

**THE IMPACT OF THE
CONSUMER PROTECTION ACT, 2008
ON THE
ACCOMMODATION SEGMENT
OF THE
TOURISM INDUSTRY**

Andrew Mark Tait

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Promoter: Professor PHG Vrancken

DECLARATION

I,

ANDREW MARK TAIT

do hereby declare that

THE IMPACT OF THE CONSUMER PROTECTION ACT, 2008 ON THE
ACCOMMODATION SEGMENT OF THE TOURISM INDUSTRY

is my own work and that it has not previously been submitted for assessment to
another University or for another qualification.

Signed on this the 7th day of December 2012 at Port Elizabeth.

ANDREW MARK TAIT

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Soli Deo Gloria!

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SUMMARY

The tourism industry is critically important for the economic well-being of South Africa. This realisation elicited a greater focus on the industry, including greater government regulation thereof. Although the concept of a tourist (consumer of tourism services) will not readily conjure up someone in need of protection, tourists are often exposed to exploitation through unfair business practices. Tourists, by definition, are outside their normal places of residence and often strangers to the environment within which they find themselves. For the important tourism industry to achieve its economic potential the protection of the tourist must be paramount.

The introduction of the Consumer Protection Act, 2008 in 2010 was heralded as a new dawn for consumers. The CPA provides consumers, including domestic and foreign tourists, with extensive consumer rights. As the CPA is the first comprehensive legislation aimed at consumer protection the impact of the Act is far from known. The CPA caused considerable uncertainty in the tourism industry establishing a clear need to determine its impact on the segments of the industry. This study focuses on the accommodation segment. The aim of the study therefore is to ascertain the impact of selected consumer rights on the accommodation segment of the tourism industry.

An overview of the tourism industry reveals that tourists are becoming more experienced, demanding and discerning. The regulation of the industry is explained. Particularly relevant are latest developments in South Africa, particularly the Draft Tourism Bill, 2011 and the National Tourism Sector Strategy.

The consumer protection regime applicable prior to the coming into effect of the CPA was characterised more by *ad hoc* legislative arrangements than any systematic programme of consumer protection. Consumers were reliant on the common law. However, as part of a larger scheme to improve the socio-economic well-being of the

people of South Africa, the government introduced a number of statutes including the CPA.

The CPA introduced wide-ranging rights for the protection of consumers and mechanisms to provide effective redress. Selected consumer rights are critically analysed to assess the impact of these rights on the accommodation segment. These include the consumer's right to equality in the market place; the right to privacy; the right to cancel advance bookings; the right to documentation in plain language; the right to quality service; and the right that a supplier having possession of the property of guest must account for such property. Another important aspect relates to the use of exemption provisions. The use of exemption provisions by suppliers is severely curtailed by the CPA. The use of prepaid vouchers, trade coupons and similar promotions, and customer loyalty programmes are also considered and the rights and obligations for consumers and suppliers respectively are elucidated.

Many of the rights considered will have a significant impact on accommodation establishments. Elsewhere the impact may not appear to be as significant as the CPA is merely codifying an existing right or remedy. However, codifying the right, providing examples of the conduct prohibited and providing enforcement mechanisms will increase the efficacy of these rights.

Keywords:

Accommodation establishment, consumer protection, consumer rights, tourism.

CHAPTER 1

INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction and problem statement

In 2010 the South African government reiterated the pivotal role to be played by tourism in the country's economy and development when Cabinet approved South Africa's New Growth Plan which identified tourism as one of the six core pillars of growth, the other pillars being infrastructure development, the agricultural value chain, the mining value chain, the green economy and the manufacturing sectors.¹ Already in June 1996 Cabinet approved the White Paper: The Development and Promotion of Tourism in South Africa² that declared that the vision of government as far as tourism was concerned 'is to develop the tourism sector as a national priority in a sustainable and acceptable manner, so that it will contribute significantly to the improvement of the quality of life of every South African. As a lead sector within the national economic strategy, a globally competitive tourism industry will be a major force in the reconstruction and development efforts of the government'.³

From the afore-going the relevance and importance of the role of the tourism industry within the South African economy could not be spelled out more emphatically. The tourism industry is playing an increasingly important role internationally as well as in South Africa. It has been reported by the United Nations World Tourism Organisation (UNWTO) that international tourist arrivals grew by 4.4% from the 939 million arrivals for 2010 to 980 million in 2011, despite the year being characterised by a world

¹ Department of Tourism *National Tourism Sector Strategy* (2011) (http://www.tourism.gov.za:8001/PublicDocuments/2011_07_19/FinalNTSSApproved%20Cabinet) (accessed 2012-02-08) 1. (Hereafter this document is referred to as 'NTSS').

² See Department of Environmental Affairs and Tourism *Tourism in Gear – Tourism Development Strategy 1998 – 2000* (1998) 1.

³ The Department of Environmental Affairs and Tourism *White Paper: The Development and Promotion of Tourism in South Africa* (1996) 23.

caught in an economic recession, major political upheaval in the Middle East and natural disasters in Japan.⁴ It has been reported that in 2011 tourism receipts exceeded US\$ 1 trillion for the first time, which is 3.8% higher in real terms than the receipts of US\$ 928 billion of 2010.⁵

At the 19th Session of the General Assembly of the UNWTO, held on 10 October 2011 at Gyeongju, Republic of Korea, in a presentation entitled 'Tourism towards 2030: A Global View' it was forecast that international tourist arrivals would increase by 43 million per year on average to reach 1.8 billion by 2030.

It is estimated that the global travel and tourism sector's contribution to the gross domestic product (GDP) is expected to increase from 9.3% in 2010 to 9.7% by 2020, and that total employment is expected to rise from 235 785 000 jobs (8.1%) of global employment to 303 019 000 (9.2%) by 2020.⁶

In comparison with the world economy and the economy of certain other countries, the tourism industry played a relatively small part in the economy of South Africa until the middle nineties. It has been estimated that the contribution of tourism to the South African GDP in 1994 was no more than 2%.⁷ In South Africa tourism has also seen significant growth since the transition to democracy in 1994. Figures released by the South African Department of Trade and Industry for 2004 indicated a significant growth in the contribution of the travel and tourism industry to the GDP to the extent that the total (direct and indirect) contribution of tourism to the South African economy was estimated to be around R94 billion or 7% of the GDP in that year.⁸ It is estimated that by 2016 the travel and tourism economy will contribute 9.3% to the South African GDP.⁹ From the aforementioned it is clear that the tourism industry will become an increasingly important part of the South African economy.

⁴ <http://media.unwto.org/en/press-release/2012-01-16/international-tourism-reach-one-billion-in-2012> (accessed 2012-06-11).

⁵ [http://media.unwto.org/en/press-release/2012-05-07/international-tourism-receipts-surpass-US\\$1trillion-in-2011](http://media.unwto.org/en/press-release/2012-05-07/international-tourism-receipts-surpass-US$1trillion-in-2011) (accessed 2012-06-11).

⁶ NTSS *op cit* (n 1) 4.

⁷ *White Paper: The Development and Promotion of Tourism in South Africa op cit* (n 3) 2.

⁸ Department of Trade and Industry *Tourism in South Africa: Trends and Opportunities* (2004) 2.

⁹ World Travel and Tourism Council *The 2006 Travel and Tourism Economic Research* (2006) 6.

Foreign visitor arrivals increased from about 3 million in 1993 to over 9.9 million in 2009.¹⁰ In terms of the NTSS a target of 15 million foreign arrivals by 2015 has been set for South Africa, with another target being the increase of the contribution of tourism to the GDP from an estimated R189.4 billion in 2009 to R499 billion in 2020.¹¹

The ability of the industry to generate employment and to attract foreign currency provides two of the main advantages of the tourism industry.¹² Employment figures in the South African tourism economy are expected to rise from an estimated 1 083 000 jobs in 2006 to 1 500 000 jobs (or one in every 11.6 jobs) in 2016.¹³ According to the NTSS the number of direct and indirect jobs supported by the travel and tourism sector amounted to 919 800 in 2009, and from this baseline the target as far as employment is concerned is for the industry to increase the number of jobs directly and indirectly supported by the industry to 1 097 000 in 2020.¹⁴ Furthermore, the tourism industry has the lowest ratio of investment to job creation, meaning that more jobs are created in this industry in comparison to any other per unit of capital invested.¹⁵ Tourism is also the fourth largest earner of foreign exchange in South Africa.¹⁶ Although some of the details may differ depending on a number of variables, the importance of tourism in a future South Africa is undeniable.

However, the hen that lays the golden egg is ultimately the tourist. Without tourists there would be no tourism. It has been reported, for instance, that each rugby tourist who visited South Africa during the tour of the British and Irish Lions to South Africa in 2009 spent R44 622 on average during the tour. These tourists alone contributed

¹⁰ NTSS *op cit* (n 1) 1.

¹¹ NTSS *op cit* (n 1) 13.

¹² Vrancken 'Introductory perspectives on travel agency in South African law' (2001) *THRHR* 64.

¹³ World Travel and Tourism Council *The 2006 Travel and Tourism Economic Research* 6.

¹⁴ NTSS *op cit* (n 1) 14. (The world-wide economic recession is probably largely to blame for the difference in forecasted and real figures). The Minister of Tourism has indicated that the tourism sector is committed to the creation of an additional 225 000 jobs by 2020: 177 000 in the tourism sector and 48 000 through direct government investment. See Parliamentary Monitoring Group 'Minister and Deputy Minister of Tourism in attendance at briefing by SA Tourism on its 2012' <http://www.pmg.org.za/print/31136> (accessed 2012-06-11).

¹⁵ World Travel and Tourism Council *The 2006 Travel and Tourism Economic Research* 6.

¹⁶ *White Paper: The Development and Promotion of Tourism in South Africa op cit* (n 3) 2.

a significant R1.5 billion to the South African GDP in that year.¹⁷ The interest of the tourist must therefore be considered very carefully – the tourism customer is, and must be, considered king and queen. Negative perceptions regarding the tourism industry in South Africa will most certainly have a detrimental impact on the industry. Factors such as crime and poor service delivery, coupled with insufficient legal protection for consumers of tourism services, will undermine the important role of the tourism industry in creating the envisaged better life for all South Africans.¹⁸

At this point it is relevant to provide a brief explanation of what constitutes the tourism industry. Tourism, being a service industry, forms part of the tertiary sector of the economy. The NTSS explains the concept ‘tourism industry’ as ‘[a]ll establishments whose principal productive activity is a tourism characteristic activity, i.e. the sum of all tourism characteristic activities, e.g. accommodation establishments, tour operators, travel agencies’.¹⁹ The tourism industry has three basic constitutive parts or branches: travel; accommodation, and attractions.²⁰ In turn, ‘hospitality’ consists of an accommodation segment and a catering segment.²¹

It is against the background of this discussion that the recently enacted Consumer Protection Act²² will have a significant impact on the tourism industry. This legislation has been described as legislation that is set to change the legal landscape and which

¹⁷ Thys ‘Rugbytoer lewer leeu-bydrae tot SA toerismesektor’ (21 November 2009) *Die Burger* 10.

¹⁸ In the ‘Travel and Tourism Competitiveness Index’ produced by the World Economic Forum in 2008 South African was rated in 60th place out of 130 countries evaluated as tourist destinations. Of the main factors contributing to this rather poor standing are crime; health services; standard of hygiene and quality of drinking water, and the prevalence of HIV/Aids. www.weforum.org/tourism (accessed 2008-03-13). See also Van der Westhuizen ‘SA 60ste op toerismelys’ (13 March 2008) *Die Burger* 6. In 2007 it was reported that crime had cost South Africa 125 000 jobs in the travel and tourism business alone at that stage. See Slabbert ‘Misdaad gryp 125 000 poste’ (13 February 2007) *Die Burger* 9. In a further news article it was reported that some business people in the tourism industry were urging tourists not to come to South Africa because of the crime situation and the apparent absence of commitment from the government to deal with the problem. (Slabbert ‘Vermy SA oor misdaad, maan keelvol toerismelui’ (1 December 2007) *Die Burger* 11.) For a more detailed discussion of the problematic of crime and tourism in South Africa, see Vrancken ‘The safety and security of tourists – a South African perspective’ (2000) *ITLJ* 153.

¹⁹ NTSS *op cit* (n 1) 12 (http://www.tourism.gov.za:8001/PublicDocuments/2011_06_01/NTSS%20Strategy (accessed 2012-02-08)).

²⁰ Vrancken ‘Introduction’ in Vrancken *Tourism and the Law in South Africa* (2002) 273.

²¹ Vrancken ‘Hospitality law’ in Vrancken *Tourism and the Law in South Africa op cit* (n 20) 343.

²² Act 68 of 2008 (hereafter the CPA).

will leave South African consumers amongst the best protected in the world.²³ The impact will affect the consumers of tourism services to the extent that the CPA provides protection in the form of certain substantive rights and enforcement procedures, and will also affect the suppliers of these services in requiring compliance with the legislation, failing which, such suppliers will become liable for penalties under the Act. The precise extent of the impact is still uncertain (and it will probably take some time for the full effect to become apparent), but that the impact will be significant in a number of ways seems quite certain. Two legal practitioners, for instance, warn as follows:²⁴

One thing about the dawning era of consumer protection is certain. There is no room for complacency. Every business transacting with consumers needs to take a long hard look at its products, services, business methodologies and terms of trade. The consequences of non-compliance can be serious and with other state regulators leading the way in demanding complete compliance with the law, while punishing non-observance heavily (just look at Competition Commissioner's recent track record) there is no reason to believe that the Consumer Commission won't follow suit.

Factors which may contribute to this uncertainty about the impact of the CPA on the tourism industry generally and specifically with regard to accommodation, include the following: the Act is new legislation; it is legislation which changes the common law in some fundamental respects; the legislation does not apply to all consumers and/or all transactions with consumers, and it is not a complete codification of the law relating to consumer protection.

This uncertainty calls for clarification, and there is therefore a clear need to investigate and analyse the impact of the CPA on the tourism industry and its constitutive branches and segments mainly because this industry is primarily and fundamentally a consumer-driven and consumer-focused industry.

The Act has caught the attention of the industry, and there is a measure of apprehension and uncertainty about its potential impact.²⁵ 'Guest houses brace for

²³ Du Preez 'The Consumer Protection Bill: A few preliminary comments' (2009) *TSAR* 61.

²⁴ Altini & Charter 'The Consumer Protection Act' <http://www.polity.org.za/print-version/the-consumer-protection-act-2011-03-15> (accesses 2011-03-17).

²⁵ Cape Town Tourism CEO Ms Mariette du Toit-Helmbold is reported as having said that the onus is on businesses (in the hospitality industry) to ensure that they are as compliant as they

CPA impact' is one example of a media report reflecting this uncertainty. The report states that²⁶

[t]he hospitality industry has no real specific guidelines on the Consumer Protection Act and how it will affect the sector ... Guest house owners have said that the way they currently do business will require additional responsibility and a better understanding of the Act ... there are several areas that are going to be challenging for accommodation establishments with regard to the CPA.

It has been suggested that businesses will have to undertake a complete review of their standard agreements and day-to-day operational processes to make sure that they comply with the provisions of the Act.²⁷ It must be remembered that every business enterprise operates in an external environment composed of various factors, including economic, social, technological, political and legal factors.²⁸ The CPA is a legal factor of considerable importance for the tourism industry and all its constitutive parts.

Underlying the travel and tourism industry is the need and desire for people to travel. Historically people travel for a number of reasons, for example, trade and religious purposes, medical treatment, educational purposes and sporting events. In modern times there are even more reasons why people travel, such as recreation and relaxation, visiting friends and family, and health reasons.²⁹ The different subsystems within which the individual operates, namely the sociological, economic, political and technological environments, have an impact on the individual and influence his or her needs and desires, for example, to travel.³⁰ The changing attitudes of people to leisure times and holidays away from home are a consequence of increased real disposable income, more leisure time, paid holidays, improved opportunities for mobility, better education and wider dissemination of information.³¹

can possibly be. The Editor 'CPA in hospitality under the spotlight' <http://www.tourismupdate.co.za/print/NewsStory.aspx?newsId=59405> (accessed 2011-06-8).

²⁶ Penaluna 'Guest houses brace for CPA impact' <http://www.tourismupdate.co.za/print/NewsStory.aspx?newsId=59032> (accessed 2011-05-06).

²⁷ Du Preez *op cit* (n 23) 61.

²⁸ See Tait 'The marketing environment' in Kotler, Armstrong & Tait *Principles of Marketing – Global and Southern African Perspectives* (2010) 83 & 93-98.

²⁹ Bennett *Managing Tourism Services – A South African Perspective* (2000) 70.

³⁰ Bennett *op cit* (n 29) 70.

³¹ Bennett *op cit* (n 29) 72.

It therefore also appears that future generations will view leisure time differently from previous generations, and that the relative demand for tourism travel is likely to increase.³² Despite offering leisure and pleasure as a main 'product', the tourism industry is intensely competitive. Competition is generally positive as it has the effect of improving the product or service offered and provided to the consumer, but it can quite often also have a negative side to it, in that questionable practices may be used to attract and sell inferior tourism products and services to a trusting public.

The increasing competition for the tourist's disposable income and leisure time elicited the following comment:

Many tourists are becoming more demanding The search is now going in the direction of continuous sophistication and refinement of recreational needs, which can be described as the birth of a new travel culture ... a new tourist, who clearly expresses his/her needs and behaves accordingly. And this implies that what up to now has been a seller's market will be replaced by a buyer's market – a market in which the consumer has the say and not the producer.³³

This demanding tourist will also be more aware of his or her consumer rights and be willing to enforce them against service providers who do not live up to their promises.

The need to provide and consider the protection of the tourist consumer is to some extent captured in the words of Lord Justice Parker, who in the matter of *Kemp v Intrasun Holidays Limited*³⁴ said

It may be that it is part of what appears to occur in this [travel] industry – that the customer finds that everybody he turns to says 'it's not my fault – it's somebody else's'.

Speaking about the travel and tourism industry, this comment succinctly captures the fundamental focus of this study, because although it was said in a British court, the comment may well be said to apply to the tourism industry in South Africa. Providing the tourist consumer with adequate and effective consumer protection is critical to the continued growth and well-being of the industry at large and therefore the country and its people as well.

³² Bennett *op cit* (n 29) 72.

³³ Bennett *op cit* (n 29) 68.

³⁴ (1988) 6 Tr. L. 161, as quoted by Grant & Mason *Holiday Law* 3rd ed (2003) 436.

Tourism has for a long time been perceived as a 'soft' industry, meaning not considered of similar importance to that, for instance, of the mining or manufacturing industries.³⁵ However, as soon as the great economic impact of tourism was realised, governments generally became increasingly involved, particularly as far as matters of policy-formulation, planning, development and regulation were concerned.³⁶ One of the reasons for this lack of (initial) involvement was the complexity and variability of the tourism industry comprising a large number of directly and indirectly related organisations.³⁷

It has been said that a significant driving force in the development of consumer law in general can be attributed to legislative responses to the phenomenon referred to in the quotation above, namely business disclaimers of accountability for negative consequences flowing from the relationship between consumer and business.³⁸ Legislative intervention was required as the courts were not able to deal adequately with the need for consumer protection.³⁹ In South Africa the protection of the consumer and the tourist consumer specifically, has thus far been left to the common law and the courts. Almost all legislation aimed at the tourism market focused on the regulation of the industry, and only indirectly on the protection of the tourist consumer. The Tourism Act,⁴⁰ for instance, aims at the 'maintenance and enhancement of the standards of facilities and services hired out or made available to tourists', thereby indirectly providing the tourist with better service and facilities, but the tourist him- or herself is not provided with directly enforceable rights or remedies. The only 'right' that a tourist has in terms of the Tourism Act is contained in section 22, which merely requires the travel agent to advise the consumer that travel insurance can be arranged for the tourist by the agent.

The apparent lack in South Africa of a body of case law on consumer protection provides a further imperative for an analysis of the protection provided by the CPA

³⁵ Tourism is as yet not even classified as an economic sector in the National System of Accounts, the latter referring to a system of accounts enabling comparisons of all significant economic activities. See NTSS *op cit* (n 1) 2.

³⁶ Vrancken 'Tourism organisations and regulation' in Vrancken *op cit* (n 20) 279.

³⁷ George 'Introduction to tourism' in George *Managing Tourism in South Africa* (2007) 11.

³⁸ Van Eeden *A Guide to the Consumer Protection Act* (2009) 4.

³⁹ Van Eeden *op cit* (n 38) 4.

⁴⁰ Act 72 of 1993.

both to the consumer and also to the service provider. The growth in the tourism industry in South Africa (understood here to include national as well as international travel and tourism to and from South Africa) must inevitably result in an increase in tourism litigation, particularly if South Africa is to see a similar trend to Australia and the United Kingdom, amongst others.⁴¹ Recent cases and newspaper reports seem to confirm this, with more and more reports of tourists taking tourist service providers to court. All of the examples mentioned pertain to accommodation establishments. Consider, for example, the matter of *Roy v Basson*⁴² in which a tourist instituted a claim against an accommodation establishment for losses resulting from a fire destroying the property of the tourist. Another matter that came before the courts was *Gabriel v Enchanted Bed and Breakfast*.⁴³ In this matter, guests had suffered damages because of a burglary while the tourists were guests at the establishment. It has also been reported that a tourist sued the Lord Charles in Somerset West for R2 million after being raped, robbed and assaulted at the hotel.⁴⁴ In another incident an American tourist filed suit against the Monateng Safari Lodge near Pretoria in the amount of R13 million after slipping and falling on a wet stoep of the lodge as a result of which the tourist sustained injuries.⁴⁵

Issues of liability and the exclusion thereof are of great importance in this industry, particularly if it is considered that adventure travel, including extreme sports, is one of the tourism market trends in South Africa. But as the examples mentioned above indicate, many things can wrong at an accommodation establishment where the

⁴¹ Vrancken 'The birth of a South African travel agency case law' (2000) *Obiter* 227.

⁴² 2007 5 SA 84 CPD.

⁴³ 2002 2 SA 597 CPD.

⁴⁴ See Schroeder 'Tourists seeks R2m after rape' (21 April 2010) *Cape Argus* 8.

⁴⁵ Versluis 'R13 m. geëis oor val op nat stoep' <http://www.beeld.com/printArticle.aspx?iframe&aid=dc273a5d-6107-487a-abec-2468> (accessed 2010-03-17). A case had also been brought to the High Court in 2009 where a group of British tourists sued the Sanbona Game Reserve for R7.4 million because of being exposed to the immediate danger of wild lions. <http://www.dieburger.com/printArticle.aspx?iframe&aid=82426963-8234-4824-8b0e> (accessed 2009-11-27). News24 reported about a settlement of a claim between a tourist and the game lodge Madikwe River Lodge, after the tourist was gored by an elephant (see <http://www.news24.com/printArticle.aspx?iframe&aid=89af85d0-8c02-4de7-bb96-1c> (accessed 2010-11-4). Spoomaker 'Slagoffer gaan regstappe doen' (3 April 2012) *Die Burger* 5 reported that a tourist that was attacked and gored by a buffalo whilst walking near a camp site in the Baviaan's Kloof has given notice of his intention to institute action against the authorities for damages resulting from his ordeal.

tourist consumer is staying, making exemption provisions for accommodation establishments of great importance.⁴⁶

In the context of tourist accommodation there is the potential for exploiting tourists through the use of less than transparent and/or misleading advertising. Hidden costs are attached to advertised prices in the form of taxes and commissions; accommodation establishments apply a standard no-refund policy in the event of advance cancellation, and consumers of accommodation services are subjected to price discrimination and poor service. Protection against such practices is provided by the CPA, but it is necessary to consider the application and extent of the protection provided for consumers.

The introduction of the CPA took place at a time of significant growth in the tourism industry in South Africa. It may well be that this growth provided additional impetus for the introduction of consumer protection legislation in this country. Whether a matter of coincidence or not, the fact remains that an analysis and understanding of the impact of this legislation on the tourism industry is of great importance both for the suppliers in the industry, so that they may appreciate the requirements for compliance, and for the consumers of tourism services, including accommodation services, so that they may be protected from exploitative and unfair business practices.

1.2 Research objectives

The primary objective of this research is a critical analysis of selected consumer rights as provided by the CPA, in order to ascertain the potential impact of these rights on the protection of consumers of tourist accommodation services. The ultimate aim of conducting this analysis is to enable consumers of tourist accommodation services to understand (and exercise) their rights on one hand, and on the other hand, to assist suppliers of these services to appreciate what is required of them in order to be compliant with the Act, thereby limiting the potential liability of these suppliers. The focus of the study therefore is to ascertain the potential impact

⁴⁶ See Chapter 2.

of selected rights as provided in terms of the CPA on consumers and suppliers of accommodation services in the tourism industry. This aspect is the cognitive object of the research, namely the specific angle or focus of the study, and is expressed in the problem statement.⁴⁷ The primary objective is addressed in Chapter 4. The cognitive object is considered within and is representative of a larger context, namely the tourism industry. The latter in turn then forms the empirical object of the study.⁴⁸ In order to achieve the cognitive object, value can be added by also addressing the empirical object. This is accomplished mainly in Chapter 2.

As the CPA applies to all branches of the tourism industry, it was thought prudent to consider the tourism industry as a whole in Chapter 2. This is done by firstly providing an overview of the industry in order to contextualise the discussion, and secondly by giving an overview of how the industry is regulated from an international level to a local level, because such regulation is relevant for tourists and often has their protection as its primary purpose. Consumer protection legislation in South Africa is therefore part of a much larger existing matrix of consumer protection. An awareness of the big picture therefore is considered important for a more holistic understanding of consumer protection and the impact of the CPA on tourism in general and the accommodation segment in particular.

Consideration of the impact of consumer rights in the specific context of consumers and suppliers of tourist accommodation services, requires that some preceding aspects be addressed. For a proper analysis and understanding of the impact of selected consumer rights on the accommodation segment of the tourism industry it is necessary to be familiar with aspects such as whether the CPA – and the selected consumer rights – do actually apply to a particular situation or transaction, and also how the Act must be interpreted. Therefore, although these aspects are general in nature and do not specifically pertain to the accommodation segment, it is necessary to have a sound understanding of these issues, in the absence of which the primary aim of the study will not be possible. ‘Understanding a right’ means little if one does

⁴⁷ See Bosch & Gray ‘The context of business management and entrepreneurship’ in Bosch, Tait & Venter *Business Management: An Entrepreneurial Perspective* (2006) 25.

⁴⁸ Bosch & Gray ‘The context of business management and entrepreneurship’ in Bosch, Tait & Venter *op cit* (n 47) 25.

not know whether the right applies to a particular situation. The efficacy of consumer rights is dependent upon easily accessible mechanisms for enforcement being available to provide adequate redress in resolving disputes and/or enforcing consumer rights that have been breached. How, when and by whom the rights can be enforced, and what remedies are available to consumers may therefore be as relevant and important to these consumers and suppliers as understanding the substantive right or rights. These formal aspects of the CPA are dealt with in Chapter 3 of this study.

The discussion about the aforementioned formal aspects of the CPA in Chapter 3 is preceded by an overview in that chapter of the consumer protection regime applicable in South Africa prior to the CPA coming into effect. This overview assists with contrasting and understanding the legal protection provided to consumers of the tourist accommodation services pre- and post-CPA.

The **secondary academic objectives** of the study therefore include:

- providing an explanation of the tourism industry and how it is regulated;
- providing an overview of the consumer protection regime in South Africa prior to the coming into effect of the CPA;
- explaining how the CPA is to be interpreted and applied; and
- explaining the mechanisms and processes established by the CPA for the enforcement of the Act.

The **secondary strategic objectives** are:

- providing the accommodation segment of the tourism industry with guidance in understanding the CPA thereby creating greater certainty for the suppliers of such services. This will assist the suppliers in limiting the operational costs of

the business⁴⁹ and will assist in avoiding penalties and awards for damages against such suppliers. Consumers will be assisted also in understanding and exercising their rights in order to prevent and/or address unfair business practices. Thereby the study addresses, *inter alia*, one of the stated purposes of the Act, namely 'improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour',⁵⁰ and

- influencing policy when regulating tourism consumer protection.

1.3 Research method

The nature of the problem statement and the research objectives dictates that a theoretical study be undertaken. As a similar study has not yet been carried out, and as very little has as yet been written in academic literature on the potential impact of the CPA generally or focusing on a specific industry (or segment of an industry), the study was for a large part exploratory in nature. Exploratory research aims at finding patterns, ideas or hypotheses, and focuses on gaining familiarity with a subject area, in this instance the impact of selected rights of the CPA on the accommodation segment of the tourism industry.

In view thereof that the topic studied was essentially a theoretical one, and considering the sources used, it was decided that the research method most appropriate for this study was a conceptual analysis of the material. The theoretical paradigm of the research consists of a critical literature review. The study, being a theoretical one, requires that mostly secondary sources be utilised. Secondary data is data previously collected for any purpose other than the current problem at hand.⁵¹ These secondary sources consulted include policy documents, legislation, case reports, articles in academic journals, academic books, internet websites, news reports, and reports generated by government and the travel and tourism industry.

⁴⁹ It has been reported by Leuvennink 'Toerismebedryf betaal drie maal meer oor regulasies' (23 April 2007) *Die Burger* 10 that suppliers of services in the tourism industry, such as B&Bs, on average pay significantly more – up to three times more - than businesses in other sectors of the economy in order to comply with regulatory requirements.

⁵⁰ S 3(1)(e) of the CPA.

⁵¹ Golestaneh 'Managing marketing information' in Kotler, Armstrong & Tait op cit (n 28) 116.

The study was delineated in a couple of ways. Firstly, as is evident from its title, the study focuses specifically on the accommodation segment of the tourism industry. To have focused on the whole of the travel and tourist industry would have been a massive undertaking with the industry being so diverse and complex. Therefore the decision was made to focus specifically on the accommodation segment of the hospitality branch of the tourism industry. This decision was at least partly motivated by the fact that a significant number of suppliers of tourism accommodation in South Africa consist of small privately-owned businesses such as bed and breakfast establishments, small hotels and lodges. These businesses, for the most part, do not belong to international and/or national chains with substantial resources at their disposal so as to be able to acquire the best legal assistance money can buy when necessary, as is the case with larger hotel chains, airlines and car rental businesses. These small businesses cannot afford to be involved in costly and lengthy litigation, nor would they want to pay the fines that may be imposed for contravening the provisions of the CPA as these may well be financially crippling. In this way it is hoped that the study will make a contribution to assist these small undertakings to appreciate and understand the impact that the CPA may have on them, and assist them to operate more readily in compliance with the Act, thereby avoiding the risks of litigation and/or fines. The ultimate benefit of the study may therefore be potentially greater than if the focus was on, for instance, the travel branch of the industry.

The CPA is primarily there to protect the consumer, and it is the tourist consumer who can quite easily be exploited by these (smaller) accommodation establishments who, perhaps unwittingly, and because they are not as controlled as the bigger businesses, do apply their own version of the law (or may simply be blissfully ignorant of it). The consumer must be made aware of and understand his or her consumer rights in order to effectively protect him- or herself. It is intended that the study will also contribute to a greater understanding and awareness amongst tourists of their rights as consumers. In this way the study can also play a role in achieving the purposes of the Act in, for instance, promoting fair business practices, protecting consumers from unfair trade practices, and improving consumer awareness.⁵²

⁵² See s 3 of the CPA.

The second delineation relates to the consumer rights provided for in the Act – not all rights provided for in the Act are considered. Essentially the reason for this is that not all the rights provided for in the Act are relevant for the relationship between the accommodation supplier and the accommodation consumer. Certain provisions, such as: section 14 (Expiry and renewal of fixed-term contracts); section 15 (Pre- authorisation of repair or maintenance services); section 20 (Consumer’s right to return goods), and section 65 (Lay-byes) are not applicable to the relationship between the accommodation supplier and consumer because of the nature of the right and the subject matter that it deals with or provides for. Although some other rights not discussed may have implications for the accommodation segment, it was decided to limit the study to the specific rights discussed because of their perceived relevance to the accommodation segment of the tourist industry.

1.4 Plan and development of the study

The study develops as follows through the chapters:

Chapter 1 is the introduction and background to the study. It sets out the problem statement, contextualises the problem, provides the research objectives and research method, and explains the plan and development of the study.

Chapter 2 provides an overview of the tourism industry so as to provide the reader with a better understanding of the context within which the study is undertaken. An overview is also provided of the regulations that apply to the industry from an international to local level.

Chapter 3 consists essentially of two separate but related parts. The first part provides an overview of the consumer protection regime that was available to the consumer before the coming into effect of the CPA. This serves to provide a background to assist in understanding the later discussions on the impact (or changes) brought about by the CPA in the protection provided to consumers in the accommodation segment. The second part of the chapter introduces the CPA and deals more specifically with what can be referred to as the ‘formal aspects of the Act’. Issues dealt with here include the interpretation and application of the Act both

aspects which are critical to a proper understanding of the impact of the substantive consumer protection rights generally, but also specifically for understanding the impact of these rights within the accommodation segment of the tourism industry.

The regulatory framework provided for the enforcement of the Act is also explained. The focus is on the enforcement mechanisms and the powers and functions of these bodies, including the National Consumer Tribunal and the National Consumer Commission, in giving effect to their mandate of implementing and enforcing the CPA. Which people may bring a complaint and what the alternative routes are where a complaint may or must go, are also indicated and discussed.

In **Chapter 4** the consumer rights selected for purposes of this study are considered critically and in detail with a view to ascertaining to what extent, if any, these rights impact on the legal responsibilities of the suppliers of accommodation services on the one hand, and on the protection of consumers of tourist accommodation services on the other hand.

Chapter 5, the final chapter, contains the summary, findings and recommendations of the study.

CHAPTER 2

TOURISM IN SOUTH AFRICA

2.1 Introduction

In Chapter 1 the critically important role played by the tourism industry in securing a better future for all South Africans was indicated. When the impact of a particular piece of legislation – in this case, the Consumer Protection Act (CPA) - on a certain segment of the tourism industry is considered, it is necessary to have a holistic understanding of the industry itself as it will assist in the process of understanding the impact of the CPA on the tourism industry, as well as on the accommodation segment specifically.

In studying the topic of tourism one must be mindful of the difficulties in studying it. Some of these problems include the fact that tourism as a subject area suffers from conceptual weakness resulting in a basic lack of focus and rigour.¹ Tourism also includes and overlaps with a large number of different fields of academic study and areas of industry, raising the question whether tourism can actually be seen as a singular subject or even an economic sector. This, in turn, has led to another challenge faced by tourism: that of tourism being perceived as a multidisciplinary subject area and approached from the perspectives of various disciplines rather than from a universal tourism perspective. This methodology has also contributed to a phenomenon referred to as 'reductionism', which means that tourism is rather seen as 'a series of activities or economic transactions and is not seen in terms of a wider series of concepts and overarching analytical frameworks that would assist in the understanding and interpretation of tourism'.² It has been suggested that the approach in studying tourism

¹ Cooper, Fletcher, Fyall, Gilbert & Wanhill *Tourism: Principles and Practice* (2008) 5.

² Page & Connell *Tourism - A Modern Synthesis* (2009) 8. See also Cooper *et al op cit* (n 1) 5.

should be more flexible and fluid, recognising the inputs and value of differing subjects and disciplines to explanation in tourism. This is termed a “post-disciplinary” approach, and it differs from the earlier ideas of multi- or inter-disciplinary approaches to tourism by being a flexible and creative approach that breaks through the parochial boundaries of disciplines.³

It is hoped that, by providing this discussion of tourism, this research will contribute to the conceptualisation of tourism as a subject-discipline which allows for the integration of ideas on tourism and the law, and therefore, ultimately also for the intellectual development of tourism as a subject. Appreciating the impact of consumer protection legislation on tourism may contribute to a conceptualisation of tourism as an independent discipline rather than a composite of many.

The primary aim of this chapter however remains to provide an analysis of the tourism industry, not only as it functions within South Africa but also as it relates to the industry in a global context. The chapter is divided into two distinct parts. The first part commences with defining a tourist and tourism; it then briefly considers the history and development of tourism, whereafter the tourism system is explained. The first part of the chapter concludes with a consideration of the tourist as consumer.

The second part of the chapter considers the regulatory scheme applicable to the tourism industry in general.

2.2 Defining tourism

As the study focuses largely on the protection provided by the CPA to tourist consumers of accommodation services, it is important to consider what a tourist is and what is meant by the concept of tourism. The latter word originated late in the era of the Grand Tour referring to an English custom in the 18th century of sending young men from the wealthy classes on extensive tours of continental Europe as part of their education.⁴ The terms ‘tourist’ and ‘tourism’ were first used officially in 1937 by the (then) League of Nations.⁵ It is however not as easy to define tourism as it

³ Cooper *et al op cit* (n 1) 5.

⁴ Leiper ‘The framework of tourism – Towards a definition of tourism, tourist, and the tourism industry’ (1979) *Annals of Tourism Research* 391.

⁵ Page & Connell *op cit* (n 2) 12. See also Holloway & Taylor *The Business of Tourism* (2006) 5.

may appear at first glance. It has been argued that this is an indication of the youth of tourism as a field of study.⁶

Although difficult, it is nevertheless important to try to define tourism as it will assist in providing a sense of credibility and ownership to all those involved in the industry, and also because of practical considerations such as measurement as well as for legislation.⁷ Furthermore, indicating what the specifically relevant and applicable provisions of the CPA are for the tourism industry generally and the accommodation segment particularly, may assist the industry and academic institutions when developing academic qualifications in the tourism industry. In compiling such a qualification it will be most beneficial to have material available that reflects the applicable aspects of the CPA for the industry and/or a specific segment of the industry, as well as the impact of these relevant provisions on the industry or a part thereof. But in order to do that one must know who a tourist is and what tourism is.

The reasons for the difficulty in defining tourism are varied, including the fact that tourism covers a very broad area to define⁸ and the complex nature thereof.⁹ Some have even referred to the endeavour of defining tourism as a 'particularly arid pursuit'.¹⁰ The result is that there is no universally accepted definition of tourism and different definitions have been developed for different purposes. So others, are there demand-side and supply-side definitions,¹¹ technical (or statistical) definitions,¹² and conceptual definitions of tourism.¹³

Technical (or statistical) definitions are developed and used to ensure that researchers are able to compare tourist statistics, thereby enabling governments and tourist organisations to monitor the size and characteristics of tourist markets.¹⁴ It is

⁶ Cooper *et al op cit* (n 1) 11.

⁷ Cooper, Fletcher, Gilbert & Wanhill *Tourism: Principles & Practice* (1993) 4.

⁸ George 'Introduction to tourism' in George *Managing Tourism in South Africa* (2007) 3.

⁹ Vrancken 'Introduction' in Vrancken *Tourism and the Law in South Africa* (2002) 273.

¹⁰ Page & Connell *op cit* (n 2) 8.

¹¹ Cooper *et al op cit* (n 1) 11-15.

¹² Page & Connell *op cit* (n 2) 12.

¹³ Bennett & Strydom 'What is tourism?' in Bennett, Jooste & Strydom *Managing Tourism Services - A South African Perspective* (2005) 2-4.

¹⁴ Leiper *op cit* (n 4) 393.

obviously necessary to have the same definition for the same aspect that one is trying to measure and compare. Technical definitions would refer also to specific concepts such as international visitors, domestic visitors, long haul, short haul, inbound and traveller. Standardised definitions of these concepts allow for comparability of tourism statistics.¹⁵

Conceptually however, tourism 'refers to the broad notional framework that identifies tourism's essential characteristics and distinguishes tourism from similar, often related but different phenomena'.¹⁶ From such a conceptual perspective it then appears as if tourism encapsulates the following basic elements:

- the movement of people;
- the journey to and the stay at a destination;
- the journey and the stay occur outside the normal environment of the tourist;
- the movement to visited destinations are of a short-term and temporary nature, and
- the destinations are visited for reasons other than to settle or to take up employment there.¹⁷

Bennett, Jooste and Strydom populate their conceptual perspective of tourism with a very similar set of elements, but do add at least one additional element, namely the facilities provided to cater for the needs of tourists.¹⁸

Leiper suggested that tourism can be approached from an economic, technical or holistic (conceptual) perspective, but because of the multi-faceted nature of tourism a holistic definition of tourism is more appropriate. Therefore he proposed the following definition:

¹⁵ Bennett & Strydom 'What is tourism?' in Bennett, Jooste & Strydom *op cit* (n 13) 2-3.

¹⁶ Page & Connell *op cit* (n 2) 11.

¹⁷ See George 'Introduction to tourism' in George *op cit* (n 8) 3 and Page & Connell *op cit* (n 2) 12.

¹⁸ *Op cit* (n 13) 5.

It is the system involving the discretionary travel and temporary stay of persons away from their usual place of residence for one or more nights, excepting tours made for the primary purpose of earning remuneration from points en route.¹⁹

The United Nations World Tourism Organisation (UNWTO) defines tourism as follows:

Tourism comprises the activities of persons travelling to and staying in places outside their usual environment for not more than one consecutive year for leisure, business or other purposes.²⁰

A problem with this definition is the absence of a reference to the purpose of the trip, apart from a very broad 'for leisure, business or other purposes'. Statistical data on tourism and tourists would therefore include data on trips beyond the scope of the ordinary or general use of the word.²¹ A further problem with the definition is that it does not contain a reference to a minimum period of being away. The UNWTO does address this issue by defining a person who spends less than 24 hours in a destination as an 'excursionist' or 'day-visitor'.²² It should however be noted that there is increasing agreement that tourism refers to both same-day visitors as well as longer stay visitors. Same-day visits are becoming more and more important for a number of role-players, such as suppliers of tourist attractions, transport operators and caterers. This development is further supported by technological advances in the transport business as well as the reduction in travel restrictions between countries. It makes the distinction between tourism and recreation increasingly arbitrary.²³

Thus far there has been no definition for tourism in legislation in South Africa and even the Tourism Act²⁴ only defines the 'tourism industry'.²⁵ The 1996 Tourism White

¹⁹ Leiper *op cit* (n 4) 403-404.

²⁰ Holloway & Taylor *op cit* (n 5) 6.

²¹ See Leiper *op cit* (n 4) 393.

²² Leiper *op cit* (n 4) 393. See George 'Introduction to tourism' in George *op cit* (n 8) 3. It is submitted that it would have been preferable to refer to a person who travels and/or visits a destination away from home for less than 24 hours and then returns home as an excursionist or day-visitor. A tourist having embarked on a tour of two weeks and while on tour visits a particular destination for less than 24 tour hours is still a tourist.

²³ Page & Connell *op cit* (n 2) 14-15.

²⁴ Act 72 of 1993.

²⁵ S 1 of the Tourism Act defines the tourism industry as 'the organized industry which is concerned with the promotion and handling of tours to and in the Republic, and the provision of services and facilities to and the provision for the needs of persons who undertake such tours,

Paper does provide a definition for tourism as ‘all travel for whatever purpose that results in one or more nights being spent away from home’.²⁶

The White Paper, in turn, defines a tourist as ‘a person who travels away from home, staying away at least one night’.²⁷ The UNWTO defines a tourist as a visitor whose visit is for at least 24 hours, and whose purpose of visit may be classified under any of these three groups: leisure and holidays, other tourism purposes, including studying and health reasons, and business and professional, such as attending a conference, exhibition, event or as part of an incentive.²⁸

The Draft Tourism Bill, 2011²⁹ introduces a legislative definition of tourism for South Africa. It reads

‘**tourism**’ comprises the activities of foreign visitors and South African residents travelling to and staying at places outside their usual environment for not more than one consecutive year for leisure, business and other purposes not related to the exercise of an activity remunerated from within the place visited.³⁰

A few comments can be made about this definition. The definition refers to ‘travelling and staying at places outside their usual environment’. Initially, this seems wide enough to include not just tourism in and to South Africa but also out-bound tourism (travelling to destinations outside South Africa).³¹ It is submitted that this is correct as travel agents and other role-players dealing in out-bound tourism are still part of tourism. Secondly, a minimum period of travelling and staying is not mentioned. The use of the word ‘staying’ seems to imply a minimum period of one night away, which will be in line with the definition of the White Paper and the UNWTO referred to above (and excludes a day-visitor or excursionist). A final comment relates to the reason for travelling. If a person travels for business it will be tourism (and the person

in the preparation for such tours, while they are under way and during their stay at their destinations’.

²⁶ Department of Environmental Affairs and Tourism *White Paper: The Development and Promotion of Tourism in South Africa* (1996) vi.

²⁷ *White Paper: The Development and Promotion of Tourism in South Africa op cit* (n 26) vi.

²⁸ George ‘Introduction to tourism’ in George *op cit* (n 8) 5.

²⁹ The Draft Tourism Bill was published for public comment in *Government Gazette* No 34506 on 5 August 2011.

³⁰ S 1(l) of the Draft Tourism Bill.

³¹ See the definition of ‘tourism industry’ below.

will be considered a tourist) provided the person is remunerated from within the place where he or she travels from and not where he or she travels to. So, a person living in Johannesburg travelling to Port Elizabeth for business may be considered a tourist if he or she is paid in Johannesburg, but not if he or she is paid in Port Elizabeth. The qualification regarding remuneration probably aims at differentiating between people travelling for work on an *ad hoc* basis and those commuting to work from one place to another. It seems as if a rather arbitrary differentiation is created which is unlikely to bring about greater clarification.

A very similar definition is provided by the National Tourism Sector Strategy (NTSS), which defines tourism as: 'The activities of persons travelling to and staying in places outside their usual environment for not more than one consecutive year for leisure, business and other purposes not related to the exercise of an activity remunerated for within the place visited.'³² The comments above concerning the definition of tourism in the Draft Tourism Bill apply equally to this definition. The positive aspect is that there seems to be a greater agreement on the definition of tourism.

Considering these perspectives and definitions, it appears that three basic elements are fundamental to the concept of tourism: travel; accommodation, and attractions.³³ All tourism involves travel – all tourists are therefore travellers (although not all travellers are tourists). The travelling takes the person outside his or her normal social environment (which includes the normal living and working environment). Secondly, and because the person travels outside his or her normal environment, accommodation is required, making it the second basic element of tourism. Finally, there is an attraction or attractions for the travel. Whether it is to experience different cultures, see natural wonders or for purposes of attending a conference or just rest and relaxation, the attraction often is the precipitating factor setting the process in motion.

³² Department of Tourism *National Tourism Sector Strategy* 12 http://www.gov.za:8001/PublicDocuments/2011_06_01/NTSS%20Strategyopt.pdf (accessed 2012-02-08).

³³ Vrancken 'Introduction' in Vrancken *op cit* (n 9) 273.

Tourism, ultimately, is about travelling to a destination outside one's normal living and working environment and staying there on a temporary basis and for a purpose involving a discretionary use of time and money to gain certain experiences.

