

Consumer Protection Act 68 of 2008 (CPA)

Topic: Consumer Rights and Quality of Goods and Services

IN A CALABASH

Introduction

The CPA seeks to protect consumers against unscrupulous supplier or vendor behaviour in South Africa. This law is the first in South Africa to embrace the legal rights of a consumer which are recognised worldwide.

Objectives of the Act

The CPA regulates consumer and supplier behaviour in the South African market. The Act provides a consumer with the following rights–

- fair, honest and transparent treatment by a supplier;
- fair business practices;
- protection from unconscionable, unfair, unreasonable or unjust or otherwise improper trade practices;
- protection from deceptive, misleading, unfair or fraudulent conduct;
- the right to a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
- the right to accessible and fair dispute resolution processes.

Application of the Act and its implication to Tourism

The CPA will apply to a consumer and a supplier operating within the South African market place. In the context of the tourism environment:

A **'supplier'** will be any person, no matter what size, who provides, sells, advertises or markets goods or services to a consumer. Example: Hotels, B&Bs, cafés or restaurants, vendors or curio shops, taxis, tour guides or spas.

A **'consumer'** will be a local or foreign tourist, patron or businessman or legal entity which has an annual turnover or asset value of less than R2 million, who purchases food, services, drinks or curios or who books a hotel room from the supplier.

'Goods' will include a beaded necklace, woodcarving, breakfast, gin and tonic, car for hire, oils or equipment used for a massage or spa treatment.

'Services' will include a tour guide service, booking service, bungee jump, lift to the airport or an air flight.

All service providers or those who sell or distribute goods to any tourist must ensure that those goods and services are of good quality, fit for purpose and free from any defect.

In addition, all consumer rights set out under the Act should be given effect to within the context of the tourism sector.

Summary of the provisions of the Act

The CPA is a vast piece of law housing over 122 sections and 46 regulations made in terms of the Act, all of which cover a vast range of consumer rights and privileges. These rights and privileges range from the right not to receive unwanted emails and spam, the right to confidentiality and the right to receive instructions, contracts and other communications in plain language which can be understood and which contains all the facts.

Some of the more important rights are singled out below.

Equality and prevention of unfair discrimination

All consumers must be treated equally and fairly and not subjected to unfair discrimination when they are entering into a transaction or agreement.

Right to privacy and to opt-out

Consumers have the right to privacy which includes the right to accept, refuse or block any approach which has been made by a supplier and which is made for the purpose of direct marketing or with the intention to sell any service or product to the consumer.

Where a consumer is approached by a supplier in person, by phone or by way of an SMS or an email, the consumer has the right to formally demand that the supplier stops or discontinue any further approach to that consumer.

This is known as an 'opt-out'. Once the supplier receives an opt-out request, the supplier must remove the consumer from its marketing or distribution database and refrain from contacting the consumer in any similar way in the future.

To further protect consumers, the CPA also prohibits any supplier from approaching a consumer for the purpose of any direct marketing on public holidays and Sundays, between the hours of 8 am and 8 pm during any working day and between the hours of 9 am and 1 pm on a Saturday.

Bundling

Suppliers are prohibited from requiring consumers to purchase bundled goods or services, unless it can be proved that the bundling results in economic benefit for consumers.

Fixed-term agreements

Consumers have the right to decide whether or not to continue a commercial arrangement during the course of an agreement and once it has expired. In addition, such commercial arrangement may not be longer than two years in duration. These commercial arrangements are known as 'fixed-term' agreements or arrangements.

A consumer will also have the right, at any time and for any reason, to cancel a fixed-term agreement, provided that he or she gives a supplier 20 business days' notice of the cancellation and provided that he or she pays a reasonable cancellation fee.

When a fixed-term agreement is due to expire, a supplier must give the consumer notice of the imminent expiry and give him or her the right or opportunity to either confirm that the agreement will expire or to agree to a further renewal period.



