form of consideration;

- not require the consumer to accept an inferior quality of goods or services than those generally available to any other consumer on the same date who tenders a different form of consideration; and
- not impose any monetary charge for handling of a transaction in respect of which the consumer tenders a trade coupon.

The supplier will have a defence for failure to comply, if he offers to supply another person to supply a consumer with comparable goods or services to satisfy the consumer's acceptance of the promotional offer, and the consumer accepted the supplier's offer and the supplier has supplied or procured another person to supply the goods or services so offered and accepted; or unreasonably refused the supplier's offer.

Promotional competitions

What is a promotional competition?

The CPA widely defines a promotional competition and the following main elements can amongst others be derived from this definition:

- the competition is conducted in the ordinary course of business;
- the purpose is to promote a supplier or the sale of goods or services;
- prizes are distributed by lot or chance;
- it is irrelevant for the purpose of the definition whether a participant is required to demonstrate any skill or ability before being awarded a prize;
- any prize offered exceeds the threshold prescribed by the regulations.

What are the do's and the don'ts of running a promotional competition?

The "do's":

- prepare competition rules before the beginning of the competition;
- make the competition rules available to the Commission and to any participant, on request and without any cost;
- retain a copy of the competition rules for the prescribed period after the end of the competition;
- state in an offer the benefit or competition to which the offer relates;
- state the steps required by a person to accept the offer or to participate in the competition;
- state the basis on which the results of the competition will be determined;
- state the closing date for the competition and the medium through which the results of the competition will be made known;
- state how, when and where a person may obtain a copy of the competition rules and the prize.

Don't inform a person that he or she has won a competition, if:

- no competition has in fact been conducted;
 - the person has not in fact won the competition;
 - the prize for that competition is subject to a previously undisclosed condition;
- or

- the person is required to offer further consideration for the prize, after the results of the competition have been announced; or

Don't inform a person that he or she has a right to a prize:

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

Don't:

- require the participant to pay any other consideration than the reasonable costs of entering the promotion
- award a prize to a winner if it is unlawful.

Alternative work schemes

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

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

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

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