It is relevant also to provide a definition of the tourism industry. According to Leiper, the tourism industry can be described as 'all those firms, organisations and facilities which are intended to serve the specific needs and wants of tourists'.³⁴ This industry can be described by dividing it into six functional sectors, namely marketing, carriers, accommodation, attractions, miscellaneous services (such as travel insurance), and regulation.³⁵ As indicated the Tourism Act defines the concept 'tourism industry'. The Act states that

'tourism industry' means the organized industry which is concerned with the promotion and handling of tours to and in the Republic, and the provision of services and facilities to and the provision for the needs of persons who undertake such tours, in the preparation for such tours, while they are under way and during their stay at their destinations.³⁶

This definition appears to limit the tourism industry only to 'tours to and in the Republic'. From this it would seem that a South African travel agent arranging tours exclusively to destinations outside South Africa is not part of the tourism industry. It also refers to 'organized industry' which may imply that if for instance an accommodation establishment is independent and not affiliated to a larger body or organisation, it is not part of the industry. When the industry will be 'organized' and when not is not clear. This definition thus provides a very limited view or understanding of the tourism industry. For this reason the definition of tourism contained in the Draft Tourism Bill and the meaning it implies for the tourism industry therefore is preferred.³⁷ The NTSS explains the concept 'tourism industry' as '[a]ll establishments whose principal productive activity is a tourism characteristic activity, i.e. the sum of all tourism characteristic activities, e.g. accommodation establishments, tour operators, travel agencies'.³⁸

³⁴ *Op cit* (n 4) 400.

³⁵ Leiper *op cit* (n 4) 400-401.

³⁶ S 1 of the Tourism Act.

³⁷ The Draft Tourism Bill does not contain a specific definition for the 'tourism industry'.

³⁸ NTSS *op cit* (n 32) 12.

2.3 History and development of tourism

A basic tenet of history is the understanding of change through time.³⁹ The importance of understanding the processes of change within tourism is attracting more attention from historians especially since tourism only relatively recently became an acceptable area for research.⁴⁰ What follows in this section is a very brief history of tourism primarily from the perspective of tourism development in England. This perspective is relevant also for South Africa considering the shared history of the two countries and the extensive exchange of tourists between the countries.

Tourism is not a new phenomenon and has some of its roots in the ancient Roman and Greek cultures, where the elite travelled to seaside resorts on the Mediterranean to escape unpleasant conditions in the cities, such as Rome, particularly during the hot summer months.⁴¹ One of the earliest forms of consumer protection is also to be found in Roman Law, where, for instance, the Praetorian edict *de nautis, cauponibus et stabulariis*, was introduced already during the first century BC, essentially to make travelling possible. It had to serve as protection against the evil of unscrupulous innkeepers colluding with thieves to steal from the guests of inns.⁴² Pilgrimages for religious reasons became quite common during the Middle Ages, with holy sites being visited at places such as Santiago de Compostela and Mecca by Christians and Muslims respectively.⁴³ Pilgrimages in medieval Britain, as described for instance in Chaucer's *Canterbury Tales*, show that tourism services such as transport and accommodation, were rendered as far back as the fifteenth century.⁴⁴

Modern tourism only started to develop in the 18th century when the upper classes began to enjoy more leisure time and visited places like the Lake District in England.⁴⁵ It is very interesting to note that it has been observed that '[v]acation-taking and holiday-making turn up ... at more or less the same moment as the

³⁹ Towner & Wall 'History and tourism' (1991) *Annals of Tourism Research* 73.

⁴⁰ Towner & Wall *op cit* (n 39) 80.

⁴¹ Page & Connell *op cit* (n 2) 25.

⁴² *Swart v Shaw t/a Shaw Racing Stables* 1996 1 SA 202 CPD 2041.

⁴³ Saunders & Barben 'The history of tourism' in George *op cit* (n 8) 20-21.

⁴⁴ Page & Connell *op cit* (n 2) 31-32.

⁴⁵ Saunders & Barben 'The history of tourism' in George *op cit* (n 8) 21.

consumer ... from some time early in the second half of the 18th century when consumers begin to take holidays as a fashionable activity'.⁴⁶ It was also in this time that the Grand Tour became a trend. The Grand Tour represents an important era in the history of tourism and made a significant contribution to the development thereof in that it stimulated tourism and contributed to an accelerated growth of an organised tourism industry in Europe.⁴⁷

At the same time domestic travel for purposes of pleasure became popular, particularly visits to the seaside and spas for 'taking the waters'.⁴⁸ This form of tourism was largely prompted by the medicinal properties of sea and mineral water; therefore domestic tourism in the United Kingdom of the time can more accurately be described as 'health-tourism'.⁴⁹ But it was still only the affluent who could afford to go on holiday. This was about to change.

Socio-economic developments such as the Industrial Revolution in the late 18th and early 19th centuries precipitated an increase in the value of money allowing more people the luxury of travel for pleasure. With industrialisation came highly organised working structures leading to reduced working hours and legislated holidays. Holidays for the working class became common by the 1890s with many workers travelling at the same time to similar destinations.⁵⁰ But for tourism to be possible, it was necessary that services were available to meet and drive tourism demand. It was the technological advances in transport (in particular, the railways) that had a very significant impact on the facilitation of tourism. The railways made leisure travel possible for the masses, and are credited with changing the class structure of the English seaside holiday.⁵¹ The railways allowed people to travel further and faster than ever before and at a reasonable price.⁵² The two World Wars had a more

⁴⁶ Inglis *The Delicious History of the Holiday* (2000) 1.

⁴⁷ See Towner 'The Grand Tour: A key phase in the history of tourism' (1985) *Annals of Tourism Research* 326.

⁴⁸ Historians have paid particular attention to the evolution of tourism in specific localities such as spas and seaside resorts. See Towner & Wall *op cit* (n 39) 73.

⁴⁹ Page & Connell *op cit* (n 2) 31-32.

⁵⁰ Page & Connell *op cit* (n 2) 33. See also Towner & Wall *op cit* (n 39) 75.

⁵¹ Page & Connell *op cit* (n 2) 34. See also Saunders & Barben 'The history of tourism' in George *op cit* (n 8) 21.

⁵² Page & Connell *op cit* (n 2) 34.

positive than negative influence on tourism, with particularly the development of transport infrastructure such as rail transport facilities being of particular importance. The South African railway infrastructure, for instance, was dramatically developed during and after the Second World War.⁵³ The development of tourism brought about a related activity, namely that of the travel intermediary: travel agents and tour operators. Thomas Cook established the first commercial tour operator business by pioneering leisure travel by rail as early as 1841.⁵⁴ The German company Deutsche Lufthansa launched the first scheduled air service in 1918 and South African Airways began with scheduled flights in 1934.⁵⁵

By the 1930s holidays, in the sense of travelling away from home, had become an accepted way of life. More and longer holidays coupled with increased income and technological advances in transport including ocean-liners and motorcars facilitated a greater demand for leisure travel. After the Second World War there was a significant growth in tourism in the Western world. The 1950s and 1960s saw the nature of tourist travel changing with the introduction of package holidays; domestic and overseas tourism were promoted via television, and greater affluence enabled greater numbers of people to travel abroad. Tourism, as an export commodity, became an increasingly important part of the economy.⁵⁶

Prior to the opening of the Suez Canal in 1869, the Cape was a popular stop-over on the route between England and India, with places such as Matjiesfontein (health) and Oudtshoorn (Cango Caves) attracting visitors. The South African War (1899 – 1902) served to focus attention on this part of the world and Thomas Cook marketed the country for ‘war tourists’ even during the war!⁵⁷ The unification of South Africa in 1910 made the marketing of the country easier. In 1919 a conference was held with all role-players, including government departments and participants in the tourism industry such as Thomas Cook. A Public and Travel Bureau was established in London for purposes of marketing the country. In 1947 the South African Tourism

⁵³ Saunders & Barben ‘The history of tourism’ in George *op cit* (n 8) 21-22.

⁵⁴ Saunders & Barben ‘The history of tourism’ in George *op cit* (n 8) 22 and Page & Connell (n 2) 34.

⁵⁵ Saunders & Barben ‘The history of tourism’ in George *op cit* (n 8) 25-26.

⁵⁶ Page & Connell *op cit* (n 2) 41.

⁵⁷ Saunders & Barben ‘The history of tourism’ in George *op cit* (n 8) 26.

Corporation (SATOUR) was established to promote South Africa as an international tourism destination. During apartheid South Africa became increasingly isolated and tourism was a low key priority for the government. Despite this, tourism increased significantly between 1958 and 1973 because of improved infrastructure, a stable economy and the use of jet aircraft. This led to the recognition by the government of the increasing importance of tourism and resulted in the creation of a separate department of tourism in 1963 and SATOUR establishing more overseas offices. Although government policy was to target only high-income (and not high volume) tourists, tourism was the fifth highest foreign revenue earner by the early 1970s. Despite an increasingly troubled internal situation South Africa continued to be one of Africa's top destinations for overseas tourists.

Tourism in a post-apartheid South Africa has been significantly boosted by the smooth political transition to democracy. Existing attractions have not lost their appeal but new additions have become possible by, such as, for instance the addition of seven new UNESCO World Heritage Sites. Township tours, struggle tourism, eco-tourism, and adventure tourism have also added extra variety to the tourism attractions offered by South Africa.⁵⁸ Then one should not forget sport tourism which became possible after the ending of the sport boycott of the apartheid era. Prime examples include the 1995 Rugby World Cup, the 2003 ICC Cricket World Cup, and the FIFA 2010 Soccer World Cup. Tourism is now one of the main contributors to the South African gross domestic product (GDP).⁵⁹

In a world context, post-1970 saw a continued development of existing trends in tourism, and the establishment of some new trends. Some of the more significant trends in the context of current tourism can be briefly highlighted.⁶⁰

- Tourism is an increasingly internationalised and globalised phenomenon, again with increases in disposable income and political changes allowing people to travel to more and new destinations. This is important and relevant for the

⁵⁸ See Saunders & Barben 'The history of tourism' in George *op cit* (n 8) 26-30 for a discussion on the South African tourism industry, its history and development.

⁵⁹ See Chapter 1 for a more detailed discussion of the economic importance of tourism in South Africa.

⁶⁰ See Page & Connell *op cit* (n 2) 41-46 for a more detailed discussion of these trends.

current study as globalised consumers may well be cognisant of consumer protection measures available to them in their countries of residence and may be willing and able to ascertain whether similar protection exists in South Africa that they may avail themselves of if need be. An example of well-known European legislation adopted to protect the tourist is the so-called 'Package Directive'. In order to address the often vulnerable position of the tourist, the Council of the European Communities, *inter alia*, in 1990 adopted a Directive – The Package Travel, Package Holidays and Package Tours Directive (90/314/EEC) that had to be implemented by the member states of the European Community by 31 December 1992.⁶¹ The United Kingdom, for example, implemented the Directive by means of regulations made under section 2(2) of the European Communities Act 1972. The Package Travel, Package Holidays and Package Tours Regulations 1992 came into force on 23 December 1992.⁶² The aim of the Directive is the protection of the consumer⁶³ and this was to be achieved through the regulation of the conventional package holiday.⁶⁴ The Directive introduced a form of strict liability in terms of which a tour operator or travel agent is liable to the consumer for the failures of any service provider (for example the air carrier or hotel) where these failures mean that the package travel contract (organised and/or sold by the tour operator or travel agent) has not been performed properly.⁶⁵

- Technological advances, especially in transport, provide the capacity to accommodate this increased demand for leisure travel. High speed trains and new era aircraft allow more people to travel more quickly to more and further destinations.⁶⁶ Technological advances also mean that consumers can very quickly ascertain whether they have a legal remedy available in the event of any mishap and/or be informed about suppliers exploiting consumers. Compliance

⁶¹ Grant & Mason *Holiday Law* (2003) 31.

⁶² Grant & Mason *op cit* (n 61) 32. See also Downes & Paton *Travel Agency Law* (1993) 103.

⁶³ Kilby 'Reviewing the implementation of the Package Travel Directive' (2000) *ITLJ* 18.

⁶⁴ Grant & Mason *op cit* (n 61) 32.

⁶⁵ Saggerson *Travel Law and Litigation* (1996) 54.

⁶⁶ See also Butler & Wall 'Introduction: Themes in research on the evolution of tourism' (1985) *Annals of Tourism Research* 289.

with consumer legislation may therefore be necessary not only to avoid fines and claims but may serve as a marketing tool.

- The importance of tourism as a contributor to the economy of countries is recognised and as such has resulted in more and more legislation for the tourism industry. The Draft Tourism Bill is a classic example of such legislation. It states in its long title that it is '[t]o provide for the development and promotion of sustainable tourism for the ... *economic* ... benefit of South Africa ...'.⁶⁷ Regulation is very much aimed at the protection of the tourist, which is achieved through the imposition and maintenance of quality assurance strategies and norms and standards in the industry, as well as specific consumer protection measures. However, legislation is also aimed at removing barriers to the trans-national flow of tourists to further facilitate travel and tourism.
- Tourism is 'demand-inelastic'. This essentially means that higher prices result in lower demand. Economic factors therefore impact on the demand for tourism. An economic downswing will adversely impact on the demand for tourism.
- Changes in demographics such as an increase in life expectancy and retirement at an earlier age has increased the number of people able to travel, explaining to some extent the increase in tourist volumes.
- For purposes of this study a significant modern trend within the tourism industry is the move away from a product-led tourism industry to a more consumer-focused approach, resulting in more niche markets such as adventure and eco-tourism. The latter approach is better able to respond to and anticipate consumer needs and wants, and represents a move away from the standard package-type product which dominated tourism in the first half of the 20th century. An increasingly empowered consumer is able to make travel arrangements via the Internet and arrange independent holidays. Such an empowered consumer is also more likely to insist on adequate and effective

⁶⁷ Emphasis added. The importance of tourism to the South African economy was considered more fully in Chapter 1 of the study.

consumer protection and willing to enforce his or her rights through available legal channels.

A historical perspective of tourism is dominated by two major themes. These themes are: on one hand, the development and continuity of tourism as a phenomenon through time, and on the other hand, the process of change, with tourism constantly changing, often because of technological advances.⁶⁸ So, where tourism maintained a certain fundamental consistency, it has also been able to maintain itself exactly because of the continuous change, mostly through innovation.⁶⁹ The main driver of this consistency and change appears to be the tourist him- or herself. This was summarised as follows:

If today's tourists are no longer satisfied with sun and tour guides, history teaches us tourists never seem to be satisfied, whether in 1799 or 1999. Restlessness, frustration, and boredom are part of that great personal experience. A strange and often insatiable longing for transcendence gives tourism an element of secular religion, a quest for that fulfilment waiting out there somewhere – in the elsewhere-lands. As soon as our vacation is over we start to fantasise about the next one: the perfect holiday.⁷⁰

2.4 The tourism system

Although tourism is ultimately a business, it has been suggested that the industry should not just be considered from a business perspective but rather from a systems approach.⁷¹ There are various approaches that can be used to study tourism, such as an institutional approach, product approach, historical approach, managerial approach, economic approach, sociological approach and a geographical approach.⁷² A system can be defined as a 'set of elements or parts that are connected to each other by at least one distinguishable principle', which in this case is tourism.⁷³ As indicated the tourism industry is a complex and multi-faceted industry, necessitating an integrated approach for a better comprehension of the industry – an approach that will enable one 'to grasp the peculiarities of the whole

⁶⁸ Page & Connell *op cit* (n 2) 27.

⁶⁹ Page & Connell *op cit* (n 2) 27.

⁷⁰ Page & Connell *op cit* (n 2) 27.

⁷¹ George 'Introduction to tourism' in George *op cit* (n 8) 13.

⁷² See Bennett *Managing Tourism Services: A South African Perspective* (2000) 34-35 for a brief explanation of these approaches.

⁷³ Page & Connell *op cit* (n 2) 10. See also George *op cit* (n 8) 13.

and the specific properties of the parts at the same time'.⁷⁴ Bennett motivates the use of a systems approach by indicating that

[t]his approach recognises the different elements or subsystems of the total system and the fact that they are interrelated and inseparable, but suggests that each of them can be studied separately. It also explains how the tourism system operates internally and how it relates to other systems, such as the political, legal, economic and social systems.⁷⁵

To this end the tourism system model developed by Leiper is widely cited and provides a methodological framework for the studying of tourism.⁷⁶ The tourist system model of Leiper consists of five identifiable elements, namely tourists, tourist-generating regions, tourist destination regions, transit routes and the tourism industry.⁷⁷ These elements constitute an open system functioning within an external environment, including political, legal, economic, technological, cultural, social, physical and other systems, which in turn influence and modify the tourist system.⁷⁸

Tourists are the travelling public and as such they are the consumers of tourism services and products.⁷⁹ Leiper defines a tourist as 'a person making a discretionary, temporary tour which involves at least one overnight stay away from the normal place of residence, excepting tours made for the primary purpose of earning remuneration from points en route'.⁸⁰

The **tourist-generating region** is the area (country or province) from which the tourist originates or the residential base of the tourist from where the tour will

⁷⁴ Bennett *op cit* (n 72) 35.

⁷⁵ Bennett & Schoeman 'The tourism system and major role-players involved' in Bennett, Jooste & Strydom *op cit* (n 13) 32.

⁷⁶ Leiper *op cit* (n 4). See also George 'Introduction to tourism' in George *op cit* (n 8) 13 and Bennett & Schoeman 'The tourism system and major role-players involved' in Bennett, Jooste & Strydom *op cit* (n 13) 33-37 for a discussion of the Leiper model as well as other models.

⁷⁷ Leiper *op cit* (n 4) 395-397; Bennett & Schoeman 'The tourism system and major role-players involved' in Bennett, Jooste & Strydom *op cit* (n 13) 34-35 & George 'Introduction to tourism' in George *op cit* (n 8) 13-14.

⁷⁸ Leiper *op cit* (n 4) 395-396; Bennett & Schoeman 'The tourism system and major role-players involved' in Bennett, Jooste & Strydom *op cit* (n 13) 35 & George 'Introduction to tourism' in George *op cit* (n 8) 13-14.

⁷⁹ Leiper *op cit* (n 4) 395 & George 'Introduction to tourism' in George *op cit* (n 8) 14.

⁸⁰ *Op cit* (n 4) 396.

commence and terminate.⁸¹ Factors at the generating region will motivate people to travel.⁸²

The **transit region or routes** are the paths that link the tourist-generating region with the tourist destination region and include places passed through en route.⁸³

Destination regions are the locations that attract tourists for a temporary stay and constitute the focus of the tourist activity. They are where the impact of tourism is most felt.⁸⁴

The **tourism industry** has been defined as 'consisting of all those firms, organisations and facilities which are intended to serve the specific needs and wants of tourists'.⁸⁵ The tourism industry therefore consists of all the businesses and organisations involved in the delivery of the tourism product and/or service to the consumer. Although these businesses and organisations are diverse in nature, they generally share an aim to satisfy the needs of tourists at a profit.⁸⁶ It has been pointed out that there is, for instance, a lack of a common structure representative of the tourism industry as countries (societies) will differ regarding the tourism product and/or service that they deliver. For example, in South Africa many tourists make use of guest houses or bed and breakfast (B&B) establishments and travel by car, whereas in South East Asia guest houses and B&Bs are not available as a mode of accommodation and in India tourists travel mostly by plane.⁸⁷

⁸¹ Leiper *op cit* (n 4) 396; Bennett & Schoeman 'The tourism system and major role-players involved' in Bennett, Jooste & Strydom *op cit* (n 13) 34 & George 'Introduction to tourism' in George *op cit* (n 8) 14.

⁸² Leiper *op cit* (n 4) 396 & George 'Introduction to tourism' in George *op cit* (n 8) 14.

⁸³ Leiper *op cit* (n 4) 397; Bennett & Schoeman 'The tourism system and major role-players involved' in Bennett, Jooste & Strydom *op cit* (n 13) 34 & George 'Introduction to tourism' in George *op cit* (n 8) 15.

⁸⁴ Leiper *op cit* (n 4) 397; Bennett & Schoeman 'The tourism system and major role-players involved' in Bennett, Jooste & Strydom *op cit* (n 13) 35 & George 'Introduction to tourism' in George *op cit* (n 8) 15.

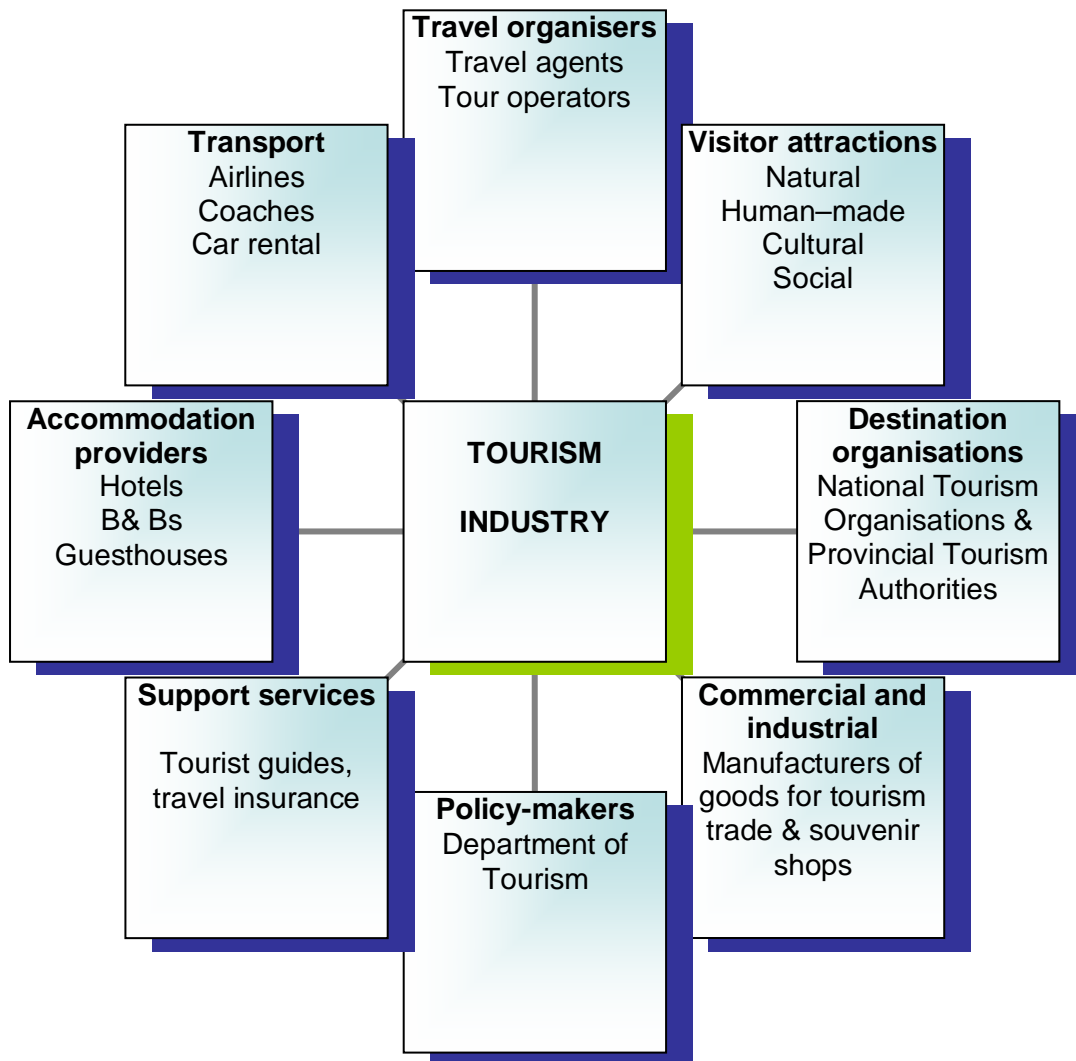
⁸⁵ George 'Introduction to tourism' in George *op cit* (n 8) 15.

⁸⁶ Bennett & Schoeman 'The tourism system and major role-players involved' in Bennett, Jooste & Strydom *op cit* (n 13) 35.

⁸⁷ George 'Introduction to tourism' in George *op cit* (n 8) 16.

The main sectors and sub-sectors of the South African tourism industry are presented in the following figure:

FIGURE 2.1 Sectors and sub-sectors of the tourism industry⁸⁸



The advantages of the systems approach are numerous and include the following:

- it fosters multidimensional thinking;
- it facilitates a multidisciplinary approach;
- it identifies the people involved in the system;
- it can be applied to the tourism system as a whole and to each subsystem.⁸⁹

⁸⁸ Adopted from George 'Introduction to tourism' in George *op cit* (n 8) 15.

The tourism system model allows then for the various sub-sectors to be located, and highlights the process of tourism from the sides of both supply (the industry) and demand (consumer). This facilitates multi-disciplinary thinking about tourism which, given the complexities of tourism, is essential for a proper understanding of tourism. The model highlights the interaction between the five elements of the systems model and confirms that tourism should not be seen in isolation from its human, socio-cultural, economical, technological, physical, political and legal environments.⁹⁰ In the final analysis, the systems approach allows the researcher to consider the effect of changes to the system on its components.⁹¹ In the context of this research, the systems approach will allow consideration of the impact of a change to the legal environment on at least one of the components of the system.

Tourism then is clearly a complex business comprising many facets and involved in many different sectors of the economy.⁹² The following are some of the important characteristics of the tourism industry:⁹³

- *Complexity.* The tourism industry consists, from the consumer perspective, of a huge number of elements such as travelling, accommodation, sustenance, entertainment and attractions – all to be provided by a range of different service providers.⁹⁴ This means that the consumer has to deal with a variety of service providers in order to obtain his or her desired purpose. The chances for things to go wrong and the consumer to be exploited therefore increase exponentially. One must also consider that tourism, by definition, takes the consumer outside his or her normal place of residence into a different and often strange environment making the consumer even more vulnerable to exploitative practices. The need for a general and effective system of redress is therefore obvious.

⁸⁹ Bennett & Schoeman 'The tourism system and major role-players involved' in Bennett, Jooste & Strydom *op cit* (n 13) 33.

⁹⁰ George 'Introduction to tourism' in George *op cit* (n 8) 16.

⁹¹ Page & Connell *op cit* (n 2) 11.

⁹² George 'Introduction to tourism' in George *op cit* (n 8) 11.

⁹³ George 'Introduction to tourism' in George *op cit* (n 8) 11.

⁹⁴ George 'Introduction to tourism' in George *op cit* (n 8) 11.

- *Fragmentation and diversity.* The supply of tourism services and products is fragmented and diverse. On one hand, the supply of tourism services is dominated financially by a relatively small group of large and well-entrenched tourism service providers (including major travel agencies and tour operators, airlines and hotel groups). Yet on the other hand, tourist services are provided by a very large number of small, medium and micro enterprises (SMMEs).⁹⁵ It may be safe to say that the large and well-entrenched suppliers of tourism services are generally reputable and will ensure that they comply with applicable legislation and, even in the absence of adequate consumer protection legislation, will endeavour to protect consumers in order, for instance, to prevent negative publicity. However, large suppliers also have the necessary resources to make it extremely difficult for a consumer to obtain redress in the event of a problem arising. The consumer is very often dependent on the goodwill of the supplier to obtain redress when a problem does occur. To uphold and enforce a consumer's rights against such a large supplier requires knowledge of applicable consumer rights as well as easily accessible remedies. In contrast, small businesses may not have the resources to get involved in litigation, but may well be relatively more exposed to the dangers of litigation precisely because they do not have the resources or knowledge to ensure compliance with legislative requirements. Then again, small enterprises may also often be in breach of consumer protection legislation because of a lack of knowledge. Some such enterprises may even wilfully be in breach in order to save costs and/or exploit consumers because of the supplier's relative obscurity. All of the above makes the dissemination of knowledge about consumer protection legislation extremely important.
- *Volatility.* The demand for tourism products is generally very volatile and subject to seasonality.⁹⁶
- *High fixed costs.* Most tourism businesses operate on a high fixed cost basis. Examples would include the operating of a B&B establishment, resort, hotel or airline. The operating costs are high and relatively consistent whether there are

⁹⁵ George 'Introduction to tourism' in George *op cit* (n 8) 11.

⁹⁶ George 'Introduction to tourism' in George *op cit* (n 8) 11.

one or 250 guests or passengers.⁹⁷ The already high cost of operating an accommodation establishment makes the added burden of compliance with (additional) consumer protection requirements something that especially small enterprises would like to avoid. However, ignoring or being ignorant of these requirements may be even more costly in the long run.

- *Vulnerability.* The tourism industry is extremely sensitive to external and adverse events. These would include events such as natural disasters but also man-made events such as terrorist bombings, political unrest and economic recession.⁹⁸
- *Resilience.* The tourism industry is, however, a resilient one and able to overcome set-backs to the industry. Recent examples include the 9/11 terrorist attacks in the USA and the 2004 tsunami disaster in South East Asia.⁹⁹
- *Dynamic.* The tourism industry is a very dynamic and challenging one and it is an industry where change is the rule rather than the exception.¹⁰⁰
- *Competitiveness.* The tourism industry is a very competitive market and organisations and destinations compete to outdo each other for the disposable income of the consumer. The tourism market requires increasingly high standards of professional service and knowledge.¹⁰¹ Being able to display compliance with relevant consumer protection legislation and even informing consumers about their rights may have the advantage of conveying a message to consumers that their interests are paramount for the supplier, providing the consumer with the necessary peace of mind. Such a consumer is also more likely to recommend the establishment to prospective consumers via, for instance, social media. Paying attention to consumer protection may actually provide an establishment with a competitive advantage.

⁹⁷ George 'Introduction to tourism' in George *op cit* (n 8) 11.

⁹⁸ George 'Introduction to tourism' in George *op cit* (n 8) 11.

⁹⁹ George 'Introduction to tourism' in George *op cit* (n 8) 11.

¹⁰⁰ Bennett *op cit* (n 72) 4.

¹⁰¹ George 'Introduction to tourism' in George *op cit* (n 8) 3 .

- *Globalisation*. Tourism is a global phenomenon and is also part of a much more comprehensive process of globalisation.¹⁰² The potential for globalisation to contribute to more demanding and knowledgeable consumers has been referred to above.¹⁰³

2.5 The tourist as a consumer

Underlying the travel and tourism industry is the need and desire for people to travel. People have always travelled for a number of reasons, for example, trade and religious purposes, medical treatment, educational purposes, sporting and other events, culture and heritage, and visiting family and friends.¹⁰⁴ The aforementioned are reasons for people travelling but are not necessarily the motivation. The motivation for travelling is linked to the needs, desires and personal goals of the tourist/traveller. Maslow's hierarchy of needs is well known for explaining motivation. Once basic physiological and safety needs are satisfied, the higher needs of social belonging, esteem and self-actualisation will motivate a person.¹⁰⁵ The motivation for travel is most likely to be found in these higher needs of people.

The different subsystems in which the individual operates, namely the sociological, economic, political and technological environments impact on the individual and influence his or her needs and desires, for example, to travel.¹⁰⁶ The changing attitudes of people to leisure times and holidays away from home are a consequence of increased real disposable income, more leisure time, paid holidays, greater mobility, better education and wider dissemination of information.¹⁰⁷ The greater availability of resources such as leisure time and disposable income allows people to pursue their higher needs. It is therefore safe to forecast that the relative demand for tourism travel is likely to increase.¹⁰⁸ However, the competition for the tourist's

¹⁰² George 'Introduction to tourism' in George *op cit* (n 8) 3 and Page & Connell *op cit* (n 2) 18.

¹⁰³ See paragraph 2.3 above.

¹⁰⁴ Page & Connell *op cit* (n 2) 81.

¹⁰⁵ Page & Connell *op cit* (n 2) 82.

¹⁰⁶ Bennett *op cit* (n 72) 70.

¹⁰⁷ Bennett *op cit* (n 72) 72. See also Page & Connell *op cit* (n 2) 78.

¹⁰⁸ Bennett *op cit* (n 72) 72.

disposable income and leisure time will also increase, eliciting the following comment:

Many tourists are becoming more demanding The search is now going in the direction of continuous sophistication and refinement of recreational needs, which can be described as the birth of a new travel culture ... a new tourist, who clearly expresses his/her needs and behaves accordingly. And this implies that what up to now has been a seller's market will be replaced by a buyer's market – a market in which the consumer has the say and not the producer.¹⁰⁹

A consumer is a person who, through a process of decision-making, acquires goods and services for personal consumption.¹¹⁰ This process then normally involves a purchase but in the context of tourism it is important to also understand the importance of experiencing the destination in that the tourist is a consumer of place and culture,¹¹¹ as well as a purchaser of tourism products.¹¹² The development of a consumer culture in the latter part of the 20th century and in the beginning of the new millennium has impacted on tourism and made the tourist today one that is more experienced, demanding and discerning. This has resulted in the tourism industry having no choice but to become considerably more consumer-orientated so as to meet the increasingly sophisticated needs of the market.¹¹³ A consequence of the emergence of a more demanding tourist is the fact that these tourists are more likely to insist on their rights as consumers. With the CPA aiming to provide an efficient system of redress for consumers, it can be safely forecasted that demanding consumers will make use of this system.

As a final comment it is worthwhile to very briefly consider some of the latest trends in the tourism market. These trends represent the direction of development of the industry as demand dictates supply. Some of these trends include the following.¹¹⁴

¹⁰⁹ Bennett *op cit* (n 72) 73.

¹¹⁰ Page & Connell *op cit* (n 2) 77. (Of course the CPA provides a different definition of what is considered a consumer for purposes of the CPA.)

¹¹¹ It has been reported that about a dozen Japanese tourists require psychological treatment after visiting Paris, France, each year 'as the reality of unfriendly locals and scruffy streets clashes with their expectations' (24 October 2006) *The Eastern Province Herald* 6.

¹¹² Page & Connell *op cit* (n 2) 77.

¹¹³ Page & Connell *op cit* (n 2) 77.

¹¹⁴ Van Zyl 'The future of tourism' in George *op cit* (n 8) 346-350. See also generally Page & Connell *op cit* (n 2) 620-635.

- *Significant changes in consumer preferences*

This trend is best illustrated by the move away from 'old' tourism of the traditional standardised package-holidays of sun, sea and sand to the so-called 'new' tourism characterised by a more flexible, individualised and authentic holiday experience.

- *Need for faster, shorter and more frequent breaks*

On these short, all-in-one breaks, nothing can be left to chance. The implication is clear that if something does go wrong, the tourist will in all likelihood be prepared to make use of legal avenues to seek damages.

- *Increased education levels of tourists*

Not only will the increase in levels of education of tourists affect their choice of where to holiday and what to do during such holidays, but it will mean also mean that tourists will be more informed about their rights and be willing to exercise those rights.

- *More adventure travel*

The rapid growth of adventure tourism (coupled with eco-tourism) is a significant tourist development but it carries the added risk of injury or worse for the tourist, and also for the provider of the service. Safety, liability and indemnity issues are therefore also of great concern to these suppliers.

Against the background of these trends the CPA has been introduced, changing the external legal environment of suppliers of tourism services and that of the consumers of those services. The introduction of the CPA is sure to provide further impetus to the evolvement of these trends, requiring suppliers (and consumers) of tourism services to take careful cognisance of this legislation.

2.6 Regulation of the tourism industry

Leiper's system model illustrates that suppliers of tourism services are impacted upon by the macro-environment within which the industry and its constituent parts function, such as the political, economic and legal environments. This macro-environment is significantly influenced by government (be it government on an

international and regional level, or the national, provincial and local governments respectively). Ultimately it is the government that provides the regulatory framework within which the industry must operate, and government that is responsible for direct intervention in certain specific areas of the industry, normally via legislation. On an international level the World Travel and Tourism Council (WTTC) has stated that governments should 'show leadership by defining coherent and streamlined management structures that can efficiently drive New Tourism; elevate tourism to strategic national level with senior policy-making', and 'factor tourism into all its policies and decision-making, to promote growth that respects both business needs and the wellbeing of citizens'.¹¹⁵

In the South African context the (then) Department of Environmental Affairs and Tourism (DEAT) provided the policy framework for tourism in the 1996 *White Paper on the Development and Promotion of Tourism in South Africa*. In terms of the policy, the roles to be played by national, provincial and local government are spelled out. As far as the national government is concerned the policy provides that the national government must play five key roles in the development and promotion of the tourism industry. These are: facilitation and implementation, coordination, planning and policy-making, regulation and monitoring, and promoting development.¹¹⁶ Although the roles of government on provincial and local government entail essentially the same areas the emphasis differs in each instance.¹¹⁷

The South African tourism industry is regulated by a large number of laws including legislation on environmental protection, immigration and travel documents, foreign currency, liquor sales, employment, health and consumer protection, and many more. Although the Department of Tourism is primarily responsible for policy and regulations specific to the industry, it shares responsibility for the industry with a number of other departments such as Home Affairs, Health, Transport, Trade and Industry and Environmental Affairs. Compliance with all the requirements of the different departments (including provincial and local government legislation) presents tourism businesses with a serious challenge. The Department of Trade and Industry

¹¹⁵ George 'The government and tourism' in George *op cit* (n 8) 147.

¹¹⁶ *Op cit* (n 26) 47-49.

¹¹⁷ *Op cit* (n 26) 47.

has identified excessive and unnecessary requirements imposed by the different spheres of government as a major constraint to the growth of businesses in the tourism industry.¹¹⁸

The purpose of the law is to regulate relations between the members of a community equitably so that they can live in peace and good order.¹¹⁹ The law must therefore order society and create an environment of certainty in which members of that particular society can interact and arrange their lives in order to pursue their idea of the 'good life'. An increasingly important part of the good life is the role that tourism plays.

In Chapter 1 of the study, the importance of tourism was highlighted in an economic sense. It was indicated that tourism is a very significant industry, both internationally and in South Africa. The industry is large, complex and very competitive, as indicated above. Tourism demands high standards of professional management and knowledge.¹²⁰ The tougher the competition the more important it is to ensure that the interests of the various role-players are effectively and fairly balanced, which is the role of the law. Another factor to consider is the inevitable result of millions of tourists visiting South Africa¹²¹ – somewhere, something is going to go wrong! The relations between these visitors and the tourism service providers must be effectively regulated in order to protect all concerned and to provide mechanisms to resolve disputes when things do go wrong. It is in these situations that the CPA will more often than not find application. The next part of this section provides an overview of the regulations that exist in the tourism industry internationally, regionally, provincially and locally.

¹¹⁸ George 'The government and tourism' in George *op cit* (n 8) 150.

¹¹⁹ Rautenbach & Malherbe *Constitutional Law* (2009) 5.

¹²⁰ George 'Introduction to tourism' in George *op cit* (n 8) 3.

¹²¹ As indicated in Chapter 1 of the study the National Tourism Sector Strategy has set as a target 15 million foreign arrivals to South Africa by 2015. Somewhere else it has been reported that South Africa can expect 13.5 million tourist arrivals by 2015. (See Els 'SA can expect 13.5m tourists by 2015' <http://www.tourismupdate.co.za/print/NewsStory.aspx?newsId=21887> (accessed on 2010-05-24)). The fact is that millions of people do visit South Africa. To this figure (or figures) one must still add the number of domestic tourists.

2.6.1 World Tourism Organisation

As a result of the growth of the tourism industry worldwide, a need developed for an international organisation empowered to deal on a worldwide basis with all matters concerning tourism and to cooperate with other competent organisations, particularly those that form part of the United Nations system.¹²² This led to the formation of the World Tourism Organisation (WTO) in 1970 – ‘an international organisation of intergovernmental character’ and who has legal personality.¹²³

In 2003 the WTO and the UN agreed to establish the WTO as a specialised agency of the UN.¹²⁴ Subsequently the organisation became known as the ‘UNWTO’. This collaboration makes ‘it possible for the UNWTO, as the only intergovernmental organization to have global responsibilities in all tourism activities, to make a significant contribution to the sustainable development of international tourism.’¹²⁵

The aim of the UNWTO is to promote and develop tourism.¹²⁶ In pursuing this aim the UNWTO is expected to contribute to economic development, international understanding, peace and prosperity, and respect for human rights.¹²⁷ The UNWTO is mandated to pay particular attention to the interests of developing countries in the area of tourism.¹²⁸ The UNWTO advises on tourism policies to improve tourism planning, education and training, and provides statistics on international tourism. It is responsible for the publication of the Tourism Satellite Accounts which provides the benchmark for measuring the economic contribution of tourism to national economies (measuring aspects such as the contribution to GDP and job creation).¹²⁹

¹²² Vrancken ‘The World Tourism Organisation’ (1999) *SAYIL* 231.

¹²³ Vrancken *op cit* (n 122) 231.

¹²⁴ Vrancken ‘World Tourism Organization (UNWTO)’ in R Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (2008) www.mpepil.com (accessed on 2012-09-27).

¹²⁵ Vrancken *op cit* (n 124).

¹²⁶ Article 3 of the Statutes of the World Tourism Organisation. See Vrancken *op cit* (n 122) 232. See also Vrancken *op cit* (n 124).

¹²⁷ Article 3 of the Statutes of the World Tourism Organisation. See Vrancken *op cit* (n 122) 232 and also Vrancken *op cit* (n124).

¹²⁸ Article 3 of the Statutes of the World Tourism Organisation. See Vrancken *op cit* (n 122) 232 and also Vrancken *op cit* (n124).

¹²⁹ George ‘The government and tourism’ in George *op cit* (n 8) 152.

The membership of the UNWTO¹³⁰ is rather unique, in that sovereign states (full members), territories that are not independent¹³¹ (associate members), as well as international bodies with a specialised interest in tourism - both intergovernmental and non-governmental - can become members¹³² (affiliate members). South Africa became a member in 1994.¹³³

Affiliate membership is also open to commercial bodies and associations whose activities are related to the aim of the UNWTO, and include airlines, travel agencies, and hotel and restaurant chains.¹³⁴ The UNWTO therefore creates a unique platform for discussion between governmental and non-governmental role-players in the area of tourism.¹³⁵ Currently the membership of the UNWTO includes 160 countries and territories and more than 350 affiliate members representing the private sector, educational institutions, tourism associations and local tourism authorities.¹³⁶

The organs of the UNWTO include the General Assembly, the Executive Council and the Secretariat.¹³⁷

The General Assembly may consider and make recommendations concerning any matter within the competence of the UNWTO. This includes the power to prepare and recommend (but not conclude) international agreements on any question within the competence of the UNWTO.¹³⁸

As a specialised UN agency, the UNWTO is the only intergovernmental organisation to have worldwide responsibilities relating to all aspects of tourism.¹³⁹ The UNWTO

¹³⁰ The membership of the UNWTO is set out in Articles 4-7 of the Statutes of the World Tourism Organisation.

¹³¹ Vrancken *op cit* (n 122) 232-233. Examples of such territories are Aruba, Flanders, Macau, Madeira & the Netherlands Antilles and Puerto Rico.

¹³² Vrancken *op cit* (n 122) 232-233.

¹³³ Vrancken *op cit* (n 122) 232.

¹³⁴ Vrancken *op cit* (n 122) 233.

¹³⁵ Vrancken *op cit* (n 122) 233.

¹³⁶ <http://www.unwto.org/aboutwto/index.php?op=0> (accessed 2009-02-20).

¹³⁷ Vrancken *op cit* (n 122) 234. The structure of the UNWTO is provided for in Articles 8-24 of the Statutes of the World Tourism Organisation.

¹³⁸ Vrancken *op cit* (n 122) 234-235.

¹³⁹ Vrancken *op cit* (n 122) 245.

plays a critical role in developing responsible, sustainable and universally accessible tourism, focusing in particular on the (tourism) interests of developing nations.¹⁴⁰ The UNWTO also encourages the implementation of the Global Code of Ethics for Tourism, through which it aims to maximise the benefits of tourism whilst minimising the harmful impact of tourism on the environment, vulnerable social groups like children, workers and indigenous cultures.¹⁴¹

2.6.2 Organisation for Economic Cooperation and Development

The Organisation for Economic Cooperation and Development (OECD) represents 30 countries which share a commitment to democratic government and a market economy and focuses on economics and social issues such as trade, education and development. It has a Tourism Committee which aims to enhance the capacity of member governments 'to adjust their policies and actions to support sustainable tourism growth, and to better integrate tourism policy issues', as well as to facilitate international cooperation.¹⁴²

2.6.3 SADC legal and institutional framework for tourism

Different regions have regional tourism organisations responsible for promoting tourism to and within that region. Some of these regional organisations include the Regional Tourism Organisation of Southern Africa (RETOSA); the Pacific Asia Travel Association (PATA); the European Travel Commission (ETC), and the Organisation of American States (OAS).

In 1998 the Southern African Development Community (SADC) Summit of Heads of State or Government adopted the Protocol on the Development of Tourism in the SADC.¹⁴³ It is believed that through cooperation in the region it will be possible to

¹⁴⁰ <http://www.unwto.org/aboutwto/index.php?op=0> (accessed 2009-02-20).

¹⁴¹ <http://www.unwto.org/aboutwto/index.php?op=0> (accessed 2009-02-20). See also Vrancken *op cit* (n 126).

¹⁴² George 'The government and tourism' in George *op cit* (n 8) 153.

¹⁴³ Vrancken 'The SADC legal and institutional framework for tourism' (2000) *SA YIL* 180.

optimise the resources of the region, and increase the competitive advantage of the region as opposed to other destinations.¹⁴⁴

The aim of this agreement is 'to use tourism as a vehicle to achieve sustainable social and economic development through the full realisation of its potential for the region and to ensure equitable, balanced and complimentary development of the tourism industry region-wide'.¹⁴⁵

To achieve this aim the Protocol recognises the necessity for:

- the creation of a favourable tourism investment climate through the improve of aspects such as service quality, competitiveness and safety of tourists;
- the promotion of the region as a multi-dimensional tourist destination; and
- the easing of restrictions on travel, and the improvement of tourism service and infrastructure.¹⁴⁶

To realise these objectives member states must adhere to certain principles, including that member states must ensure:

- the full involvement of the private sector in the industry, including in the formulation of policy;
- sound management practices to ensure environmentally and socially sustainable tourist development;
- the taking of all necessary practical steps to realise the objectives of the protocol (such as the passing of necessary laws);
- facilitating the ease of entry of tourists into and travel between states of the region;

¹⁴⁴ Vrancken *op cit* (n 143) 180.

¹⁴⁵ Vrancken *op cit* (n 143) 180.

¹⁴⁶ Vrancken *op cit* (n 143) 180-181.

- harmonisation of tourist registration documents; and
- harmonisation of training standards at tourism training institutions.¹⁴⁷

The bodies responsible for the implementation of the Protocol are:

- SADC Summit Heads of State or Government;
- SADC Committee of Tourism Ministers;
- Committee of Senior Officials;
- Tourism Coordinating Unit; and
- Regional Tourism Organisation of Southern Africa (RETOSA).