In addition, 40 days before the two-year contract is to come to an end, the service provider must tell the consumer that the contract is coming to an end and give the consumer the option to renew the agreement or to confirm that the agreement or contract will come to an end.

Advance bookings

In the case of any advance booking, a consumer may terminate the booking before the date, but the supplier has the right to charge the consumer a deposit and the right to charge the consumer a reasonable 'cancellation fee' as a result of such cancellation. The right to choose also includes the right of the consumer to cancel advance reservations or bookings, but suppliers may charge advance deposits and impose reasonable cancellation penalties.

Repairs and quotations

Where suppliers provide a repair, maintenance or replacement service, this service may not commence until the consumer has been given a quotation and the consumer has expressly agreed that the quotation is in order.



If the cost increases over and above the value of the quote agreed on, the service provider must send an additional quote to the consumer before the additional work can commence.

Cooling-off

Consumers who are approached by direct marketers often feel psychologically pressured to agree to a transaction. Because that sort of agreement is often not an exercise of free choice, the CPA gives the consumer the right to cancel such an agreement without penalty, as long as the cancellation is given in writing to the supplier within five days of the conclusion of the transaction. This is known as a five-day cooling-off period. Any monies paid by the consumer will have to be refunded to the consumer.

Examination

Consumers have the right to examine goods. This particularly applies to circumstances where the consumer is buying on the basis of a description or sample. Such goods, when delivered, must correspond with the description or sample or the Consumer has a limited right to return them and receive a refund.

Right to disclosure and information

Transparency

Before a consumer enters into a transaction with a supplier, the supplier must provide the consumer with all the relevant details pertaining to the goods, services and/or the transaction. Such a disclosure must be made in a manner which the consumer can understand.



All terms and conditions, including disclaimers, must be written in plain language which the consumer can understand.

Price

The CPA makes it compulsory to display prices for any goods that are displayed for sale. If two prices are displayed for the same goods, the lowest price has to be charged.

Sales record

Asupplier has to provide each consumer with a sales record or VAT invoice in respect of every consumer transaction.

Agents

If one trades as an intermediary, middle man or agent and one is not regulated by any other law, one, as the intermediary, has a duty to disclose certain details, including commissions earned and the entities that one represents. The regulations at the end of the CPA set out which information or records intermediaries or categories of intermediaries must keep.

Delivery persons

Persons who attend at a consumer's place of business or residence to deliver or install any goods or perform any services must wear satisfactory identification or name badges.

Plain language

Any printed information, document or notice that the CPA requires a supplier to produce, provide or deliver to a consumer must be written in plain language which a consumer can understand.

Catalogues and coupons

Where suppliers sell or advertise products or services by way of a catalogue or through the use of trade coupons, certain prescribed disclaimers and conditions have to be met and housed on these documents or instruments.

Loyalty programmes

The CPA regulates loyalty programmes by–

- requiring sponsors of loyalty programmes to meet their obligations when loyalty credits are tendered;
- prohibiting the offering of inferior quality products or requiring the bundling of 'reward' goods or services with 'revenue' products; and
- requiring a supplier to accept the tender of sufficient loyalty credits as adequate consideration for goods and services at any time, subject to limited black-out periods.

If the sponsor of a loyalty programme keeps a register of members, the sponsor may increase the price of 'rewards' only after notifying the members.

Promotional competitions

The CPA replaces the current Lottery Act scheme for regulating promotional competitions. The CPA prohibits offering prizes with the intention of not providing them. It also prohibits informing consumers that they have won a prize when no competition has been conducted or they have never entered a competition, or making the prize subject to a previously undisclosed conditional payment of any consideration, whether for participating in the competition or for the prize itself.



If you use various marketing tactics, such as offering vouchers and coupons to patrons, then these must be honoured. Examples include:

'buy one double room and kids stay for free';

'stay for two days and we will give you 10% off your next stay'; 'buy a discount voucher and this gives you the following free products . . .'

A document which sets out the terms which apply to the coupon or loyalty voucher must be drawn up and presented to the consumer who wants to take up these offers.