The Committee of Tourism Ministers (CTM) is responsible for the adoption and amendment of tourism policies for the region. The Committee of Senior Officials (CSO) is in turn responsible for assessing the need for updating and amending regional policy. The Tourism Coordinating Unit (TCU) coordinates the daily implementation of the Protocol and provides technical and administrative support to the CTM and CSO.

RETOSA is the body responsible for the promotion and marketing of the SADC tourism sector and as such its main objective is to assist in the development of legal and ethical tourism in the SADC region.¹⁴⁸

To realise this objective RETOSA must perform a number of varied tasks, including:

- facilitating the flow of tourism into the region;
- coordinating the tourist marketing of the region;
- promotion of consistency in the quality of tourist service standards; and
- facilitating communication between member states and tourism organisations to improve the region's tourism industry.¹⁴⁹

¹⁴⁷ Vrancken *op cit* (n 143) 181-183.

¹⁴⁸ Vrancken *op cit* (n 143) 185.

RETOSA's full membership consists of registered and nationally recognised private sector umbrella organisations and national public sector tourism authorities operating in member states. Associate members are mainly private and public sector organisations primarily involved in the tourism industry. Affiliate members are organisations from non-SADC countries.¹⁵⁰

RETOSA is governed by a Board of Directors responsible for overall direction and activities and which has to ensure that the policy and decisions of the CTM are carried out. The Board appoints an Executive Director, who is responsible for implementing decisions of the Board; managing the affairs of RETOSA, and implementing the objectives of RETOSA. The Executive Director is assisted by a Secretariat.¹⁵¹

Vrancken observes that the Protocol will provide benefits for the whole region flowing from greater harmonisation of the legal and structural framework, greater freedom of movement for tourists and related services in the region and joint marketing. However, the author also warns that a disadvantage is the fact that the region is then perceived to be one. Negative developments in one country could adversely affect the whole region.¹⁵²

2.6.4 Tourism Act, 1993

In South Africa, the national legal framework of tourism is provided by the Tourism Act.

Tourism is a functional area listed in Schedule 4 of the Constitution of the Republic of South Africa, 1996 (the Constitution). This means that both the national legislature (Parliament) and the provincial legislatures have the necessary legislative competence to legislate on matters of tourism. The Tourism Act then is the national

¹⁴⁹ Vrancken *op cit* (n 143) 185.

¹⁵⁰ Vrancken *op cit* (n 143) 185-186.

¹⁵¹ Vrancken *op cit* (n 143) 186-189.

¹⁵² Vrancken *op cit* (n 143) 189.

Act whilst the provinces have the necessary legislative competence to pass their own provincial legislation.

The executive branch of government is responsible for the implementation and enforcement of this legislation. The responsible ministry for tourism is the Minister of Tourism.

The responsibilities of the Ministry regarding tourism are as follows:

- to raise the profile of tourism;
- to unlock the tourism industry's potential for wealth creation and employment generation;
- by formulating a cohesive development strategy for linking the management of tourism with critical environmental products (such as national parks, protected areas and cultural resources);
- to coordinate amongst different ministries whose functions directly impacts on tourism; and
- to facilitate strategic interaction between tourism and other related policies, e.g. water, land management, energy and natural resources.¹⁵³

The specific functions of the Chief Directorate: Tourism include:

- tourism policy formulation;
- monitoring of the tourism policy and its implementation;
- initiate legislative changes to promote and facilitate tourism development;
- liaise with national and provincial tourism structures to support and facilitate tourism development;

¹⁵³ *White Paper: The Development and Promotion of Tourism in South Africa op cit (n 26) 60-61.*

- coordinate with provincial tourism departments;
- international liaison; and
- the promotion and facilitation of responsible tourism and effective environmental management.¹⁵⁴

Whereas cabinet's responsibility regarding tourism is largely that of policy-making, planning and facilitation, the other responsibilities rest with a statutory body, the South African Tourism Board, established in terms of the Tourism Act.¹⁵⁵

(i) South African Tourism Board

The South African Tourism Board,¹⁵⁶ previously known as 'SATOUR' and now as 'SA Tourism',¹⁵⁷ is South Africa's national tourism organisation and has as its main function the marketing of South Africa as a tourist destination. Whereas the role of SATOUR was to market South Africa as an international tourist destination, the role of SA Tourism has been extended to include the promotion of domestic tourism in South Africa.

The objective of the Board is to promote tourism by encouraging people to travel to and within South Africa. In achieving this objective the Board must:

- take due regard of the sustainability of environmental resources;
- take measures to ensure that services and facilities rendered to tourists are of the highest possible standards;

¹⁵⁴ See Vrancken 'The National Legal Framework of Tourism: Past, present and future' (2000) *Stell LR* 89-90.

¹⁵⁵ S 2 of the Tourism Act. See also Vrancken *op cit* (n 154) 92.

¹⁵⁶ The Draft Tourism Bill, which is set to replace the Tourism Act, provides for the continued existence of the South African Tourism Board. The Bill does however introduce certain changes regarding the Board. Some of these will be mentioned in this discussion so as to reflect changes to the position under the Tourism Act. A more detailed discussion of relevant aspects of the Draft Tourism Bill is done in paragraph 2.6.5 below.

¹⁵⁷ This name change and change in responsibility and focus were precipitated by the recommendations of the *White Paper: The Development and Promotion of Tourism in South Africa op cit* (n 26) 63-64.

- manage information and conduct research relating to tourism, and
- advise the Minister on tourism policy, either on its own initiative or when requested by the Minister.¹⁵⁸

The Draft Tourism Bill does not refer to the objectives of the Board *per se*. The purpose of the Board in terms of the Draft Tourism Bill is to give effect to the Act (Bill).¹⁵⁹ The Draft Tourism Bill stipulates the functions of the Board.¹⁶⁰ These include the marketing of South Africa as a domestic and international tourist destination,¹⁶¹ as well as to market South African tourist products and facilities internationally and domestically;¹⁶² to develop and implement a marketing strategy for tourism that promotes the objects of the Act (Draft Tourism Bill) and the national tourism sector strategy;¹⁶³ to advise the Minister on matters related to tourism marketing,¹⁶⁴ and establish a National Convention Bureau to market South Africa as a business tourism destination.¹⁶⁵

In order to achieve its objective the Board is vested with the power to:

- negotiate with any government body or person regarding any matter aimed at achieving its objective;
- conclude any agreement, with the Minister's approval, with such body or person for the promotion of tourism;
- open offices where necessary for the effective exercise of its powers and duties; and

¹⁵⁸ S 3 of the Tourism Act.

¹⁵⁹ S 10(1). These objects of the Draft Tourism Bill are contained in s 2 of the Bill and are set out below in paragraph 2.6.5.

¹⁶⁰ S 11.

¹⁶¹ S 11(1)(a) of the Draft Tourism Bill.

¹⁶² S 11(1)(b) of the Draft Tourism Bill.

¹⁶³ S 11(1)(c) of the Draft Tourism Bill.

¹⁶⁴ S 11(1)(d) of the Draft Tourism Bill.

¹⁶⁵ S 11(1)(e) of the Draft Tourism Bill.

- perform any act which may contribute towards the achievement of the object of the Board.¹⁶⁶

The Board must cooperate closely with the Department of Tourism to promote efficiency, and through the agency of the Department, liaise with other departments.¹⁶⁷

The Board can delegate any of its powers to a committee or to an employee of the Board, provided the Minister approves the delegation in the latter instance.¹⁶⁸

(ii) Establishment of Schemes

The Minister can, on the recommendation of the Board, establish a grading system for accommodation establishments.¹⁶⁹ This was done in the form of the Tourism Grading Council of South Africa (TGCSA), which is responsible for the grading of tourism accommodation establishments in South Africa.¹⁷⁰ The Board may recommend to the Minister the establishment of similar schemes in respect of other sectors of the tourism industry.¹⁷¹ The Draft Tourism Bill provides specifically for the establishment of a national grading and classification system for tourism.¹⁷²

Finally, the Board may recommend to the Minister that he or she promotes legislation aimed at the promotion of standards or any matter relating to the tourism industry.¹⁷³

¹⁶⁶ S 13 of the Tourism Act.

¹⁶⁷ S 13 of the Tourism Act.

¹⁶⁸ See s 10 of the Tourism Act.

¹⁶⁹ S 18(1) of the Tourism Act.

¹⁷⁰ Caras 'Managing accommodation for tourists' in George *op cit* (n 8) 118.

¹⁷¹ S 19 of the Tourism Act.

¹⁷² S 9. This aspect is discussed in par 2.7.5 below.

¹⁷³ S 27 of the Tourism Act.

2.6.5 Draft Tourism Bill, 2011¹⁷⁴

As indicated the Draft Tourism Bill was published on 5 August 2011 for public comment.¹⁷⁵ The long title of the Bill states that the Bill is to provide for development and promotion of sustainable tourism for the social, economic and environmental benefit of South Africa and for the enjoyment of all its citizens and foreign visitors. It also provides that the Bill is to replace the Tourism Act, 1993.

Section 2 sets out the objectives of the Bill. These provide for:

- the promotion of responsible tourism for the benefit of South Africa and for the enjoyment of all its citizens and foreign visitors;
- the effective domestic and international marketing of South Africa as tourist destination;
- the promotion of quality tourism products and services;
- the promotion of growth, development and transformation of the tourism sector; and
- the enhancement of co-operation and co-ordination between all spheres of government in developing and managing tourism.

From a consumer protection perspective, the emphasis placed on the promotion of quality tourism products and services as one of the main aims of the Bill is significant. To facilitate the achievement of this aim the Bill introduces a number of mechanisms. These include provisions allowing the Minister to determine norms and standards for service excellence, and provisions for the Minister to issue codes of good practice to guide the conduct of, for example, tourism service providers. Chapter 3 of the Bill provides for the introduction of a national quality assurance strategy and grading

¹⁷⁴ It was reported at the Portfolio Committee for Tourism meeting held on 7 August 2012 that the Draft Tourism Bill was currently with the State Law Adviser's Office. See <http://www.pmg.org.za/node/33248> (accessed on 2012-08-13).

¹⁷⁵ *Government Gazette* No 34506 (dated 5 August 2011).

system, whereas Chapter 5 of the Bill introduces a Tourism Protector to receive tourist consumer complaints. A brief overview of these mechanisms is provided below.

(i) National Tourism Sector Strategy, norms and standards, and codes of good practice

Chapter 2 of the Tourism Draft Bill empowers the Minister to take a number of steps aimed at the promotion and improvement of the tourism industry. Firstly, the Minister has to establish a national tourism sector strategy to promote the objectives of the Bill.¹⁷⁶ Such a strategy must provide the strategies, objectives, indicators, targets, plans, guidelines and procedures and institutional arrangements relating to the promotion and development of tourism.¹⁷⁷ A coherent strategy will contribute significantly to tourism, realising its full potential in South Africa, particularly in view of the fact that tourism is an industry characterised by diversity and complexity.

A National Tourism Sector Strategy (NTSS) was indeed drafted by the Department of Tourism.¹⁷⁸ The document provides a comprehensive strategic plan for the tourism industry. The NTSS identifies three main themes, each with a set of strategic objectives.¹⁷⁹ The first of these themes is '[t]ourism growth and the economy'. The first strategic objective mentioned under this theme is '[t]o grow the tourism sector's absolute contribution to the economy'. The primacy of the position of this strategic objective leaves no doubt as to the role (and need) of tourism as a contributor to the economy and the appreciation of government thereof. The second theme is '[v]isitor experience and brand.' Under this theme, the first strategic objective is '[t]o deliver a world-class visitor experience'. The third theme relates to sustainability and good governance of the tourism industry.

¹⁷⁶ S 4(1) of the Draft Tourism Bill.

¹⁷⁷ S 4(2) of the Draft Tourism Bill.

¹⁷⁸ NTSS *op cit* (n 32).

¹⁷⁹ NTSS *op cit* (n 32) 12.

Certain strategic thrusts were identified and clustered for priority attention in the implementation of the NTSS. Four clusters were identified.¹⁸⁰ Of particular relevance for present purposes are:

- (a) 'Cluster 2.2: Tourism growth and development – supply', which includes as one of its focus areas 'Quality assurance', and
- (b) 'Cluster 3: People development' that has service excellence as one of its focus areas.

These are some of the indicators reflecting an awareness of the need to provide tourism products of high quality and excellent service.

Secondly, in terms of the Draft Tourism Bill, the Minister is empowered to establish a national tourism information and monitoring system for collecting, recording, managing, analysing and disseminating information on tourism, and to monitor development and trends in tourism.¹⁸¹ Providing both the public and private sector with accurate and relevant information and data is critical in facilitating better planning and implementation of measures to promote and develop tourism.

Closely linked to this measure is the mandate of the Minister to establish and maintain a database of information on tourism businesses to be used for planning and development of tourism growth and development.¹⁸² The NTSS describes the lack of proper data as follows:

Though significant progress has been made in tourism research and information since 1994, there are still some shortcomings. In particular, there is no national research framework to guide tourism-related research conducted in the country by the national government, academic institutions, provinces, destinations and the private sector. Therefore, existing research often fails to address the needs of industry stakeholders. A lack of collaboration also results in a duplication of efforts and resources.

¹⁸⁰ NTSS *op cit* (n 32) 25.

¹⁸¹ S 5(1) of the Draft Tourism Bill.

¹⁸² S 6(1) of the Draft Tourism Bill.

One of the key issues relating to tourism research is the lack of a proper database of tourism businesses operating in South Africa. Such a database would enable an understanding of the industry's capacity and of basic performance or demand levels.¹⁸³

This problem is addressed in that the Minister may list categories of tourism businesses that may¹⁸⁴ provide information; the period within which the information is to be provided; determine the form and manner for providing the information, as well as the recognition and incentives that may accrue to tourism businesses that provide information.¹⁸⁵

Section 7 permits the Minister firstly, to determine norms and standards for responsible tourism, service excellence and to promote the achievement of any of the objectives of the Draft Tourism Bill; and secondly, to determine indicators to measure compliance with such norms and standards.¹⁸⁶

Finally, Chapter 2 of the Draft Tourism Bill also allows the Minister to issue codes of good practice to guide the conduct of tourism service providers and organs of state responsible for the development and management of tourism and to promote the objectives of the Draft Tourism Bill.¹⁸⁷

(ii) National quality assurance strategy and grading system

Chapter 3 of the Draft Tourism Bill empowers the Minister to develop a national quality assurance strategy for tourism businesses that will promote the objectives of the Bill, the national tourism sector strategy and excellence in the provision of tourism services and products.¹⁸⁸ This quality assurance strategy will be underpinned by the development of a national grading and classification system by the Minister on recommendation of the South African Tourism Board to ensure the maintenance and

¹⁸³ NTSS *op cit* (n 32) 26.

¹⁸⁴ The use of the word 'may' seems strange as it leaves the business with a discretion to supply or not supply the required information. This may impact on the reliability of the information collected.

¹⁸⁵ S 6(2) of the Draft Tourism Bill.

¹⁸⁶ S 7(1) of the Draft Tourism Bill.

¹⁸⁷ S 8 of the Draft Tourism Bill.

¹⁸⁸ S 9(1)(a) of the Draft Tourism Bill.

enhancement of the standards and quality of tourism services and products.¹⁸⁹ The Minister may also monitor and evaluate the quality of tourism services and products.¹⁹⁰ This monitoring and evaluation will in all likelihood be conducted at the hand of the national grading and classification system to be developed.¹⁹¹

It is provided that the national grading and classification system may establish schemes in respect of tourism services and products and that the provisions of such a scheme shall govern the acquisition, continuation and termination of membership.¹⁹² Such a scheme will make use of a star-grading system in terms of which a person rendering tourism services and facilities is granted authority to use and display prescribed insignia, inclusive of one or more stars indicating the grading awarded.¹⁹³ It will be the responsibility of the Tourism Grading Council (TGCSA) to implement the national quality assurance strategy and grading system.¹⁹⁴ The Minister may delegate the overseeing of the TGCSA and the performance of any other functions in terms of Chapter 3 of the Bill to the Department, the SA Tourism Board or any other suitable body.¹⁹⁵

(iii) Tourism protector

The emphasis which the Draft Tourism Bill places on ensuring the maintenance and enhancement of standards and quality of tourism services and products is given further meaning by the introduction of the office of the Tourism Protector.¹⁹⁶ This person must be a suitably qualified officer of the Department of Tourism.¹⁹⁷

¹⁸⁹ S 9(1)(b) of the Draft Tourism Bill.

¹⁹⁰ S 9(1)(c) of the Draft Tourism Bill.

¹⁹¹ The NTSS, when dealing specifically with the aspect of Quality Assurance as a focus area of Cluster 2.2, provides that '[t]he current quality assurance programme aimed at tourism accommodation and conference facilities needs to be expanded also to include other aspects of the industry. Additional standards need to be developed to cover tourism activities, attractions and services, where appropriate, and there should be a drive to implement the recently developed "responsible tourism" standards in the industry'. See NTSS *op cit* (n 32) 49.

¹⁹² S 9(3) of the Draft Tourism Bill.

¹⁹³ S 9(4) of the Draft Tourism Bill.

¹⁹⁴ S 9(5) & (6) of the Draft Tourism Bill.

¹⁹⁵ S 9(7) of the Draft Tourism Bill.

¹⁹⁶ See Chapter 5 of the Draft Tourism Bill.

¹⁹⁷ S 29 of the Draft Tourism Bill.

The question may be asked whether it would not be better if the Tourism Protector was an independent person, particularly in view of the fact that government is such an important role-player in the provision of tourism services and tourism products. The answer, to some extent at least, may well lie with the fact that Tourism Protector has a very limited jurisdiction. Essentially the Tourism Protector has two basic functions. The first is that the Tourism Protector may, in terms of section 30 of the Draft Tourism Bill either on his or her own initiative or in response to a proposal from a person conducting a business within a particular tourism sector, recommend to the Minister the accreditation of a particular scheme or arrangement established by or for such a particular sector *to resolve tourist complaints*.¹⁹⁸ Such a scheme must be consistent with the objectives of the Bill and the purposes and policies of the Consumer Protection Act.¹⁹⁹

The Tourism Protector can, after having followed a consultative process with the relevant role-players, make a recommendation to the Minister for the accreditation of the (section 30) scheme. Upon accreditation the Tourism Protector must monitor the effectiveness of the scheme and is entitled to require such an accredited scheme to provide the Tourism Protector with information necessary to ensure effective monitoring.²⁰⁰

The second basic function of the Tourism Protector is to serve as conduit for tourism complaints. On receiving a tourism-related consumer complaint the Tourist Protector may refer such complaint to any number of bodies. These may be a scheme or arrangement accredited in terms of section 30; a provincial consumer protection authority or consumer court if the Tourism Protector is of the view that the issue(s) raised can be expeditiously and fully dealt with by such referral; the NPA; an equality court in the event of alleged unfair discrimination against a tourist; or another regulatory authority with jurisdiction.²⁰¹ It is clear that the Tourist Protector itself has no dispute resolution jurisdiction and can only refer complaints to the most

¹⁹⁸ S 30(1) of the Draft Tourism Bill.

¹⁹⁹ S 30(3) of the Draft Tourism Bill.

²⁰⁰ S 30(5) of the Draft Tourism Bill.

²⁰¹ S 31(1) of the Draft Tourism Bill.

appropriate body with jurisdiction. Section 31 corresponds substantially with section 73 of the CPA regarding where consumer complaints may be directed.²⁰²

The Draft Tourism Bill has attracted some criticism, primarily for the reason that it may add to the already significant administrative and bureaucratic burden faced by tourism service providers with a resultant increase in costs for such businesses.²⁰³ Although the proposed new Act could result in an increased administrative burden, the benefits of a coordinated national tourism strategy and the emphasis on quality assurance may serve the industry well in the long run. It may help to ensure that tourists as consumers are better protected against unscrupulous tourist service providers and it may engender consumer confidence, ensuring a sustainable industry.

2.6.6 Regulation of tourism in the provinces

As indicated above, tourism is one of the functional areas of concurrent national and provincial legislative competence. Section 104(1)(b)(i) of the Constitution provides that the provincial legislatures have the power to legislate on tourism for their respective provinces.

All the provinces have made use of this power by passing provincial legislation dealing with tourism. The relevant statutes are as follows:

- Eastern Cape Parks and Tourism Agency Act;²⁰⁴
- Free State Tourism Marketing Board Act;²⁰⁵
- Gauteng Tourism Act;²⁰⁶
- KwaZulu-Natal Tourism Authority Act;²⁰⁷
- Northern Cape Tourism Act;²⁰⁸

²⁰² The latter section is considered more fully in Chapter 3 of the study.

²⁰³ See Editor “AA travel guides warns against over-regulation of the industry” <http://www.tourismupdate.co.za/NewsDetails.aspx?newsId=61112> (accessed on 2011-10-02).

²⁰⁴ Act 2 of 2010.

²⁰⁵ Act 7 of 1997.

²⁰⁶ Act 18 of 1998.

²⁰⁷ Act 11 of 1996.

- North West Tourism Council Act;²⁰⁹
- Western Cape Tourism Act;²¹⁰
- Northern Province Tourism and Parks Board Act;²¹¹ and
- Mpumalanga Tourism and Parks Agency Act.²¹²

This section highlights only the tourism legislation of the Eastern Cape, namely the Eastern Cape Parks and Tourism Agency Act 2 of 2010 (ECPTAA).²¹³

The main purpose of the Act is to establish a juristic body, the Eastern Cape Parks and Tourism Agency.²¹⁴ The Agency has two primary functions, namely to develop and manage protected areas in the province, and to promote and facilitate the development of tourism in the province.²¹⁵ The objects of the Agency are to:

- (a) manage biodiversity in protected areas located in the province;
- (b) manage tourism in the Province;
- (c) ensure the effective implementation of its biodiversity management and tourism and powers and duties granted in terms of this Act and any other law; and
- (d) ensure excellence in the business and resource management of the Agency.²¹⁶

Section 13 of the Act provides the Agency with specific powers and duties relating to tourism. In terms of this section the Agency 'is responsible for the marketing, promotion and development of tourism in the Province and the transformation of the tourism industry'.²¹⁷ The section also spells out in some detail what is to be understood by these tasks.

²⁰⁸ Act 5 of 1998.

²⁰⁹ Act 7 of 1998.

²¹⁰ Act 3 of 1997.

²¹¹ Act 8 of 2001.

²¹² Act 5 of 2005.

²¹³ For a discussion on the tourism legislation of other provinces one may refer to the following sources: Beckerling & Douvelos 'Tourism' (2003) *LAWSA* Vol 28 First Re-issue. Vrancken 'The provincial tourism legislation' (2000) *TSAR* 506. Vrancken 'New Western Cape tourism legislation' (2005) *Obiter* 412. Vrancken 'New Mpumalanga tourism legislation' (2006) *Obiter* 351.

²¹⁴ S 10 of the ECPTAA.

²¹⁵ Long title of the of the ECPTAA.

²¹⁶ S 11 of the ECPTAA.

²¹⁷ S 13(1) of the ECPTAA.

Firstly, the Agency is to *market* the province as a preferred destination for international, regional and domestic tourists²¹⁸ by developing and implementing marketing strategies that will specifically target these segments of tourists,²¹⁹ and participation in marketing initiatives and strategies of the Department and/or other organs of state.²²⁰

Secondly, the Agency must promote tourism in the province by advertising tourism attractions of the Province; producing and disseminating publications useful to tourists; producing and distributing pictorial material; and organising displays, broadcasts and telecasts, talks and public lectures relating to the tourism industry.²²¹

Thirdly, the Agency must develop tourism in the province. This is to be achieved by identifying tourism development opportunities and implementing initiatives and programmes to make use of such opportunities; implementing effective means to facilitate the improvement of standards of tourism products and services being offered; identifying tourism training needs and facilitating training to address such training needs; and assisting with the development and implementation of a national system of standards, classification and grading for tourist accommodation establishments, products and services.²²²

In order to effectively exercise its powers and duties the Agency *must* develop and maintain a database of all tourist attractions, facilities, infrastructure, services, natural

²¹⁸ The concepts of international, regional and domestic tourists are not defined in the Act. The South African Standard on Tourism Service Excellence (SANS 1197:2012, available on <https://www.sabs.co.za> (accessed on 2012-09-27)) does not provide a specific definition for the concept 'tourist' but provides definitions for domestic and international tourists respectively. A 'domestic tourist' is defined as a 'resident visitor who visits a destination within the economic territory of the relevant country'. An 'international tourist' is defined as an 'international visitor who stays at least one night in collective or private accommodation in the country visited'.

²¹⁹ S 13(2)(a)(i) of the ECPTAA.

²²⁰ S 13(2)(a)(ii) of the ECPTAA. It may be questioned why the ECPTAA limits the jurisdiction of the Agency to participating 'in marketing initiatives and strategies of the Department and/or other organs of state' only, presumably excluding such participation in private initiatives. The answer probably lies in the introductory part of s 13(2), which contains the imperative 'must'. The Agency therefore *must* participate in the initiatives and strategies of the department and other organs of state in pursuance of the constitutional principle of co-operative government, but it will be within the (implied) discretion of the Agency to participate in private initiatives if the Agency considers it expedient in fulfilling its mandate as expressed in s 13(1), namely being responsible for the marketing, promotion and development of tourism in the Province.

²²¹ S 13(2)(b) of the ECPTAA.

²²² S 13(2)(c) of the ECPTAA.

and cultural attractions and their location in the province, and register any tourist amenity and person conducting or operating a tourists service.²²³ Section 42(1) also requires of 'the Agency to develop and maintain a register of all tourist amenities and persons conducting or operating a tourism service in the Province'.²²⁴ A person is considered to be conducting or operating a tourism service if that person is a tour operator, courier, travel agent, vehicle rental operator or a tourism or biodiversity management training provider.²²⁵ The Act further explains that an amenity is a tourist amenity if it is a hotel, lodge, guest lodge, bed and breakfast establishment, conference centre or restaurant.²²⁶ Every tourist amenity or person conducting or operating tourism services in the Province must register with the Agency and may not conduct or operate a tourist amenity or tourist service unless so registered.²²⁷ The Agency, in consultation with the MEC and by notice in the Provincial Gazette, determines the requirements which are to be complied with for purposes of registration.²²⁸ A certificate of registration is issued to a tourist amenity or person conducting or operating a tourist service.²²⁹ The Agency may require a tourist amenity or person conducting or operating a tourist service to comply with a registration requirement within a period of three months of being notified of the non-compliance, failing which the Agency may withdraw the registration.²³⁰ Decisions of the Agency may be appealed to the MEC.²³¹

2.6.7 Regulation of tourism at local government level

In terms of the South African constitutional scheme, municipalities have legislative and executive authority in respect of *local tourism*.²³² Furthermore, as tourism is a functional area listed in Part A of Schedule 4, the national and provincial

²²³ S 13(3) of the ECPTAA.

²²⁴ S 42(1) of the ECPTAA.

²²⁵ S 42(2) of the ECPTAA.

²²⁶ S 42(2) of the ECPTAA.

²²⁷ S 43(1) of the ECPTAA.

²²⁸ S 43(3) of the ECPTAA.

²²⁹ S 46(1) of the ECPTAA.

²³⁰ S 48(1) of the ECPTAA.

²³¹ S 50 of the ECPTAA.

²³² Local tourism is listed in Part B of Schedule 4 of the Constitution and in terms of s 156(1) and (2) of the Constitution municipalities have legislative and executive competence in respect of such functional areas.

governments are to assign by agreement to municipalities, the administration of tourism to the extent that:

- tourism necessarily relates to local government;
- it can be most effectively be administered locally; and
- the municipality has the capacity to administer it.²³³

The situation is somewhat complicated by the fact that the Constitution distinguishes between three types of municipalities, namely Categories A, B & C.²³⁴

- A Category A municipality is a municipality which has exclusive municipal executive and legislative authority in its area (metropolitan municipality).
- A Category B municipality shares municipal executive and legislative authority in its area with a Category C municipality within whose area they fall (local municipality).
- A Category C municipality is a municipality which has municipal executive and legislative authority that includes more than one municipality (district municipality).

The Local Government: Municipal Structures Act²³⁵ refers to a Category A municipality as a 'metropolitan municipality' and which municipality has exclusive executive and legislative authority in its area, including the powers conferred in terms of s 156 of the Constitution.

However, as local and district municipalities share common territory, the Constitution requires of Parliament to provide legislation for dividing powers and functions between the different authorities.²³⁶ This was done by the Local Government:

²³³ See s 156(4) of the Constitution.

²³⁴ See s 155(1) of the Constitution.

²³⁵ Act 117 of 1998.

²³⁶ S 155(3)(c) of the Constitution.

Municipal Structures Act²³⁷ which provides that the promotion of local tourism for the area of the district municipality is one of the functions of that (district) municipality.²³⁸ Matters of local tourism falling outside the promotion of local tourism would then appear to fall under the administration of the local municipality (unless those functions had also been allocated by the MEC to the district municipality).²³⁹

2.7 Self-regulation by the tourism industry

The tourism industry is characterised by a large number of non-governmental bodies that exist with the aim of promoting the interests of the tourism industry in general, or of certain segments of the industry.

The most significant of these is the World Travel and Tourism Council (WTTC). The WTTC is a privately-sponsored pressure group representing the interests of the world's leading tourism organisations and airline companies. It is the only international body representing the private sector in the global travel and tourism industry.²⁴⁰ The WTTC encourages governments to develop tourism by adopting legislative and other measures to provide a framework for the facilitation of sustainable tourism.²⁴¹

The International Air Transport Association (IATA) represents over 270 of the world's leading passenger and cargo airlines operating on international routes. Some of its aims include working with governments to set international standards of airline safety and security.²⁴²

On a national level there are a number of tourism organisations mostly working in partnership with the government and the private sector to ensure that policy on a national and provincial level is a joint undertaking. In South Africa the Tourism Business Council of South Africa (TBCSA) acts as the voice of the South African

²³⁷ Act 117 of 1998.

²³⁸ S 84(1)(m) of Act 117 of 1998.

²³⁹ Vrancken *op cit* (n 213) 362.

²⁴⁰ George 'The government and tourism' in George *op cit* (n 8) 153.

²⁴¹ See George 'The government and tourism' in George *op cit* (n 8) 153.

²⁴² George 'The government and tourism' in George *op cit* (n 8) 153.

tourism industry on issues affecting tourism. The TBCSA engages with all stakeholders in the industry to facilitate an environment conducive to the development of tourism. Under the auspices of the TBCSA a trust fund was established to raise funds for the marketing of South Africa internationally. Tourism Marketing South Africa (TOMSA) collects funds through a tourism levy on certain tourist products and services such as a 1% levy in the accommodation and car rental segments. The funds are channelled to SA Tourism to be utilised as part of its marketing budget.²⁴³

Then there are also a number of different organisations representing specific interests in the tourism industry. In the accommodation segment on national level there are several bodies including the Federated Hospitality Association of South Africa (FEDHASA), the Bed & Breakfast Association of South Africa (BABASA), the National Accommodation Association of South Africa (NAAS-SA) and the Guest House Association of South Africa (GHASA). Mostly these organisations are, in turn, members of industry-wide tourism organisations such as the TBCSA.

2.8 Summary

Tourism is becoming an increasingly important part of any modern economy and particularly in a developing country such as South Africa. However, tourism is a complex and sensitive industry. So, stability for instance, is becoming a prerequisite for tourism and any major occurrences such as pandemics, outbreaks of war or climate change can dramatically affect the sustainability of tourism. Ultimately the tourist remains the driving force of the industry – without tourists there is no industry. Therefore it remains paramount that the tourist is well looked after and the needs of the tourists provided for with value-for-money products and services in order for tourism to remain sustainable. It is therefore crucial to understand the context of the industry and the tourist situated within the industry. One of the most significant trends in the industry is the fact that tourists, as consumers, are becoming more demanding and discerning. This provides the tourist industry with opportunities for developing niche markets but at the same time places more responsibility on the service

²⁴³ George 'The government and tourism' in George *op cit* (n 8) 162-165.

providers in the industry to live up to the expectations and demands of the consumers. Consumers of tourist services and products are, in turn, more inclined to demand quality service and products and are therefore also becoming increasingly inclined to pursue legal remedies where expectations have not been met.

Another important development specifically in the South African context is the passing into legislation of the new Tourism Act (currently the Draft Tourism Bill). The aim of the new Act is ultimately to provide a sustainable tourism industry for the social, economic and environmental benefit of South Africa. This legislation seeks to achieve this aim through the introduction of a National Tourism Sector Strategy, norms and standards, and codes of good practice for tourism. It also provides for a national quality assurance strategy and for grading systems to apply to all parts of the tourism industry. Significant emphasis is therefore placed on giving content and meaning to standards and quality of tourism products and service excellence. The creation of an office of Tourist Protector will assist in dealing with consumer complaints in the context and ambit of the CPA. Providing measurable standards of service and quality and an easily accessible avenue for lodging complaints will surely lead to increased consumer action against suppliers in the tourism industry.

It is at this interface that the CPA will play a significant role. The CPA provides consumers with rights and the means to enforce those rights. An understanding of the impact of this Act on the tourism industry is therefore of great importance for both suppliers and consumers of tourism services.

In the next chapter the consumer protection regime that applied in South Africa prior to the CPA coming into effect, is briefly considered. The second part of the chapter consists of an analysis of the CPA focusing on the structure, purpose, application and the regulatory framework and enforcement of the Act.

CHAPTER 3

CONSUMER PROTECTION IN SOUTH AFRICA

3.1 Introduction

There is no small measure of irony in the situation that the more technologically advanced society becomes, the more consumers become disempowered to make decisions about the need for and quality of products and services. Technological advances in mass production, processing and packaging, as well as ingenious marketing strategies, provide consumers with products they know little about and often do not even need. This problem is exacerbated by the fact that consumers generally are ignorant of their rights as consumers and, even when aware of their rights, are unwilling or unable to enforce those rights.¹

During the 19th and 20th centuries, a consumer movement developed internationally which challenged the existing paradigms of how the law and economic processes regulated the relations between suppliers and consumers.² The development of consumerism was a slow process and one of the reasons for this was the fact that consumers did not have a clear identity.³ However, this problem has been addressed to some extent by the identification of the following common interests shared by consumers, namely 'economic efficiency, diversity of purchasing choice, avoidance of monopoly profits and consumer frauds, optimal purchasing information, and good quality products and services in relation to price.'⁴ It therefore became possible for consumer groups to advocate for consumer protection around these shared interests.

¹ See McQuoid-Mason 'Consumers and consumerism' in McQuoid-Mason *Consumer Law in South Africa* (1997) 7. See also Van Eeden *A Guide to the Consumer Protection Act* (2009) 21. See also generally Cranston *Consumers and the Law* (1978) 1-7.

² Van Eeden *op cit* (n 2) 1.

³ McQuoid-Mason 'Consumers and consumerism' in McQuoid-Mason *op cit* (n 1) 7. See also Van Eeden *op cit* (n 1) 85.

⁴ McQuoid-Mason 'Consumers and consumerism' in McQuoid-Mason *op cit* (n 1) 7.

Other factors that have probably played a significant role in slowing the development of consumer protection law are the fundamental principle of freedom of contract, and the idea that the state should not interfere with freedom of contract. This freedom is vital to the proper functioning of trade and industry which, in turn, would result in the greatest advantage for all.⁵ This approach assumes that suppliers and consumers are on an equal footing when it comes to bargaining power, which of course does not correspond with reality. In the context of a developing country like South Africa this lack of equal bargaining power between suppliers and consumers is exacerbated by huge disparities in income and education.⁶ Despite the hegemony of the principle of freedom of contract, it has however always been accepted that limitations may be imposed where the public interest takes precedence over the freedom of the individual.⁷ (It is interesting to note that some studies have shown that the protection of consumers has actually led to more competition, less restrictive trade practices and less inflation.⁸)

All tourists are consumers – one may even say that they are the ultimate consumers as tourists are often completely dependent upon suppliers of goods and services for the entire journey, from the moment of leaving home (and even before that) until the moment the tourist returns home. Tourists are often in exceptionally vulnerable positions because of the nature of tourism: they are outside their normal place of living; they are dependent upon suppliers for accommodation and sustenance and most other requirements; they are subject to pressures of time; they lack knowledge of the environment or legal rules of the place they find themselves in, and so on. This often means tourists are in particular need of consumer protection.

However, specific consumer protection for tourist consumers has been almost completely absent from the South African law. As far as the common law is concerned it is probably only the praetorian edict *de nautius, cauponibus et stabulariis* that is aimed at tourists (or more generally perhaps travellers) as

⁵ Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 37 and Eiselen 'Kontrakteervryheid, kontraktuele geregtigheid en die ekonomiese liberalisme' (1989) *THRHR* 516.

⁶ Woker 'Business practice statutes and consumer protection' in McQuoid-Mason *op cit* (n 1) 115.

⁷ Woker 'Business practice statutes and consumer protection' in McQuoid-Mason *op cit* (n 1) 113.

⁸ McQuoid-Mason 'Consumers and consumerism' in McQuoid-Mason *op cit* (n 1) 7. Cranston *op cit* (n 1) 12.

consumers of accommodation services. The only legislation aimed specifically at protecting the interests of tourists (or travellers) is section 22 of the Tourism Act,⁹ providing that travel agents must advise consumers that travel insurance is available from the said travel agent. For the rest, the tourist consumer is dependent on the general principles of the common law and legislation where applicable.

In South Africa the promotion of consumer protection development has also been slow, with consumer affairs not being considered a government priority prior to 1994.¹⁰ This was as a result of factors such as the limited recognition of consumer interests by government and the fact that consumers were poorly organised. This situation can be ascribed to 'the diffuse nature of consumer interests, poor articulation of the consumer interest, and possibly to disinterest on the part of organs of governance'.¹¹ (It is safe to say that the concept of consumer protection does not normally conjure up images of a tourist.) However the situation started to change when in 1994 the newly-elected government of South Africa committed itself to a policy of consumer protection.¹² This policy culminated in the adoption of the National Credit Act,¹³ and some time later, in the Consumer Protection Act.¹⁴ The tourist, being a consumer, is also entitled to the protection of this legislation to the extent applicable.

The purpose of this chapter is to provide further background and context (together with Chapters 1 and 2) for the rest of the study. The chapter provides a brief overview of the consumer protection regime that existed in South Africa prior to the coming into effect of the CPA, and particularly of the common law, legislation and self-regulation applicable to the accommodation segment of the tourism industry. Thereafter the CPA is introduced and discussed with reference to the purposes and aims of the Act; the structure of the Act, namely the system put in place to administer the Act; and the application, interpretation and enforcement processes of the Act. The chapter concludes with a summary.

⁹ Act 72 of 1993.

¹⁰ Woker 'Consumer protection' in Vrancken *Tourism and the Law in South Africa* (2002) 95.

¹¹ Van Eeden *op cit* (n 1) 85.

¹² Woker 'Consumer protection' in Vrancken *op cit* (n 10) 96.

¹³ Act 34 of 2005 (hereafter the NCA).

¹⁴ Act 68 of 2008 (hereafter the CPA).

3.2 An overview of the consumer protection regime in South Africa prior to the CPA

As indicated above, consumer protection in South Africa was not considered a priority until relatively recently. This of course does not mean that there was no consumer protection before the CPA made its appearance. Consumers include people who have contracted with a supplier for the provision of products and/or services, and could therefore always rely on the normal contractual remedies for products that are defective or for poorly performed services. Users of products, or people adversely affected by the use of products, and who do not stand in a contractual relationship with the supplier, may have made use of delictual remedies to claim damages that were incurred as a result of the use of the products.¹⁵ However, it has been generally accepted that the common law does not, and could not, provide adequate protection for consumers.¹⁶ More often than not it was required of the legislature to provide protection for consumers by way of statutory protection provisions in specific instances.¹⁷ Often industries would, however, resort to making

¹⁵ McQuoid-Mason 'Consumers and consumerism' in McQuoid-Mason *op cit* (n 1)2.

¹⁶ Woker 'Consumer protection' in Vrancken *op cit* (n 10) 95. See further 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) *Obiter* 230; Naudé 'The consumer's "right to fair, reasonable and just terms" under the new Consumer Protection Act in comparative perspective' (2009) *SALJ* 505; Van Eeden *op cit* (n 1) 21; Sharrock 'Judicial control of unfair contract terms: The implications of Consumer Protection Act' (2010) *SA Merc LJ* 296-297, and Naudé 'Unfair contract terms legislation: The implications of why we need it for its formulation and application' (2006) *Stell LR* 361. See also Lewis 'Fairness in South African contract law' (2003) *SALJ* 120. Bhana & Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2005) *SALJ* 865 argue that the courts displayed in a line of judgments 'a reversion of contract law to its classical libertarian roots and a concomitant hostility, not only to constitutional values, but also to broader concerns of equity and fairness that had previously been allowed to infiltrate the application of its rules'. Although not necessarily proponents of legislative reform they do argue a change in approach is necessary to bring about greater fairness in contractual relations. More than 20 years ago McQuoid-Mason 'Consumer law: The need for reform' (1989) *THRHR* 243 stated that '[i]t is clear that consumers in South Africa are being short changed concerning their rights to safety, honesty, fair agreements, knowledge, choice, privacy and a hearing'. He continued: 'The time has come for a radical reassessment of consumer protection law in South Africa.' See also McQuoid-Mason 'Consumer law: The need for reform' (1989) *THRHR* 32. (See Cranston *op cit* (n 1) 67 & 413 and Howells & Weatherill *Consumer Protection Law* (1995) 42 who point out that a similar position prevailed in the United Kingdom necessitating legislative intervention.)

¹⁷ Justice Brand 'The role of good faith, equity and fairness in the South African law of contract: The influence of the common law and the Constitution' (2009) *SALJ* 87 has expressed himself in favour of contractual enforcement to be controlled generally by 'the rubic of public policy, which has by now become firmly established as a mechanism of judicial control over contractual enforcement.' He does point out (at 77) that the legislature tends to intervene in contractual relations with more specific legislation aimed at specific types of contracts, especially in the area of consumer protection. See also Hefer 'Billikheid in die kontraktereg volgens die Suid-

use of forms of self-regulation to protect the image of the industry or profession but also to prevent it from being prescribed to through government regulation. Then there are of course mechanisms such as the media and private consumer protection bodies which have always played an important role in the protection of consumers.

3.2.1 Statutory consumer protection

It is indeed a distinct feature of consumer protection law internationally that where consumer protection law has been established as a legal discipline, it is invariably the legislatures of the respective countries that have taken the initiative in developing consumer protection law.¹⁸ In South Africa this resulted in legislation being introduced which attempted to remedy problems in particular industries or situations. Examples of specific statutory consumer protection provisions are to be found in diverse legislative instruments such as the Competition Act;¹⁹ Counterfeit Goods Act;²⁰ Estate Agency Affairs Act;²¹ National Gambling Act;²² Liquor Act;²³ Trade Practices Act;²⁴ Financial and Intermediary Services Act;²⁵ NCA; Electronic Communications and Transactions Act;²⁶ Housing Consumer Protection Measures Act;²⁷ Foodstuffs, Cosmetics and Disinfectants Act;²⁸ Tobacco Products Control Act;²⁹ and the Tourism Act,³⁰ to name a few. The Consumer Affairs (Unfair Business Practices) Act³¹ provided for general consumer protection provisions and is considered further below.

Afrikaanse regs kommissie' (2000) TSAR 152-153 who expresses a similar view than that of Brand J.

¹⁸ Van Eeden *op cit* (n 1) 3.

¹⁹ Act 89 of 1998.

²⁰ Act 37 of 1997.

²¹ Act 112 of 1976.

²² Act 7 of 2004.

²³ Act 59 of 2003.

²⁴ Act 76 of 1976.

²⁵ Act 37 of 2002.

²⁶ Act 25 of 2002.

²⁷ Act 95 of 1998.

²⁸ Act 54 of 1972.

²⁹ Act 83 of 1993.

³⁰ Act 72 of 1993.

³¹ Act 71 of 1988 (hereafter the Consumer Affairs Act). This Act was originally named the Harmful Business Practices Act, but the title and some of the content were amended by the Harmful Business Practices Amendment Act 23 of 1999.

The result was statutory consumer protection provisions dispersed over a whole range of statutes which protective provisions often are unknown to suppliers and consumers alike. Government departments, such as the Department of Trade and Industry, were essentially responsible for the enforcement of the legislative provisions. A lack of coordination between the different bodies responsible for the enforcement of these different pieces of legislation further contributed to an inconsistent application of consumer protection measures.³²

The Marketing Act³³ established the South African Co-ordinating Consumer Council (SACCC) with its main objectives being the promotion and protection of consumer interests through the co-ordinating and representing; education; dissemination of information; research and consumer advice.³⁴ The major functions of the SACCC included negotiating and mediating on behalf of consumers and in this manner made important contributions to legislation such as the Credit Agreements Act³⁵ and the Usury Act.^{36 37} The SACCC also engaged with many business chambers, self-regulatory and industry bodies on behalf of consumers including the Association of South African Travel Agents, and the South African Tourism Board.³⁸ The SACCC made a valuable contribution to consumer education and also, through its Consumer Advisory Service, assisted thousands of individual consumers in resolving their complaints.³⁹ The ability of the SACCC to carry out its mandate was however restricted by the limited resources made available to it.⁴⁰ The SACCC was disbanded in 1996 and its functions were taken over by the respective provincial departments responsible for consumer protection.⁴¹

³² Woker *op cit* (n 16) 219.

³³ Act 59 of 1968. (This Act has been repealed by s 27(1) of the Marketing of Agricultural Products Act 47 of 1996).

³⁴ McQuoid-Mason 'Statutory consumer protection bodies' in McQuoid-Mason *op cit* (n 1) 327.

³⁵ Act 75 of 1980.

³⁶ Act 73 of 1968.

³⁷ McQuoid-Mason 'Statutory consumer protection bodies' in McQuoid-Mason *op cit* (n 1) 328.

³⁸ McQuoid-Mason 'Statutory consumer protection bodies' in McQuoid-Mason *op cit* (n 1) 328.

³⁹ McQuoid-Mason 'Statutory consumer protection bodies' in McQuoid-Mason *op cit* (n 1) 328-329.

⁴⁰ Woker 'Consumer protection' in Vrancken *op cit* (n 10) 95.

⁴¹ The functional area of consumer protection is a matter contained in Schedule 4 of the Constitution of the Republic of South Africa, 1996 (the Constitution), which means, as in the case with tourism, that it is a functional area of concurrent national and provincial legislative competence.

The Consumer Affairs Act provided for the prohibition and control of certain business practices.⁴² It has been described as an ‘enabling Act rather than a prescriptive one and the Act itself does not prohibit anything’.⁴³ The Act established a statutory body under the auspices of the Department of Trade and Industry, namely the Consumer Affairs Committee (CAFCOM), whose functions included investigation into any unfair business practice.⁴⁴ If the business practice was indeed found to be unfair, the Committee could make recommendations to the Minister who could, by notice in the Government Gazette, declare such practice to be unlawful and then provide directions to ensure the discontinuance or prevention of such unfair practice.⁴⁵ The directions could include the dissolution of any body, corporate or incorporate, or the severance of any connection or form of association between persons to ensure the discontinuance of such unfair business practice.⁴⁶ Failure to comply with such a notice of the Minister as indicated under this section carried substantial penalties, including a fine not exceeding R200 000 or imprisonment not exceeding five years, or both.⁴⁷

An ‘unfair business practice’ was defined in the Act to mean:

any business practice which, directly or indirectly, has or is likely to have the effect of-

- (a) harming the relations between businesses and consumers;
- (b) unreasonably prejudicing any consumer;
- (c) deceiving any consumer; or
- (d) unfairly affecting any consumer.⁴⁸

This wide definition of what constitutes an unfair business practice, did allow the Committee to investigate any business practices which, even though legal, had the effect of prejudicing consumers.⁴⁹ Problems with the Act and its enforcement were

⁴² See the Preamble to the Consumer Affairs Act.

⁴³ Woker *op cit* (n 16) 219.

⁴⁴ See s 8(1) of the Consumer Affairs Act.

⁴⁵ S 12(1) of the Consumer Affairs Act.

⁴⁶ S 12(1)(a) of the Consumer Affairs Act.

⁴⁷ S 12(7), as read with s 15(b) of the Consumer Affairs Act.

⁴⁸ S 1 of the Consumer Affairs Act. Woker ‘Business practices and the Consumer Affairs (Harmful Business Practices) Act 71 of 1988’ (2001) *SA Merc LJ* 322 points out that the Act did allow for drastic measures and provided a powerful tool to address some of the many consumer problems experienced in South Africa. Despite this a relatively small number of formal investigations were conducted with the Committee acting too cautiously at times.

⁴⁹ Woker *op cit* (n 16) 220 fn 15.

that the Committee was under-resourced and therefore lacked the necessary capacity to be really effective.⁵⁰ The biggest problem was probably the fact that the Committee only had the power to advise the Minister and had no enforcement powers of its own. The Committee would advise the Minister, as indicated, and the Minister then had to declare a practice harmful by way of a notice in the Government Gazette. A contravention of such order constituted a criminal offence which meant that it had to be prosecuted through the offices of the South African Police Services and the prosecuting authorities. Considering the crime problem in South Africa and the backlog of cases in the criminal courts it is hardly surprising that consumer issues did not receive high priority from these bodies or were not considered to be particularly important.⁵¹

How a consumer is defined also contributes to the availability of consumer protection for people. In modern society every person is a consumer. Everybody must, at least to some extent, buy and make use of goods and services. Therefore a consumer can be described, in the narrow sense, as any person who buys or hires goods or services, and/or uses such goods or services. In a broad sense, a consumer can include any person affected by the use of goods or services, whether or not such person bought, hired or used such goods or services.⁵² The dictionary definition of 'consumer' corresponds with the narrow description of a consumer, namely, 'a person who buys goods or uses services'.⁵³ The Oxford Dictionary of Law defines a 'consumer' as '[a] private individual acting otherwise than in a course of a business'.⁵⁴ This is a narrow definition of the concept and, for one, excludes a business from qualifying as a consumer, whether the business is owned by a sole proprietor or not. It also excludes juristic persons from being considered consumers.

⁵⁰ Woker *op cit* (n 16) 220.

⁵¹ Woker *op cit* (n 16) 220-221. See *S v Pepsi-Cola (Pty) Ltd* 1985(3) SA 141 (C) 142E, where the Court made the following remarks in a matter involving a marketing technique allegedly in contravention of the Gambling Act 51 of 1965:

On reading the papers I confess to experiencing a measure of surprise that in the light of statistics for serious crime in the Western Cape, where one daily reads in the newspapers that robbery, rape and murder are rife on and from the local trains, in our parks and on our beaches, an officer of the South African Police Force can be spared to investigate a complaint of this nature.

⁵² McQuoid-Mason 'Consumers and consumerism' in McQuoid-Mason *op cit* (n 1) 1.

⁵³ Wehmeier *Oxford Advanced Learner's Dictionary of Current English* (2005) 313.

⁵⁴ Law & Martin *A Dictionary of Law* (2009) 126.

The definition appears to have only final end-users in mind.⁵⁵ A similar approach has been adopted in South African legislation where the Consumer Affairs Act essentially defines a consumer, for purposes of this discussion, as any natural person to whom any property or service is offered, supplied or made available. A 'consumer' is narrowly defined and the focus is clearly only on natural persons. Contrasting the aforementioned with the definition of consumer in the CPA it is evident that there are some significant differences from the meaning of consumer as provided in the Consumer Affairs Act. In section 1 of the CPA the term 'consumer' is defined as follows:

'consumer', in respect of any particular goods or services, means-

- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e).⁵⁶

Probably the most obvious differences between the two definitions are, firstly, the extension of the definition in the CPA to include both natural and juristic persons (including franchisees) as consumers and, secondly, the fact that a direct relationship between a consumer and supplier is not required because later users and recipients of goods are also considered consumers even in the absence of any dealings between the supplier and the later user, recipient or beneficiary.

The Consumer Affairs (Unfair Business Practices) Act has been repealed by the CPA.⁵⁷

⁵⁵ This narrow approach is in line with a business management and marketing approach. See Rammile & Van Zyl 'Consumer markets and consumer buyer behaviour' in Kotler, Armstrong & Tait *Principles of Marketing – Global and Southern African Perspectives* (2010) 147.

⁵⁶ S 1 of Act 71 of 1988.

⁵⁷ S 121(2)(f) of the CPA.

The Competition Act⁵⁸ aims to promote and maintain competition in order to provide consumers with competitive prices and product choices, and advance the social and economic welfare of South Africans.⁵⁹ Effective competition in the market is necessary for consumers, in order to avoid the market being dominated by a few which will result in practices unfavourable to consumers such as price fixing and exclusive dealing.⁶⁰ To this end the Act established a Competition Commission and provided a fairly simple process for lodging a complaint.⁶¹

Another statutory body that plays a significant role in protecting the interests of consumers, albeit in an indirect manner, is the South African Bureau of Standards (SABS), which body was established in terms of the Standards Act.⁶² The SABS promotes the interests of consumers by providing various services to industry and commerce, including the development of standards for products and services, and the administration of a product certification scheme and of a quality system certification scheme.⁶³ The SABS is involved in consumer protection in both a regulatory and a voluntary manner. The SABS is responsible for regulating compulsory standards under the Standards Act. An example of such a standard in the tourism industry is the South African National Standard on Tourism Service Excellence.⁶⁴ This standard presents its scope as follows:

- ‘1.1 This national document establishes standards and practices for planning, developing, implementing, maintaining, improving and recognizing service excellence, within the various sub-sectors and organizations found within the tourism value-chain.
- 1.2 These standards and practices are applicable to any Tourism related business and organizations participating towards providing a meaningful and positive experience for all their guests regardless of type, size, product and service offered.’⁶⁵

⁵⁸ Act 89 of 1998.

⁵⁹ See Neuhoff *A Practical Guide to the South African Competition Act* (2006) 13.

⁶⁰ Woker ‘Consumer protection’ in Vrancken *op cit* (n 10) 101.

⁶¹ See Woker ‘Consumer protection’ in Vrancken *op cit* (n 10) 102.

⁶² Act 24 of 1945.

⁶³ McQuoid-Mason ‘Statutory consumer protection bodies’ in McQuoid-Mason *op cit* (n 1) 336.

⁶⁴ South African Bureau of Standards ‘South African Standard on Tourism Service Excellence’ SANS 1197:2012 Introduction. (The standard in draft form was published for public comment on 27 December 2011 with the closing date for such commentary being 27 February 2012. The standard was approved on 19 March 2012.)

⁶⁵ SANS 1197:2012 3.

Manufacturers also are encouraged to enter into agreements with the SABS in terms whereof the manufacturer pays to use the SABS logo on its products provided it complies with SABS standards.⁶⁶ This provides consumers with peace of mind as well as another course for redress in case of problems.

There also exist a number of statutory professional bodies which provide protection to consumers who have been harmed by the conduct of members of that profession.⁶⁷ The Tourism Act⁶⁸ provides for the establishment of the South African Tourism Board which performs certain regulatory functions in respect of tour guides and the establishment of a grading scheme for accommodation establishments.⁶⁹

Section 181(1) of the Constitution of the Republic of South Africa, 1996 (Constitution) provides for the office of a Public Protector. The primary task of this official is 'to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice',⁷⁰ especially in circumstances where it is inappropriate or not possible to obtain a judicial remedy.⁷¹ Examples of such conduct may include bias, neglect, delay and incompetence.⁷² The Public Protector must report on the conduct complained of and take appropriate remedial action.⁷³ The Public Protector Act⁷⁴ provides further powers and functions for this official and also provides guidelines for the establishment of provincial public protectors. The office of Public Protector is an important mechanism for the control of the administration in its dealings with consumers of state services and can play a valuable role in protecting consumers from, for example, maladministration, abuse, and incompetence.⁷⁵ The

⁶⁶ McQuoid-Mason 'Statutory consumer protection bodies' in McQuoid-Mason *op cit* (n 1) 337-339.

⁶⁷ Examples include South African Medical and Dental Council, the Estate Agents Board, the Financial Services Board, the Ombud for Financial Services Providers, the National Energy Regulator of South Africa, and the Medical Schemes Council.

⁶⁸ Act 72 of 1993.

⁶⁹ See Chapter 2 for a more detailed discussion on SA Tourism.

⁷⁰ S 182(1)(a) of the Constitution.

⁷¹ Devenish, Govender & Hulme *Administrative Law and Justice in South Africa* (2001) 402. See also Burns *Administrative Law under the 1996 Constitution* (2003) 273-274.

⁷² Devenish, Govender & Hulme *op cit* (n 71) 402.

⁷³ S 182(1)(b) & (c) of the Constitution.

⁷⁴ Act 23 of 1994.

⁷⁵ McQuoid-Mason 'Statutory consumer protection bodies' in McQuoid-Mason *op cit* (n 1) 351.

Public Protector may have a role to play when it comes to the management (which concept includes service delivery) of any state-owned facilities, such as the accommodation services provided by national parks, and other services provided by the government to tourists, such as the issuing of passports and visas. The Public Protector offers an expedient and cheap method of obtaining redress where a person is the victim of improper behaviour by the state, especially where a person does not have a legal remedy, or where the cost factor prohibits making use of potential legal remedies.⁷⁶ Unfortunately the office of the Public Protector was criticised for its apparent lack of independence as required by the Constitution.⁷⁷ This criticism was however expressed some time ago and the current Public Protector, it is submitted, has displayed significant independence in fulfilling the function of her office.

As indicated above, consumer protection is a functional area of concurrent legislative competence of both the national and provincial legislatures and therefore these bodies may respectively legislate regarding consumer protection matters. However, where there is conflict between national and provincial legislation, the national legislation may prevail provided that certain conditions are met. These conditions are spelled out in section 146(2) and (3) of the Constitution. National legislation that applies uniformly to the whole country, prevails over provincial legislation if the national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.⁷⁸ The national legislation also prevails if it deals with a matter requiring uniformity across the nation to be effective, and the national legislation provides such uniformity by establishing norms and standards, frameworks or national policies.⁷⁹ National legislation also prevails over provincial legislation if for example, it is required for the maintenance of economic unity; the protection of the common market in respect of the mobility of goods, services, capital and labour; the promotion of economic activities across

⁷⁶ Devenish, Govender & Hulme *op cit* (n 71) 402.

⁷⁷ See Sarkin 'An evaluation of the role of the Independent Complaints Directorate for the Police, the Inspecting Judge for Prisons, the Legal Aid Board, the Human Rights Commission, the Commission on Gender Equality, the Auditor-General, the Public Protector and the Truth and Reconciliation Commission in developing a human rights culture in South Africa' (2000) *SAPR/PL* 385 at 410.

⁷⁸ S 146(2)(a) of the Constitution.

⁷⁹ S 146(2)(b) of the Constitution.

provincial boundaries, or the protection of the environment.⁸⁰ National legislation will also prevail over conflicting provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that is prejudicial to the economic, health or security interests of another province or the country as a whole, or the provincial legislation obstructs the implementation of national economic policy.⁸¹

This has been cited as the reason why the provinces have adopted similar legislation to that of the Consumer Affairs Act and why the Department of Trade and Industry sees itself as having overall supervision of consumer affairs in the country.⁸² It is submitted that this situation will continue under the CPA. It cannot be conducive to effective consumer protection to have different consumer protection regimes in different provinces.⁸³

The national Minister of Trade and Industry and the respective Members of the Executive Councils of the corresponding provincial departments are also members of a MINMEC committee for Trade and Industry, which includes the functional area of consumer protection, established in terms of the Intergovernmental Relations Framework Act.⁸⁴ This body is a consultative forum to promote inter-governmental relations in the area of consumer protection in order to give effect to the principle of cooperative governance as provided for in Chapter 3 of the Constitution.

Each province has its own consumer protection office headed by a consumer protector, and provinces have adopted their own consumer protection legislation and established consumer courts. The main purpose of the consumer protection offices and the consumer legislation is to resolve problems through a process of negotiation, which apparently has been quite effective. The provincial consumer courts are

⁸⁰ S 146(2)(c) of the Constitution.

⁸¹ S 146(3) of the Constitution.

⁸² McQuoid-Mason 'Statutory consumer protection bodies' in McQuoid-Mason *op cit* (n 1) 335.

⁸³ See for example Naudé 'Enforcement procedures in respect of the consumer's right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective' (2010) *SALJ* 524 who states for instance:

It is clearly advantageous to bestow ultimate responsibility to exercise preventative powers over unfair contract terms on one national body, as opposed to allowing each provincial authority the freedom to act as it sees fit. Consistent and predictable enforcement policy would be especially important for suppliers who operate in more than one province.'

⁸⁴ Act 13 of 2005.

presided over by legally trained personnel, and have the benefit of being able to convene at short notice and issue urgent temporary orders to stop unfair business practices from continuing.⁸⁵ (The CPA envisages the establishment of provincial consumer protection authorities.⁸⁶ The provincial legislatures will have to enact legislation to ensure the establishment of such bodies and it is anticipated that uniform legislation will be drafted by the provinces to ensure maximum alignment between the CPA and the provincial statutes.)

Then, of course, there is the role of the courts to be considered. The point has been well made that consumers are reluctant to use ordinary courts for legal action for reasons such as the small amounts usually involved, the high costs of litigation, and the time it takes.⁸⁷ These problems have been addressed to some extent by the introduction of the Small Claims Court. Assistance has been provided by certain other bodies such as the Legal Aid Board, the Legal Resources Centres and Legal Aid Clinics, and allowance has been made for the use of speculative and contingency fees.⁸⁸ Class and public interest actions are allowed in South Africa only in respect of a fundamental rights breach.⁸⁹

In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act)⁹⁰ proceedings under this Act may also be instituted by way of a class action or public interest action before a relevant court with jurisdiction, including the equality courts created in terms of the Act.⁹¹ The Act also provides that an equality court may make an order preventing unfair discriminatory practices or order that specific steps must be taken to stop unfair discrimination.⁹² These provisions may

⁸⁵ Woker 'Consumer protection' in Vrancken *op cit* (n 10) 99-100.

⁸⁶ See Chapter 5, Part A of the CPA.

⁸⁷ See McQuoid-Mason 'Consumers and access to the courts' in McQuoid-Mason *op cit* (n 1) 307-308 & Woker 'Consumer protection' in Vrancken *op cit* (n 10) 99-100.

⁸⁸ McQuoid-Mason 'Consumers and access to the courts' in McQuoid-Mason *op cit* (n 1) 308-310 & 315-319.

⁸⁹ S 38(c) & (d) of the Constitution.

⁹⁰ Act 4 of 2000.

⁹¹ S 20(1)(c) & (d) of the Equality Act.

⁹² S 21(2)(f) of the Equality Act.

well be of assistance to consumers in the event of unfair discrimination as contemplated in the CPA.⁹³

The fact that there is as yet no general class and/or public interest action allowed in South African law is something that has previously mitigated the effective protection of the interests of consumers.⁹⁴ As is pointed out below, the CPA has also addressed this situation.

3.2.2 Self-regulation

In a number of industries, self-regulation has been employed in an attempt to ensure that proper standards with regard to product and service delivery were maintained, and arguably also to try to maintain the independence of an industry by attempting to avoid legislative interference. This was primarily effected through subscription to voluntary codes of conduct.

Self-regulation happens when an industry shoulders the responsibility for developing and enforcing its own standards, which includes penalising its members for not complying with the agreed norm of behaviour, usually set out in an industry code of conduct.⁹⁵ The benefits of self-regulation include providing a faster and cheaper remedy, since it functions parallel to the normal legal system and is therefore not belaboured by the procedural requirements associated with court action.⁹⁶ But self-regulation can only be effective if there exists a controlling body to which most (preferably all) of the businesses in that industry belong, and that body has the means to effectively enforce its findings against any of its members.⁹⁷ The Business Practices Committee, which was the predecessor of the Consumer Affairs Committee, had investigated the role that codes of conduct can play, and concluded that it could make a significant contribution to the prevention of harmful business

⁹³ See Chapter 2, Part A of the CPA.

⁹⁴ See McQuoid-Mason 'Consumers and access to the courts' in McQuoid-Mason *op cit* (n 1) 322 & 326.

⁹⁵ Woker 'Consumer protection' in Vrancken *op cit* (n 10) 97.

⁹⁶ Woker 'Consumer protection' in Vrancken *op cit* (n 10) 97.

⁹⁷ Woker 'Consumer protection' in Vrancken *op cit* (n 10) 97.

practice.⁹⁸ The Committee actually approved and published a number of industry-specific consumer codes, including one for travel agents.⁹⁹ This Consumer Code for Travel Agents issued in 1994 was not a substitute for any rights or remedies the consumer had against the travel agent in terms of the law or any agreement, but instead reflected the desired conduct of travel agents. The Business Practices Committee would consider the Code when determining whether the conduct in question constituted a harmful business practice. The Code expected travel agents to comply with a number of requirements including:

- maintaining an ethical and professional approach in addressing the needs of consumers;
- providing accurate and detailed information to consumers regarding travel products;
- paying immediate attention to consumers' requests;
- acting with absolute integrity in the handling and remittance of consumers' money;
- making a recommendation to consumers to take out comprehensive travel insurance;
- meeting and complying with the promises and offers made in any advertising; and
- making available a brochure, leaflet or other publication for each inclusive tour or package product, and travel-related product offered, which document is to contain certain minimum information.

The Code also expects travel agents to publish their terms and conditions of business and to bring said terms and conditions to the attention of consumers of the

⁹⁸ Woker *op cit* (n 16) 221-222.

⁹⁹ Woker 'Consumer protection' in Vrancken *op cit* (n 10) 97 fn 11.

services of the travel agent. These terms and conditions also have to comply with certain requirements, including:

- that it must be easy to read and understand;
- the conditions of payment and all costs that may be incurred in a transaction;
- stating the general conditions of cancellations over and above those agreed between the parties;
- that all transactions are confidential;
- the extent of responsibilities and the limit of liabilities are defined in the case of tour arrangements; and
- that the conditions may not exclude liability for negligence or lay down a time-bar for considering consumer complaints.¹⁰⁰

The Code of Conduct of the Association of South African Travel Agents (ASATA)¹⁰¹ contains, *inter alia*, the following terms:¹⁰²

General Conduct

1. ASATA Members shall maintain a high standard of service to Consumers. Members shall be honest and accurate when providing information in any form about their services and prices.
3. ASATA Members will always put the interests of the Consumer first and not allow any preferred partnership or relationship with a supplier to interfere with these interests.
4. ASATA Members will respect the confidentiality of each Consumer's transaction and will not disclose any information regarding the transaction to any other Consumer or any other member of the public, excluding ASATA, unless required by law.
6. ASATA Members will provide all components as stated in their brochure or as stated in their written confirmation. Failing that, the ASATA Member will provide alternative services of equal or greater value or provide appropriate compensation.

¹⁰⁰ Vrancken 'Travel law' in Vrancken *Tourism and the Law in South Africa* (2002) 328-329.

¹⁰¹ http://www.asata.co.za/downloads/asata_code_conduct_0809.pdf (accessed 2012-05-22). It is interesting to note that the Code of Conduct is headed by the following words: 'This code, which is binding upon all ASATA members, has been approved by the Board of Directors and will be revised in accordance with the Consumer Protection Bill upon legislation.' It appears as if this revision has not yet been finalised.

¹⁰² Only a number of selected items from the ASATA Code of Conduct are included as examples. The numbers are the numbers from the Code and are therefore not sequential.

Advertising

1. ASATA Members will ensure that all Consumer advertising contains fully inclusive prices in accordance with the ASATA Advertising Guidelines policy.

Booking Procedures and Travel Documents

1. Members shall ensure that their Customers have access to all booking and other conditions applicable to their Travel Arrangements before a booking contract is signed or agreed to.
5. ASATA Wholesalers will promptly advise the Retail Travel Agent or Consumer who reserved the space of any change in itinerary, services, features or price. If substantial changes are made that are written within the control of the operator (sic), the Consumer will be allowed to cancel without penalty unless otherwise stated in the terms and conditions of the operator.

It is clear from the above that aspects such as transparency, accuracy and honesty in dealing with consumers are considered extremely important. Specific provisions also suggest how disputes are to be dealt with, and include that a consumer must be informed of the right to refer the dispute to ASATA.

Industry codes can provide significant protection for consumers by ensuring that standards of products and service delivery are set and maintained in a specific industry. These codes can provide an easy and expeditious process for the resolution of consumer complaints, as well as providing guidance to a regulatory body so as not to impair the proper functioning of the industry in the pursuance of consumer protection. The fact that industry experts are responsible for the application and administration of the code makes for more effective identification of genuine consumer abuses than in the case of civil servants having to do so. The legitimate activities of businesses in the industry are also subject to fewer control measures whilst acting within the scope of the code. The process for amending and updating codes is not as complex or time-consuming as the cumbersome process of changing legislation.¹⁰³

Within the tourism industry there are a number of self-regulatory organisations. These include bodies representing the industry as a whole, and those for specific segments of the tourism industry. So, for instance, the Tourism Business Council of South Africa (TBCSA) is 'the official umbrella organisation for the Travel and Tourism private sector in South Africa'.¹⁰⁴ Within the travel segment one finds organisations

¹⁰³ See Woker 'Consumer protection' in Vrancken *op cit* (n 16) 222-223. The CPA provides for the continued use of industry codes and sets out the requirements for doing so in s 82 of the Act.

¹⁰⁴ <http://www.tbcsa.org.za/> (accessed on 2010-10-28).

such as the Southern African Vehicle Rental and Leasing Association (SAVRALA), whose aim is to establish standards of good practice for passenger vehicle rentals, as well as the Southern African Bus Operators Association (SABOA), and ASATA. The accommodation segment is represented by bodies such as The Federated Hotels Association of South Africa (FEDHASA) and the National Accommodation Association in South Africa (NAA-SA), the latter's vision being '[t]o have an organisation which has credibility with key provincial and national role players and which assists, supports and represents its members whilst striving to enhance the position of the smaller accommodation establishments in the hospitality industry'.¹⁰⁵

NAA-SA does not yet have a code of conduct as yet and is currently in the process of drafting one.¹⁰⁶ The Bed-and-Breakfast Association of South Africa (BABASA) does have a code of conduct.¹⁰⁷ The BABASA code of conduct requires a commitment to a laudable set of values and/or standards but is clearly not aimed at setting out a definitive set of rules with accompanying enforcement measures and penalties. This very clearly illustrates the fundamental problem with self-regulation. As membership, and therefore adherence to the code of conduct is voluntary, enforcement relies on the goodwill of the member and not on any power wielded by the organisation.

Fair Trade in Tourism (FTTSA) is an independent organisation promoting fair trade principles which are based on respect for human rights, the culture of different groups (especially the culture of indigenous people in a particular tourist area), and the environment.¹⁰⁸

The South African Tourism Services Association (SATSA) has a code of conduct dealing with the relations between SATSA members and the public, providing for advertising not to be misleading, and for the clear indication of cancellation fees and

¹⁰⁵ <http://www.mybedandbreakfast.co.za/naa.html> (accessed on 2010-09-13).

¹⁰⁶ Information provided by the President of NAA-SA, Ms Caroline Ungersbock, via e-mail on 27 July 2012.

¹⁰⁷ The BABASA code of conduct was provided by Ms Barbara Hamm, Managing Director of BABASA via e-mail on 30 July 2012. The Code of Conduct is contained in Annexure A.

¹⁰⁸ See Woker 'Consumer protection' in Vrancken *op cit* (n 10) 102. See also the FTTSA website at <http://www.fairtourismsa.org.za> (accessed on 2010-09-13).

the terms and conditions under which cancellation fees will be payable.¹⁰⁹ Other examples of bodies in the tourism industry that have implemented codes of conduct include the Southern African Association for the Conference Industry (SAACI),¹¹⁰ as well as the recently established Federation of South African Tourist Guides Associations (FSATGA).¹¹¹

The National Consumer Forum is an autonomous organisation dedicated to the protection and promotion of consumer rights and interests generally in South Africa.¹¹²

Finally, there is also the indirect mechanism of control of the media. The media, whether in the form of press, radio or television, can and does play a significant role in promoting consumer awareness and is a powerful weapon in championing the cause of consumers because of the adverse publicity that it can create for a business.

3.2.3 Common law

Consumers in South Africa, for the most part, had to rely on the protection afforded them by the common law, which protection includes remedies provided by the law of contract and delict.¹¹³ Normal contractual remedies for breach of contract include specific performance, cancellation and damages. Contractual remedies available for defective products or services included warranties against latent defects in the sale of goods and the *actio redhibitoria* (action for rescission of the contract) or *actio quanti minoris* (for a reduction in the contract price). There are also specific remedies available in specific instances such as actions for damages in terms of *depositum* and the praetorian edict *de nautis, cauponibus et stabulariis*, the latter two being of particular relevance to the travel and tourism industry. Suppliers are also liable for

¹⁰⁹ See Clause 3 of the SATSA Code of Conduct http://www.satsa.com/Pages/About_Code.asp (accessed on 2010-09-02).

¹¹⁰ <http://www.saaci.co.za/content.asp?pageID=310> (accessed on 2010-09-02).

¹¹¹ <http://www.fstaga.org/> (accessed on 2010-09-01).

¹¹² <http://www.ncf.org.za/about/history.html> (accessed on 2010-09-13). See also generally about the NCF McQuoid-Mason 'Private consumer protection bodies and mechanisms' in McQuoid-Mason *op cit* (n 1) 353-354.

¹¹³ Woker *op cit* (n 16) 223.

damages, including consequential loss, when the supplier is the manufacturer of the goods, or professes to have expert knowledge in respect of the goods sold.¹¹⁴

The remedies in delict, for present purposes, consist mainly of actions for damages such as the *actio legis Aquiliae* (action for compensation for patrimonial loss), the *actio iniuriarum* (action for satisfaction for infringement of personality rights), and an action for pain and suffering (which is an action for claiming reparation for infringements of physical-mental integrity).¹¹⁵ But before one has a remedy certain conditions must exist. The position under the law of delict will first be considered.

(a) Delict

The law of delict is essentially concerned with the circumstances in which one party can claim damages (or compensation) from another for the harm or damage that the former has suffered as a result of the act of the other.¹¹⁶ The basic moral principle underlying the law of delict is that there can be no liability without fault.¹¹⁷ (No-fault, or strict liability does exist in South African law and is based on the principle that the nature of the risk associated with the conduct is such that anyone harmed by it should be compensated by the party partaking of that conduct.¹¹⁸)

The elements required to establish delictual liability based upon fault are conduct (an act or omission), wrongfulness (unlawfulness), causation, fault, and harm. In the case of strict liability obviously fault is not an element to be proved to establish liability.

Wrongfulness is determined by using the reasonableness criterion. Whether an act was reasonable or not is ultimately decided with reference to the legal convictions, or the *boni mores*, of society and involves public policy and a value judgment.¹¹⁹

¹¹⁴ For a more detailed discussion on contractual remedies see Eiselen 'Remedies for breach' in Hutchison & Pretorius (eds) *The Law of Contract* (2009) 308-348.

¹¹⁵ For a more detailed discussion of delictual remedies see Loubser & Midgley *The Law of Delict* (2009) 384-419.

¹¹⁶ Loubser & Midgley *op cit* (n 115) 4.

¹¹⁷ Loubser & Midgley *op cit* (n 115) 5.

¹¹⁸ Loubser & Midgley *op cit* (n 115) 5.

¹¹⁹ Loubser & Midgley *op cit* (n 115) 154.

The requirement of causality needs a causal link to be established between the conduct and the (resultant) harm. Even if there was factual causation (or the conduct was a *sine qua non* for the resultant harm) it may not be enough, as legal causation is also required. In other words, the damage or harm must not be too remote. The courts use a flexible approach in respect of legal causation, based on policy considerations of reasonableness, fairness and justice.¹²⁰

The fault requirement refers to the blameworthiness of a person's actions in causing harm to another, and can manifest itself in two ways, namely intention or negligence. In order for a wrongdoer to be liable on the basis of either intention or negligence it must be shown that a person is accountable, which is determined by factors such as age, mental illness and intoxication.

Intention 'is a technical, legal expression that describes a wrongdoer's will to achieve a specific wrongful consequence. Intention, therefore, refers to a person's state of mind or predisposition regarding wrongful conduct and consequences'.¹²¹ The test for intention is completely subjective.

One deals with negligence when a person has not met the standard of conduct that society deems appropriate in the context of the situation, meaning that a person's conduct is measured against a general standard as required by law and this standard is expressed with reference to the reasonable person. An objective test is used to determine negligence. A distinction is sometimes made between negligence, gross negligence and recklessness. These concepts have been explained as follows:

Negligence is understood to mean 'an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions he failed to adhere to the standard of care legally required of him'. 'Gross negligence' is distinguished from negligence and refers to conduct which, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme. Where there is conscious risk-taking, a complete obtuseness of mind must be demonstrated; alternatively, where there is no conscious risk-taking, a total failure to take care must be demonstrated. If the risk of harm is foreseen and the person in question acts recklessly or indifferently regarding

¹²⁰ Loubser & Midgley *op cit* (n 115) 96.

¹²¹ Loubser & Midgley *op cit* (n 115) 99.

whether it ensues, the conduct will amount to recklessness in the narrow sense'
[footnotes omitted].¹²²

This distinction becomes particularly relevant in the context of the CPA as the Act refers specifically to the concepts of gross negligence and recklessness in particular instances. Section 18(1) of the CPA, for instance, provides that a consumer is not liable for damages to goods displayed by a supplier, unless the damage results from an act by the consumer amounting to gross negligence or recklessness. Section 51(1)(c)(i) of the CPA prohibits a supplier from entering into an agreement with a consumer which purports to limit or exempt a supplier of goods or services from liability for loss attributable to the gross negligence of the supplier, or a person acting for or controlled by the supplier. The difference in the use of the concepts in the mentioned sections creates uncertainty.¹²³ The legislature appears to acknowledge that there is a concept such as 'recklessness' and that it means something different from 'gross negligence'. This makes it difficult to understand why the legislature has not used both concepts in both sections. It would make no sense to argue that section 51(1)(c)(i) of the CPA prohibits a supplier from making an agreement subject to a term that excludes liability for gross negligence but that a supplier can validly conclude such an agreement containing a term excluding liability for recklessness. The absence of 'recklessness' from section 51(1)(c)(i) of the CPA, it is submitted, is an oversight by the legislature and therefore the word should be read into the section.

When the supplier excludes liability for damages caused through the fault of the supplier, the latter is utilising a form of self-insurance against liability and therefore the law of insurance is particularly relevant when considering these concepts. In

¹²² Van Eeden *op cit* (n 1) 63-64. See *Transnet Ltd t/a Portnet v The Owners of the Mv "Stella Tingas"* 2003 (1) All SA 286 (SCA) par 7. See also *Paterson v Aegis Insurance Co Ltd* 1989 (3) SA 478 (C) where the court explained recklessness as the recognition of an obvious or imminent risk and the failure to take any or adequate precautionary measures against such risk. Davis in *Gordon & Getz The South African Law of Insurance* (1993) 185, points out that the concept of recklessness has questionable validity in South African law, explaining it as that it 'may denote a serious degree of negligence or the act of the insured might be of the nature that though he subjectively foresaw the possibility of his unlawful conduct being the cause of an event, he recklessly persisted in such conduct, despite such foresight, consciously taking the risk of the resultant event, not caring whether it ensued or not'.

¹²³ S 18(1) of the CPA refers to both gross negligence and recklessness whilst s 51(1)(c)(i) of the CPA refers only to gross negligence and not to recklessness as well.

terms of the common law relating to insurance, an insured can insure against both gross negligence and recklessness.¹²⁴

(b) Contract

A contract can be defined as 'an agreement entered into by two or more persons with the intention of creating a legal obligation or obligations'.¹²⁵ For a contract to be valid and binding it must satisfy the requirements of:

- consensus (which is understood to be a meeting of the minds of the contracting parties – or at least an apparent meeting of the minds - on the material aspects of the agreement);
- capacity (parties must have the necessary legal capacity for purposes of concluding a contract);
- formalities (as prescribed by the law or the parties);
- legality (the agreement must be lawful, in other words it must not be prohibited by law);
- possibility (the obligations undertaken must be capable of being performed);
and
- certainty (the obligations must be certain or ascertainable).¹²⁶

The contract as a legal and economic instrument is fundamentally important in the modern world as it forms an inseparable part of all economic activity.¹²⁷ The foundation of the South African law of contract is the principle of freedom of

¹²⁴ Davis *op cit* (n 122) 185. See also *Government of the RSA (Department of Industries) v Fibre Spinners & Weavers (Pty) Ltd* 1977 (2) SA 324 (D) 338 and Reinecke, Van der Merwe, Van Niekerk & Havenga *General Principles of Insurance Law* (2002) 205-209.

¹²⁵ Hutchison 'The nature and basis of contract' in Hutchison & Pretorius *op cit* (n 114) 6.

¹²⁶ Hutchison 'The nature and basis of contract' in Hutchison & Pretorius *op cit* (n 114) 6.

¹²⁷ Christie *The Law of Contract in South Africa* (2001) 1.

contract.¹²⁸ This hegemony of the principle of freedom of contract is evident in the following comment of the Appellate Division, as it then was, when the Court stated ‘that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom’.¹²⁹ However, public policy is a determinant of legality. A ‘contract’ that does not comply with the requirement of legality is not a legal contract. Generally it can be stated that contracts do not comply with the legality requirement if the contract is against public policy. The Appeal Court, as it then was, explained the situation as follows:

Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy not be enforced.¹³⁰

What exactly constitutes public policy has however for some time been a source of debate, with public policy for instance being described as an ‘expression of ‘vague import’.¹³¹ Public policy is not a static concept as it represents the public opinion of a particular community at a particular time and is therefore necessarily an open-ended standard.¹³² With reference to public policy then the interest of society as a whole is the primary determinant.¹³³ In a relatively recent and significant development the courts have now held that public policy is primarily based on the values of the Constitution and particularly those of the Bill of Rights, including dignity, equality and freedom.¹³⁴ It must immediately be said that the Supreme Court of Appeal has also made it clear that the principle of freedom of contract is one of the constitutional values constituting public policy.¹³⁵ In a particular situation different values may be in contestation and it will then be required of the court to balance these competing

¹²⁸ Eiselen *op cit* (n 5) 516. See also Van der Merwe, Van Huysteen, Reinecke & Lubbe *Contract – General Principles* (2007) 11 and De Wet & Van Wyk *Die Suid-Afrikaanse Kontrakte- en Handelsreg* (1992) 130.

¹²⁹ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD) 9.

¹³⁰ *Sasfin (Pty) Ltd v Beukes supra* (n 129) 8.

¹³¹ *Sasfin (Pty) Ltd v Beukes supra* (n 129) 7.

¹³² Floyd ‘Legality’ in Hutchison & Pretorius *op cit* (n 114) 175.

¹³³ Floyd ‘Legality’ in Hutchison & Pretorius *op cit* (n 114) 174.

¹³⁴ See in particular *Brisley v Drotzky* 2002 (4) SA 1 (SCA) par 91; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21(SCA) par 18 and *Barkhuizen v Napier* 2007 (5) SA 323 (CC) par 29. This development was probably initiated with the decision in *Carmichele v Minister of Safety and Security* 2001(10) BCLR 995 (CC) par 56.

¹³⁵ *Afrox Healthcare Bpk v Strydom supra* (n 134) par 23.

constitutional values. A very good example of this problem is to be found in restraint of trade agreements, where there is tension between freedom of contract and freedom of trade. But it is not just the values of freedom of trade and freedom of contract that must be considered and/or balanced. All relevant values must be considered as part of the public policy mix. While freedom of contract can facilitate and give effect to the greater realisation of human dignity and equality, in equal measure, freedom of contract can be abused to undermine other constitutional values, requiring the courts (and the Legislature) to intervene when this happens. So, although freedom of contract is the cornerstone of the South African law of contract, it is controlled through its interplay with others as part of a matrix of constitutional values.¹³⁶ This means that the courts will uphold the principle of freedom of contract and its concomitant principle of *pacta sunt servanda* in the public interest, but can also refuse to enforce a contract (even though the parties had agreed to the terms thereof) because the terms of the contract are inimical to the (other) constitutional values.

Besides the public interest, other considerations of public policy that may require that a contract not be enforced (for a want of legality) include statutory prohibitions, instances under common law and the *bonos mores* of society.¹³⁷ Examples of statutory prohibitions of certain agreements and terms are to be found in section 51 of the CPA.¹³⁸ Contracts *contra bonos mores* are usually linked to agreements about sexual immorality but are not necessarily limited to these types of agreements.¹³⁹ A type of agreement that has been declared illegal for being *contra bonos mores* is the so-called 'conclusive proof' agreement.¹⁴⁰

An individual interest of a party to a contract may also be a consideration in determining whether a contract violates the public policy.¹⁴¹ The unfairness and

¹³⁶ See Floyd 'Legality' in Hutchison & Pretorius *op cit* (n 114) 175-177.

¹³⁷ Floyd 'Legality' in Hutchison & Pretorius *op cit* (n 114) 173.

¹³⁸ Par 3.2.1 *infra* contains other examples of legislation regulating contracts.

¹³⁹ Floyd 'Legality' in Hutchison & Pretorius *op cit* (n 114) 179.

¹⁴⁰ *Ex parte Minister of Justice: in re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Donnelly v Barclays National Bank Ltd* 1995 (3) SA 1 (AD) 21. A conclusive proof agreement is an agreement providing for a certificate of balance issued by one party to constitute conclusive proof of indebtedness of the other party to the agreement.

¹⁴¹ Floyd 'Legality' in Hutchison & Pretorius *op cit* (n 114) 182.

unreasonableness of a contract towards a contracting party is considered when determining the legality of the contract.¹⁴² The South African common law has been described as an 'inherently equitable system',¹⁴³ which is characterised by 'its broad equitable spirit'.¹⁴⁴ It has been accepted that all contracts are *bona fide* and that the requirement of good faith underlies the South African law of contract.¹⁴⁵ This being the case there has been no general substantive defence recognised in South African law of contract based on equity.¹⁴⁶ This raised the question whether good faith could fulfil this role by allowing courts to intervene directly in contractual relations, 'or did it only operate indirectly, through established common-law rules and doctrines, such as those relating to public policy and the legality of contracts'?¹⁴⁷

The Supreme Court of Appeal explained that good faith is a foundational value underlying the law of contract and that it finds expression in specific rules and principles of the law of contract. Good faith is not an independent or free-floating basis for setting aside or not enforcing contractual terms. Good faith is an 'ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract'.¹⁴⁸ Good faith, together with other abstract concepts like reasonableness and justice, provide the basis and legitimacy for rules of law and can motivate the formation and amendment of rules, but are not rules in themselves. When it comes to the enforcement of contractual terms, the court does not have a general discretion to act on the basis of abstract ideas. The court must act on the basis of clearly crystallised and formulated rules of law.¹⁴⁹ Good faith, in itself, is not a basis for not enforcing a contractual term.¹⁵⁰ The

¹⁴² Floyd 'Legality' in Hutchison & Pretorius *op cit* (n 114) 183.

¹⁴³ *Bank of Lisbon and SA Ltd v De Ornelas* 1998 (3) SA 580 (AD) 606.

¹⁴⁴ *FNB of SA Ltd v Bophuthatswana Consumer Council* 1995 (2) SA 853 (BGD) 864.

¹⁴⁵ See also for example *Meskin v Anglo-American Corporation of SA Ltd* 1968 (4) SA 793 (W); *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A), and *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A).

¹⁴⁶ *Bank of Lisbon and SA Ltd v De Ornelas supra* (n 143) 605.

¹⁴⁷ Hutchison 'The nature and basis of contract' in Hutchison & Pretorius *op cit* (n 114) 29.

¹⁴⁸ *Brisley v Drotzky supra* (n 134) par 22. See also Hawthorne 'The principle of equality in the law of contract' (1995) *THRHR* 172.

¹⁴⁹ *Afrox Healthcare Bpk v Strydom supra* (n 134) par 32.

¹⁵⁰ *Afrox Healthcare Bpk v Strydom supra* (n 134) par 31-32.

Constitutional Court expressed itself as follows on the matter in *Barkhuizen v Napier*.¹⁵¹ The Court stated that

In my view, the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.

Whether a contract or contractual term complies with the requirement of legality (or is against public policy) must now be determined with reference to constitutional values.¹⁵² The Court stated further that notions of fairness, justice and equity, and reasonableness cannot be separated from public policy, and are informed by *ubuntu*, whilst taking into account the necessity to do simple justice between individuals.¹⁵³ Public policy 'is the general sense of justice of the community, the *boni mores*, manifested in public opinion.'¹⁵⁴ Public policy, the Court held, imports the concepts of fairness, justice and reasonableness.¹⁵⁵ The enforcement of a contract that is unfair or unjust would therefore be prohibited by public policy.¹⁵⁶

In determining fairness, two questions need to be considered. The first is whether the clause itself is objectively unreasonable so as to offend public policy.¹⁵⁷ Answering this question requires a weighing-up of competing values – the value of freedom of contract versus other relevant values, depending on the particular contract in question.¹⁵⁸ If the contract is objectively not contrary to public policy then the second question arises, namely whether it is reasonable to enforce the contract in view of the particular circumstances of the case and the relative situation of the parties.¹⁵⁹

¹⁵¹ *Supra* (n 134) par 30.

¹⁵² *Barkhuizen v Napier supra* (n 134) paras 28 & 29.

¹⁵³ *Barkhuizen v Napier supra* (n 134) par 51.

¹⁵⁴ *Barkhuizen v Napier supra* (n 134) par 73.

¹⁵⁵ *Barkhuizen v Napier supra* (n 134) par 73.

¹⁵⁶ *Barkhuizen v Napier supra* (n 134) par 73.

¹⁵⁷ *Barkhuizen v Napier supra* (n 134) par 59.

¹⁵⁸ *Barkhuizen v Napier supra* (n 134) par 57. See also Hutchison 'The nature and basis of contract' in Hutchison & Pretorius *op cit* (n 114) 31.

¹⁵⁹ *Barkhuizen v Napier supra* (n 134) par 56 to 59.

Inequality of bargaining power is a factor that can impact on this second question which is more subjective than the first question.¹⁶⁰

Numerous considerations, including fairness, can be accommodated under the concept of public policy, with the latter now having been firmly established as a mechanism of judicial control over contractual enforcement.¹⁶¹ Public policy is therefore informed by considerations such as good faith, fairness, reasonableness, justice and equality of bargaining power. For this reason it is submitted that claims that the Constitutional Court has introduced a general substantive defence based on equity into the law of contract, may be interpreting the meaning of the Constitutional Court's approach, as quoted above, in a broader manner than what was stated.¹⁶² The impact of this decision has already been felt.¹⁶³ The general tenor of the *Barkhuizen v Napier*-decision appears to be very much in line with the views of the Legislature as evidenced by the subsequent enactment of the CPA.¹⁶⁴

It has been pointed out that the majority of consumer complaints received by CAFCOM and the Department of Trade and Industry relate to consent obtained in an improper manner; consumers being misled during the negotiating process; unfair terms, and defective goods.¹⁶⁵

Defective consent pertains to consent obtained in an improper manner because of the amount of (undue) pressure brought to bear on the consumer. Having a contract set aside because of undue influence is difficult and usually only happens where

¹⁶⁰ *Barkhuizen v Napier supra* (n 134) par 59.

¹⁶¹ *Brand op cit* (n 17) 87.

¹⁶² Hutchison 'The nature and basis of contract' in Hutchison & Pretorius *op cit* (n 114) 32.

¹⁶³ In the decision of *Breedenkamp v Standard Bank of South Africa Ltd* 2009 (5) SA 304 (GSJ) the Court, in relying on the *Barkhuizen*-decision, interdicted the bank from terminating Breedenkamp's account, although the contract between the parties allowed the bank to do so for any reason whatsoever. The Court held that the power (to terminate) had to be exercised fairly and for good cause. However, this interim order was overturned in *Breedenkamp v Standard Bank of South Africa Ltd* 2009 (6) SA 277 (GSJ), where the Court, again relying on the *Barkhuizen*-decision, found that the way in which the cancellation clause was implemented was not unfair and no constitutional values were compromised in the manner of implementing the cancellation clause. Furthermore, the parties were not in an unequal bargaining position and, therefore, subjectively the contract was not contrary to public policy (at pars 26-30). See also Nortje 'Unfair contractual terms – Effect of the Constitution *Breedenkamp v Standard Bank of South Africa Ltd* 2009 5 SA 304 (GSJ) and 2009 6 SA 277 (GSJ)' (2010) *THRHR* 519.

¹⁶⁴ Hutchison 'The nature and basis of contract' in Hutchison & Pretorius *op cit* (n 114) 32.