Overselling and overbooking

There is a prohibition against overselling and overbooking, which requires a supplier not to accept consideration for any goods or services unless it reasonably expects to have capacity to supply them or intends to provide goods or services that are materially different. Consumers have to be refunded in full with interest, and consumers can also claim contractual and consequential damages, including economic losses, as a result of the supplier failing to supply the goods or services already ordered and often paid for by a consumer.

Right to fair, just and reasonable contractual terms and conditions

Consumers have the right to fair and honest dealings, and this includes the right to be given contracts and terms which are fair and transparent. Unreasonable transactions are prohibited, as are unjust or unfair terms or conditions. **Any standard terms of a contract may not be unfair or one-sided.**

Limitation of liability

Where a supplier seeks to limit its or another's liability, this must be specifically and conspicuously brought to the attention of the consumer before he or she enters into a transaction or enters any premises.



Any disclaimer must be clear and displayed in a hotel lobby where all patrons can see it. The wording of the disclaimer must be fair and not be one-sided or contract out of gross negligence.

Quality

Consumers have a right to receive goods that are reasonably suitable for the purpose for which they are intended, are of good quality, are in good working order, are free of defects and are useable and durable for a reasonable period of time. In addition, if the consumer has informed the supplier that he or she wants to use the goods for a particular purpose (special order goods), the consumer has the right to expect that those goods will be suitable for that particular purpose.

Hazards

The CPA imposes an obligation on the supplier to issue alerts of any activity or facility that is subject to any hazard that could result in serious injury or death to consumers.

In this regard the following are required—

- notice or instructions of safe handling of goods; and
- notice on how to inhibit any risk associated with the use of goods, remedy or mitigate the effects and provide for the safe disposal of the goods.

Waste

Suppliers are obligated under the CPA to accept the return of waste goods that may not be accepted in the common waste collection system.

Strict liability

Very importantly, the CPA imposes a type of strict liability or hybrid thereof on suppliers, including all parties in the supply chain.

The CPA provides that any producer, distributor or supplier of goods will be strictly liable for any harm wholly or partly caused as a consequence of product defect or failure, with certain exceptions and defenses. The liability provided for in the CPA is in addition to any other liability of that person in terms of any law and extends to loss arising from death, illness or injury or loss or damage to any property.

Vouchers

The CPA provides that prepaid certificates, credits and vouchers for goods, services or future services remain negotiable, unless redeemed, for up to three years, and that the supplier is obligated to honour them when presented.

Remedies

The CPA outlines the available avenues of redress, including the courts, alternative dispute resolution and complaints to the Commission.

If a complaint arises in an industry in which a statutory ombudsman scheme is in place, the consumer must pursue a resolution through that scheme before making a complaint to the Commission.

An ombudsman, consumer court or provincial authority that has resolved a complaint may record the agreement as an order, which must then be confirmed as a consent order by the courts.

If a complaint is made to the Commission, the Commission will investigate and may make a referral to the Tribunal, which may resolve the matter by making certain orders as per the clauses outlined in the CPA.

In addition to their jurisdiction to hear a matter initiated directly by a consumer, the courts have jurisdiction to hear appeals against Tribunal decisions. The courts may order suppliers to alter or discontinue certain practices, award damages against suppliers for collective injury to all or a class of consumers to be paid to any person on any terms that the courts might decide.

Business names

All trading entities must reflect on any trading document its trading name, trading registration number and address from where the business is operated.



WHAT HAPPENS IF YOU DO NOT COMPLY?

Enforcement mechanisms

The CPA gives the Commission power to–

- issue a compliance notice to a person or association of persons whom the Commission, on reasonable grounds, believes has engaged in prohibited conduct. It is an offence to fail to comply with a compliance order;

- issue notice of non-referral to the complainant in respect of a complaint that appears to be frivolous or vexatious or does not allege reliable facts that may constitute grounds for a remedy under the Act;
- refer matters relating to alleged prohibited conduct in terms of the CPA to the Tribunal; and
- refer matters relating to alleged offences in terms of the CPA to the National Prosecuting Authority.