¹⁶⁵ *Woker op cit* (n 16) 223.

there is a special relationship between parties which is then abused by one party.¹⁶⁶ The legislature has created a so-called 'cooling-off' period in certain instances. This allows a 'pressured' consumer to change his or her mind and cancel a contract within a specific period of time. Examples are found in certain transactions relating to the sale of land¹⁶⁷ and credit agreements.¹⁶⁸

Where a party is deceived into concluding a contract such a party can use the *actio legis Aquiliae*, a delictual action, to claim patrimonial losses suffered. This is somewhat easier said than done as it is often very difficult to prove that certain promises were made, and even more so where the contract expressly states that the written agreement constitutes the whole of the contract (and the promises, or (mis)representations made are not part of the written agreement). Then there is the further factor that the difference between an actionable misrepresentation and a non-actionable puff or advertising speak is often not self-evident.¹⁶⁹ A significant problem as far as representations is concerned stems from not providing consumers with proper information. Consumers are not adequately informed about interest charges, administration fees, insurance and delivery fees.¹⁷⁰ This factor contributed substantially to the introduction of the NCA which now limits the amount of interest that can be charged, as well as prescribes which fees may be levied as administration and service costs, amongst others.¹⁷¹

Although a number of measures have been utilised to ameliorate the operation of unfair contractual terms, South Africa has not had a statute dealing with unfair contracts or contractual terms in general. A recommendation by the South African Law Commission to do so was never realised.¹⁷² Essentially it is the hegemony of the principle of freedom of contract and a corresponding loathing for paternalistic interference with what the parties have freely and voluntarily agreed to which mitigated against such legislation (and a more activist role for the courts for that

¹⁶⁶ Woker 'Consumer protection' in Vrancken *op cit* (n 10) 103.

¹⁶⁷ S 29A(1) of the Alienation of Land Act 68 of 1981.

¹⁶⁸ Sn 121(2) of the NCA.

¹⁶⁹ See Woker *op cit* (n 16) 225.

¹⁷⁰ Woker *op cit* (n 16) 225-226.

¹⁷¹ S 101 of the NCA.

¹⁷² The South African Law Commission Discussion Paper 65 'Unreasonable stipulations in contracts and the rectification of contracts' (1998).

matter).¹⁷³ Thus the courts have held that a person who has signed a contract is agreeing to whatever terms appear in the contract above his or her signature.¹⁷⁴ This rule is reflected in the maxim: *caveat subscriptor*. This rule is quite understandable as it would seriously complicate commercial life if parties were allowed to escape contractual liability based upon the fact that parties did not inform themselves of what they were signing.¹⁷⁵ However, commercial contracts are often presented in a standard form and it is acknowledged that these contracts can be complex, long, in very small print and most often not read or understood by consumers.¹⁷⁶ Sachs J explained the problem with standard form contracts in the following terms:¹⁷⁷

Prolix standard form contracts undermine rather than support the integrity of what was actually concluded between the parties. They unilaterally introduce elements that were never in reality bargained for, and that had nothing to do with the actual bargain. It may be said that far from promoting autonomy, they induce automatism. The consumer's will does not enter the picture at all. Indeed, it could be contended that the question has moved from being one of whether judges should impose their own subjective and undefined preferences in this field, to one of whether their own vision has become so clouded by anachronistic doctrine as to prevent them from seeing objective reality.

Then one also finds that terms and conditions are included in a contract (whether written and signed or not) by reference. It is very common to see that an agreement is subject to so-called 't & c's', which are then contained in another document often not seen by the consumer.¹⁷⁸

Even where the contract is not required to be signed, (unfair) terms can be incorporated by way of the display of a notice or the handing over of a ticket. Therefore, if the terms are in contractual form, are prior to or contemporaneous with the contract, and provided sufficient notice has been given of the terms, they will be

¹⁷³ See for instance Sachs J in *Barkhuizen v Napier supra* (n 134) par 171.

¹⁷⁴ The Court in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2010 (1) SA 8 GSJ 17 stated that it is 'settled law that generally a person who signs a contractual document thereby signifies his assent to the contents of the document'.

¹⁷⁵ See Maxwell 'Obligations and terms' in Hutchison & Pretorius *op cit* (n 114) 237.

¹⁷⁶ Maxwell 'Obligations and terms' in Hutchison & Pretorius *op cit* (n 114) 237. This acknowledgment led to the requirement that a party presenting another with a standard form contract must draw the attention of the other party to any terms that may be considered unusual in the context – failing which the other party may escape liability.

¹⁷⁷ *Barkhuizen v Napier supra* (n 134) par 155. See also Lewis 'Fairness in South African contract law' (2003) SALJ 331.

¹⁷⁸ Maxwell 'Obligations and terms' in Hutchison & Pretorius *op cit* (n 114) 237-238.

considered part of the contract.¹⁷⁹ Even where the consumer did not see the notice or did not read it the consumer will be bound by this notice (and the terms contained therein) provided the supplier took reasonable steps to bring the notice to the attention of the consumer.¹⁸⁰

Contracts in clear conflict with public policy do not comply with the legality requirement for a valid contract and will not be enforced by the courts. The role of public policy and good faith were discussed above. However, it must be remembered that, in terms of the common law, the courts will only interfere with contracts on the ground of public policy in the clearest of cases.

The fourth 'general' consumer complaint concerning contracts relates to defective goods. In the normal course of events consumers have very limited remedies when it comes to defective goods.¹⁸¹ Depending on the seriousness of the defect the consumer can claim a reduction in the purchase price or reclaim the total purchase price.¹⁸² These remedies do not allow a claim for consequential damages and in most cases the resultant damage is far greater than the cost of the product. A claim in delict may be possible but then it will have to be shown that the supplier was at fault (either through intention or negligence), which is very difficult, especially where the product is imported.¹⁸³ A third party, (one who is not in a contractual relationship with the supplier), will have to rely on a claim in delict to recover damages and will therefore also have to establish fault.¹⁸⁴ Some jurisdictions have opted to make use of strict liability to hold suppliers of defective goods liable for such defects.¹⁸⁵

¹⁷⁹ Woker *op cit* (n 16) 227-228.

¹⁸⁰ Woker *op cit* (n 16) 227. See also *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA), as well as Maxwell 'Obligations and terms' in Hutchison & Pretorius *op cit* (n 114) 239.

¹⁸¹ Where the supplier is in breach of a guarantee, acted fraudulently, is the manufacturer of the product or professed to be expert sellers the consumer will enjoy greater protection.

¹⁸² The remedies in these cases are enforced by the *actio quanti minoris* and the *actio redhibitoria* respectively.

¹⁸³ See Woker *op cit* (n 16) 229.

¹⁸⁴ McQuoid-Mason 'Consumers and product liability' in McQuoid-Mason *op cit* (n 1) 93.

¹⁸⁵ See for example the English Consumer Protection Act 1987 which implemented the European Community Directive on Liability for Defective Products 1985 (85/374/EEC) and sections 138-142 of the Australian Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010.

The tourism industry is for the most part a service industry. Consumers who suffer damage as a result of defective performance of services, which amount to a breach of contract, will be able to use the normal contractual remedies. A consumer may also have an action in delict against a supplier to recover damages resulting from the negligent or intentional delivery of defective service.¹⁸⁶ Skilled practitioners such as doctors and lawyers, are subject to the *imperitia* rule and are considered negligent if they have failed to exercise the degree of care that is usually expected of reasonably competent practitioners in their profession.¹⁸⁷ It may well be argued that this rule will also apply to service providers in the tourism industry such as travel agents and tour operators.¹⁸⁸ McQuoid-Mason suggests that 'in all cases the provider of the service must exercise the degree of skill and care expected of a reasonably competent person in that particular occupation'.¹⁸⁹

3.3 The Consumer Protection Act, 2008

Until the advent of the CPA there has been no comprehensive and systematic body of law designed specifically to provide for the regulation and protection of consumers, causing the term 'consumer law' to be somewhat of a misnomer.¹⁹⁰ The coming into force of the CPA is set to dramatically change the face of consumer protection law in South Africa. The introduction of the CPA has been hailed as a landmark development which now 'lays the foundation for an era of consumers in South Africa by introducing a single, comprehensive legal framework for consumer protection'.¹⁹¹ The Act has also been described as 'a Bill of Rights for Consumers'; 'groundbreaking new and dynamic legislation that will soon set a benchmark internationally'; 'comprehensive and overarching consumer law of general application that will regulate the interaction between business and consumers in the marketplace', and

¹⁸⁶ See generally Woker 'Consumer protection' in Vrancken *op cit* (n 10) 108.

¹⁸⁷ McQuoid-Mason 'Consumers and product liability' in McQuoid-Mason *op cit* (n 1) 111.

¹⁸⁸ See in this regard Vrancken 'Introductory perspectives on travel agency in South African law' (2001) *THRHR* 64-83 and Lubbe 'The changing role of the travel intermediary' (2000) *SAJEMS* 273-289.

¹⁸⁹ McQuoid-Mason 'Consumers and product liability' in McQuoid-Mason *op cit* (n 1) 111.

¹⁹⁰ See Woker 'Consumer protection' in Vrancken *op cit* (n 10) 95.

¹⁹¹ Du Preez 'The Consumer Protection Bill: A few preliminary comments' (2009) *TSAR* 58.

'legislation that is set to change the legal landscape and which will leave South African consumers amongst the best protected in the world'.¹⁹²

The CPA was signed and assented to by the President on 24 April 2009¹⁹³ and published on 29 April 2009 in Government Gazette No. 32186. The English text of the Act was signed.

The CPA came into effect on an incremental basis. Provision was made that certain parts of the Act would come into effect one year after the signing of the Act.¹⁹⁴ These parts of the Act were Chapter 1 and Chapter 5, as well as section 120. Section 120 of the CPA empowers the Minister to make regulations and this allowed for the preparation of the regulations in anticipation of the coming into general effect of the Act. Subject to certain exceptions the remainder of the Act was to take effect 18 months after the date of signature although the Minister could postpone the general effective date for a further period of six months.¹⁹⁵ Eventually, after the Minister did in fact postpone the general effective date,¹⁹⁶ the Act came into effect on 1 April 2011.

The CPA represents the culmination of a relatively long process the purpose of which was to give effect to the Department of Trade and Industry's aim to 'create and promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities'.¹⁹⁷ The reasoning behind the introduction of this legislation was recognition that consumer protection legislation was needed. This need was precipitated by various factors and/or developments including the

¹⁹² Du Preez 'A Summary of the Consumer Protection Act 68 of 2008' (Winter 2009) *DLA Cliffe Dekker Hofmeyer Update* 1. Not all are equally enthusiastic about the Act. Otto 'Verborge gebreke, voetstootsverkope, die Consumer Protection Act en die National Credit Act' (2011) *THRHR* 535 expresses his view on the CPA as follows: 'Die Consumer Protection Act, met sy vrome voornemes en al, is een van die mees breedsprakige en irriterende wette wat ek nog gelees het.'

¹⁹³ As with many things about the CPA there also seems to be some confusion about the date of assenting. Jacobs, Stoop & Van Niekerk 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis' (2010) *PER* 302 indicate the date of assent as 29 April 2009.

¹⁹⁴ Schedule 2, item 2(1) of the CPA.

¹⁹⁵ Schedule 2, item 2(3)(a) of the CPA.

¹⁹⁶ Notice to defer the general effective date of the Consumer Protection Act, 2008 (Act 68 of 2008), Notice 917 in *Government Gazette* No. 33581 of 23 September 2010.

¹⁹⁷ Memorandum on the objects of the Consumer Protection Bill 2008 80. See also Du Preez *op cit* (n 192) 58-59.

existence of unfair and discriminatory market practices, the proliferation of low-quality and unsafe products, a lack of knowledge of the rights of consumers, limited redress and weak enforcement capacity for and of consumer rights.¹⁹⁸ The Memorandum on the objects of the Consumer Protection Bill 2008¹⁹⁹ expresses itself as follows on the need for consumer protection legislation:

Existing provisions relating to the protection of consumers in South Africa are fragmented and outdated, and are mostly incorporated in legislation that is merely incidental to consumer protection. They are further premised on principles that are no longer applicable to the values of the democratic and developing society. This state of affairs has resulted in uneven regulation, with heavy regulation in some industries, and a reliance on self-regulation in other industries, leaving consumers and business, especially small business, vulnerable and subject to widespread abuse.

There are currently no general rules of law relating to the consumer's most basic rights to information, disclosure, fairness, transparency, etc. The current legislative framework does not address the challenges of discriminatory and unfair market practices, proliferation of low quality and unsafe products, lack of awareness of rights, inadequate protection and limited redress as well as weak enforcement systems.

Therefore the Department of Trade and Industry commissioned a research project to develop a new consumer protection regime for South Africa. The consultative process resulted in the Draft Green Paper on the Consumer Policy Framework.²⁰⁰ The Consumer Policy Framework was subsequently presented to the Parliamentary Portfolio Committee on Trade and Industry and NEDLAC^{201, 202}. A first draft of the Consumer Protection Bill was published in 2006,²⁰³ with a third draft published in 2008. The Bill was introduced to Parliament in terms of section 76 of the Constitution as the Bill dealt with a matter listed in Schedule 4 of the Constitution, i.e. a matter in respect of which both the national and provincial legislatures have concurrent jurisdiction. As indicated, the Bill was assented to on 24 April 2009 and promulgated on 29 April 2009, becoming generally effective on 1 April 2011.

Having briefly considered what the position was in South Africa regarding consumer protection prior to the commencement of the CPA it is now necessary to consider the

¹⁹⁸ Memorandum on the objects of the Consumer Protection Bill 2008 80.

¹⁹⁹ Memorandum on the objects of the Consumer Protection Bill 2008 80.

²⁰⁰ The Green Paper was published in Notice 1957 in *Government Gazette* No. 26774 on 9 September 2004.

²⁰¹ National Economic Development and Labour Council.

²⁰² Du Preez *op cit* (n 192) 60.

²⁰³ Notice 418 published in *Government Gazette* No. 28629 on 15 March 2006.

regulatory framework that is established by the CPA to provide for consumer protection in South Africa. The focus in this section therefore falls on the structures and processes established by the Act.

3.3.1 The structure of the CPA

The structure of the CPA, very briefly, is as follows:

The Act consists of seven chapters and 122 sections.

- Chapter 1 deals with the interpretation, purpose and application of the Act.
- Chapter 2 identifies the various consumer rights provided for in the Act.
- Chapter 3 provides for the protection of consumer rights and the consumer's voice. Set out in this chapter is the role of the National Consumer Commission (NCC), the National Consumer Tribunal (NCT) and courts in protecting the rights of consumers. The role and function of consumer rights groups are also provided for in this Chapter.
- Chapter 4 deals with business names and industry codes of conduct.
- Chapter 5 regulates the co-operative exercise of concurrent jurisdiction between national and provincial government in respect of the functional area of consumer protection and details the establishment and functioning of the NCC.
- Chapter 6 explains how the enforcement of the Act occurs, particularly enforcement by the NCC, and creates offences and prescribes penalties including administrative fines. The Chapter also provides for certain miscellaneous matters especially of procedural nature, including limitations in bringing an action and the standard of proof required.

- Chapter 7, the final chapter, provides for general matters such as the making of regulations, consequential amendments, repeal of legislation and transitional arrangements.
- There are two schedules providing for the amendment of laws and transitional provisions respectively.

Section 120 provides the Minister with authority to make regulations expressly authorised or contemplated in the Act. In accordance with this section the Minister published for public comment proposed Consumer Protection Regulations in November 2010.²⁰⁴ The regulations were signed by the Minister of Trade and Industry on 31 March 2011 and published in *Government Gazette* No. 34180 on 1 April 2011.

In addition, the Minister or the Commissioner of the NCC has published certain other regulations and notices in terms of the CPA to deal with specific issues, such as

- Guidelines for the Accreditation of Ombud-Schemes in terms of the Consumer Protection Act (No. 68 of 2008);²⁰⁵
- Determination of a threshold in terms of section 6 of the Act for purposes of section 5(2)(b) of the CPA;²⁰⁶
- National Consumer Commission Rules regulating the functions of the National Consumer Commission;²⁰⁷
- Notice to exempt banks from the provisions of section 14;²⁰⁸
- Notice to exempt the pension fund industry, the collective investment schemes industry and the security services industry;²⁰⁹

²⁰⁴ Notice 1099 published in *Government Gazette* No. 33818 on 29 November 2010.

²⁰⁵ Notice 174 of 2011 in *Government Gazette* No. 34163 of 25 March 2011.

²⁰⁶ Notice 294 in *Government Gazette* No. 34181 of 1 April 2011.

²⁰⁷ Notice 489 published in *Government Gazette* 34348 of 3 June 2011.

²⁰⁸ Notice 532 in *Government Gazette* No. 34399 of 27 June 2011.

²⁰⁹ Notice 533 in *Government Gazette* No. 34400 of 27 June 2011.

- Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007;²¹⁰
- National Consumer Commission Guidelines for Advisory Opinions and Clarifications;²¹¹
- Final Enforcement Guidelines;²¹²
- Guidelines for the Development of Industry Codes of Conduct for Accreditation under the Consumer Protection Act 68 of 2008;²¹³ and
- Consumer Product Safety Recall Guidelines.²¹⁴

3.3.2 The purposes and interpretation of the CPA

It has been indicated above that since 1994 the South African government has committed itself to consumer protection. This commitment was part of a wider commitment to the promotion and advancement of the social and economic welfare of all South Africans. Legislation subsequent to 1994 reflected the theme of the promotion and advancement of the social and economic welfare of South Africans. Particular legislation aimed at facilitating this aim includes statutes regulating labour relations, such as the Labour Relations Act²¹⁵ and the Basic Conditions of Employment Act,²¹⁶ the Competition Act,²¹⁷ which specifically states as one of its aims the promotion and maintenance of competition to promote employment and advance the social and economic welfare of South Africans;²¹⁸ the Electronic Communications and Transactions Act,²¹⁹ and the NCA which also indicates that its

²¹⁰ Notice 789 in *Government Gazette* No. 30225 of 28 August 2007 as amended by Notice 428 in *Government Gazette* 34405 of 29 June 2011.

²¹¹ Notice 438 in *Government Gazette* No. 34426 of 1 July 2011.

²¹² Notice 492 in *Government Gazette* No. 34484 of 25 July 2011.

²¹³ Notice 415 in *Government Gazette* No. 35375 of 23 May 2012.

²¹⁴ Notice 490 in *Government Gazette* No. 35434 of 13 June 2012.

²¹⁵ Act 66 of 1995.

²¹⁶ Act 75 of 1997.

²¹⁷ Act 89 of 1998.

²¹⁸ Neuhoff *op cit* (n 60) 13.

²¹⁹ Act 25 of 2002.

purpose is 'to promote and advance the social and economic welfare of South Africans...'.²²⁰

The CPA is the latest addition to this developing legal framework with the overall aim of advancing the social and economic welfare of South Africans.²²¹ Lewis states that '[o]ur modern conception of a constitutional democracy includes the principle of consumer protection'.²²² The CPA states that its primary purpose is 'to promote and advance the social and economic welfare of consumers in South Africa ...'.²²³ This purpose is clearly grounded in the constitutional purpose as provided in the Preamble to the Constitution, namely to '[i]mprove the quality of life of all citizens and free the potential of each person'.

The Act aims to achieve this purpose through realising specified supportive objectives including:

- establishing a legal framework for achieving and maintaining a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
- reducing and ameliorating disadvantages experienced in accessing goods and services by vulnerable consumers;²²⁴
- protecting consumers from unfair trade practices;
- encouraging responsible consumer behaviour; promoting consumer empowerment; and
- providing an efficient system for redress.²²⁵

²²⁰ S 3 of the NCA.

²²¹ Van Eeden *op cit* (n 1) 12.

²²² *Op cit* (n 177) 331.

²²³ S 3(1) of the CPA.

²²⁴ S 3(1)(b)(i)-(iv) of the CPA make mention of the vulnerable consumers. These include people who have a low-income; people living in remote areas; minors, seniors or similarly vulnerable persons, and people whose ability to read and understand promotional material or documents or notices are impaired by low literacy, disability and/or a lack of fluency in the language to material, document or notice is provided in.

By stipulating the purposes of the Act in such specific terms the legislature has given a clear indication that it considers the current consumer market as not fair, accessible, efficient and responsible for the benefit of consumers generally.²²⁶ The CPA must help facilitate a legal framework that must establish a balance in the consumer market between consumers and suppliers thereby ensuring sustainability for the benefit of both sectors.²²⁷

The impact of section 3 of the CPA is significant as it will play an important role in the interpretation of the Act because the Act specifically requires that it is to be interpreted in a manner that gives effect to the purposes set out in the section.²²⁸ Furthermore, a court or the NCT, when it hears a matter in terms of the CPA, *must* promote the spirit and purposes of the Act.²²⁹

This imperative is further underlined by the requirement contained in section 4(2) of the Act which holds that in a matter before a court in terms of the Act, the court must develop the common law as is necessary to facilitate the realisation and enjoyment of consumer rights in general, and for the vulnerable groups in particular.²³⁰ When interpreting or applying the CPA the person, court, NCT or NCC has a discretion to consider appropriate foreign and international law; appropriate international conventions, declarations or protocols relating to consumer protection; and any decision of a consumer court, ombud or arbitrator in terms of the Act, provided such decision has not been set aside by a competent court.²³¹

The CPA explicitly mandates a purposive approach for the interpretation of the Act.²³² Purposivism seeks to give meaning to a legislative provision in the light of the purpose that the provision seeks to achieve within the context of the statute of which

²²⁵ S 3(1)(a)-(h) of the CPA.

²²⁶ Van Eeden *op cit* (n 1) 38.

²²⁷ Van Eeden *op cit* (n 1) 38.

²²⁸ S 2(1) of the CPA. See also Du Preez *op cit* (n 192) 63.

²²⁹ S 4(2)(b)(i) of the CPA.

²³⁰ S 4(2)(a) of the CPA.

²³¹ S 2(2)(a)-(c) of the CPA.

²³² Du Preez *op cit* (n 192) 65. See also Van Eeden *op cit* (n 1) 37-40.

the provision forms part. When and only when the clear language and the purpose thereof differ, then it is the purpose that must prevail.²³³ Du Plessis points out that²³⁴

[p]urposiveness nowadays seems to be becoming the substitute for *clear language* as the key to constitutional interpretation. This could in the course of time have (and has already had) an impact on court's approach to the interpretation of non-constitutional legislation too. This is especially true where legislation closely associated with socio-economic and political transformation stands to be construed and where specialist fora called into existence to deal with such legislation are involved.

So, for instance, the Land Claims Court has handed down several decisions where statutory provisions were generously interpreted justified by the need for purposive interpretation.²³⁵ However, as a rule the purposive approach is normally secondary to the literalist-cum-intentionalist approach. In other words, as a rule, clear language will prevail over the other indicators of meaning such as purpose, policy or object.²³⁶ But purposivism can also be approached differently: where the purpose of the legislation and the intention of the legislature are seen as the same. In this approach preambles and statements of purpose, which are features of post-1994 legislation, and particularly of legislation with significant policy effects, serve to guide the interpretation process beyond the literal form of the provision and to 'go by the design or purpose which lies behind it'.²³⁷

The inclusion of preambles and purpose statements in non-constitutional statutes leads Du Plessis to state:²³⁸

It is as if the legislature is urging the interpreters of legislative texts (and the courts in particular) to let go of the conventional literalist-cum-intentionalist shibboleths of statutory interpretation, and opt for more constructive systematic and especially purposive (and purposeful) readings of statutory texts instead. The legislature is, in other words, seeking to minimise the interpretive effects of the conventional order of primacy of the canons of statutory interpretation. It does so in quite a powerful way by including interpretive precepts and guidelines in the body of the statutory texts thereby making it hard to deny them legal efficacy. This means that specific provisions of a statute always have to be read and reconciled with interpretive directives such as statements of the objects of an act, interpretive guidelines, guiding principles and/or provisions piloting the application of an act.

²³³ Du Plessis *Re-Interpretation of Statutes* (2002) 96, 115 & 118.

²³⁴ Du Plessis *op cit* (n 233) 115 (footnotes omitted).

²³⁵ Du Plessis *op cit* (n 233) 215 fn 218.

²³⁶ Du Plessis *op cit* (n 233) 218.

²³⁷ Du Plessis *op cit* (n 233) 218.

²³⁸ Du Plessis *op cit* (n 233) 243 (footnotes omitted).

Considering the wording of the Preamble and Purpose section of the CPA one cannot but agree with Du Plessis that the legislation is urging a move away from traditional interpretation in favour of more purposeful interpretation. It may well be that different results to those under traditional rules of interpretation will be achieved if the interpretational latitude seemingly promoted by the CPA is used.²³⁹ It will be very interesting to see how the courts in particular, deal with this interpretational imperative (and freedom) provided in the CPA.

Where any provision of the Act is susceptible to more than one reasonable interpretation, section 4(3) requires of a court or NCT to 'prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b)', the vulnerable persons.

Section 4(4) of the Act also prescribes that a court or the NCT must interpret any standard form, contract or document used by the supplier, even if it is a document that the Act requires the supplier to produce for the benefit of the consumer, to the extent that it is consistent with the purposes and policies of the Act so that any ambiguity that allows for more than one reasonable interpretation is resolved to benefit the consumer,²⁴⁰ and that any limitation of a consumer's right set out in such document is limited to the extent that a reasonable person would ordinarily expect, considering the content of the document, the manner and form in which it was prepared, and the circumstances of the transaction.²⁴¹ This subsection is therefore a codification of the *contra preferentum* rule in respect of consumer contracts, but also of the rule that in the use of standard form contracts the supplier must draw the attention of the consumer to any objectively unusual terms, failing which the consumer may be considered not bound by such a term.²⁴² Particularly the latter rule will serve to protect consumers against 'unique' terms used in standard form contracts by suppliers who know that consumers rarely bother to read what they sign.

²³⁹ Du Preez *op cit* (n 192) 66.

²⁴⁰ S 4(4)(a) of the CPA.

²⁴¹ S 4(4)(b) of the CPA.

²⁴² See *Afrox Healthcare Bpk v Strydom supra* (n 134) par 35-36 and Maxwell 'Obligations and terms' in Hutchison & Pretorius *op cit* (n 114) 237.

The challenge will be to effect this 'drawing of the attention' of consumers. It will not be adequate, it is submitted, to have a term in the contract stating that the attention of the consumer was specifically drawn to certain provisions and that the consumer acknowledges this by his or her signature at the end of the contract. It is suggested, for a start, that these terms will have to be highlighted (and the requirements of plain language will play a significant role in this respect) and the consumer will have to sign next to or below each of these terms. The problem of course is as indicated by Brand JA in *Afrox Healthcare Bpk v Strydom*²⁴³ that in the specific instance of exemption clauses in standard form contracts they are the rule rather than the exception and should therefore be expected.²⁴⁴

One must bear in mind also that section 2(10) of the Act provides that '[n]o provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law'.

3.3.3 The application of the CPA

It has been said that the CPA introduces 'an entirely new way of doing business'.²⁴⁵ The reason why such a claim can be made lies to a large extent in the different substantive rights and protections introduced and provided by the Act. However, before considering the extent of the application and resultant impact of these rights, it is necessary to determine when the Act has application. Section 5 of the CPA provides when the Act applies and when not. Section 5(1) more specifically provides that the Act applies to:

- every transaction occurring within the Republic, unless exempted;
- the promotion of goods or services, or of the supplier thereof, within the Republic, unless the goods or services cannot reasonably be the subject of a

²⁴³ *Supra* (n 134) par 36.

²⁴⁴ The use of exemption provisions is specifically dealt with in s 49 of the CPA and considered in Chapter 4.

²⁴⁵ Du Preez *op cit* (n 193) 3.

transaction to which the Act applies, or the promotion of those goods or services have been exempted;

- any goods or services provided or supplied in terms of a transaction to which the Act applies; and
- the goods supplied in terms of a transaction, even though the transaction has been exempted from the application of the Act.

Relevant aspects of this sub-section will now be considered in more detail.

(a) Section 5(1)(a)

Firstly, the Act applies to every transaction occurring within South Africa, unless exempted.²⁴⁶

The term

'transaction' means -²⁴⁷

- (a) in respect of a person acting in the ordinary course of business,
 - (i) an agreement between that person and another for the supply or potential supply of any goods or services in exchange for consideration; or
 - (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
 - (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or
- (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a).²⁴⁸

Any agreement between people with the object of supplying goods or services, and any supply of goods by one person to another, and any supply of services by one person to another, for or at the direction of the consumer is a transaction to which the

²⁴⁶ S 5(1)(a) of the CPA.

²⁴⁷ S 1 of the CPA

²⁴⁸ In terms of s 5(6)(a) of the CPA the definition of 'transaction' must be understood to include certain arrangements between a supplier and consumer within the meaning of the CPA, such as the supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or collectivity, whether incorporated or not, of persons voluntarily associated or organised for a common purpose, whether it is done for consideration or not, and irrespective of whether there is a charge levied for becoming or remaining a member. Section 5(6)(b)-(e) refers to specific interactions relating to franchise agreements falling within the definition of a transaction.

Act applies. Provisions are that such supply is done for consideration²⁴⁹ and that the 'supplier' must act in the ordinary course of his, her or its business.

'Agreement', used in the definition of transaction, is defined as 'an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them'. The definition of 'transaction' makes it clear that it includes the agreement²⁵⁰ as well as the performance that takes place in terms of the agreement, be it the supply of goods or the performance of a service.²⁵¹

'Supply', when used as a verb in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or, in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.

Section 5(1)(a) of the CPA, as read with the definition of 'transaction', does not include the actual goods or services provided. At least, it is submitted that that this is not the intention of the paragraph. The actual goods or services that constitute the subject of the transaction are provided for in section 5(1)(c) of the Act. Therefore when the definition of 'transaction' refers to the supply of goods and the performance of services, it is not the *goods* or *services* that are included but the *supply* or *performance* of the goods and services respectively that are referred to as far as the supply or performance is relevant in a particular situation. If one considers the situation of a transaction for the supply of goods or performance of services then the timing of the performance may be an issue. This aspect will then be covered by the ambit of the CPA because of the definition of 'transaction'. Therefore the CPA will apply and a section such as section 19 of the CPA for instance, which provides

²⁴⁹ 'Consideration' is defined in s 1 of the CPA and is done so widely to include anything of value given and accepted in exchange for goods or services irrespective of the apparent or intrinsic value thereof. To give a thing *of value* irrespective of its intrinsic value seems to be a contradiction, but it is submitted that the consideration given (and accepted) may not have an objective value but may have a subjective value for the party willing to accept it as exchange for goods or services.

²⁵⁰ It is submitted that the concept 'agreement' as defined, has a wider meaning than the concept of contract. 'Agreement' would for instance include also the negotiation process preceding the conclusion of the contract. However, for current purposes 'agreement' and 'contract' are understood to mean the same, namely the underlying *causa* for the supply of the goods or performance of the service.

²⁵¹ S 1 of the CPA.

specifically for the rights of consumers with respect to delivery of goods or supply of services, will apply to that situation in the event of late supply or performance. In the context of the accommodation segment section 54 of the CPA, which provides for a consumer's right to quality service, will be relevant. Reliance by a consumer on section 54 cannot therefore be countered by an argument that the supply of the service is not covered by the CPA.

A transaction is subject to the provisions of the CPA if it occurs within South Africa. The use of the word 'occurring' has raised some question marks.²⁵² It is submitted that it seems the word will have a wider application and resultant impact than a more specific word such as 'concluded' and is probably more in line with a phrase such as 'having an effect'. This is likely to have consequences for tourism: a contract concluded outside South Africa between a tourist consumer and a South African supplier and where the service is provided in South Africa 'occurs' in South Africa and therefore the CPA will apply, whereas if the transaction was concluded in South Africa and the service is delivered outside South Africa one could still argue that the transaction occurred within the country – it is 'found to exist' and/or 'it took place' in South Africa.²⁵³

²⁵² See Du Preez *op cit* (n 192) 67-68 who indicates that the word includes meanings such as 'come to pass'; 'to be found to exist'; 'to happen'; 'to take place'; 'to come about'; to present itself' and 'to befall'. See also Jacobs, Stoop & Van Niekerk *op cit* (n 193) 309 fn 51.

²⁵³ Neels 'Consumer protection legislation and private international law' (2010) *Obiter* 128-133 suggests that the conflict rules of consumer protection legislation (including the NCA and the CPA) be repealed and replaced with a special private international law rule for consumer contracts. He suggests that the consumer should be able to choose between the applicability of the consumer protection measures in either the proper law of the contract, which is determined in the usual way including choice of law, or the law of the country of habitual residence of the consumer. The law of the place of habitual residence may have the closest connection with the consumer and the proper law of the contract the closest connection to the contract. Such a choice is based on the principle of preferential treatment in private international law, which aims to protect the socio-economically weaker party (the consumer). Currently however there are no specific rules on how to determine the proper law of a consumer contract in South African private international law and therefore the standard rules of South African private international law of contract will in all likelihood lead to an application of the *lex loci solutionis* (in the absence of a choice of law). If, as Neels has pointed out, the *lex loci solutionis* would normally apply it would mean that the law of the place where performance is delivered will apply and if that is in a country outside South Africa (e.g. Namibia or Zimbabwe) the CPA will normally not apply, even though the contract was concluded in South Africa. The word 'occurring' may then be sufficiently wide to still allow for the application of the CPA to the contract as the latter is 'found to exist' or 'to have taken place in South Africa.' Practically this would in all likelihood provide the consumer with exactly the choice Neels is suggesting.

A final issue must be mentioned under section 5(1)(a) of the CPA, and this is the fact that a transaction is defined within the context of a supplier acting in the ordinary course of business. A consumer, in terms of the CPA, is someone to whom goods or services are marketed in the ordinary course of the supplier's business; a person with whom the supplier has concluded a transaction in the ordinary course of business, or other user or beneficiary of such goods or services.²⁵⁴ It therefore appears that a transaction not in the ordinary course of business of the supplier will not constitute a transaction for purposes of the CPA.²⁵⁵ This is an important aspect for accommodation establishments to consider. These establishments often have to provide services that may well be considered extraordinary and therefore not part of what would ordinarily be considered part of their business. However, it is the nature of an accommodation establishment that people live there and as a result may require rather unique services from time to time. Thus even an extraordinary service and/or a single, isolated activity may well be considered to be part of what is understood to be the ordinary business of the supplier of accommodation in the tourism industry. Accommodation establishments therefore will not easily be able to rely on the fact that a service provided is not part of the ordinary course of the business of the accommodation service provider.

Although the supplier must act in the ordinary course of his or her business, the Act does not provide that it is only applicable to consumers *not* acting in the ordinary course of their business. Consumers are therefore protected by the Act whether they

²⁵⁴ See the definition of 'consumer' in s 1 of the CPA and quoted in par 3.2.1.

²⁵⁵ The word 'business' can have many varied meanings. See *Amalgamated Banks of South Africa Bpk v De Goede* [1997] 2 All SA 427 AD 433h-434c. In *AA Mutual Insurance Associated Ltd v Biddulph* 1976 (1) SA 725 738D the Court said: 'Now "business" is a vague, elastic concept capable of sustaining a great variety of connotations, some wide, other narrow.' Even a single, isolated activity can in appropriate circumstances be considered as a business. See *Amalgamated Banks of South Africa Bpk v De Goede supra* 434h and *AA Mutual Insurance Associated Ltd v Biddulph supra* 739C. The phrase 'in the ordinary course of business' does appear in different statutes but does not necessarily have the same meaning in each case. See *Amalgamated Banks of South Africa Bpk v De Goede supra* 437b-i. The test is an objective one and the enquiry will not be limited to the terms of the specific transaction and all relevant circumstances will be considered to ascertain whether a transaction was in the ordinary course of business or not. See *Al-Kharafi & Sons v PEMA* 2010 (2) SA 360 (WLD) 376F-377C. In *Warickshire County Council v Johnson* [1993] 1 All ER 299 (HL) 304h the House of Lords interpreted the phrase 'in the course of any business of his' as it appears in the Consumer Protection Act, 1987 narrowly to mean 'any business of which the defendant is either the owner or in which he has a controlling interest'. Considering the references above it is submitted that the South African courts will prefer to follow a more flexible approach as to the meaning of 'business' and that it may be given a wider or narrower meaning depending on the situation.

are acquiring goods or services for private or business purposes (subject to the section 5(2)(b) threshold provided by the Act in respect of juristic persons).²⁵⁶ Thus, whether the consumer is making use of accommodation services for business reasons or for private reasons is immaterial for the application of the CPA. But where a supplier is not acting in the ordinary course of business, the CPA will not apply to that transaction.

(b) Section 5(1)(b)

Secondly, the Act applies to the *promotion* of any goods or services, or of the supplier of any goods or services, within the Republic,²⁵⁷ unless the goods or services cannot reasonably be the subject of a transaction to which this Act applies,²⁵⁸ or the promotion of those goods or services have been exempted in terms of sections 5(3) and 5(4) of the Act²⁵⁹. In the Act, 'promote' has three meanings.²⁶⁰ The first meaning is to 'advertise,²⁶¹ display²⁶² or offer to supply any goods or

²⁵⁶ Otto *op cit* (n 192) 536. This argument is further supported by the fact that the definition of 'person' in s 1 of the CPA includes a juristic person as defined by the Act.

²⁵⁷ S 5(1)(b) of the CPA, at a first reading, means that the Act applies to the promotion of goods and services in South Africa, as well as the promotion in South Africa of a supplier of goods and services. Neels *op cit* (n 253) 131 argues that it is possible to read the phrase 'or of the supplier' as 'or the supply'. The problem, it is submitted, with this suggested reading is, firstly, the clear language of the Act (whether a mistake was made or not); secondly, the definition of 'transaction' in s 5(1)(a) already provides for the supply of goods and services making it unnecessary to refer to it again. See the discussion on s 5(1)(a) above. If the explanation provided in the discussion on s 5(1)(a) of the CPA above is accepted then it makes it unnecessary to strain the meaning of s 5(1)(b) of the CPA by reading 'or of the supplier' as 'or the supply'.

²⁵⁸ S 5(1)(b)(i) of the CPA. What is meant by this exclusion is not clear. Neels *op cit* (n 253) 131 fn 89 raises the question as to what goods or services cannot reasonably be the subject of a transaction occurring in South Africa and suggests that it may refer to unlawful transactions in terms of the *lex fori* (the law of the court), or to the advertising of goods and services that are not readily available in South Africa.

²⁵⁹ S 5(1)(b)(ii) of the CPA.

²⁶⁰ S 1 of the CPA.

²⁶¹ 'Advertisement' in s 1 of the CPA means any form of communication transmitted by any medium by which a person seeks to (a) bring to the attention of the public the existence or identity of a supplier, or services or goods available for supply; (b) promote the supply of any goods or services, or (c) promote any cause. Although s 1 does not define 'advertise' nor indicate that it has a similar meaning to 'advertisement' it is very likely that when 'advertise' is interpreted, the courts will consider the definition of 'advertisement'. See Van Eeden *op cit* (n 1) 43.

²⁶² "Display", when used-

(a) in relation to any goods, means placing, exhibiting or exposing those goods before the public in the ordinary course of business in a manner consistent with an open invitation to members of the public to inspect, and select, those or similar goods for supply to a consumer; or

services in the ordinary course of business, to all or part of the public for consideration'. Van Eeden argues (correctly, it is submitted), that the subordinate clause 'any goods or services in the ordinary course of business, to all or part of the public for consideration' pertains only to the 'offer to supply', since 'advertise' and 'display' would not normally be conducted for consideration.²⁶³ Secondly, 'promote' means to make 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; and, thirdly, it means to engage in 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.

It is clear that the CPA has cast the net as widely as possible so as not to limit or even exclude the possibility of any form of promotion (or 'advertising' in layman's terms) from the application of the Act.

Accommodation establishments, as well as all other suppliers of tourism products or services, must appreciate that any form of promotion is covered by the CPA.

(c) Section 5(1)(c)

Thirdly, the Act applies to the actual goods or services that are supplied or performed in terms of a transaction to which this Act applies.²⁶⁴

'Goods' include anything marketed²⁶⁵ for human consumption; any tangible and intangible object or product; any legal interest in immovable property other than an interest that will fall under the definition of 'service'; and gas, water and electricity.²⁶⁶

'Service' is defined in section 1 of the CPA and reads as follows:

(b) in relation to 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.'

²⁶³ *Op cit* (n 1) 43.

²⁶⁴ S 5(1)(c) of the CPA.

²⁶⁵ In terms of s 1 of the CPA 'market' when used as a verb, means to promote or supply any goods or services.

²⁶⁶ S 1 of the CPA.

'Service' includes, but is not limited to-

- (a) any work or undertaking performed by one person for the direct or indirect benefit of another;
- (b) the provision of any education, information, advice or consultation, except advice subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002);
- (c) any banking, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service-
 - (i) constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002); or
 - (ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act 52 of 1998), or the Short-term Insurance Act, 1998 (Act 53 of 1998);
- (d) the transportation of an individual or any goods;
- (e) the provision of-
 - (i) any accommodation or sustenance;
 - (ii) any entertainment or similar intangible product or access to any such entertainment or intangible product;
 - (iii) access to any electronic communication infrastructure;
 - (iv) access, or of a right of access, to an event or to any premises, activity or facility; or
 - (v) access to or use of any premises or other property in terms of a rental;
- (f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and
- (g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e),
irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service.

From the perspective of the accommodation sector it is interesting to note that accommodation and sustenance are specifically mentioned as a service. What is therefore normally provided to consumers by the accommodation sector is a service and generally subject to the provisions of the CPA.

(d) Section 5(1)(d)

Fourthly, the Act applies to goods that are supplied in terms of a transaction that is exempt from the application of the Act, but only to the extent provided for in subsection (5). This subsection provides that even though a transaction may be exempt from the application of the Act, any goods that are supplied within South Africa to any person in terms of such exempt transaction, as well as the importer or producer, distributor and retailer of such goods, respectively, are subject to sections

60 and 61 of the Act.²⁶⁷ Section 60 pertains to safety monitoring and recall of unsafe goods, whilst section 61 provides for the strict liability of the constituents of the supply-chain in the event of damage or harm caused to consumers by unsafe goods supplied to consumers. It therefore appears that goods supplied in terms of an exempted transaction are only subject to the provisions of sections 60 and 61 of the CPA and to no other provision of the Act. Goods supplied in terms of exempted transactions are subject to the CPA in a very limited manner. It is therefore critical to understand whether a transaction is exempted or not (and this aspect is dealt with below) before one can make relevant comments about the impact of this provision on the accommodation sector.

In the final analysis then the CPA covers the initial promotion (or marketing) of the supplier and the goods and services; the transaction between supplier and consumer; the goods and services themselves; and the period following the conclusion of the transaction.²⁶⁸

(e) Section 5(2) exclusions

The CPA makes provision for the exclusion from the application of the Act of certain transactions, as well as for industry-wide exemptions from the general application or specific provisions of the Act.

Transactions²⁶⁹ excluded from the ambit of the Act, are firstly those in terms of which goods or services are supplied to the State.²⁷⁰ The fact that transactions between

²⁶⁷ S 5(5) of the CPA.

²⁶⁸ Du Preez *op cit* (n 192) 72.

²⁶⁹ In terms of s 1 of the CPA 'transaction' means-

- (a) in respect of a person acting in the ordinary course of business-
 - (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
 - (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
 - (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or
- (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a).

²⁷⁰ S 5(2)(a) of the CPA, which states:

'This Act does not apply to any transaction-

the state and its organs and suppliers to these organs are excluded from the application of the CPA has a significant implication for the accommodation sector. Government officials, whilst acting in their capacity as government employees, are therefore not to be considered consumers for purposes of the CPA and consequently the CPA does not apply to the transaction between the supplier and the government employee or the state for that matter.

An 'organ of state' is to be understood to mean 'an organ of state as defined by section 239 of the Constitution'.²⁷¹ Section 239 of the Constitution describes an 'organ of state' as any department of state or administration in the national, provincial or local sphere of government, or any functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, but does not include a court or judicial officer. The courts do exercise state power, but the fact that the courts and judicial officers are not organs of state is probably because not all the provisions of the Constitution regarding organs of state are meant to apply to the courts.²⁷² It could certainly not have been the intention of the legislature to provide the judiciary with the protection of the CPA but not the other branches of government. It is submitted that the judiciary and judicial officers, if and where relevant, are to be considered part of the state for purposes of section 5(2)(a) of the CPA. Any transaction (in other words the supply of goods, the performance of a service and the agreement in terms of which such supply or delivery is to take place) between a supplier and an organ of state is not subject to the provisions of the CPA. It cannot be argued that when two guests of an accommodation establishment, one being a judge presiding over the circuit court in the area and the other an official of the Department of Tourism on official business, the CPA would not apply to the relationship between the accommodation establishment and the tourism official but that it would apply to the relationship between the establishment and the judge.

(a) in terms of which goods or services are promoted or supplied to the State'.

²⁷¹ S 1 of the CPA.

²⁷² See Rautenbach & Malherbe *Constitutional Law* (2009) 78.

Secondly, the CPA also does not apply to transactions where the consumer is a juristic person²⁷³ whose asset value or annual turnover is the same or greater than a threshold value determined by the Minister which threshold has been set at R2 million.²⁷⁴ The Act will apply however in the case of franchise agreements referred to in section 5(6)(b)-(e), irrespective of whether the asset value or annual turn-over of the franchisee is above or below the set threshold.²⁷⁵ Section 5(2)(b) also has implications for the suppliers of accommodation establishments. Juristic persons can only participate in the legal sphere, such as concluding contracts, through an agent representing the juristic person or a mandamus or an employee.²⁷⁶ Such a person must be a natural person acting on behalf of the juristic person.²⁷⁷ Often it is required of such a person to travel and to make use of an accommodation establishment. Where such a business traveller is making use of accommodation services whilst acting for or on behalf of his or her employer, the latter being a juristic person as defined by the CPA, the transaction between the business traveller is therefore a transaction with the juristic person with the result that the transaction may be excluded from the application of the CPA in terms of section 5(2)(b) of the Act. The problem for the accommodation establishment of course, is that the latter will not necessarily know whether the juristic person falls above or below the threshold. That may only become known after a problem has occurred. So, the establishment may assume that, as the business traveller is representing a company, the CPA will not apply since the company presumably falls outside the threshold; only to discover after the conduct causing a complaint that the company actually does fall within the threshold and that the CPA is therefore applicable. Accommodation establishments should therefore ensure that they deal with all their customers in a manner which complies with the CPA. But the important aspect for current purposes is that transactions between accommodation establishments and representatives of juristic persons will not necessarily be subject to the application of the CPA depending on

²⁷³ A 'juristic person' for purposes of the CPA, includes a body corporate; a partnership or association, or a trust. See s 1 of the CPA.

²⁷⁴ S 5(2)(b) of the CPA. This threshold has been published in *Government Gazette* No. 34181 of 1 April 2011. In the case of the NCA the corresponding threshold is R1 million as provided in s 7 of Act 34 of 2005.

²⁷⁵ S 5(7) of the CPA.

²⁷⁶ These different roles may overlap as Kerr *The Law of Agency* (2006) 33 points out that an agent may be independent, or a mandatory or an employee.

²⁷⁷ Van Jaarsveld 'Agency' in Nagel *Commercial Law* (2011) 158.

the asset value of annual turnover of the specific juristic person. Thus some transactions with business travellers will, and other such transactions will not be, subject to the provisions of the CPA. This is a factor that will complicate the dealings of accommodation establishments with consumers on business travel.

Thirdly, transactions may be exempted by the Minister on application by a regulatory authority for an industry-wide exemption on the basis that the CPA, or certain provisions thereof, duplicate a regulatory scheme administered by that authority in terms of existing legislation or any treaty, international law, convention or protocol, provided however that the regulatory scheme in question ensures the achievement of the purposes of the CPA at least as well as the Act itself.²⁷⁸ It is clear that such a regulatory scheme must provide the same or better protection to consumers otherwise an application to the Minister for industry-wide exemption will not succeed. It is the responsibility of the NCC to advise the Minister of the appropriateness of granting an application, together with the limits and conditions to be attached to such exemption, if granted. It should be noted that the Minister must exercise his or her discretion after having received the advice of the NCC.²⁷⁹ The Minister is therefore not obliged to follow the advice of the NCC, but must seek and duly consider the advice of the NCC.²⁸⁰ As far as the accommodation sector is concerned no exemptions have been granted by the Minister as far as could be ascertained, making this provision of little relevance to the latter sector at present.

Section 82 of the CPA empowers the Minister of Trade and Industry to prescribe by way of regulation an industry code for a specific industry. To this end the NCC has published two sets of guidelines, namely the 'Guidelines for the Accreditation of Ombud Schemes in terms of the Consumer Protection Act (No. 68 of 2008)' and the

²⁷⁸ S 5(2)(c), as read with s 5(3) and s 5(4) of the CPA.

²⁷⁹ S 5(4) of the CPA provides that '[t]he Minister, by notice in the *Gazette* after receiving the advice of the Commission, may grant an exemption contemplated in subsection (3)...'

²⁸⁰ See the discussion in Rautenbach & Malherbe *op cit* (n 272) 203-206 where it is argued in considering the powers of the President that 'after consulting' requires of the President to consult but that the President is not bound by the advice. The situation in s 5(4) of the CPA is analogous in that the Minister is required to exercise his discretion *after having received the advice* of the NCC. This interpretation is further supported by the fact that s 5(4) of the CPA provides that the Minister *may* grant the application after having received the advice of the NCC. Clearly then the Minister can decide to approve or not approve the application after the advice was obtained.

'Guidelines for the Development of Industry Codes of Conduct for Accreditation under the Consumer Protection Act 68 of 2008'. Although sections 5(3) and 5(4) of the CPA do not refer directly to section 82 of the Act, it would appear as if an industry code that complies with the requirements of section 82, can be used to apply to the Minister, in terms of section 5(3) as read with section 5(4) of the CPA, for an industry wide exemption from one or more provisions of the Act. It does not follow however that a section 82 industry code is the same as the regulatory scheme envisaged in section 5.

In order for a regulatory authority to apply for an industry exemption from one or more of the provisions of the CPA it must be shown that the CPA provisions overlap or duplicate an existing regulatory scheme which is administered by that regulatory authority in terms of 'any other national legislation'.²⁸¹

It has been pointed out in Chapter 2 that in terms of the Draft Tourism Bill the Minister of Tourism may 'develop a national grading and classification system for tourism with a view to the maintenance or enhancement of the standards and the quality of tourism services and products'.²⁸² It seems that the system intended by the Draft Tourism Bill is not of the same nature as that referred to by the CPA in section 5 of the CPA. The scheme in terms of the Draft Tourism Bill appears to be aimed more at quality assurance than it is an out-and-out regulatory scheme for the industry or a segment thereof. Although quality assurance will benefit the tourist consumer it does not directly provide protection of specific consumer rights as provided for by the CPA. The Tourism Bill seems to leave the consumer protection and enforcement thereof to the CPA. This perception is further strengthened by the very limited jurisdiction of the Consumer Protector provided for in the Tourism Bill, as being a conduit of consumer complaints without any power to address and/or resolve consumer complaints.

²⁸¹ S 5(3)(a) of the CPA.

²⁸² S 9(1)(b) of the Draft Tourism Bill, 2011.

Fourthly, transactions that constitute credit agreements under the NCA²⁸³ are excluded from the application of the CPA, provided however that the goods or services that are the subject of the credit agreement are not excluded from the ambit of the Act.²⁸⁴ An example would be where the supplier, such as a hotel, sells services to consumers on credit (for example, where the consumer uses a credit card to pay for the services). The agreement in terms of which the supplier grants credit to the consumer is a credit transaction and falls under the NCA.²⁸⁵

This provision differs from the previously discussed subsections in that it specifically provides that *goods and services* are subject to the CPA even though the (credit) agreement in terms of which the goods and/or services is supplied are exempt from the application of the CPA. Thus a contract between an accommodation establishment and a consumer that is regulated in terms of the NCA will be exempted from the application of the CPA, but the service contracted for, namely the provision of accommodation, still falls under the provisions of the CPA. For instance, the consumer will still be able to demand quality service in terms of section 54 of the CPA and be entitled to the warning in the prescribed manner and form as provided for in section 58 of the Act.

Lastly, transactions pertaining to services to be supplied under an employment contract, or that give effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act,²⁸⁶ or give effect to a collective agreement as defined in section 213 of the Labour Relations Act, are all excluded from the ambit of the CPA.²⁸⁷ The CPA does not apply to an individual contract of employment between an accommodation establishment and its employees, nor to a collective agreement between such establishment and a

²⁸³ S 8 of the NCA spells out what agreements qualify as credit agreements. Van Eeden *op cit* (n 1) 49-50 points out that 'the transaction potentially constituting a credit agreement for purposes of the NCA must firstly constitute a transaction in terms of the CPA, and secondly, constitute a credit agreement in terms of the NCA.'

²⁸⁴ S 5(2)(d) of the CPA.

²⁸⁵ See s 8 of the NCA.

²⁸⁶ Act 66 of 1995.

²⁸⁷ S 5(2)(e), (f) & (g) of the CPA.

representative trade union or unions. The Act also does not apply to the services rendered in terms of such agreements.²⁸⁸

If the CPA applies in terms of section 5(1) to (7) then it will apply to a matter irrespective of whether the supplier resides or has its principal office in or outside the Republic; operates on a for-profit basis or not; is an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services, or is a public-private partnership; or is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public.²⁸⁹ When the CPA applies to a transaction, or to the goods or services supplied or performed in terms of an exempted transaction, then, where the supplier is considered to reside or has its principal place of business or the nature of the supplier, is immaterial. Whether the principal place of business is in or outside the Republic, whatever the business or legal form of the supplier and whether the supplier has a profit motive or not, cannot operate to exclude the application of the CPA to such transaction, or goods or services as the case may be. A hotel will, for instance, not be able to argue that the CPA does not apply to it for the reason that its head office is in the United Kingdom.

One can be in little doubt that the application of the CPA is indeed wide-ranging and may well change the way business will be conducted in South Africa. The tourism industry in general and the accommodation segment in particular will not be excluded from this.

3.3.4 The regulatory framework and enforcement of the CPA

Besides the substantive rules of law mitigating against consumers in the past, procedural aspects have also played a role in frustrating legitimate complaints of consumers. Two of the main problems for consumers in enforcing their rights have frequently been the relatively small amounts involved, particularly in comparison to legal costs if the consumer institutes legal action in the ordinary civil courts, and the

²⁸⁸ This is clear from the definition of transaction and the provisions of s 5(5) of the CPA.

²⁸⁹ S 5(8) of the CPA.

protracted nature of such legal proceedings. The CPA therefore recognises the need for resolving consumer complaints quickly and effectively.²⁹⁰ In an effort to address the problems mentioned, the Act introduces a new regulatory framework which includes dispute resolution mechanisms such as the NCC and the NCT. Emphasis is also placed on alternative dispute resolution and self-regulatory systems as measures to address consumer issues. This section briefly explains the operation of these mechanisms established by the CPA to ensure compliance with the Act including the methods of enforcement of the rights of consumers provided for by the Act. But before doing so, it is necessary to indicate who may pursue a consumer complaint on behalf of a consumer in the *fora* established by the Act.

When it becomes necessary to enforce the CPA, the Act states who may seek to do so. Section 4(1) specifies who may approach a court, the NCT or the NCC with an allegation that a consumer's right or rights have been infringed or threatened, or that prohibited conduct²⁹¹ has occurred or is occurring. These categories of persons are:

- persons acting on their own behalf;
- an authorised person acting on behalf of another who cannot so act;
- a person acting as member of, or in the interest of, a group or class of affected persons;
- a person acting in the public interest with leave of the court or NCT as the case may be; and
- an association acting in the interest of its members.²⁹²

²⁹⁰ Du Preez *op cit* (n 192) 81.

²⁹¹ 'Prohibited conduct' is defined in s 1 of the Act as an act or omission in contravention of the Act.

²⁹² In this regard s 71(1) of the CPA creates a problem as it provides that *any* person can file a complaint in terms of that section. (The incorrect cross-referencing in s 71(1) of the Act is considered in par (b)(ii) below.) The apparent conflict between s 4(1) and s 71(1) of the CPA can be resolved quite easily, it is submitted, by reading the 'any person' of s 71(1) as any person provided for in s 4(1). If this interpretation is not adopted s 4(1) of the CPA actually becomes redundant.

The need for a class action to protect consumer rights has been emphasised regularly.²⁹³ The Constitution contains a similar provision to that of section 4(1) of the CPA.²⁹⁴ One likely implication of this similarity is that the requirements for bringing a class action in terms of the Constitution will apply *mutatis mutandis* to the bringing of a class action in terms of the CPA.²⁹⁵ A class action will allow a member of a group or class of affected persons to institute action against a supplier in terms of the CPA in order to obtain redress for the infringement of the rights of such member or group or class.²⁹⁶ Should the class action then be successful, all the members of that group or class may benefit from the award.²⁹⁷ A class action has clear benefits for a consumer who is not in a position to institute action against a supplier on an individual basis and it may have equally detrimental consequences for a supplier, particularly financial and public image implications.²⁹⁸

(a) National Consumer Tribunal

The NCT has been established in terms of section 26 of the NCA and is required to exercise jurisdiction in terms of that or any other applicable legislation, which includes the CPA.²⁹⁹ It is a juristic person,³⁰⁰ a tribunal of record³⁰¹ and has jurisdiction throughout the Republic.³⁰²

(i) Composition

The NCT consists of a chairperson and no less than 10 persons - there is no maximum - appointed by the President,³⁰³ who also appoints persons to fill vacancies

²⁹³ Van Eeden *op cit* (n 1) 301.

²⁹⁴ S 38 of the Constitution.

²⁹⁵ See *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (E) and *Independent Electoral Commission v Langeberg Municipality* 2001 3 SA 925 (CC), in which the courts have dealt with various issues surrounding class actions.

²⁹⁶ Jacobs, Stoop & Van Niekerk *op cit* (n 193) 306.

²⁹⁷ Jacobs, Stoop & Van Niekerk *op cit* (n 193) 306.

²⁹⁸ Jacobs, Stoop & Van Niekerk *op cit* (n 193) 306.

²⁹⁹ S 26(1)(d) of the NCA.

³⁰⁰ S 26(1)(b) of the NCA.

³⁰¹ S 26(1)(c) of the NCA.

³⁰² S 26(1)(a) of the NCA.

³⁰³ S 26(2) of the NCA.

as they may occur.³⁰⁴ There shall also be a deputy-chairperson appointed by the President from amongst the other members of the NCT³⁰⁵ who will act for the chairperson when the latter is unable to do so.³⁰⁶

Each member of the NCT must be a South African citizen and ordinarily resident in South Africa; have suitable qualifications and experience in economics, law, commerce, industry or consumer affairs, and be committed to the purposes of the Act.³⁰⁷ (Although the first two requirements can arguably be objectively determined, it is not clear how a prospective member can give evidence of his or her commitment to the purposes of the Act.) Viewed as a collective, the NCT must represent a broad cross-section of the population and have a sufficient number of legally trained and experienced persons to ensure compliance with section 31(2)(a) of the NCA, that is, any assigned panels of the NCT consisting of three members must have at least one member that is suitably legally qualified and experienced.³⁰⁸ The term of office as members of the NCT is five years³⁰⁹ and members may be reappointed after the expiry of the term of such a member but no person may serve more than two consecutive terms of office as chairperson.³¹⁰

The President may remove any other member from the NCT if such person becomes subject to specified disqualifications³¹¹ or for reasons such as serious misconduct, permanent incapacity, or engaging in any activity that undermines the integrity of the NCT.³¹²

³⁰⁴ S 26(3)(b) of the NCA.

³⁰⁵ S 30(1) of the NCA.

³⁰⁶ S 30(2) of the NCA.

³⁰⁷ S 28(2) of the NCA.

³⁰⁸ S 28(1) of the NCA.

³⁰⁹ S 29(1) of the NCA.

³¹⁰ S 29(2) of the NCA.

³¹¹ The disqualifications are referred to in s 20(2) of the NCA and include grounds such as being an office-bearer of a body of partisan political nature; being an unrehabilitated insolvent, or being a person removed from a position of trust due to misconduct involving fraud or the misappropriation of money.

³¹² S 29(5)(b) of the NCA.

(ii) Access to the NCT

There are different ways in which matters can be brought before the NCT for adjudication and determination in terms of the CPA.

- Section 69(a) of the CPA allows for a person contemplated in section 4(1) of the Act to refer a matter directly to the NCT, if such direct referral is permitted by the Act in the case of the particular dispute.³¹³
- The NCC, after it has concluded an investigation into a complaint, may refer the matter to the NCT.³¹⁴ The NCC however may rather choose to refer the matter to a consumer court of the province in which the supplier has its principal place of business.³¹⁵
- Where the NCC has referred the matter directly to the consumer court, as indicated in the previous point, then any party to the referral may apply to the NCT for an order that the matter be referred to the NCT,³¹⁶ which it will order if the balance of convenience or interests of justice so require.³¹⁷
- When the NCC issues a notice of non-referral in response to a complaint, the complainant may refer the matter directly to the NCT with leave of the NCT or to the consumer court of the province where the respondent has its principal place of business.³¹⁸
- If the matter discussed in the previous point was referred directly to the consumer court, the respondent may apply to the NCT for the matter to be

³¹³ As is discussed in Chapter 4 of the study an alleged contravention of the provisions of Part A of Chapter 2 (Equality in the consumer market) of the CPA must be heard by an Equality Court meaning that such disputes cannot be referred to the NCT.

³¹⁴ S 73(2)(a) and (b) of the CPA respectively read with s 73(1)(c)(iii) of the CPA.

³¹⁵ 'Consumer court', according to s 1 of the CPA, 'means a body of that name, or a consumer tribunal, that has been established in terms of applicable provincial legislation.' A consumer court is therefore not a court of law but a provincial version of the NCT.

³¹⁶ S 73(3) of the CPA.

³¹⁷ S 73(4) of the CPA.

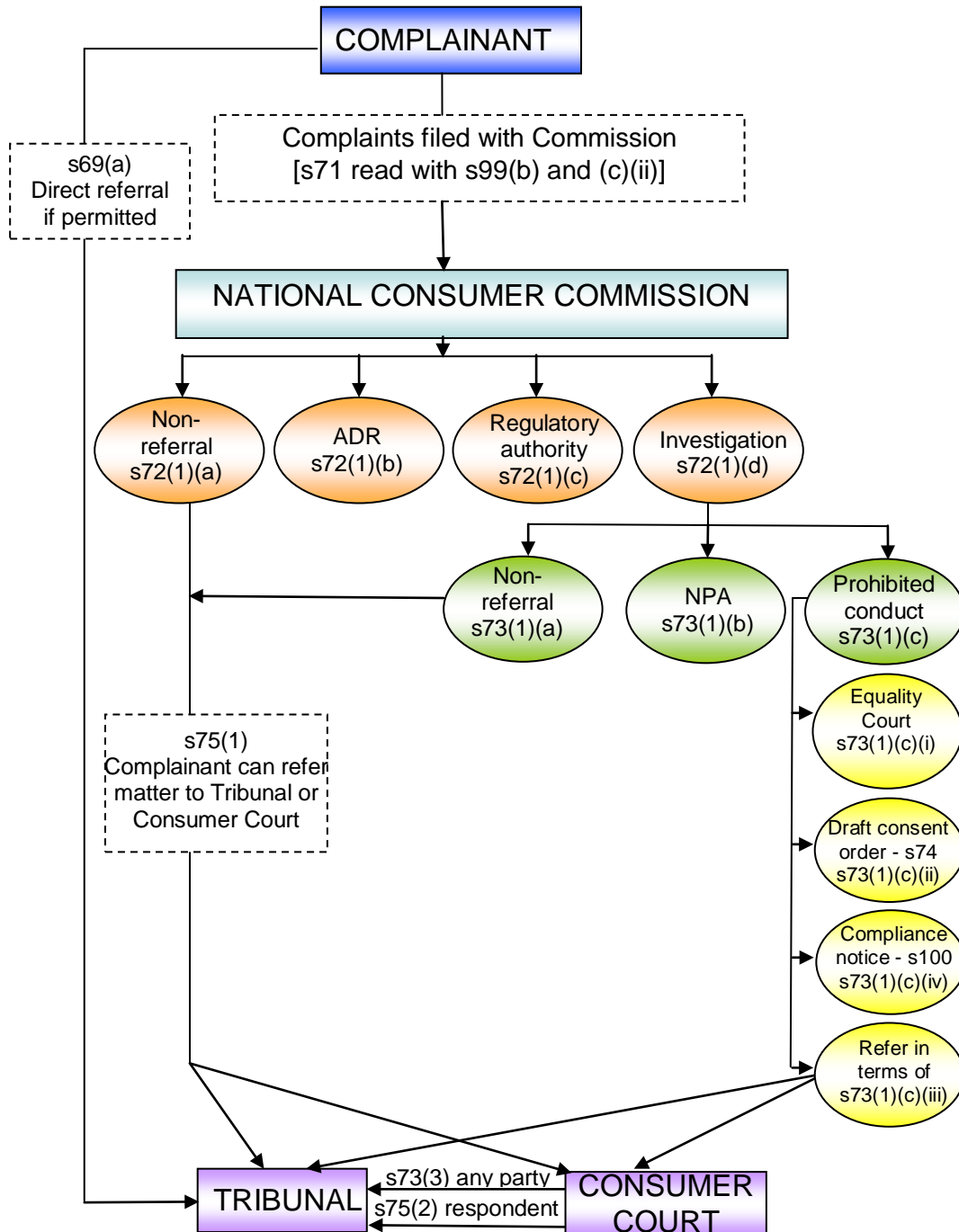
³¹⁸ S 75(1) of the CPA. Such a referral to the NCT (or consumer court) will not be possible where the non-referral by the NCC is the result of, for instance, the complaint having become prescribed. See s 116 of the CPA.

referred to it and the NCT will grant such an order if the balance of convenience or interests of justice so require.³¹⁹

Figure 3.1 depicts the potential routes a consumer complaint may follow when lodged with the NCC. It also graphically illustrates the alternative routes a complaint can follow to reach the NCT.

³¹⁹ S 75(2) of the CPA.

FIGURE 3.1: NCC'S options in dealing with consumer complaints



(iii) Powers and functions of the NCT

The task of the NCT is to adjudicate in respect of any application made to it in terms of applicable legislation and make any order it may make in terms of such legislation, or in respect of any allegations of prohibited conduct made determining whether prohibited conduct has occurred and, if so, by imposing a remedy as provided by the relevant legislation.³²⁰ The NCT may also make orders as to costs and exercise any power conferred on it by law.³²¹

The Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal, 2007,³²² as amended, spells out the types of matters which the NCT is authorised to hear in terms of the CPA. Table 1B of these regulations provides for the specific applications that may be brought directly before the NCT. Part 1B of Table 2 of the regulations also sets out the requirements that must be complied with in respect of each application set out in Table 1B. Part 2B sets out those matters that originate as complaints to the NCC and are then referred or brought before the NCT.

The Chairperson of the NCT is responsible for managing the case load of the NCT and assigning cases to either a single member, if that is allowed by applicable legislation, or to a panel of three.³²³ In the latter instance one of the panel members is appointed to preside over the panel and one of the three panel members must be suitably legally qualified and experienced.³²⁴ A decision of a panel must be in writing and must include reasons for such decision.³²⁵ A decision of a single member hearing a matter and a majority decision of a panel in a matter is a decision of the NCT.³²⁶

³²⁰ S 27(a) of the NCA.

³²¹ S 27(b)-(c) of the NCA.

³²² *Op cit* (n 210).

³²³ S 31(1) of the NCA.

³²⁴ S 31(2) of the NCA.

³²⁵ S 31(4) of the NCA.

³²⁶ S 31(5) of the NCA.

Once a matter has been properly referred to the NCT it must conduct a hearing into the matter in accordance with the requirements of the CPA and applicable provisions of the NCA, and may make an order in accordance with the provisions of the CPA or sections 150³²⁷ or 151³²⁸ of the NCA.³²⁹ The NCT must provide written reasons for its decision.³³⁰ The Registrar has the responsibility to compile a record of every matter that comes before the NCT.³³¹ It is the duty of the NCT to provide participants in a hearing, as well as the public with reasonable access to the record of each hearing, subject to any ruling to protect confidential information made under section 142(2)(a) of the NCA.³³²

Hearings of the NCT are open to the public (unless otherwise decided by the Presiding Member);³³³ are conducted in an inquisitorial manner and as expeditiously and informally as possible; and in accordance with the rules of natural justice.³³⁴ The Presiding Member at a hearing may summon any person to appear at such hearing and question the person under oath or affirmation, and/or require such person to produce any item necessary for purposes of the hearing, or perform such other act necessary in relation to the Act.³³⁵ The Presiding Member may also give directions for prohibiting or limiting the publication of any evidence given during the hearing.³³⁶ Self-incriminating answers given may not be used in subsequent criminal proceedings, except to prove, for instance, perjury.³³⁷ Witnesses must answer all relevant questions and provide all relevant evidence even if it is self-incriminating to do so. Subject to the rules of procedure of the NCT the Presiding Member at any hearing will determine the procedure for that hearing, having regard to the

³²⁷ S 150 of the NCA provides that the NCT may make an appropriate order in relation to prohibited conduct or required conduct, including amongst others declaring conduct to be prohibited; interdicting prohibited conduct; imposing administrative fines, and any other appropriate order required to give effect to a right, as contemplated in this Act.

³²⁸ S 151 of the NCA relates to the imposition of administrative fines and corresponds verbatim with s 112 of the CPA which is considered in par (f) below.

³²⁹ S 75(4) of the CPA.

³³⁰ S 142(4) of the NCA.

³³¹ Regulation 23(1).

³³² S 142(5) of the NCA.

³³³ S 142(2) of the NCA.

³³⁴ S 142(1) of the NCA.

³³⁵ S 144(a)-(c) of the NCA.

³³⁶ S 144(d) of the NCA.

³³⁷ S 146 of the NCA.

circumstances and the requirements of relevant provisions of applicable legislation.³³⁸ The NCT determines the admissibility of presented evidence as well as the probative value thereof. Witnesses may be subpoenaed and must take the prescribed oath or affirmation.³³⁹ At any time prior to making a final order in respect of a current matter the member or panel hearing the matter may adjourn to provide the parties with an opportunity to reach agreement on an issue.³⁴⁰ A default order may be made against a party if no response to an application was filed within the time limits.³⁴¹

In a hearing before the NCT the following persons may participate in person or through a representative and may question witnesses and inspect any items presented at the hearing: the NCC; the applicant or complainant, the consumer or prospective consumer, if that person is not the complainant; the respondent, and any other person who has a material interest in the hearing, unless in the view of the Presiding Member that interest is adequately represented by another participant.³⁴²

As far as costs are concerned the general rule is that each party bears its own costs in a matter before the Tribunal.³⁴³ However, where the Tribunal has not made a finding against a respondent, costs may be awarded against the complainant, and where the Tribunal has found against a respondent, cost may be awarded against the respondent.³⁴⁴

Any decision, judgment or order of the Tribunal may be served, executed and enforced as if it were an order of the High Court, and it is binding on the Commission; provincial consumer regulatory authorities, consumer courts, alternative dispute resolution agents or ombuds with jurisdiction, and a Magistrate's Court.³⁴⁵

³³⁸ See s 145 of the NCA and Regulation 17(5)(e) of the Regulations for matters relating to the functions of the Tribunal and Rules for the conduct of matters before the National Consumer Tribunal *op cit* (n 211). See also Van Eeden *op cit* (n 1) 283.

³³⁹ The prescribed oath and affirmation are set-out in Table 3 under Regulation 21(7) of the Regulations *op cit* (n 210).

³⁴⁰ Regulation 22 *op cit* (n 210).

³⁴¹ Regulation 25(2) *op cit* (n 210).

³⁴² S 143 of the NCA.

³⁴³ S 147(1) of the NCA.

³⁴⁴ S 147(2) of the NCA.

³⁴⁵ S 152(1) of the NCA.

A participant (not just a complainant or a respondent) may appeal a decision of a single member of the NCT to a full panel of the NCT.³⁴⁶ A participant in a hearing before a full panel of the Tribunal may, subject to the rules of the High Court, apply to the High Court to review the decision of the NCT, or appeal against the decision of the NCT in that matter, except against a consent order.³⁴⁷ A consent order may therefore be reviewed but not appealed.

The NCT is empowered to grant also interim relief to a complainant who has asked for relief from the NCT and such interim relief will be granted provided there is evidence that the allegations may be true; it is necessary to prevent serious, irreparable damage to that person, or to prevent the purposes of the Act to be frustrated; the respondent has been given a reasonable opportunity to be heard given the urgency of the proceedings; and, the balance of convenience favours the granting of interim relief.³⁴⁸ The order for interim relief may not be for longer than the earlier of the completion of the hearing or six months from the granting of the order.³⁴⁹ If the hearing is not completed within six months then the interim relief order may be extended on good cause shown.³⁵⁰

(iv) Confidential information

Section 106 of the CPA provides for the procedure in protecting information that has to be submitted to the NCT, NCC, an inspector or an investigator appointed in terms of the Act, and which a party claims that is confidential.³⁵¹

(v) Limitation of bringing an action

A complaint in terms of the CPA may not be referred or made to the NCT or a consumer court more than three years after the act or omission that is the cause of the complaint, or in the case of a course of conduct or continuing practice, the date

³⁴⁶ S 148(1) of the NCA.

³⁴⁷ S 148(2) of the NCA.

³⁴⁸ S 114(1) of the CPA.

³⁴⁹ S 114(2) of the CPA.

³⁵⁰ S 114(3) of the CPA.

³⁵¹ S 106(1) of the CPA.

that the conduct or practice ceased.³⁵² A complaint against a person in terms of the CPA may also not be referred to the NCT or a consumer court against a person who is or has been the respondent in proceedings under another section of the Act relating substantially to the same conduct.³⁵³

(vi) Standard of proof

The standard of proof in all proceedings before the NCT or consumer court in terms of the CPA is a balance of probabilities.³⁵⁴

(vii) Service of documents

A notice, order or document that must be served on another person in terms of the CPA, will be considered properly served when it has been delivered to that person, or sent by registered mail to that person's last known address.³⁵⁵

(b) National Consumer Commission

The NCC will be discussed, for the sake of convenience, under three headings: establishment and structure, powers and functions, and enforcement.

(i) Establishment and structure

The CPA established the NCC as an organ of state within the public administration but outside the public service.³⁵⁶ It has jurisdiction throughout the Republic; it is a juristic person, and must perform the functions assigned to it in terms of the CPA, other legislation or the Minister in the most efficient and cost-effective manner and in accordance with the basic values and principles governing the public administration as set out in section 195 of the Constitution.³⁵⁷

³⁵² S 116(1) of the CPA.

³⁵³ S 116(2) of the CPA.

³⁵⁴ S 117 of the CPA.

³⁵⁵ S 118 of the CPA.

³⁵⁶ S 85(1) of the CPA.

³⁵⁷ S 85(2) of the CPA.

The Minister may issue policy directives to the NCC consistent with the Act and may direct the NCC to investigate an alleged contravention of the Act or a matter with respect to the purposes of the Act whether or not it appears to amount to a contravention of the Act.³⁵⁸

To give effect to the language requirements of the Constitution, the Minister must prescribe at least two official languages to be used in all documentation which the Commission is required to deliver in terms of the Act for all or any part of the Republic.³⁵⁹ The two languages may differ between parts of the Republic. It is submitted that the Minister should ensure that different languages are used in different parts as firstly, this will give effect to the parity of esteem principle regarding languages required by the Constitution,³⁶⁰ and, secondly, it will certainly assist in giving effect to some of the aims of the CPA by making documentation more understandable to the people it affects. The factors mentioned in the Constitution, such as the language of preference of the people of an area, should serve as guidance to the Minister in making these choices.³⁶¹

In terms of the Consumer Protection regulations, the Minister has designated (only) English and isiZulu as the official languages to be used by the Commission in any documents it is required to deliver in terms of the Act.³⁶² Whether this proposed regulation actually complies with the constitutional parity of esteem principle, particularly in the context of a piece of legislation whose Preamble holds that innovative means must be utilised to protect the interests of all consumers, is open to question.

The Minister, after consulting with the relevant Parliamentary Committee,³⁶³ appoints a person with suitable qualifications and experience in economics, law, commerce,

³⁵⁸ S 86 of the CPA.

³⁵⁹ S 92(4) of the CPA.

³⁶⁰ See the discussion of Rautenbach & Malherbe *op cit* (n 272) 109-112 on the parity of esteem principle in respect of the official languages.

³⁶¹ S 6(3) of the Constitution.

³⁶² Regulation 41.

³⁶³ S 87(2) of the CPA.

industry or public affairs as the Commissioner³⁶⁴ of the NCC, whose term of office is five years and who is responsible for all matters pertaining to the functioning of the NCC.³⁶⁵ The Minister must appoint at least one Deputy Commissioner³⁶⁶ satisfying the same qualification criteria as the Commissioner, to assist the Commissioner in the performance of his/her functions.³⁶⁷ The Minister must designate a Deputy Commissioner to perform the functions of the Commissioner when the latter is unable to perform the functions of his or her office, or the office of the Commissioner is vacant.³⁶⁸

(ii) Powers and Functions

The NCC has a number of functions stipulated in the Act and these are considered briefly.

Section 92 of the CPA provides a general power to the NCC to perform the powers assigned to it by the Act or other national legislation.³⁶⁹ In doing so the NCC may consider international developments and consult with any person concerning consumer protection.³⁷⁰ With respect to specific matters under its authority the NCC may negotiate agreements with other regulatory authorities to facilitate the co-ordination and harmonisation in the exercise of jurisdiction over consumer matters in

³⁶⁴ Ms Mamodupi Mohlala-Malaudzi was appointed as the first National Consumer Commissioner.

³⁶⁵ S 87(1) of the CPA.

³⁶⁶ Mr Ebrahim Mohamed was appointed the first Deputy Commissioner. At the time of writing Mr Mohamed was acting as the National Consumer Commissioner. This follows the decision of the Minister of Trade and Industry not to renew the contract of Ms Mohlala-Malaudzi, whose term of office was marred by controversy. See <http://www.moneyweb.co.za/mw/content/en/moneyweb-south-africa?oid=608629> accessed on 2012-09-25.

³⁶⁷ S 87(6)(a) of the CPA.

³⁶⁸ S 87(6)(b) of the CPA.

³⁶⁹ S 92(1) of the CPA. It is submitted that a significant overlap exists between s 85 and s 92, particularly s 85(2) and s 92(1) of the CPA. It is unfortunate that the functions of the NCC are not being dealt with as a whole. The result is that some of the elements are lost in the repetition. As indicated above, s 85(2) requires the NCC to exercise the functions assigned to it in terms of the Act or any other law, or by the Minister. Section 92(1) instructs the NCC that it is responsible to carry out the functions and exercise the powers assigned to it by or in terms of the Act or any other national legislation. No mention is made of the Minister. Of course the Minister can only instruct the NCC as per power granted in terms of the CPA (or other applicable legislation) so there should not be conflict between these two sections, but the discrepancy when referring to the Minister in the separate sections appears to be evidence of some careless drafting.

³⁷⁰ S 92(2) of the CPA.

a relevant industry or sector, as well as ensure the consistent application of the principles of the Act by the different bodies.³⁷¹

Section 93 of the CPA allows the NCC to develop and to promote the voluntary use of codes of practice for aspects such as the use of plain language; standardised or uniform means of presenting and communicating the information contemplated in sections 23 to 28 of the Act;³⁷² alternative dispute resolution, and any matter that may assist to better achieve the aims of the Act. These codes are to be published for public comment prior to finalisation.³⁷³ Seemingly, the NCC cannot force a code of practice on an industry and therefore the role of the NCC will be one of facilitation – persuading role-players in an industry to invest in such codes to the benefit of all.

The NCC also has an important role to play concerning industry codes. An ‘industry code’ is a code that regulates the interaction between persons conducting business in that industry; or regulates the interaction, or provides for alternative dispute resolution, between a business within that industry and consumers.³⁷⁴ The NCC may recommend a proposed industry code to the Minister after a process of consultation³⁷⁵ and ensuring that the code is consistent with the purposes and policies of the Act.³⁷⁶ The Minister may then by regulation prescribe such a code for the relevant industry.³⁷⁷ The intention therefore seems to be that, in respect of industry codes, all suppliers in the particular industry or segment thereof will be bound by the code and that adherence thereto is not voluntary.³⁷⁸ The NCC is also responsible for the regular review³⁷⁹ and monitoring³⁸⁰ of the effectiveness of industry codes. This process of prescribing an industry code appears to be similar to that of

³⁷¹ S 92(3) of the CPA.

³⁷² These sections deal with disclosure of the price of goods or services (s 23); product labelling and trade descriptions (s 24); disclosure of reconditioned or grey market goods (s 25); sales records (s 26); disclosure by intermediaries (s 27), and identification of deliverers and installers (s 28).

³⁷³ S 93(2) of the CPA.

³⁷⁴ S 82(1)(a) of the CPA.

³⁷⁵ S 82(3) of the CPA.

³⁷⁶ S 82(4) of the CPA.

³⁷⁷ S 82(2)(a) of the CPA.

³⁷⁸ Naudé *op cit* (n 83) 543.

³⁷⁹ S 82(5) of the CPA.

³⁸⁰ S 82(7) of the CPA.

the provisions of section 7 of the Tourism Bill allowing the Minister of Tourism to determine norms and standards for the industry in order, *inter alia*, to promote the achievement of any of the objects of the Tourism Bill.³⁸¹

Section 94 provides the NCC with the role of initiating legislative reform by identifying any legislation that affects consumers and is inconsistent with the Act, consulting with the relevant role-players involved and/or affected thereby, and developing reform proposals which is to be submitted to the Minister.

Section 95 imposes a significant burden on the NCC, namely to facilitate achievement of the purposes of the CPA in relation to goods and services supplied by organs of state to consumers. In so doing the NCC must consult with relevant role-players, identify aspects that hinder achieving the aims of the Act, develop proposals for reform and report these recommendations to the Minister.³⁸² This has clear implications for all organs of state that are responsible for the provision of tourism services, including establishments providing accommodation to tourists. Examples include bodies like SANPARKS which is responsible for the management of the national parks and the accommodation provided in such parks. Municipalities responsible for facilities such as caravan parks and camp sites may also be included.

The NCC must monitor the functioning of bodies such as organs of state in the national sphere; provincial consumer protection authorities; regulatory authorities; consumer protection groups and ombuds with respect to the supply of services and goods to consumers, and to this end the NCC may require these bodies to supply it with relevant information for such monitoring purposes.³⁸³

Section 96 provides for the educational function of the NCC. In furtherance of the purposes of the Act which include 'improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour'³⁸⁴ and 'promoting consumer confidence, empowerment, and the development of a culture of

³⁸¹ See s 7(1)(a)(iii) of the Draft Tourism Bill.

³⁸² S 95(1) of the CPA.

³⁸³ S 95(2) of the CPA.

³⁸⁴ S 3(1)(e) of the CPA.

consumer responsibility, through individual and group education',³⁸⁵ the NCC must issue notices on its procedures and (non-binding) opinion on the interpretation of provisions of the Act;³⁸⁶ apply to court for declaratory orders where necessary on the interpretation and application of provisions of the Act,³⁸⁷ and publish any orders and findings of the NCT or a court in respect of breaches of the Act.³⁸⁸

Section 97 mandates the NCC to liaise with any provincial consumer authority or other regulatory authority on matters of common interest; to conclude agreements with any regulatory authority in order to ensure consistent application of the Act; participate in the proceedings of any regulatory authority; and may advise, and receive advice from, any regulatory authority.³⁸⁹ The NCC may also liaise with foreign or international authorities that have similar objects to the NCC.³⁹⁰

Section 98 contains the advisory function of the NCC and it has the responsibility of advising the Minister on a number of issues, including the determination of national norms and standards regarding consumer protection that should generally apply throughout the Republic;³⁹¹ recommend changes regarding uniformity in legislation,³⁹² and report annually on market practices and the implications for consumer choice and competition in the consumer market.³⁹³

The NCC may co-operate with, facilitate or support any of the activities of consumer protection groups such as education activities, research, promotion of consumer rights, representation of consumers in court, and alternative dispute resolution.³⁹⁴ Provided a consumer protection group complies with the requirements set out on

³⁸⁵ S 3(1)(f) of the CPA.

³⁸⁶ S 96(b)(i) of the CPA. Such notices have been issued already and are set out in par 3.3.1 of this Chapter.

³⁸⁷ S 96(b)(ii) of the CPA.

³⁸⁸ S 96(b)(iii) of the CPA.

³⁸⁹ S 91(1) of the CPA.

³⁹⁰ S 97(4) of the CPA.

³⁹¹ S 98(a) of the CPA.

³⁹² S 98(b) of the CPA.

³⁹³ S 98(c) of the CPA.

³⁹⁴ S 77 of the CPA.

section 78(3) of the Act it may be accredited by the NCC.³⁹⁵ An accredited consumer protection group is entitled to perform any act to protect the interests of consumers in any matter or before any forum contemplated in this Act, and may also intervene in any matter if the consumer interest represented by such group is not otherwise adequately represented.³⁹⁶ The NCC must monitor the effectiveness of accredited consumer protection groups and in so doing may require such groups to provide the NCC with relevant information.³⁹⁷

In furtherance of the principles of co-operative government amongst and between the provincial governments and the national government, section 83 provides a number of provisions to ensure effective co-operation between the Commission and the respective provincial consumer protection authorities with a view to the furtherance of the purposes of the CPA.

Section 84 of the Act provides respective provincial consumer protection authorities within each province with the jurisdiction to issue compliance notices on behalf of the Commission,³⁹⁸ and request the Commission to initiate a complaint in respect of any apparent prohibited conduct or offence in terms of the Act arising within that province.³⁹⁹

³⁹⁵ These requirements that the person or association functions predominantly to promote or represent the interests of a category of consumer or consumer in general; is committed to achieving the purposes of the CPA; and, engages in actions to promote consumer interests of vulnerable consumers as contemplated in s 3(1)(b).

³⁹⁶ S 78(1) of the CPA. Naudé *op cit* (n 83) 522-523 points out that s 78 of the CPA specifically states that an 'accredited consumer protection group' may initiate or undertake any act to protect the interest of consumers. A similar qualification is not contained in s 4 of the CPA, and more specifically s 4(1)(c) and (e) of the Act. These provisions allow respectively for a person acting as a member of, or in the interest of, a group or class of affected persons', or 'an association acting in the interest of its members.' She suggests that it may be that a court will treat s 78 as qualifying s 4 and that only accredited consumer protection groups would have *locus standi*.

³⁹⁷ S 78(5) of the CPA.

³⁹⁸ S 84(a) of the CPA.

³⁹⁹ S 84(d) of the CPA. In respect of this power Naudé *op cit* (n83) 524 suggests that perhaps 'the NCC will effectively be forced to intervene where a business which does not carry on business exclusively within a province, and which is not regulated by a sectoral regulatory authority, is involved'.

(iii) Enforcement

The efficacy of the CPA will ultimately be judged on how well the Act succeeds in giving effect to the rights of consumers as provided for in the Act. The Commission plays a very important role in protecting and enforcing the rights of consumers. This role is now considered.

Section 99 indicates that the Commission is responsible for the enforcement of the Act by performing a number of duties. These duties are:

- promoting informal resolution of disputes in terms of this Act without intervening or directly adjudicating a dispute;⁴⁰⁰
- receiving complaints, and dealing with such complaints in the prescribed manner;⁴⁰¹
- monitoring (i) the consumer market to ensure that prohibited conduct is prevented, detected and prosecuted;⁴⁰² (ii) the effectiveness of accredited consumer groups,⁴⁰³ industry codes and alternative dispute resolution schemes,⁴⁰⁴ service delivery to consumers by organs of the state,⁴⁰⁵ and any regulatory authority exercising jurisdiction over consumer matters within a particular industry or sector;⁴⁰⁶

⁴⁰⁰ S 99(a) of the CPA. Exactly how disputes are to be informally resolved without intervening is not clear. It may be that the Commission will do this by clarifying the correct position to one or both of the parties. But the line between such actions and the requirement not to intervene may be very unsure. The National Consumer Commission Enforcement Guidelines (*op cit* (n 211) provide guidelines on the resolving of disputes. In Part B detailed guidelines are provided to effect conciliation.

⁴⁰¹ S 99(b) of the CPA. See s 71 of the CPA. Unfortunately s 71(1) of the CPA creates problems as it states that any person can file a complaint concerning a matter contemplated in s 69(1)(c)(ii) or (2)(b). Neither of these provisions exists. If the cross-reference is read to mean s 69(c)(ii) and s 69(b) then it still makes little sense because of the content of these latter provisions. Therefore, the cross-reference must be to a completely different section and is probably s 99 of the CPA. But this section also does not contain a subsection (1) or subsection (2). The cross-reference in s 71 is probably meant to refer to s 99(c)(ii) and s 99(b) of the CPA.

⁴⁰² S 99(c)(i) of the CPA.

⁴⁰³ See s 78(5) of the CPA.

⁴⁰⁴ See s 82(5) & (7) of the CPA.

⁴⁰⁵ S 95(2) of the CPA.

⁴⁰⁶ S 99(c)(ii) of the CPA.

- investigating and evaluating alleged prohibited conduct and offences;⁴⁰⁷
- issuing and enforcing compliance notices;⁴⁰⁸
- negotiating and concluding undertakings and consent orders;⁴⁰⁹
- referring to the Competition Commission any conduct that may be in contravention of the Competition Act;⁴¹⁰
- referring matters to and appearing before the Tribunal as required;⁴¹¹ and
- referring alleged offences to the prosecuting authorities.⁴¹²

Figure 3.1 above presents a graphic illustration of the options that may be exercised by the NCC on having received a complaint in terms of section 71 (as read with section 99(b) and (c)(ii)) of the Act.

A compliance notice is issued to a person whom the Commission believes on reasonable grounds has or is engaged in prohibited conduct.⁴¹³ Such notice must indicate the person it is directed to; the relevant provision of the Act that has been breached; the nature and extent of the breach; the steps required to be taken and the time allowed to do so, and any penalty that may be imposed for not complying with the order.⁴¹⁴ A person issued with a compliance notice can approach the NCT for a review of the notice.⁴¹⁵

⁴⁰⁷ S 99(d) of the CPA. This provision should be read with Part B of Chapter 3 of the CPA.

⁴⁰⁸ S 99(e) of the CPA, as read with s 100 of the CPA, considered below.

⁴⁰⁹ S 99(f) of the CPA, as read with s 74 of the CPA.

⁴¹⁰ S 99(g) of the CPA.

⁴¹¹ S 99(h) of the CPA. See for example s 73(2)(b) of the CPA.

⁴¹² S 99(i) of the CPA. See s 73(1)(b) of the CPA.

⁴¹³ S 100(1) of the CPA.

⁴¹⁴ S 100(3) of the CPA.

⁴¹⁵ S 101 of the CPA. This has already happened in a number of instances. See the website of the NCT at <http://www.ntc.gov.za> for the judgments of the NCT. The matter of *Vodacom Service Provider Company (Pty) Ltd & Vodacom (Pty) Ltd v National Consumer Commission* NCT/2793/2011/101 (1)(P) is an example of where the NCT was critical of the manner in which the NCC had used compliance notices. See also *Cell C v National Consumer Commission* NCT/2737/2011/101 (1)(P).

For purposes of conducting an investigation the Commission is provided with extensive powers to summon persons to appear before the Commission or an investigator, including an independent investigator, to answer questions.⁴¹⁶ An investigator before whom a person has been summoned to appear or produce certain items may administer the oath or an affirmation; may interrogate the person, and may retain for inspection any item produced for a period not exceeding two months.⁴¹⁷ All questions must be answered truthfully and to the best of the person's ability but a person does not have to answer self-incriminating questions.⁴¹⁸ A person must be informed of this right.⁴¹⁹ Self-incriminating answers will not be admissible in subsequent criminal proceedings except to prove perjury or offences relating to sections 108(3) and/or 109(2)(d) of the Act.⁴²⁰

Section 103 authorises a judge or magistrate with jurisdiction to issue a warrant for an inspector or investigator to enter and search premises if from information on oath or affirmation it appears that there are reasonable grounds to believe that a contravention of the Act has taken place, is taking place or will take place on those premises, or that something connected with an investigation is on that premises.⁴²¹ Before executing the warrant, the person who will execute the warrant must identify him/herself to the owner or person in control of the premises, explain by what authority the warrant is being executed, and hand a copy to the person.⁴²² A person authorised to enter and search premises may enter and search the premises, inclusive of persons on the premises reasonably considered to have personal items that have a bearing on the case; examine items with a bearing on the case; make copies; use any computer system on the premises to search for relevant data and produce records of such data; seize any output from that computer for further examination and attach and remove any item that has a bearing on the case for

⁴¹⁶ S 102(1) of the CPA.

⁴¹⁷ S 102(3) of the CPA.

⁴¹⁸ S 102(4) of the CPA . This situation is different from the situation before the Tribunal where a witness appearing must answer all questions including self-incriminating ones. See above s 146(3) of the NCA.

⁴¹⁹ S 102(4)(b) of the CPA. Presumably a person must be informed of this right prior to the commencement of the questioning. The Act is not specific.

⁴²⁰ S 102(5) of the CPA.

⁴²¹ S 103(1) of the CPA.