Courts

The courts are responsible for the adjudication of all matters relating to alleged offences in terms of the Act, interpretation of law and issuing of declaratory orders and consent orders.

Criminal sanctions and administrative penalties

The CPA makes provision for criminal and administrative sanctions. Penalties imposed by the Tribunal could be up to 10% of a defaulter's turnover or up to R1 million, whichever is the greater.



RECOMMENDED ACTIONS OR CONTROLS WHICH SHOULD BE IMPLEMENTED BY THE TARGET AUDIENCE TO ENSURE COMPLIANCE WITH THE ACT

The entity must ensure that the following is done or available:

- records of all training programmes and educational/awareness campaigns, proving that all staff members are trained on the CPA provisions;
- records confirming that audits have been conducted across the supplier's business to make sure that all activities are fair, honest and transparent;
- activities are not to be unconscionable, unfair, unreasonable or unjust;
- activities are not to be deceptive, misleading, unfair or fraudulent;
- practices and activities must be consistent, accessible and efficient;
- there must be no discriminatory practices in place;
- an opt-out system must be in place for direct marketing;
- any direct marketing campaign should feature all applicable terms and conditions;
- all forms of bundling should result in economic benefit for the consumers;
- fixed-term agreements are not to be longer than two years, have a 20-day notice period and cancellation penalty and consumers must be notified of imminent termination or an expiration period;

- cancellation and deposit terms must be in place for any advance bookings;
- before any repairs are carried out there should be pre-approval of cost, as per quotations;
- prices must be attached to goods and services;
- trade descriptions applied to any goods must not be misleading;
- sales record or VAT invoice in respect of every transaction must be kept;
- an agency disclosure agreement must be in place;
- delivery persons must have badges or identification;
- all printed information, documents or notices provided by a supplier to a consumer must be written in plain language which a consumer can understand and they must also be free of unlawful or unfair clauses;
- all contractual terms must be in plain language, and be fair and transparent;
- any limitation of liability clauses must be correctly documented and disclosed in plain language;
- product quality controls must be in place;
- a returns policy must be in place;
- hazards must be brought to the attention of the consumer and, where applicable, be in writing;
- safety and product recall programmes must be in place;
- prepaid vouchers/items and funds on fiduciary basis must be held in a safe environment on behalf of consumers;
- vouchers must be valid for three years; and
- dispute resolution procedures must be in place.

FURTHER INFORMATION

Regulator

The Act falls under the Department of Trade and Industry.

Commission and Tribunal

The CPA will be regulated and monitored by the National Consumer Commission.

The Commission will be the primary administrative regulator under the CPA responsible for carrying out education, research and investigation of complaints and enforcement of the Act.

The National Consumer Tribunal, established under the National Credit Act 34 of 2005, will conduct hearings on complaints under the CPA and adjudicate certain disputes and alleged prohibited conduct under the Act. The CPA encourages unhappy consumers to seek resolution of their disputes through mediation, conciliation and arbitration in their provincial consumer courts by the ombudsman or other such agencies. The decisions of the Tribunal can be appealed against or reviewed by the High Court.

Websites

These agencies or Council of Trade and Industry Institutions (COTII) include the following:

Companies and Intellectual Property Commission (CIPC):

www.thedti.gov.za/agencies/cipc.jsp

South African Bureau of Standards (SABS):

www.thedti.gov.za/agencies/sabs.jsp

National Consumer Tribunal (NCT):

www.thedti.gov.za/agencies/nct.jsp

National Consumer Commission (NCC):

www.thedti.gov.za/agencies/ncc.jsp

National Metrology Institute of South Africa (NMISA):

www.thedti.gov.za/agencies/nmisa.jsp

National Regulator for Compulsory Specifications (NRCS):

www.thedti.gov.za/agencies/nrcs.jsp