⁴²² S 103(6) of the CPA.

further examination.⁴²³ Self-incriminating answers given or statements made during a search may not be used in a subsequent criminal prosecution.⁴²⁴ Section 105 prescribes the manner of conduct to be employed by the inspector (and the police who may assist)⁴²⁵ requiring it to be done with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy.⁴²⁶

A person subject to a search may refuse to permit the inspection or removal of an item on the grounds that it contains privileged information.⁴²⁷ The person conducting the search may then request the sheriff or registrar of the High Court to attach and remove the item until such time as a court could determine whether or not the matter is privileged.⁴²⁸ A police officer accompanying an inspector during a search may overcome resistance to the entry and search by using reasonable force required to overcome the resistance.⁴²⁹

The National Consumer Commissioner published a comprehensive document entitled 'National Consumer Commission Enforcement Guidelines' in order to set out in a practical fashion the manner in which consumer complaints are to be dealt with.⁴³⁰ The Guidelines consists of four parts: Part A sets out the functions of the NCC and the Commissioner, and how the CPA will be enforced. It also explains what consumer complaints are, who may bring a complaint and against whom may it be brought, as well as what the CPA is applicable to and what is exempted there from. Part B deals with the complaints process and investigations by the NCC. Part C provides guidance on evidence handling and procedural fairness, while Part D provides guidance on the management of investigation case file reviews and related auditing processes.

⁴²³ S 104(1) of the CPA.

⁴²⁴ S 104(2) of the CPA. The Act does not specifically say that a person needs to be informed of this right. It is submitted that a person must be so informed.

⁴²⁵ S 104(3) of the CPA.

⁴²⁶ S 105(1) of the CPA.

⁴²⁷ S 105(5) of the CPA.

⁴²⁸ S 105(6) of the CPA.

⁴²⁹ S 105(7) of the CPA. Section 106 deals with information claimed to be confidential and this aspect has been dealt with above under par (a).

⁴³⁰ *Op cit* (n 212).

(c) Alternative Dispute Resolution

In terms of section 70(1) of the CPA a consumer may seek to resolve any dispute in respect of an agreement or transaction by referring the matter to an alternative dispute resolution agent.⁴³¹ This agent may be an ombud with jurisdiction⁴³² if the supplier is subject to the jurisdiction of such an ombud;⁴³³ a section 82(6) accredited ombud if the supplier is subject to the jurisdiction of such an ombud;⁴³⁴ a person or entity providing conciliation, mediation and arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud;⁴³⁵ or the consumer court of the province with jurisdiction over the matter, provided there is such a court and subject to the law establishing or governing that court.⁴³⁶

If the alternative dispute agent concludes that there is no reasonable probability that the parties can resolve their dispute through the process provided, the agent may terminate the process by notice to the parties, whereafter the party who brought the matter can file a complaint with the Commission.⁴³⁷

⁴³¹ In terms of s 1 of the CPA an 'alternative dispute resolution agent' means-

- (a) an ombud with jurisdiction;
- (b) an industry ombud accredited in terms of section 82(6); or
- (c) a person or entity providing conciliation, mediation and arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud'.

An 'ombud with jurisdiction' refers to an ombud or statutory ombud (i.e. ombud established and provided with jurisdiction by national legislation) that has jurisdiction in respect of that supplier, or if the supplier is a financial institution then the ombud as determined in terms of ss 13 or 13 of the FAIS Act. See the definition of 'ombud with jurisdiction' in s 1 of the CPA.

⁴³² In terms of s 1 of the CPA an 'ombud with jurisdiction' refers to an ombud or statutory ombud (i.e. ombud established and provided with jurisdiction by national legislation) that has jurisdiction in respect of that supplier, or if the supplier is a financial institution then the ombud as determined in terms of ss 13 or 13 of the FAIS Act.

⁴³³ S 70(1)(a) of the CPA.

⁴³⁴ S 70(1)(b) of the CPA. A s 82(6) accredited ombud is an ombud established in terms of an industry code which the Commission on its own initiative or in response to a proposal from roleplayers within an industry, recommended to the Minister and approved by the latter in terms of s 82(3) of the CPA.

⁴³⁵ S 70(1)(c) of the CPA.

⁴³⁶ S 70(1)(d) of the CPA.

⁴³⁷ S 70(2) of the CPA.

Where the matter is resolved through the process of alternative dispute resolution the agent may record the resolution in the form of an order, and, if the parties consent to the order, submit it to the Tribunal or High Court to be made a consent order.⁴³⁸ Such an order may include an award for damages for the complainant provided the complainant consents thereto.⁴³⁹

(d) Consumer protection groups and industry codes

The role and function of consumer protection groups, particularly accredited consumer protection groups, were considered above, with the discussion of the functions of the Commission in paragraph (b). The fact that the Act also makes provision for class and public interest actions will significantly assist consumer protection groups in advancing the cause of consumers.⁴⁴⁰

Similarly, the role of industry codes was referred to in the discussion in paragraph (b) above and does not need repeating, save to say that the Act clearly allows and promotes the idea that industries develop their own codes in line with the Act to set standards and extend protection to consumers of products and/or services of that industry. The Act therefore allows ample opportunity for an industry to regulate itself subject to the requirements of the Act as far as the relationship with consumers is concerned. As indicated, the Draft Tourism Bill contains similar provisions making it only a matter of time before such industry codes are implemented in the tourism industry. The diversity of the industry will in all likelihood dictate that different codes be developed for the different branches and/or segments of the industry such as the accommodation segment.

⁴³⁸ S 70(3) of the CPA. From the wording of section 73(b) it appears as if it is in the discretion of the ADR agent to submit to the Tribunal or High Court a resolution, which has been recorded in the form of an order, to be made a consent order, provided the parties had consented to the order. The consent of the parties does not seem to be required for the said order to be made a consent order by the Tribunal or the High Court.

⁴³⁹ S 70(4) of the CPA.

⁴⁴⁰ See s 4(1)(c) & (d) of the CPA.

(e) Courts

Section 69(d) of the CPA provides that a person as contemplated in section 4(1) of the Act may seek to enforce any right in terms of this Act or in terms of an agreement or transaction or otherwise resolve any dispute with a supplier, by approaching a court with jurisdiction over the matter, but only if all other remedies available to that person in terms of national legislation have been exhausted. As the exhaustion of remedies is a requirement to approach the court, such an averment will have to be made in the pleadings.⁴⁴¹

Once a matter is properly before a competent court in terms of the CPA then such court, in addition to any other order it may make under the CPA or other law, may order a supplier to alter or discontinue any conduct that is inconsistent with the Act; make any order specifically contemplated in this Act; and/or award damages against a supplier for collective injury to all or a class of consumers generally to be paid on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of the CPA.⁴⁴² The CPA does not diminish any right of the consumer or the supplier to recover interest or special damages in any case where interest or special damages are recoverable by law or to recover money paid if consideration for which the payment was made has failed.⁴⁴³ A person may not institute a claim in a court for the assessment or awarding of damages if that person has consented to an award of damages in a consent order.⁴⁴⁴

(f) Business names

A final aspect requiring mention is that of business names. No person may carry on business unless it is under that person's full name as contained in an acceptable identification document (in the case of an individual), or under a name registered in

⁴⁴¹ See Van Eeden *op cit* (n 1) 300.

⁴⁴² S 76(1) of the CPA.

⁴⁴³ S 76(2) of the CPA. Van Eeden *op cit* (n 1) 302 points out that the doctrine of consideration is not part of South African law and it appears as if this doctrine is now being imported into South African law.

⁴⁴⁴ S 115(2)(a) of the CPA.

terms of legislation (in the case of a juristic person), or under a *business name*⁴⁴⁵ registered to, and for the use of, that person in terms of section 80 of the CPA or other legislation.⁴⁴⁶ An accommodation establishment therefore has to register the actual name under which it is doing business and not just the name of the person owning the business or the juristic person operating the business and to whom the business belongs. For example, if an accommodation establishment is owned and operated by Shelf Company (Pty) Ltd and the establishment trades under the name 'Sea View Lodge', then both these names must be registered as provided.

A person doing business must include certain information in any documentation issued, namely the name, title or description under which the business operates; the address of the primary place from which the business is operated, and if a business name is used then also the name of the person to whom the business name is registered.⁴⁴⁷

The Commission can issue a compliance notice for failure to comply with the requirements set out before.⁴⁴⁸

On filing a notice in the prescribed manner and form with the Registrar of Companies a person may register any number of business names used or to be used by that person for conducting business, including translations thereof into any of the official languages; changes to the address of any registered business name; or transfer of a business name to another person.⁴⁴⁹

The criteria for business names are set out in section 81. A business name may comprise any words in any language, together with any letters, numbers or punctuation marks, permitted symbols or round brackets.⁴⁵⁰ A business name must not be the same or confusingly similar to a name of a juristic person incorporated in

⁴⁴⁵ S 1 of the CPA defines 'business name' as 'a name under which a person carries on a business other than the person's full name'.

⁴⁴⁶ S 79(1) of the CPA.

⁴⁴⁷ S 79(2) of the CPA.

⁴⁴⁸ S 79(3) of the CPA.

⁴⁴⁹ S 80(1) of the CPA. The process and form to register, change or transfer business names are provided in the Consumer Protection Regulations, specifically Regulation 39 and Annexure H.

⁴⁵⁰ S 81(1) of the CPA.

terms of the Company's Act,⁴⁵¹ the Close Corporations Act,⁴⁵² the Co-operatives Act,⁴⁵³ a registered trade mark belonging to another, or a mark, word or expression whose use is protected by the Merchandise Marks Act.⁴⁵⁴ ⁴⁵⁵ The business name must also not falsely imply or mislead a person into believing that the business is part of, or associated with another entity; is an organ of state, or supported or endorsed by the state; is owned, managed or conducted by persons having any particular educational designation or who are regulated entities; enjoys the support, patronage of, or is owned or supported by a foreign state or government or international organisation; and may not contain anything that will cause it to fall into the category of expression contemplated in section 16(2) of the Constitution, such as hate speech.⁴⁵⁶

3.4 Summary

In this chapter, two distinct aspects of consumer protection are dealt with. The first part provided an overview of the protection afforded consumers generally in South Africa before the CPA came into effect. This protection, to the extent that it existed, was provided primarily by ad hoc statutory measures including statutory bodies, the principles of the common law, and industry self-regulation.

Each of these categories of protection had its problems. As far as statutory measures were concerned the main drawback probably was the fact that the measures were ad hoc – there was no overarching legislation to which a consumer could revert for protection and recourse. The attempt to overcome this concern and introduce a general statute, the Consumer Affairs Act, did not resolve all the problems as it was inhibited by both internal and external factors. From an internal perspective, for instance, the Act had limited application and CAFCOM, the statutory body established by the Act, had no enforcement powers. From an external

⁴⁵¹ Act 61 of 1973.

⁴⁵² Act 69 of 1984.

⁴⁵³ Act 14 of 2005.

⁴⁵⁴ Act 17 of 1941.

⁴⁵⁵ S 81(2)(a) of the CPA.

⁴⁵⁶ S 81(2)(b) of the CPA.

viewpoint the Committee was under-resourced with a consequential debilitating effect.

Self-regulation suffered from the major limitation that a supplier had to belong to an industry self-regulatory authority for it to be effective. Enforcement mechanisms are limited in range and are based more on mediation and persuasion to comply with a vague code of conduct than on actual enforcement. This may have the desired results in many cases but lacks the threat of the 'big stick' to persuade recalcitrant suppliers. Serious cases may end up in the media, but that was scant consolation for the general consumer.

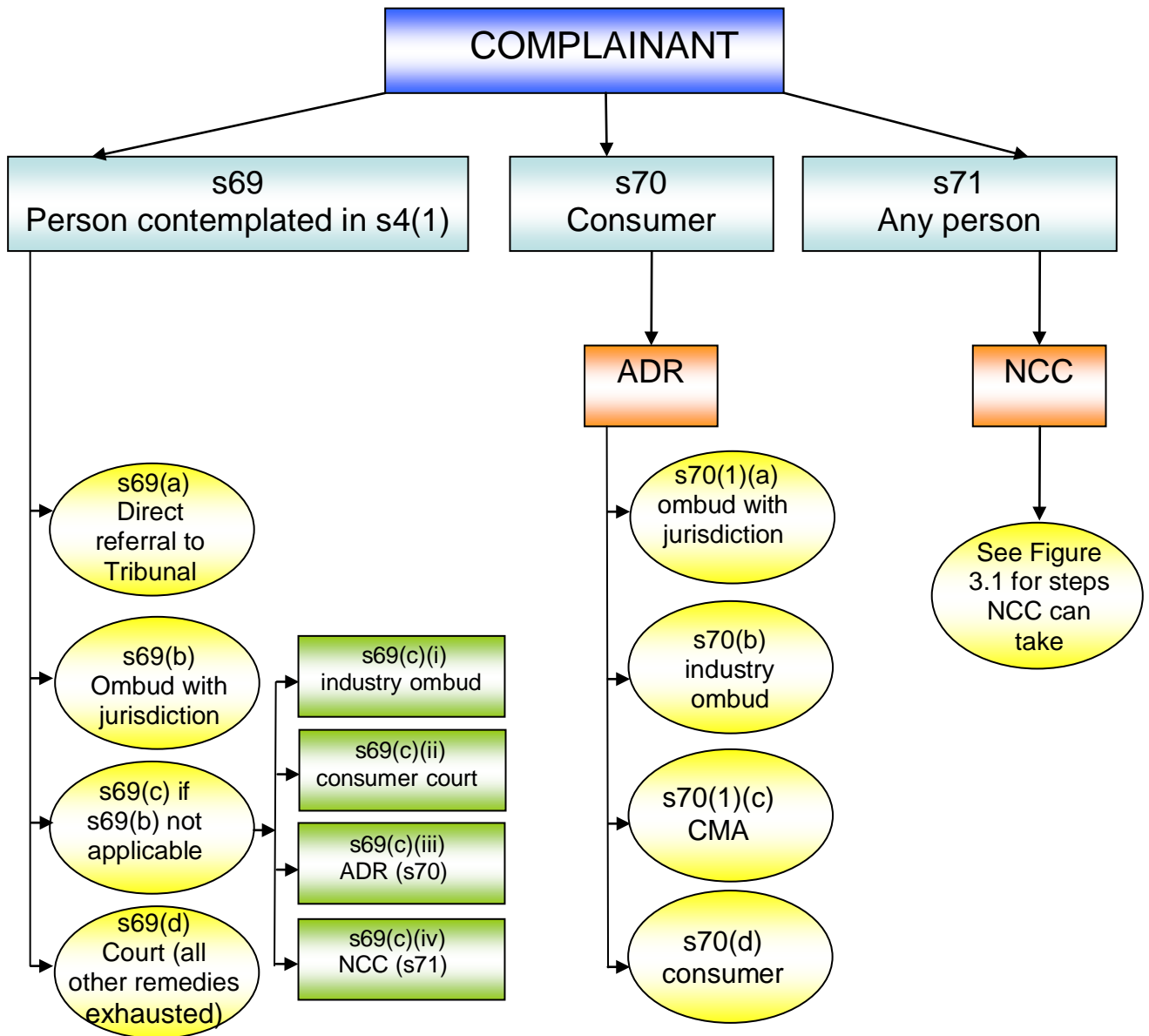
The common law provided significant protection through the rules of the law of contract and delict. However such protection was also subject to serious inhibiting factors, including the cost and time duration of legal proceedings. On a substantive level, the South African law of contract in particular has for some time grappled with how to deal with concepts such as fairness, reasonableness and good faith in contractual relations. Indicative of the difficulty of this issue is the fact that an attempt to pass legislation dealing with unreasonable contractual stipulations came to naught. Constitutional litigation has provided some much needed impetus for addressing this problem and the both the Constitutional Court and the Supreme Court of Appeal have developed the common law significantly in this respect. However, to have developed specific remedies would have taken too long and the procedural and logistical problems in enforcing consumer rights cannot be effectively addressed by the courts. It may well be argued that the way for the introduction of legislation such as the NCA and CPA was prepared to some extent by the role played by the superior courts.

The second part of the chapter introduced the CPA. In this part the aim was to provide an overview of the Act. Particular attention was focussed on the structure, application and interpretation, regulatory framework, and the mechanisms for enforcement of the rights of consumers. The relevance of the purposive approach to statutory interpretation was pointed out. The application of the Act was considered and it was shown that this application is extensive indeed. Such application is aided by definitions of terms, for example 'consumer', whose meaning is much wider than

was traditionally the case. It is interesting that the Act does not make use of the (legal) concept of contract, rather does the Act use terms such as ‘transaction’ and ‘agreement’. One reason for this could be to avoid legal argument around whether a contract exists between parties, which in turn may lead to arguments about whether the Act then applies or not.

Within the regulatory framework created by the Act for the protection of consumer rights, important bodies were established and/or referred to including the National Consumer Tribunal and the National Consumer Commission. The composition, powers and functions of these bodies were considered. Figure 3.1 was developed to show the different routes that a complainant may take to the Tribunal and also to show the alternatives available to the NCC when dealing with a complaint filed with the Commission in terms of section 71 of the Act. As could be seen from the discussion on section 99 of the Act (as read with sections 69; 70 and 71) there are a number of different options available for dealing with a complaint of a tourist consumer. Figure 3.2 serves to graphically reflect these options.

FIGURE 3.2: Alternative methods to protect consumer rights



The next chapter focuses on the impact of the CPA, particularly the substantive consumer rights provided for by the Act, on the accommodation segment of the tourism industry.

CHAPTER 4

THE CPA AND THE ACCOMMODATION SEGMENT

4.1 Introduction

In this chapter the focus falls on the potential impact of the Consumer Protection Act (CPA) on the accommodation segment of the tourism industry. The chapter consists of an introduction that includes a brief overview of the role of accommodation in the tourism industry. This is followed by considering the protection afforded tourists making use of accommodation services in South Africa prior to the coming into effect of the CPA. Thereafter follows an analysis of the potential impact of selected sections of the CPA on the accommodation segment of the tourism industry in South Africa. The chapter concludes with a summary.

As indicated in Chapter 1, the tourism industry can be divided into three branches namely travel, hospitality and attractions. Hospitality again consists of catering and accommodation. For purposes of this discussion the focus is on the accommodation sector.

The fact that tourism is defined with reference to a temporary stay of at least one night away from the tourist's normal place of residence, makes accommodation an essential component of tourism.¹ Accommodation is not only an essential part, but it also constitutes the largest segment of the tourism industry.² The accommodation segment itself is diverse and complex and in a state of constant change and evolution making it impossible to provide a definitive classification of all the forms of

¹ See Chapter 2. See also Cooper, Fletcher, Gilbert & Wanhill *Tourism Principles & Practice* (1993) 161.

² Caras 'Managing accommodation for tourists' in George *Managing Tourism in South Africa* (2007) 104.

accommodation.³ The nature of accommodation is fundamentally a function of the demand by the tourist as a consumer of accommodation services. In other words, it is what the tourist consumer demands that will determine in most cases what type of accommodation will be found at the destination.⁴ The CPA also deals with consumers and suppliers in general terms and does not require that a classification of different types of accommodation establishments for purposes of applying the Act is made.⁵ Statistics South Africa (Stats SA), for purposes of tourism accommodation statistics, classify accommodation as hotels, caravan parks and camping sites, guest houses and guest farms, and other accommodation.^{6 7} The Tourism Grading Council of South Africa (TGCSA) classifies tourism accommodation according to the following types and provides a definition of each:

- hotel
- lodge
- guesthouse
- bed and breakfast establishments (B&Bs)
- self-catering
- backpacker and hostelling, and
- caravan and camping park.⁸

Commercial hospitality has its roots in providing the basic needs of accommodation, food and drink for travellers.⁹ From as early as the Roman times the innkeeper and

³ Page & Connell *Tourism: A Modern Synthesis* (2009) 238. See also Holloway *The Business of Tourism* (2006) 281.

⁴ Bennett & Schoeman 'The tourism system and major role-players involved' in Bennett, Jooste & Strydom *Managing Tourism Services – A South African Perspective* (2005) 43.

⁵ It is however submitted that it is quite foreseeable that classifications of accommodation establishments may become more relevant from a legal perspective (and not just a statistical one), and specifically from a consumer protection perspective, in that what is understood by booking a certain type of accommodation may mean that certain terms are read into the contract as implied terms. For instance, making a reservation at a B&B implies that breakfast will be provided. Booking self-catering accommodation may imply that facilities and equipment are provided to enable guests to cater for themselves.

⁶ 'Other accommodation' is described by Stats SA to include lodges, B&B establishments and self-catering establishments. See Statistics South Africa Statistical release P6410 (September 2010) *Tourist Accommodation (Preliminary)* 8.

⁷ Caras 'Managing accommodation for tourists' in George *op cit* (n 2) 105. See also Statistics South Africa Statistical release P6410 *op cit* (n 6).

⁸ Caras 'Managing accommodation for tourists' in George *op cit* (n 2) 105.

⁹ Page & Connell *op cit* (n 3) 226.

stable-keeper provided basic hospitality services.¹⁰ In Medieval times ale houses, inns and public houses provided for the hospitality requirements of travellers.¹¹ The modern day concept of hotel developed in the 18th century.¹²

Three major factors have historically influenced the development of the accommodation sector, particularly the development of hotels. These are the development of transport, social patterns and habits, and economic climate.¹³ The coming of the railways led to the development of hotel (and other accommodation) near railway stations, since the railways made many places more readily accessible to the masses thereby driving the need for the development of accommodation services. The development of commercial air travel has had a similar impact on the development of accommodation. In turn, the road lodge, motel and even the bed-and-breakfast phenomenon are to a large extent the result of independent motor-vehicle travel. Lastly, the economic climate has a significant impact on the development of hotels and accommodation.¹⁴ Hotel development requires huge capital investment and this will not happen readily in times of economic difficulty and/or conditions of political instability. (It may well be that certain accommodation establishments such as small B&Bs may actually proliferate in times of economic downturn as people convert unused space in a house into tourist accommodation so as to generate extra income.)

The hotel sector in South Africa in the first half of the 20th century was generally in a sad state because of the fact that hotels mostly focused on the liquor trade. The accommodation part was merely a ruse for obtaining a liquor licence. This situation led to the promulgation of the Hotels Act¹⁵ in 1965 which introduced the Hotel Board which, in turn, introduced a grading system for hotels in South Africa.¹⁶ The purpose of the Board was to facilitate the development and improvement of accommodation establishments in order to achieve and maintain the highest possible standards in

¹⁰ Page & Connell *op cit* (n 3) 226.

¹¹ Cooper *et al op cit* (n 1) 166.

¹² Cooper *et al op cit* (n 1) 166 and Page & Connell *op cit* (n 3) 226.

¹³ Cooper *et al op cit* (n 1) 166.

¹⁴ Cooper *et al op cit* (n 1) 166.

¹⁵ Act 70 of 1965 (repealed by the Tourism Act 72 of 1993).

¹⁶ Caras 'Managing accommodation for tourists' in George *op cit* (n 2) 106.

accommodation and other services provided by such establishments.¹⁷ The creation of the TBVC states during the 1970s and 1980s led to the awarding of casino licences in these states.¹⁸ This resulted in the development of major hotel complexes such as Sun City and the Wild Coast Holiday Inn and Casino.¹⁹ Post-1994 saw a dramatic increase in tourist numbers to South Africa and as a consequence caused an explosion in the supply of all forms of tourist accommodation, including hotels,²⁰ B&Bs, game and other lodges.²¹

Grading accommodation establishments is a way of providing consumers with a benchmark by which to judge the likely standard (and price) of accommodation and related services when making a reservation. Grading systems for accommodation are widely used in the world but, unfortunately, with equally wide differences in the application of such grading between countries.²²

In South Africa the TGCSA introduced a voluntary star-grading system which extends beyond hotels to include other forms of tourist accommodation such as lodges and B&Bs. The grading criteria relate to the functional and physical characteristics of the establishment, including minimum requirements regarding maintenance of buildings, fittings and fixtures, as well as requirements relating to the services and amenities available to guests.²³

¹⁷ Vrancken 'Hospitality law' in Vrancken *Tourism and the Law in South Africa* (2002) 344.

¹⁸ The TBVC states is the acronym for the Republics of Transkei, Bophuthatswana, Venda and Ciskei which territories were granted independence by South Africa as part of the policy of grand apartheid. See Rautenbach & Malherbe *op cit* (n) 15-17.

¹⁹ Caras 'Managing accommodation for tourists' in George *op cit* (n 2) 107.

²⁰ It was reported that the City Lodge group of hotels had opened its 52nd hotel in South Africa on 8 November 2010 in Port Elizabeth – the fifth hotel of the group in Port Elizabeth. The group has opened 8 new hotels in South African since the middle of 2009. Lamprecht 'City Lodge Open sy 52ste Hotel in SA' (9 November 2010) *Die Burger (Oos-Kaap)* 15.

²¹ Caras 'Managing accommodation for tourists' in George *op cit* (n 2) 107-108. It is reported on the website of the Small Enterprise Development Agency (SEDA) that there were approximately 300 B&B's in South Africa in 1993. This number increased to a staggering 9000 by 1997. See <http://www.seda.org.za> (accessed on 2012-07-29).

²² Caras 'Managing accommodation for tourists' in George *op cit* (n 2) 117-118. See also Page & Connell *op cit* (n 3) 237.

²³ Caras 'Managing accommodation for tourists' in George *op cit* (n 2) 118. The Tourism Grading Council of South Africa (TGCSA) has reported that it has a total of 23 467 accredited establishments on its data base of which 5728 were graded at the time of the report. See Parliamentary Monitoring Group 'Tourism Grading Council briefing on the new grading system and latest developments' (22 May 2012). See <http://www.pmg.org.za/print/32364> (accessed 2012-06-11).

Other factors of particular relevance for the accommodation segment in a consumer protection context deserve mention. First and foremost is probably the use of technology such as computerised central reservation systems and the internet in making reservations.²⁴ This mode of reserving accommodation has already had an impact on travel intermediaries such as travel agents. Tourism accommodation is currently one of the most extensively traded commodities on the internet.²⁵ Transactions via electronic means also allow the supplier to engage the consumer with direct marketing.²⁶

Secondly, there is a growing acknowledgment that retaining customers is much more profitable than the cost of acquiring new ones.²⁷ This makes marketing techniques such as relationship marketing very relevant.²⁸ How this marketing is done may have clear consumer protection implications including issues of direct marketing and information provided on websites. Another method used by businesses in the tourism sector to retain customers is to offer loyalty programmes. Airlines, car rental companies and hotels make use of this method.

Thirdly, it has been said that the main challenge facing the accommodation segment – a segment where the ‘product’ is mainly a service - is the management of service quality.²⁹ In a highly competitive market quality service is often the most effective way of ensuring high occupancy and therefore profitability. Quality service makes for satisfied customers ensuring important repeat business and, through word-of-mouth recommendation, also new business.³⁰ Quality hotels have used this critical role as part of their marketing strategy thereby creating high expectations of the accommodation product.³¹ Pressure for quality service has been further pushed by the growth in ‘consumerism’ – the demand for better than a minimum acceptable

²⁴ See Caras ‘Managing accommodation for tourists’ in George *op cit* (n 2) 112; Bennett & Schoeman ‘The tourism system and major role-players involved’ in Bennett, Jooste & Strydom *op cit* (n 4) 47; Cooper *et al op cit* (n 1) 170-171 and Page & Connell *op cit* (n 3) 250.

²⁵ Caras ‘Managing accommodation for tourists’ in George *op cit* (n 2) 112-113 & 120.

²⁶ Bennett & Schoeman ‘The tourism system and major role-players involved’ in Bennett, Jooste & Strydom *op cit* (n 4) 47.

²⁷ George *op cit* (n 2) 112 and Page & Connell *op cit* (n 3) 250.

²⁸ Page & Connell *op cit* (n 3) 250.

²⁹ Caras ‘Managing accommodation for tourists’ in George *op cit* (n 2) 116.

³⁰ Cooper *et al Op cit* (n 1) 173.

³¹ Cooper *et al op cit* (n 1) 172.

level of service.³² The importance of quality in tourism has been pointed out in the discussion of the National Tourism Sector Strategy (NTSS) and the Draft Tourism Bill in Chapter 2. Both these instruments place considerable emphasis on quality in the tourism industry. All of this has implications for the business, and also for consumer protection. Expectations which are created but not fulfilled will lead to unsatisfied customers, which is bad for business, but may also result in redress being sought through legal means.

4.2 Consumer protection in the accommodation segment before the CPA

The relationship between the consumer and the suppliers of hospitality services such as tourist accommodation is regulated by what can be referred to as 'hospitality law'. The latter has been defined as 'the body of legal norms regulating specifically the satisfaction of the tourists' accommodation and subsistence needs, including the legal norms governing the relationship between tourists and the relevant service providers.³³ As has been pointed out previously, a number of statutes and general principles of the common law, including the rules of contract and delict, serve to provide consumers of tourist services with protection.³⁴ Therefore, in this brief discussion, only a few specifically relevant issues are considered.

4.2.1 International regulation

At an international level one of the foremost organisations in the accommodation sector is the International Hotel and Restaurant Association (IH&RA). The objectives of this body include acting as the international representative organisation of the global hotel and restaurant industry so as to promote its interests through the development of working contacts with other international organisations, as well as governmental and non-governmental bodies.³⁵ In 1981 the International Hotel Association (IHA) adopted its Regulations which aim to codify the generally accepted international trade practices governing the contract of hotel accommodation.³⁶ This

³² Cooper et al *op cit* (n 1) 172.

³³ Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 343.

³⁴ See Chapter 3.

³⁵ Article 2(a) of the Statutes of the IH & RA.

³⁶ Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 343.

serves to inform the hotelkeeper and the guest (including the person who has to pay) of their mutual rights and duties.³⁷ The Regulations serve as complement to national law and therefore consideration needs to be given to the question whether national law (such as the CPA) or the IHA provides the better protection. If it is the national law then the IHA Regulations will have limited application in South Africa.³⁸

The relationship between hotelkeepers and travel agents in an international sphere is governed by the 1979 International Hotel Convention Relative to Contracts between Hoteliers and Travel Agents concluded between the IHA and the Universal Federation of Travel Agents Association.³⁹

The 1978 UNIDROIT Draft Convention on the Hotelkeeper's Contract deals with the relationship between the hotelkeeper and the guest with particular focus on the conclusion and performance of the contract, the liability of the hotelkeeper for death and personal injuries, as well as damage to property.⁴⁰

4.2.2 National regulation

Reference has been made above to the Hotels Act, and the establishment of the Hotel Board in terms of the Act. The aforementioned Act was repealed by the Tourism Act. The latter mandated the Minister responsible for tourism to establish a grading and classification scheme in respect of accommodation establishments.⁴¹ Section 1 of the Tourism Act defines 'accommodation establishment' as 'any place in or upon which the business of providing accommodation with or without meals is conducted for gain'. The purpose of this scheme is to develop and maintain the standard of accommodation and quality of services offered by such accommodation establishments. Although all accommodation establishments can participate in the scheme, participation is nonetheless voluntary.⁴² The South African Tourism Board,

³⁷ Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 343-344.

³⁸ Considering the provisions of s 2(2) of the CPA the IHA instruments may well play a role during the process of interpreting the CPA.

³⁹ Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 344.

⁴⁰ Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 344.

⁴¹ S 18(1) of the Tourism Act.

⁴² Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 345.

established in terms of the Tourism Act, must however keep a register of all the members of the grading scheme and all the accommodation establishments graded in terms of the scheme.⁴³

A number of non-governmental organisations exist within the tourism industry to self-regulate the industry, including bodies such as the Federated Hospitality Association of South Africa (FEDHASA), the Bed-and-Breakfast Association of South Africa (BABASA), the Guest House Association of South Africa (GHASA) and the National Accommodation Association of South Africa (NAA-SA) which focuses primarily on the accommodation segment of the industry.⁴⁴

4.2.3 Provincial and local regulation

As far as accommodation establishments go, the majority of regulation emanates from provincial and local spheres of government.⁴⁵ These regulations relate to aspects such as zoning and business licences and differ from municipality to municipality.

4.2.4 Common law

When a tourist arranges for accommodation to be supplied, a legal relationship between the tourist and the supplier of the accommodation comes into being.⁴⁶ This relationship is primarily regulated by the law of contract and, to some extent, by the law of delict. Often however the common law position regulating such a position is impacted by legislation. Some relevant statutes are therefore also referred to.

Different types of agreements are possible depending on the intention of the parties and often this intention is evident from the length of occupancy. In this respect the

⁴³ S 18(6) of the Tourism Act.

⁴⁴ This aspect is considered in Chapter 2.

⁴⁵ Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 346.

⁴⁶ This will be the situation unless the accommodation is provided as part of a package purchased through a tour operator, in which case the legal relationship will exist between the tourist and the tour operator. See in this regard Vrancken *op cit* (n 17) 333.

relationships of inn-keeping, board and lodging, and lease may be distinguished from each other.⁴⁷

(a) Lease

A contract of lease is a reciprocal agreement in terms of which the lessor provides the lessee with the temporary use and enjoyment of the lessor's property in return for the payment of a sum of money.⁴⁸ Generally in terms of the common law the lessor has the following duties in respect of the lessee: a duty to place the lessee in possession of the leased property; a duty of maintenance of the property during the lease; a duty not to disturb the lessee's use and enjoyment of the property; a guarantee against eviction of the lessee, and a duty to pay the rates and taxes for the property.⁴⁹ The lessee has the duty to pay the rental amount as agreed; the duty to take reasonable care of the property; a duty not to make major changes to the property without the lessor's permission, and the duty to return the property in the same condition as it was received.⁵⁰

Legislative intervention has impacted on the common law, primarily with a view to preventing the abuse of freedom of contract by the party in the stronger bargaining position. So, for instance, the Rental Housing Act⁵¹ grants rights and imposes duties on lessors and lessees of domestic leases, but particularly seeks to provide the lessee (tenant) with more extensive power than was the situation under the common law.⁵² The Act provides that the lessee may request that the agreement be reduced to writing,⁵³ and any deposit payable must be invested in an interest-bearing account for the benefit of the lessee and which deposit must be refunded within 7 days of the expiry of the lease if no deductions are made.⁵⁴ The Act also makes provision for the

⁴⁷ Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 347.

⁴⁸ Havenga, Havenga, Kelbrick, McGregor, Schulze, Van der Linde & Van der Merwe *Algemene Beginsels van Kommersiële Reg* (2004) 163.

⁴⁹ See Holness 'The law of lease' in Govindjee, Holness, Shirk & Hutchings *Commercial Law 1: Fresh Perspectives* (2006) 256-262.

⁵⁰ Holness 'The law of lease' in Govindjee *et al op cit* (n 49) 262-268.

⁵¹ Act 50 of 1999.

⁵² Maxwell 'Obligations and terms' in Hutchison & Pretorius *The Law of Contract in South Africa* (2009) 244.

⁵³ S 5(2) of the Rental Housing Act.

⁵⁴ S 5(3)(d) & (i) of the Rental Housing Act.

inspection of the property at the commencement and at the termination of the lease by both parties so as to ascertain whether there are any defects at the beginning of the lease or any damage at the end of the lease.⁵⁵

(b) Board and lodging

The contract of board and lodging is not the same as that of a contract of lease.⁵⁶ For instance, the former type of contract includes an implied term that the parties must conduct themselves in a decent and reasonable manner failing which the relationship between lodger and boarding-house keeper will become intolerable.⁵⁷ Whether for personal injury⁵⁸ and/or damage sustained to the property⁵⁹ of the lodger whilst on the premises of the boarding house, it is required that the claimant (lodger) must prove negligence on the part of the boarding-house keeper. The burden of proof is on the lodger to show that the boarding-house keeper was negligent and that the resultant damage or loss was the result of such negligence.⁶⁰

(c) Innkeeping

The relationship between a tourist making use of accommodation supplied by a hotel, guest house, B&B or lodge is regulated by the rules of innkeeping. Unfortunately the courts have not identified the requirements that a supplier of accommodation must comply with in order to be considered as an innkeeper. The courts have however regarded both hotels and B&Bs as inns in a number of instances.⁶¹ It is difficult to see that lodges and guest houses will not be similarly considered.

⁵⁵ S 5(e) & (f) of the Rental Housing Act.

⁵⁶ Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 350.

⁵⁷ Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 350. See also *Brown v Hayden* 1931 CPD 70.

⁵⁸ See *McLaughlin v Koenig* 1928 CPD 102 and *Buys v Lennox Residential Hotel* 1978 3 SA 1037 (C) 1043D-E.

⁵⁹ *Connell v Kluge* 1921 CPD 596.

⁶⁰ *Sunnyhoek Private Residential Hotel v Shields* 1953 1 SA 494 (T).

⁶¹ See for instance *Davis v Lockstone* 1921 AD 153; *Walker v Carlton Hotels (SA) Ltd* 1946 AD 321; *Gabriel v Enchanted Bed and Breakfast* 2002 (2) SA 597 CPD and *Roy v Basson NO* 2007(5) SA 84 CPD.

Vrancken had pointed out that it is unclear whether innkeepers have a duty to supply travellers with accommodation in all cases where there exists no legitimate ground for refusal.⁶² Once a traveller has been supplied with accommodation, certain consequences result from the relationship established between innkeeper and traveller. The first of these is that the innkeeper may not cease to supply accommodation without lawful reason. However, the traveller does not have a right to stay indefinitely, as the right to stay is depended on the traveller being a traveller. Once this fact changes, the right to stay terminates.⁶³

The innkeeper's liability for any injury sustained by guests whilst on the premises of the inn is governed by the ordinary principles of the law of delict, including those rules relating to the requirement of negligence.⁶⁴ The situation is however different when it comes to the loss or damage to property brought onto the premises of the inn by the traveller. The common law basis for the liability of innkeepers in respect of property brought onto the premises of the inn by travellers is to be found in the praetorian edict *de nautis cauponibus et stabulariis*. This edict essentially entails that innkeepers are liable for the loss or damage to the property of travellers brought onto the premises of the inn, even in situations where the innkeeper (or his or her employees) are not at fault. In other words, the edict imposes strict liability on the innkeeper. The parties may however contract to exclude this liability. A mere sign excluding liability is not enough to exclude liability unless the attention of the traveller has been drawn to it.⁶⁵ If the indemnity clause appears clearly next to the space for signing the register of the inn and which is to be signed by the traveller, it will generally be enough to exclude the operation of the praetor's edict.⁶⁶

Two aspects raised need further consideration, namely the precise meaning and application of the edict *de nautis cauponibus et stabulariis*, as well as the use of clauses indemnifying innkeepers against claims for loss or damage to property

⁶² Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 353.

⁶³ Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 353.

⁶⁴ Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 353-354. See also *Simpson v Smith* 1921 CPD 48.

⁶⁵ *Gabriel v Enchanted Bed and Breakfast supra* (n 61) 600E-601B.

⁶⁶ See *Glenburn Hotels (Pvt) Ltd v England* 1972 2 SA 660 (RAD) at 662F-G.

brought onto the premises of the inn by a traveller. The former issue will be considered here whereas the latter aspect will be considered below.⁶⁷

(i) The Praetor's edict *de nautis, cauponibus et stabulariis*

The edict *de nautis, cauponibus et stabulariis*, when introduced during the 1st century BC, was enacted essentially to make travelling possible. It had to serve as protection against unscrupulous innkeepers colluding with thieves to steal from the guests of the inn.⁶⁸ Common to the professions covered by the edict was the fact that they were in a position which lent itself to abuse. The traveller had to deliver his property into the custody of the innkeeper or servants of the innkeeper and had to depend on their good faith and honesty as he/she had brought his/her property into a sphere which was under the control of the innkeeper. In the case of damage or loss, it was very difficult for the traveller to establish whose fault contributed to the loss.⁶⁹ Therefore, for policy reasons, the Praetor granted the edict *de nautis, cauponibus et stabulariis*, which was enforceable through the *action de recepto*. The Praetor framed the edict simply as an action against sea carriers, innkeepers and stable keepers if they fail to restore to any person any property of which they have undertaken the safekeeping.⁷⁰

Voet describes the purpose of the action, and when it can be used, as follows⁷¹:

It lies for their making good all damage which has been sustained in whatever manner to the property received by theft, spoiling or otherwise, with the exception only of what clearly appears to have perished by inevitable loss or *vis major*, as by shipwreck or the outrage of pirates.

The case is not dissimilar where a house or stable has been broken into by burgling thieves and the property of travellers removed or horses taken away, provided that no negligence or fault of the keeper of the inn or stable-keeper is proved to have contributed. The reservation must be made that the proof of such chance happenings lies upon the sailors and inn-keepers.

⁶⁷ See para 4.3.16.

⁶⁸ *Swart v Shaw t/a Shaw Racing Stables* 1996 1 SA 202 CPD 2041.

⁶⁹ Zimmerman *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 516.

⁷⁰ *Davis v Lockstone supra* (n 61) 157 and *Anderson Shipping (Pty) Ltd v Polysius (Pty) Ltd* 1995 3 SA 42 AD 46C).

⁷¹ *Commentary on the Pandects* (Gane's translation) 4 9 2 767 – 768.

Nor does it matter whether the damage to the property received has been caused by those whose services the person running the concern employed, or by passengers or travellers.

The position of the innkeeper, where his or her liability is governed by the Praetor's edict, arises as an inference from the nature of the contract which places the innkeeper under an obligation to return the article or prove the reason why he or she has failed to do so.⁷² The action that can be brought against the *nautis, cauponibus* or *stabulariis* is therefore a special form of action which arises *quasi-ex contractu* against mariners, innkeepers and stable keepers who had received the property of anyone for safekeeping. Liability does not depend on negligence.⁷³ So, in terms of the Praetorian edict liability for the damage or loss of property of the traveller will follow where the innkeeper had received the property of the traveller, unless the liability had been specifically excluded by the parties.⁷⁴ The traveller does not have to prove negligence and therefore the innkeeper is forced to rely on the recognised exceptions in order to escape liability.

The edict has been received into and applies in South African law.⁷⁵ The Appellate Division, as it then was, in *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* summarised the effect of the edict in the following words:

The general effect of the Edict is to impose upon seamen, innkeepers and stable-keepers an absolute liability for all loss of or damage to goods given into their custody, unless the loss or damage falls within one or other of certain acknowledged exceptions, viz *casus fortuitus*, *damnum fatale* or *vis major*, negligence of the consignor or inherent vice or latent defect in the goods themselves.⁷⁶

What exactly constitutes *vis major*, *casus fortuitus* and *damnum fatale* can often be quite difficult to determine. However the strict distinctions between *vis major*, *casus fortuitus* and *damnum fatale* have become blurred and it is now accepted that an occurrence which is unforeseen, unexpected and irresistible and which human

⁷² *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (AD) 762B–D.

⁷³ *O.K. Bazaars (1929) Ltd v Stern & Ekermans* 1976 (2) SA 521 (C) 529C–D.

⁷⁴ See Zimmerman *op cit* (n 69) 520 & Van der Bijl 'B & B establishments, hotels and the praetorian edictum *de nautis cauponibus et stabulariis: cessante ratione legis cessat lex ipsa?*' (2006) 123 SALJ 571.

⁷⁵ See eg, *Davis v Lockstone supra* (n 61) 159 and *Swart v Shaw t/a Shaw Racing Stables* 1996 (1) SA 202 (CPD) 205A.

⁷⁶ *Supra* (n 72) 761F–H.

foresight cannot guard against, such as burglary with violence and unavoidable accident, can be raised as a special defence by the innkeeper.⁷⁷

An important consequence of the imposition of strict liability is the fact that the onus rests on the innkeeper to establish that he or she is not liable because the damage was caused by circumstances falling within one of the exceptions.⁷⁸ The innkeeper cannot escape liability by showing that he or she acted with all due diligence or that the loss was not caused by his or her negligence.⁷⁹ To avoid liability, the innkeeper must prove, as a special defence, that one or more of the exceptions are applicable.⁸⁰

However, where it is proved (and it is the traveller who will have the onus in this instance) that the innkeeper contributed through his or her negligence to the damage and loss the guest had suffered, the protection of the exceptions will be nullified. The traveller may show that the innkeeper's negligence exposed the goods to an occurrence which would normally constitute an exception, such as *vis major*. The act of the innkeeper therefore constitutes a *novus actus interveniens*.⁸¹ Where the damage or loss resulted from the negligence of the traveller, the innkeeper will be absolved from liability.⁸²

It is important to note that liability for property received is not limited only to property handed over for safekeeping to the innkeeper, but also property not expressly

⁷⁷ *Gabriel v Enchanted Bed & Breakfast supra* (n 61) 599I–600A. See also Hutchison *Wille's Principles of South African Law* (2007) 974 and Moss 'Carriage' in Joubert *LAWSA* (2003) par 607.

⁷⁸ Voet 4 9 2 768 and Moss *op cit* (n 77) par 607. See also *Roy v Basson supra* (n 61) 86B-C and *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd supra* (n 72) 761H.

⁷⁹ *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd supra* (n 72) 761H.

⁸⁰ *Gabriel v Enchanted Bed and Breakfast supra* (n 61) 86E-F.

⁸¹ Moss *op cit* (n 77) par 607 and Beckerling & Douvelos 'Tourism' in Joubert (ed) *LAWSA* par 42. See also Voet 4 9 2 767-768.

⁸² See Moss *op cit* (n 77) par 607 and Beckerling & Douvelos *op cit* (n 81) par 42). See also *Glover v Finch* 1921 CPD 358 at 361 where the Court held that negligence of the guest is a consideration that can be taken into account in determining the liability of the innkeeper. *In casu* the Court found that a hotel room door that was left unlocked resulting in a suit of clothes being removed from the room did not constitute negligence in the context of that case and the innkeeper was held liable for the loss.

accepted by or entrusted to the innkeeper when brought onto or into the premises of the accommodation establishment.⁸³ The Court in *Davis v Lockstone* stated that

[t]o hold that ... the inn keeper would not be liable for the loss of luggage which had not been specially entrusted to him for safe keeping, would make the law of but little effect, seeing that a guest in an hotel needs his luggage in his room, and consequently could not hand it over to the proprietor for safe keeping.⁸⁴

The test for excluding the strict liability imposed under the edict is whether the loss or damage to the property of the guest was the result of an occurrence that was unforeseen and/or unexpected and/or irresistible and/or something that human foresight could not guard against. Once it is established that the occurrence which caused the damage or loss was indeed an occurrence which could not be foreseen, expected, resisted or which human foresight could not guard against, and the onus is on the innkeeper to do so, liability of the innkeeper is excluded. The establishment of an exception can be undone however, by the traveller showing that the innkeeper was negligent in exposing the goods to the occurrence which would normally qualify as an exception.

In the *Roy* case the Court held that, in determining liability under the edict, it must consider the circumstances relating to the particular event (in this case the particular fire). In the context of this case it was not sufficient to say that there had been a number of fires in the area and therefore this particular fire, and resultant damage, should have been foreseen.⁸⁵ The correct approach is to consider the particular circumstances under which the loss or damage occurred to determine whether those were circumstances that resulted from some power or agency which could not be resisted or controlled by the ordinary individual. In the *Roy* case for instance, it was found that the fire (and resulting loss) initially was not foreseeable, and secondly, the spreading of the fire to the inn could not be resisted.⁸⁶

The issues of theft, burglary and robbery present particular difficulties. Theft is not considered to be 'inevitable loss' and is distinguished from loss caused by 'burgling

⁸³ See Beckerling & Douvelos *op cit* (n 81) par 42.

⁸⁴ *Supra* (n 61) 161.

⁸⁵ *Supra* (n 61) 87B.

⁸⁶ *Supra* (n 61) 87F-88F.

thieves' and robbery.⁸⁷ However, burglary in this context must not be given a strict technical meaning of house-breaking but should be understood in the sense of breaking into a house (or inn or hotel) by force.⁸⁸ Theft perpetrated by the mere opening of a door or window (which could technically constitute house-breaking or burglary) would therefore not necessarily bring the loss within the understanding of an 'inevitable loss' for purposes of excluding the liability of the innkeeper. The innkeeper will have to show that the occurrence was indeed an occurrence which could not be foreseen, expected, resisted or which human foresight could not guard against. The innkeeper will have to show that, where the occurrence could be reasonably foreseen, he or she had taken reasonable measures to prevent it. The more violence which is used in perpetrating the damage or loss the more unforeseen, unexpected and/or irresistible the loss is. The less violence, the more difficult it may be for the innkeeper to establish that the loss or damage was indeed unforeseen, unexpected, irresistible, or that human foresight could not have guarded against the event.

Zimmerman points out, '[t]here have always been reasons for the *receptum*, ..., most notably those deriving from the fact that the customer and his property are exposed to dangers emanating from a sphere which only the other party is able to organise and control'.⁸⁹ It is exactly for this reason, and the difficulty the traveller will have in proving fault, that the Praetorian edict must still apply by imposing strict liability on the innkeeper. Without the edict the traveller will be in an untenable position in cases of house-breaking without violence. The least a traveller could expect from the innkeeper is that the latter takes reasonable precautions in safeguarding the property of the traveller while a guest at the inn.⁹⁰

In the context of the *Gabriel* case the questions arise whether, firstly, the event of a theft or burglary was foreseeable; and, secondly, if so, could it have been resisted by taking reasonable precautionary measures? Considering the context of the event it is relevant that there were numerous break-ins in the area and that these break-ins

⁸⁷ Voet 4.9.2 767.

⁸⁸ *Davis v Lockstone supra* (n 61) 161 and 166.

⁸⁹ *Op cit* (n 69) 521.

⁹⁰ See Tait & Vrancken 'The fire, the burglary and the praetorian edict *de nautis, cauponibus et stabulariis*' (2010) *Obiter* 175.

were not accompanied by violence. The potential for loss to guests had to be foreseen and, in turn, had to be guarded against by taking reasonable precautions. By securing the window this particular burglary and resultant loss could have been prevented. As it is the innkeeper that is subject to the imposition of strict liability he or she should have ensured that the window was closed or secured by having had burglar proofing installed. Had the window been secured and had that obstacle been overcome with violence then, in all likelihood, the innkeeper would have escaped liability as the use of violence was in all probability not reasonably foreseeable. It was the lack of reasonable precautions to guard against a foreseeable occurrence that founded liability on the part of the innkeeper.⁹¹

The position regarding the application of the Praetorian edict in relation to theft (which is understood to include non-violent house-breaking) can be set out in the following terms: as a point of departure, loss or damage as a result of theft, results in the innkeeper being liable. This liability is not depended upon the negligence of the innkeeper and is imposed for policy reasons. If the loss or damage is the result of theft that was not foreseeable then it means that the occurrence falls within the ambit of what can be described as an exception to the application of the edict. There is then no liability. The innkeeper must establish this exception. Where the occurrence is foreseen or is reasonably foreseeable, it requires that consideration be given to whether the innkeeper took reasonable measures to prevent the occurrence or not. If reasonable preventative measures were taken but the event still occurred, then there is no liability because the overcoming of reasonable preventative measures will qualify as an exception (for being irresistible, for example). Again the onus is on the innkeeper to prove that the occurrence is an exception (because it could not be resisted despite reasonable measures having been taken). Where the occurrence is foreseen or reasonably foreseeable and the innkeeper does not take reasonable measures to prevent it, then the innkeeper will be liable for the loss based on his negligence.

⁹¹ Van der Bijl *op cit* (n 74) 570-580 argues that the absolute or strict liability of the innkeeper is no longer appropriate and that liability should rather be based on culpability, amongst others because of policy reasons and the absence of negligence can provide a defence against a claim under the edict.

In *Frank v Biden* it was confirmed that the liability of the innkeeper in terms of the edict did not extend beyond the departure of the traveller.⁹²

(ii) *Depositum*

Another type of contract at in common law which can play a role in regulating the relationship between a supplier of accommodation and a tourist is *depositum*. It often happens that property is left with the supplier of accommodation services (such as a B&B or hotel), to be kept until the return of the tourist from further travels. The tourist is then not staying at the establishment but merely leaving his/her property there for a period of time.⁹³ *Depositum* can be defined as 'a contract whereby one person delivers to another a thing for safekeeping on the understanding that it is to be returned on demand'.⁹⁴ In order for such a contract to come into being, there must be an express undertaking to retain and have charge of something, and not merely a passive acquiescence that an object may be left somewhere.⁹⁵ (Although the facts of the *Roy* case are silent on this aspect, it is very difficult to accept that in this particular scenario there was no explicit agreement of depositing the property of the tourist with the inn, making the application of the Praetor's edict *in casu* difficult to understand.)⁹⁶

A contract of *depositum* requires of the *depositarius* to keep the object deposited in his or her custody, to take proper care of the object so entrusted to him, and to restore the thing unimpaired to the depositor.⁹⁷ However, the *depositarius* does not have a duty of special care in respect of the object deposited. What is required is the same care and vigilance that the *depositarius* will apply in respect of his or her own property.⁹⁸

⁹² 1886 OFS 16 18.

⁹³ This is indeed what happened in *Roy v Basson supra* (n 61).

⁹⁴ Hutchison *op cit* (n 77) 581.

⁹⁵ Bester 'Deposit' in Joubert (ed) *LAWSA 2nd ed* (2005) Vol 8 Part 1 par 174. See also *Frank v Biden supra* (n 92) 18.

⁹⁶ See Vrancken & Tait *op cit* (n 90) who suggest that on the facts of *Roy v Basson supra* (n 61) *depositum* and not the Praetor's edict should have been applied to the situation.

⁹⁷ Bester *op cit* (n 95) par 177 and *Swart v Shaw Racing Stables supra* 208 C.

⁹⁸ *Frank v Biden supra* (n 92) 20.

The depositary, if unable to restore the object left for safekeeping in an undamaged condition, however, has the onus of proving that the damage was not a result of his or her negligence.⁹⁹ In *Stocks & Stocks v T J Daly & Sons (Pty) Ltd*¹⁰⁰ the Court stated that the depositary 'is under a duty to exercise reasonable care in regard to the goods entrusted to him for conveyance and who, in the event of the goods being damaged or destroyed, is liable in damages to the owner thereof unless he can show that the damage or destruction occurred without *culpa* or *dolus* on his part'.

The Appellate Division, as it then was, continued as follows:¹⁰¹

The position of a contracting party whose liability is governed by the provisions of the Praetor's Edict and the position of a depositary or bailee for reward is similar in that in each case the *onus* which lies on him in regard to loss of or damage to the goods entrusted to his custody 'arises as an inference from the nature of the contract which places him under an obligation to return the article or prove the reason why he has failed to do so' ...; the only real difference being that in the case of the party subject to the Praetor's Edict the grounds upon which he can escape liability are substantially more circumscribed than in the case of the depositary or bailee for reward.

(d) Own accommodation

Tourists may also make use of their own accommodation, as opposed to supplied accommodation, when going on holiday. This may include making use of a motor-home, caravan or camping. In such a case the tourist must make use of a campsite that allows for overnight stay as camping is usually not allowed in public open spaces.¹⁰² The legal relationship between the campsite owner and the tourist is usually regulated by contract in terms of which the tourist undertakes to pay a fee in return for which the campsite owner makes available to the tourist certain facilities.¹⁰³

Tourists may also make use of accommodation in terms of a timesharing scheme which basically entails that the tourist has the right to the exclusive use and occupation of accommodation (such as a room in a hotel) for a particular period

⁹⁹ Bester *op cit* (n 95) par 179.

¹⁰⁰ *Supra* (n 72) 762A.

¹⁰¹ *Supra* (n 72) 762B–C.

¹⁰² Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 346.

¹⁰³ Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 346.

annually.¹⁰⁴ In practice people will buy timeshare to secure holiday accommodation. The accommodation acquired is then actually the (private) property of the tourist. Often these timeshare schemes will allow for the letting of the accommodation when the owner does not want to make use of it. The accommodation is then let to tourists either on a private basis (between the owner and a tourist directly) or through the management of the specific scheme acting as agent. The normal rules of lease will apply to these situations.

The timeshare industry however is substantially regulated by legislation. The Property Time-sharing Control Act¹⁰⁵ regulates the sale and lease of timesharing interests in immovable property, dealing mainly with aspects relating to the development of timeshare schemes; the contents of advertisements regarding the sale of timeshare interests; disclosures to be made by a developer; the terms of the contracts of sale of timeshare interests, and the management of timeshare schemes.¹⁰⁶ Consumers are also specifically protected by the Act in that sellers are not allowed to contract out of liability for any misrepresentations made by the seller or an agent of the seller.¹⁰⁷

The timeshare industry is further regulated in terms of a code of conduct prepared by the Business Practices Committee, established in terms of the former Harmful Business Practices Act,¹⁰⁸ and the Timeshare Institute of South Africa.¹⁰⁹ The code aims to provide for the self-regulation of the industry by balancing the interests of both consumers and the industry.¹¹⁰

Some people are fortunate enough to have their own holiday home where vacations are spent. Where the house must first be built or where it is deemed necessary by the owner of the property to make alterations or improvements, there is consumer

¹⁰⁴ Delpont *South African Property Practice and the Law* (2001) 136.

¹⁰⁵ Act 75 of 1983.

¹⁰⁶ See Delpont *op cit* (n 104) 138.

¹⁰⁷ Vrancken 'Hospitality law' in Vrancken *op cit* (n 17) 356.

¹⁰⁸ Act 71 of 1988. See the discussion on this Act in Chapter 3 *infra*.

¹⁰⁹ Delpont *op cit* (n 104) 137-1.

¹¹⁰ Delpont *op cit* (n 104) 137-1.

protection provided by the Housing Consumers Protection Measures Act.¹¹¹ The Act makes provision for the protection of housing consumers and the regulation of the home-building industry. The Act provides for the establishment of the National Home Builders Registration Council (NHBR) whose purposes are to represent the interests of housing consumers by providing warranty protection against defects in new homes; to regulate the home-building industry; to provide protection to housing consumers in the event of the failure of home builders to comply with their obligations in terms of the legislation; to establish and promote ethical and technical standards in the home-building industry, and to promote housing consumer rights and to provide housing consumer information.¹¹² One of the specific ways in which the Act seeks to protect consumers is to require of the home builder to ensure that the agreement concluded between the builder and the consumer is reduced to writing, signed by both parties and sets out all the material terms of the agreement including the financial obligations of the consumer.¹¹³

4.3 The CPA and the accommodation segment

Chapter 2 of the CPA sets out the substantive consumer rights provided for by the Act. The main aim of this chapter of the study is to indicate to what extent the CPA, particularly selected rights from Chapter 2 of the Act, impact on the accommodation segment of the tourism industry. As explained in Chapter 1 this part constitutes the primary objective of the study.

4.3.1 Right to equality in the consumer market

Considering the particular history of South Africa and the preamble¹¹⁴ to the CPA, as well as the stated purpose and policy¹¹⁵ of the Act it comes as little surprise that the

¹¹¹ Act 95 of 1998.

¹¹² S 3 of the Housing Consumers Protection Measures Act. See also Church & Church in 'Housing' in Joubert (ed) *LAWSA* 2nd ed (2008) Vol 11 36-37.

¹¹³ S 13(1) of the Housing Consumers Protection Measures Act. See Church & Church *op cit* (n 112) par 48.

¹¹⁴ The first statement of the Preamble recognises '[t]hat apartheid and discriminatory laws of the past have burdened the nation with unacceptable high levels of poverty, illiteracy and other forms of social and economic inequality'.

¹¹⁵ S 3(1)(b) of the CPA provides that the purpose of the Act is to ameliorate disadvantages experienced in accessing the supply of goods and services by consumers, particularly the poor

first consumer right to be provided is the right to equality in the consumer market. The right to equality is set out in sections 8, 9 and 10 of the CPA. Equality is a core value underlying the democratic society envisioned by the Constitution of the Republic of South Africa, 1996 (the Constitution).¹¹⁶ There is no doubt that the guarantee of equality lies at the heart of the Constitution and defines the very ethos on which the Constitution is based.¹¹⁷

The Constitution prescribes that everyone is equal before the law and entitled to both the equal protection and benefit of the law.¹¹⁸ Furthermore, it proscribes that neither the state nor any person may unfairly discriminate against anyone on any of the prohibited grounds, which include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.¹¹⁹ Equality entails 'the full and equal enjoyment of all rights and freedoms'.¹²⁰ To further promote the achievement of equality the Legislature adopted the Promotion of Equality and the Prevention of Unfair Discrimination Act.¹²¹ The Equality Act contains a general prohibition against discrimination and states that '[n]either the State nor any person may unfairly discriminate against any person'.¹²² The Act, in section 1, defines discrimination as follows:

Discrimination means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-

- (a) imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.

The Equality Act defines 'prohibited grounds' in section 1 of the Act as:

and other vulnerable groups. The aim and purpose of the Act clearly captures a vision of establishing greater equality for consumers within the consumer market.

¹¹⁶ De Vos 'Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court' (2002) *THRHR* 63.

¹¹⁷ Devenish *A Commentary on the South African Bill of Rights* (1999) 36. See also, for example, *Fraser v Children's Court, Pretoria North* 1997 2 BCLR 153 CC par 20.

¹¹⁸ S 9(1) of the Constitution.

¹¹⁹ S 9(3) & (4) of the Constitution.

¹²⁰ S 9(2) of the Constitution.

¹²¹ Act 4 of 2000 (the Equality Act).

¹²² S 6 of the Equality Act.

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that ground-
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

The specified grounds are a precise copy of the grounds mentioned in section 9 of the Constitution. The Equality Act anticipates that discrimination may also be practised on grounds other than the specified grounds and for that reason includes a general ground on which a claim to unfair discrimination can be based provided that the impact of the discrimination is to cause or perpetuate systemic disadvantage, or that it undermines human dignity, or adversely affects the equal enjoyment of rights and freedoms in a serious manner that is comparable to discrimination based on one or more of the specified grounds. The Equality Act therefore also guards against forms of discrimination that may exist or may develop and which fall outside the specified grounds.

The Schedule to the Equality Act contains a list of practices in certain sectors which serve as *prima facie* illustrations of unfair discrimination. This list provides, for instance, that the unfair refusal or failure to provide goods or services or to make available facilities to any person or group of persons on one or more of the prohibited grounds will constitute such an unfair practice.¹²³ The equality provisions of the Constitution and the Equality Act have clear implications for the consumer market.

In following the lead of the Constitution and the Equality Act, section 8 of the CPA provides for the protection against discriminatory marketing. The definition of 'market, when used as a verb, means to promote or supply any goods or services'.¹²⁴ Marketing must therefore be understood to include both the promotion of goods and/or services, as well as the actual supply of goods and/or services.¹²⁵ Sections

¹²³ Para 9(a) of the Schedule to the Equality Act.

¹²⁴ S 1 of the CPA.

¹²⁵ Tait & Mazibuko 'Introduction to marketing management' in Bosch, Tait & Venter *Business Management: An Entrepreneurial Perspective* (2006) 413 describes marketing (from a business management perspective) as 'a business function that can be defined as a process of satisfying consumer needs by adding value through appropriate products or services, at reasonable

8(1) and (2) of the CPA as read with section 9 set out the type of conduct that may constitute unfair discriminatory conduct by suppliers in respect of consumers. Section 8(1) provides that:

- (1) Subject to section 9, a supplier of goods or services must not unfairly-
 - (a) exclude any person or category of persons from accessing any goods or services offered by the supplier;
 - (b) grant any person or category of persons exclusive access to any goods or services offered by the supplier;
 - (c) assign priority of supply of any goods or services offered by the supplier to any person or category of persons;
 - (d) supply a different quality of goods or services to any person or category of persons;
 - (e) charge different prices for any goods or services to any persons or category of persons;
 - (f) target particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or
 - (g) exclude a particular community, district, population or market segment from the supply of any goods or services offered by the supplier,on the basis of one or more grounds of unfair discrimination contemplated in section 9 of the Constitution or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.

Section 8(2) provides that:

[s]ubject to section 9, a supplier must not directly or indirectly treat any person differently than any other, in a manner that constitutes unfair discrimination on one or more grounds of unfair discrimination contemplated in section 9 of the Constitution or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act, when

- (a) assessing the ability of the person to pay the cost, or otherwise meet the obligations, of a proposed transaction or agreement;
- (b) deciding whether to enter into a transaction or agreement, or to offer to enter into a transaction or agreement;
- (c) determining any aspect of the cost of a transaction or agreement to the consumer;
- (d) interacting with the consumer –
 - (i) in the supplier's place of business, or
 - (ii) in the course of displaying or demonstrating any goods, testing or fitting any goods, or negotiating the terms of a transaction or agreement, or
- (e) selecting, preparing, packaging or delivering any goods for or to the consumer, or providing any services to the consumer;
- (f) proposing or agreeing the terms and conditions of a transaction or agreement;
- (g) assessing or requiring compliance by the person with the terms of a transaction or agreement
- (h) exercising any right of the supplier under a transaction or agreement in terms of this Act or applicable provincial consumer legislation;
- (i) determining to continue, enforce, seek judgment in respect of, or terminate a transaction or agreement; or
- (j) determining whether to report, or reporting, any personal information of such person.

prices, through acceptable distribution channels using promotional strategies and marketing communication in an ever-changing business environment'. Marketing, in a business management context, also includes both a promotional and a supply aspect.

Section 8(1) of the CPA refers to specific types of actions that may not be performed by a supplier in respect of a person or category of persons in an unfair manner and which action or conduct is based on, or precipitated by, any of the prohibited grounds. Section 8(2) of the Act covers conduct where a supplier unfairly differentiates between different consumers on one or more of the prohibited grounds of discrimination.¹²⁶

Before discussing the substantive provisions of the section, a few comments concerning the drafting of the section may be relevant. Firstly, it is not immediately obvious why the Legislature has decided on this rather elaborate formulation contained in the two sub-sections. It is submitted that there is very little, if any, substantive difference between the respective provisions contained in section 8(1)(a), (b), (c), (d), (e), (f) or (g) of the Act. It could further be argued that there is indeed no significant difference between sections 8(1) and 8(2) of the CPA. The basis for such an argument is that an unfair discriminatory method of assessing whether or not a person can pay for a product or service and which discrimination is based on the prohibited grounds contemplated in section 9 of the Constitution or Chapter 2 of the Equality Act¹²⁷ (section 8(2)(a) of the CPA) is just another way of excluding a person from accessing any goods or services on such prohibited grounds as envisaged by section 8(1)(a) of the CPA. The only value that is added by drafting the section in this manner is the different examples provided of prohibited differentiation, thereby giving both suppliers and consumers a better understanding of the type of behaviour that is prohibited. That this seems to be the only rationale for the particular drafting of the section is supported by the fact that section 8(4) of the Act specifically states that a court is not limited from considering any conduct between a supplier and consumer not contemplated in section 8 and finding such conduct to constitute prohibited conduct.¹²⁸ Sections 8(1) and (2) of the Act therefore do not contain a *numerus clausus* of prohibited differentiation.¹²⁹

¹²⁶ Van Eeden *A Guide to the Consumer Protection Act* (2009) 150.

¹²⁷ S 8(2)(a) of the Equality Act.

¹²⁸ S 8(4)(a) & (b) of the CPA.

¹²⁹ The only difference between examples listed in s 8 and those not listed is the fact that a presumption of unfair discrimination is created by s 10(4)(a) of the CPA in respect of those examples listed.

Considering the definition of a supplier¹³⁰ and market, it is submitted that all of the scenarios in sections 8(1) and 8(2) of the CPA could have been addressed with a provision couched in the terms set out below without running the risk of limiting the protection intended by the section. Such an alternative formulation of the provision may have read as follows:

Subject to section 9, a supplier must not unfairly differentiate between any consumers on any of the prohibited grounds contemplated in section 9 of the Constitution or Chapter 2 of the Promotion of Equality and the Prevention of Unfair Discrimination Act.

Another aspect about the drafting of the section relates to the use of the phrase 'directly or indirectly' that appears in section 8(2) of the CPA but is not in subsection (1). The type of conduct that section 8(1) protects consumers against can also be used to unfairly discriminate against consumers in either a direct or indirect manner. Both sections 8(1) and (2) of the CPA are placed squarely within the context of a constitutional equality enquiry meaning that direct or indirect unfair discrimination on a prohibited ground is unlawful. It was not necessary therefore to include the specific phrase in section 8(2), but because it was included, it should also have been included in section 8(1) for sake of consistency and to avoid questions as to the reasons for its inclusion in section 8(2) but exclusion from section 8(1) of the Act.

A further comment that must be raised is the inconsistent use of terminology. 'Person or category of persons' is used in section 8(1) of the CPA, whereas 'consumer' and 'person' are used in section 8(2) in an apparent *ad hoc* fashion.¹³¹ It is submitted that it would have been preferable had the Legislature opted to make consistent use of the term 'consumer' in both these subsections as this would provide consistency and certainty in the mind of the reader, be it a supplier or consumer or body responsible for interpreting and applying the Act.

Subsequent to these general comments about the drafting of sections 8(1) and (2) of the CPA, the attention will now move to the specific protection provided by the respective sub-sections. Section 8(1)(a) of the Act prohibits a supplier from unfairly

¹³⁰ In terms of s 1 of the CPA 'supplier means a person who markets any goods or services'.

¹³¹ S 8(1)(a)-(e) of the CPA uses the words 'person or category of persons', whilst s 8(2)(a), (g) & (j) of the CPA uses 'person' whereas s 8(2)(c), (d) & (e) use the term 'consumer'.

excluding any person or category of persons from accessing any goods or services offered by the supplier on the basis of any of the prohibited grounds. It has been argued that 'accessing' can mean 'pursuing access or of seeking to gain or having access'.¹³² Simply put, it means that a supplier (such as the proprietor of an accommodation establishment) cannot prevent a person from having access to such an establishment based on any of the prohibited grounds in an unfair manner.

Exclusion can also occur on the basis of promotion (being an aspect of marketing). Excluding a certain category of persons from the promotion of the attraction will result in them being excluded from having access.¹³³ Promotion, sometimes also referred to as the 'marketing communication mix', includes advertising, sales promotion, personal selling and publicity.¹³⁴ It is quite conceivable that the promotion of an accommodation establishment can be aimed at a particular group and that a person or category of persons is thereby excluded. Should a hotel for instance advertise that it has a peaceful and tranquil atmosphere and include a statement: 'Sorry, no kids' on its website or marketing brochures such practice will constitute (direct) discriminating on the basis of the age of the consumer. An accommodation establishment may promote itself as 'pink' thereby focusing its promotion on the homosexual segment of the market. Such a promotion, it could be argued, may be directly or indirectly discriminating against heterosexuals, depending on the manner in which the promotion is conveyed.¹³⁵

It is not always that obvious that there is differentiation and that the differentiation is actually unfair. Section 8(1)(e) of the CPA provides a case in point. The paragraph provides

- (1) A supplier of goods or services must not unfairly-
 - (e) charge different prices for any goods or services to any persons or category of persons;

¹³² Van Eeden *op cit* (n 126) 151.

¹³³ Van Eeden *op cit* (n 126) 151.

¹³⁴ Tait & Mazibuko 'Introduction to marketing management' in Bosch, Tait & Venter *op cit* (n 125) 432-436.

¹³⁵ See s 9(5) of the Constitution and s 13(2) of the Equality Act which provides that discrimination will be unfair if the discrimination is based on a prohibited ground. Section 10(2)(a) of the CPA contains a similar provision in respect of differentiation under s 8 of that Act.

on the basis of one or more grounds of unfair discrimination contemplated in section 9 of the Constitution or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.

Businesses will often adapt the prices of a product or service to allow for differences in customers, products or locations. This means, for instance, that a business will sell a product or service at two or more different prices even though the difference in price is not based on any difference in the cost of providing the service or product or a difference in the service or product itself.¹³⁶

Segmented pricing can take different forms and includes location pricing, time pricing and customer-segment pricing. Location pricing is the strategy of asking different prices for different locations: a theatre would, for instance, ask different prices for tickets in different parts of the theatre. The cost of providing the product or service is the same for all the seats in the theatre but a premium can be asked for certain seats because of customer preference for those seats (location). Time pricing again is the strategy where different prices are asked at different times of the year. Accommodation establishments readily make use of this strategy to raise or lower prices based on the season. The strategy where different customers have to pay different prices for the same product or service is an example of what is referred to as 'customer-segment pricing'.¹³⁷

Businesses worldwide employ different pricing strategies to try and optimise revenue. One price for accommodation may be asked for adults, another for children. One such pricing strategy employed is to differentiate between South African citizens and foreign nationals (or between residents and non-residents)¹³⁸ when charging for a service or product.¹³⁹ As indicated, section 8(1)(e) of the CPA prohibits the charging of different prices for any goods or services to any persons or category of persons on

¹³⁶ De Jager 'Pricing products: Pricing strategies' in 'Managing Marketing Information' in Kotler, Armstrong & Tait *Principles of Marketing – Global and Southern African Perspectives* (2010) 336.

¹³⁷ De Jager 'Pricing products: Pricing strategies' in 'Managing Marketing Information' in Kotler, Armstrong & Tait *op cit* (n 136) 336.

¹³⁸ It is appreciated that there may be a legal difference between a non-resident and a foreign national on the one hand and between a resident and a South African citizen on the other hand. This aspect is addressed later in the discussion.

¹³⁹ For example, the Belvidere Manor of Knysna advertised a 'Fabulous Winter Special' for the period 12 July to 30 September 2010 but made it clear that the rate of the special offer extends only to South Africa residents.

the basis of one or more of the grounds of unfair discrimination contemplated in the Constitution or the Equality Act. The aforementioned pricing strategy of differentiating between South African citizens and foreign nationals or between South African residents and non-residents in the price for accommodation services may be in conflict therefore with the provisions of the CPA and requires closer scrutiny.

The wording of subsections 8(1) and (2) of the CPA places the question squarely in the ambit of a constitutional equality inquiry. Therefore the test formulated in *Harksen v Lane NO*¹⁴⁰ should be applied to the problem.

- ***The first phase of the Harksen-test***

In terms of the *Harksen*-test the first matter to be considered is whether the conduct under consideration actually differentiates between people or categories of people. If it does not, then that is the end of the equality enquiry. If there is differentiation then the question is whether the differentiation bears a rational connection to a legitimate purpose. This is the threshold-test: unless there is differentiation there can be no violation of the equality provisions. But, differentiation can only violate the equality provision if such differentiation does not have a rational connection to a legitimate purpose.

In the question under discussion, different prices are asked of people on the basis of their citizenship or residency. The price to be paid is determined by whether the person is a South African citizen (paying a cheaper price normally) or a non-citizen (or South African resident or non-resident) and therefore there appears to be clear differentiation on the basis of nationality (or citizenship)¹⁴¹ or on the basis of residency.

¹⁴⁰ 1998 (1) SA 300 (CC) par 53. For a discussion of the *Harksen* test see amongst others Currie & De Waal *The Bill of Rights Handbook* (2005) 234 – 264 and Govindjee & Vrancken *Introduction to Human Rights Law* (2009) 74 – 80.

¹⁴¹ For current purposes there is no legal difference between the concepts nationality and citizenship and the terms are therefore used interchangeably. See Rautenbach & Malherbe *Constitutional Law* (2009) 57.

The 'rational connection' test requires of the court to evaluate the reasons provided by the supplier for the conduct that allegedly differentiates unfairly in order to determine whether the purpose of the conduct is legitimate. The court must consider then whether there is a rational relationship between the differentiation and the purpose sought to be achieved by the conduct.¹⁴² In *Jooste v Score Supermarkets Trading (Pty) Ltd*¹⁴³ the Court said 'that the only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this inquiry whether the scheme chosen by the legislature could be improved in one respect or another'. The rationality test essentially entails asking whether there is a good reason for treating people differently. If not, then people must be treated the same, because inequality arises from treating people differently who should be accorded equal treatment.¹⁴⁴ By treating people the same effect is given to the constitutional imperative of formal equality, which is providing all people with equal protection and equal benefit of the law.

It is submitted that there is no rational connection between differentiating in the price for providing accommodation services between a South African citizen and non-citizen or a South African resident and non-resident, and the purpose of differentiating. There can only be one purpose for asking a higher price of certain categories of consumers and that is to maximise profits, and there is nothing wrong with that provided it happens within the parameters permitted by law. Specifically, one cannot differentiate between consumers in the price that is asked purely on the basis that one is a citizen (or even a non-citizen but who happens to be residing in South Africa) and the other is a foreign national (or even a citizen who happens to be residing in another country). If the basis for differentiating is citizenship then a non-resident citizen will pay a different price (normally less) than a resident non-citizen. If the basis for differentiating is residence then a resident non-citizen can pay less than a non-resident citizen. However, at no stage is ability to pay considered, and the only actual reason why one consumer could be asked to pay more for the exact

¹⁴² Currie & De Waal *op cit* (n 140) 241.

¹⁴³ 1999 (2) SA 1 (CC). See also *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) par 25 and *Geldenhuys v NDPP* 2009 (5) BCLR 435 (CC) par 33.

¹⁴⁴ Bonthuys & Albertyn *Gender, Law and Justice* (2005) 92.

same service as the next consumer must be the perception that the consumer from outside the country can afford to pay more because such a person earns money in euros, British pounds or US dollars.¹⁴⁵ Clearly this is completely arbitrary. Considering what the court said in *Jooste v Score Supermarkets Trading (Pty) Ltd*¹⁴⁶ it must be stated that there is no good reason for treating people differently. This form of differentiation manifests a 'naked preference' for residents or citizens, as the case may be, or rather a naked deprecation for non-citizens or non-residents, as the case may be. It is therefore submitted that a challenge to this form of differentiation should be successful at the first phase of the *Harksen*-test.¹⁴⁷

A provision, decision or practice (such as a pricing strategy) which differentiates between people, and which differentiation is not rationally connected to a legitimate government purpose, violates the equality provisions of the Constitution as there is no rational reason for treating them differently. The limitation clause has the potential to justify this provision.¹⁴⁸ It is difficult to see how a policy or provision that is arbitrary or irrational can be justifiable, even when attempting to serve a legitimate government purpose. However, the applicability, if any, of the limitation clause will be considered below.

¹⁴⁵ Of course a non-citizen resident may also be earning a substantial income in e.g. US dollars or euros and a non-resident citizen can also earn a significant income in a foreign currency, or both may earn very little. So, depending on whether the basis for differentiating is citizenship or residency some will win and some will lose. Then one has not even considered visitors from so-called 'poor' countries.

¹⁴⁶ *Supra* (n 143).

¹⁴⁷ Although not bearing on addressing the first phase of the *Harksen*-test it must be stated that the potential for the exploitation of foreign tourists must be clear if the above line of argumentation is followed. The negative impact that such differentiating practices can have on perceptions of tourists and ultimately the tourism industry cannot be in the best interest of South Africa.

¹⁴⁸ Govindjee & Vrancken *op cit* (n 140) 77.

- ***The second phase of the Harksen-test***

In this phase of the test the question is asked whether the differentiation amounts to *unfair discrimination*. A two-stage enquiry is used to answer this question. Firstly, it must be considered whether the differentiation constitutes *discrimination*, and if so, secondly, it must be determined whether the discrimination is *unfair*.

Not all differentiation necessarily constitutes unfair discrimination: if the differentiation is based on one of the specified grounds mentioned in the Constitution or the Equality Act, it is discrimination and the unfairness of such discrimination is presumed.¹⁴⁹ If the differentiation is based on an unspecified or analogous ground, then whether it is discrimination or not 'will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner'.¹⁵⁰ Nationality is not one of the specified grounds mentioned in section 9 of the Constitution, nor is it mentioned in section 1 of the Equality Act. However, nationality is one of the grounds to be given special consideration in terms of section 34 of the Equality Act for potential elevation to the status of one of the listed prohibited grounds, thereby reflecting the sensitivity around differentiation on the basis of nationality (citizenship). Differentiation on citizenship (or rather differentiation on the basis of citizenship and non-citizenship) has been recognised in fact as differentiation on a so-called analogous or unspecified ground.¹⁵¹ It is submitted therefore that, in the problem under discussion, there is discrimination. The next issue to be determined is whether the discrimination is fair.

In the context of the Equality Act, a claim to unfair discrimination can be established on a non-specified ground if the claimant can show that the impact of the discrimination is such as to cause or perpetuate systemic disadvantage, or undermine human dignity, or adversely affect the equal enjoyment of rights and

¹⁴⁹ S 9(5) of the Constitution and s 13(2)(a) of the Equality Act provide for this presumption in the respective enactments.

¹⁵⁰ *Harksen v Lane supra* (n 140) para 53.

¹⁵¹ *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC) paras 19-20. See also *Govindjee & Vrancken op cit* (n 140) 79.

freedoms in a serious manner that is comparable to discrimination based on one or more of the specified grounds.

In assessing whether the discrimination is fair or not, sections 14(2) and (3) of the Equality Act provide assistance. Section 14(2) provides that when considering whether the discrimination is fair, certain aspects can be considered, such as whether the discrimination 'reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned'.¹⁵² Other factors may also be considered and include whether the discrimination impairs or is likely to impair human dignity; whether it has a legitimate purpose; whether and to what extent it achieves its purpose; whether there are less restrictive and less disadvantageous means to achieve the purpose, and, whether the respondent has taken the measure as being a reasonable step to accommodate diversity.¹⁵³

Differentiating in price on the basis of citizenship imposes a burden, obligation or disadvantage on a person, or withholds benefits, opportunities or advantages from a person¹⁵⁴ on a ground that may very well affect such a person's dignity, and has the potential to cause systemic disadvantage.¹⁵⁵

As the discriminatory ground is an unspecified one, the complainant must establish the unfairness thereof.¹⁵⁶ Unfair discrimination essentially means that people are treated differently in a manner that impairs their fundamental dignity as human beings. Unfairness, in the final analysis, is determined by the impact of the discrimination on the complainants. This introduces the aspect of substantive equality requiring that, in considering whether there has been unfair discrimination, the approach should be contextual and historical.¹⁵⁷ The fact that foreign tourists generally cannot be said to have suffered from past patterns of disadvantage does not preclude their dignity from being injured when confronted with this type of discriminatory practice. Unfair discrimination occurs when people are treated

¹⁵² S 14(2)(c) of the CPA.

¹⁵³ S 14(3) of the CPA.

¹⁵⁴ See the definition of 'discrimination' in s 1 of the Equality Act.

¹⁵⁵ See para (b) of the definition of 'prohibited grounds' in s 1 of the Equality Act.

¹⁵⁶ See s 13(2)(b) of the Equality Act.

¹⁵⁷ Bonthuys & Albertyn *op cit* (n 144) 98-99.

differently in a manner that is hurtful or demeaning.¹⁵⁸ It is submitted that it cannot be argued that it would not impact negatively on a person's dignity when she or he has to pay more for a product or service than others just because such a person is an 'outsider' or foreign visitor. The message that is being conveyed is an idea of being different (perceived to be rich) and therefore less deserving of protection, and even that 'they' can be exploited as 'they' are at the mercy of the host country and its inhabitants. (Such a lack of a good reason for the differentiation must also be considered in the context of the rationality of the differentiation in relation to the purpose of the differentiation. The absence of a good reason makes the differentiation arbitrary and irrational.) It is therefore submitted that the discrimination under consideration is unfair.

The Constitutional Court stated in *Pretoria City Council v Walker*.¹⁵⁹

No members of a racial group should be made to feel that they are not deserving of equal 'concern, respect and consideration' and that the law is likely to be used against them more harshly than others who belong to other race groups.

It is argued that this reasoning can be applied equally to the current question under discussion. Where people with different citizenship or residency are made to feel that they are not equally deserving of concern, respect and consideration and that the law is likely to be used against them more harshly than against others who have a different citizenship or residency than their own they are treated differently in a manner that impairs their dignity.

- ***The third phase of the Harksen-test***

Once it has been determined that the discrimination is unfair it has to be considered whether the unfair discrimination is justified under section 36 of the Constitution: the limitations clause.

In terms of the said section, the rights in the Bill of Rights can only be limited in terms of a law of general application to the extent that the limitation is reasonable and

¹⁵⁸ Currie & De Waal *op cit* (n 140) 244.

¹⁵⁹ 1998 (2) SA 363 (CC) par 81

justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

The first question to be addressed in the limitation enquiry is whether the limitation is contained in a law of general application. The Constitutional Court in *Barkhuizen v Napier* stated that a contractual term is not a law of general application and can therefore, on its own, not be subjected to a limitation analysis under section 36(1).¹⁶⁰ The implication hereof is that a contract in terms of which a private supplier of goods or services to a tourist who is a non-South African citizen or resident, which provides for a different price than for a South African citizen or resident, cannot be justified in terms of the limitation clause if the contract violates the fundamental right (to equality) of the tourist.

Therefore a customer-segment pricing strategy aimed at the tourist market and where the differentiation is based on citizenship or residency cannot pass a constitutional challenge based on equality and that this is indeed what section 8 of the CPA wants to achieve.

The Constitution creates a presumption of unfairness where the discrimination is based on one of the specified grounds, but the complainant bears the onus where the onus is based on an unspecified ground.¹⁶¹ The Equality Act appears to provide a complainant with some procedural benefits over a constitutional challenge based on unfair discrimination. Section 13(1) of the Equality Act provides that if the complainant makes out a *prima facie* case of discrimination, the respondent bears the onus of proof to show that the discrimination did not take place or that the conduct is not based on one or more of the prohibited grounds. Section 13(2) of the Act goes further than section 9(5) of the Constitution in that it creates a presumption of unfairness also in the case of discrimination on the basis of an unspecified (or analogous) ground such as nationality, provided the complainant established that the

¹⁶⁰ 2007 (5) SA 323 (CC) para 23.

¹⁶¹ S 9(5) of the Constitution.

discrimination causes or perpetuates systemic disadvantage and/or undermines human dignity and/or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a specified ground. The complainant must still go some way in establishing unfairness (for example, establishing that the discrimination undermines human dignity). But the Act provides the complainant with specific guidelines as to how the complainant can establish such unfairness.

The CPA contains its own provisions concerning the onus of proof in respect of challenges of unfair discrimination in the consumer market. Section 10(2) of the CPA provides that:

In any proceedings contemplated in this Part-

- (a) there is presumption that any differential treatment contemplated in section 8 is unfair discrimination, unless it is established that the discrimination is fair; and
- (b) a court may draw an inference that a supplier has discriminated unfairly if-
 - (i) the supplier has done anything contemplated in section 8 with respect to a consumer in a manner that constituted differential treatment compared to that accorded to another consumer;
 - (ii) in the circumstances, the differential treatment appears to be based on a prohibited ground of discrimination; and
 - (iii) the supplier, when called upon to do so, has refused or failed to offer an alternative reasonable and justifiable explanation for the difference in treatment.

The CPA, similarly to the Equality Act, creates a presumption of unfairness where any differential treatment contemplated in section 8 of the CPA takes place. Thus, for example, section 8(1)(e) of the CPA prohibits differential treatment of consumers by charging different prices for any goods or services to any persons or category of persons on the basis of one or more grounds of unfair discrimination contemplated in section 9 of the Constitution or Chapter 2 of the Equality Act (prohibited grounds). Any such price differentiation between different consumers creates a presumption of unfair discrimination entitling the consumer to protection against discriminatory marketing. The consumer therefore has to establish that there was conduct within the ambit of section 8 (for example, customer-segment pricing) and that the differentiation was based on a prohibited ground as contemplated in the Equality Act, which includes also unspecified grounds such as nationality, for the presumption of unfairness to come into operation. The supplier then has the burden to show that the differentiation was fair. If the differentiation is based on a specified ground, for

instance race, then the consumer only has to show that there was a differentiation in price and that the differentiation was based on race for the presumption of unfairness to arise. If the differentiation in price is based on an unspecified ground the consumer still will have to establish that the unspecified prohibited ground causes or perpetuates systemic disadvantage and/or undermines human dignity and/or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a specified ground. In this endeavour the consumer is assisted by the factors mentioned in subsections 14(2) and (3) of the Equality Act. Once that is done there will arise a presumption of unfairness. The factors include 'whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned'.¹⁶² Differentiating in price between citizens and non-citizens or residents and non-residents when providing tourist accommodation services cannot be argued to be 'intrinsic to the activity involved'. The factors mentioned in section 14(3) of the Equality Act include '[w]hether the discrimination impairs or is likely to impair human dignity',¹⁶³ 'whether the discrimination is systemic in nature',¹⁶⁴ and 'whether the discrimination has a legitimate purpose'.¹⁶⁵ As argued above, a practice of price differentiation on the basis of residency or citizenship does not have a legitimate purpose, is systemic in nature and serves to impair the dignity of people.

To assist the consumer the CPA provides for a scenario in section 10(2)(b)(i)-(iii), which, if it exists, will allow a court (and this subsection applies specifically to courts only), to draw an inference of unfair discrimination from the situation. A few comments on these provisions are called for.¹⁶⁶

¹⁶² S 14(2)(c) of the Equality Act.

¹⁶³ S 14(3)(a) of the Equality Act.

¹⁶⁴ S 14(3)(e) of the Equality Act.

¹⁶⁵ S 14(3)(f) of the Equality Act.

¹⁶⁶ S 10(2)(b) provides that-

a court may draw an inference that a supplier has discriminated unfairly if-

- (i) the supplier has done anything contemplated in section 8 with respect to a consumer in a manner that constituted differential treatment compared to that accorded to another consumer;
- (ii) in the circumstances, the differential treatment appears to be based on a prohibited ground of discrimination; and
- (iii) the supplier, when called upon to do so, has refused or failed to offer an alternative reasonable and justifiable explanation for the difference in treatment.

It appears, firstly, as if the provisions of section 10(2)(b)(i), (ii) and (iii) of the CPA must be read to be all present before the court may draw an inference that the supplier has discriminated unfairly. The main reason for this is the presence of the 'and' (and not an 'or') at the end of subparagraph (2)(b)(ii).

It is not clear immediately how section 10(2)(b) of the CPA can assist the consumer. Firstly, if a person has 'done anything contemplated in section 8'¹⁶⁷ then one has already performed an act, for example, excluded a person from accessing certain services on a prohibited ground as contemplated in the Constitution or Equality Act.¹⁶⁸ If the consumer has established this, then the presumption provided for in section 10(2)(a) of the CPA becomes operative and it is presumed that the differentiation constitutes unfair discrimination. The same applies in respect of the provision in section 10(2)(b)(ii) of the CPA. A consumer (complainant) would have had to establish that the specific differential treatment took place on a prohibited ground to be successful before a court. Nothing more is therefore added by the provisions contained in section 10(2)(b)(i) and (ii) of the CPA as far as proving unfair discrimination is concerned within the context of the CPA. If a consumer has already established the differential treatment as envisaged by section 8(1) and (2) of the CPA and has furthermore established that the differential treatment took place on a prohibited ground, then there is a presumption that the conduct constitutes unfair discrimination and, unless the supplier rebuts the presumption and proves that the discrimination was fair, the consumer will win his or her case. What the point is of allowing a court to draw an inference about unfair discrimination when the presumption is already operative, is unclear. Another aspect of section 10(2)(b)(ii) of the Act is the phrase 'appears to be based on'.¹⁶⁹ A consumer in any event will have to establish on a balance of probabilities that there is conduct as contemplated in section 8 of the CPA that differentiates on a prohibited ground before the respondent will have to answer a case. The words 'appears to be based on' seem to import a notion of a lesser and more subjective finding than a conclusion requiring that it be *based* on a prohibited ground, rather than *appears to be based* on a prohibited ground. Again it bears reiteration that section 10(2)(b) of the CPA can only apply in

¹⁶⁷ See s 10(2)(b)(i) of the CPA.

¹⁶⁸ See s 8(1)(a) of the CPA.

¹⁶⁹ See s 10(2)(b)(ii) of the CPA.

respect of court proceedings and in this respect the standard of proof is clear. What will be necessary to establish that differential treatment *appears* to be based on prohibited conduct is far from certain. In all likelihood the phrase 'appears to be based on' means nothing more than that a *prima facie* case has been made out which would be an interpretation that is completely in line with the normal rules of civil procedure.

Then section 10(2)(b)(iii) of the Act, thirdly, provides that the supplier, when called upon to do so, must have refused or failed to provide a reasonable and justifiable explanation for the difference in treatment, and only then by establishing this third requirement can a court draw the inference of the conduct constituting unfair discrimination. It is not clear whether the request for an explanation must, or can be done by the consumer or the court or both. It is in any event the duty of the court to provide the supplier with an opportunity to state his or her case, and a failure by the supplier to avail him- or herself of such an opportunity may then result in an adverse inference being drawn by the court. Equally the consumer bringing the matter to court must allege unfair discrimination and this will require a response from the supplier in the pleadings. Not responding to such an averment will be the death knell for the case of the supplier. It must be remembered that the provisions of section 10(2)(b) of the CPA apply during *court proceedings* contemplated in Part A of Chapter 2 of the Act, specifically, the right to equality in the consumer market. In order to comply with section 10(2)(b)(iii) of the Act this means that the supplier must be asked for an explanation during court proceedings. A failure at this stage to provide justification will certainly result in an adverse inference being drawn by the court. But again it will not add anything that has not already been established in terms of the rest of section 10(2)(b) of the CPA. In the final analysis it is submitted that section 10(2)(b) of the CPA is so uncertain of its meaning that it will not be of any assistance to the consumer.

The CPA aims to protect the interests of *all* consumers – also foreign tourists to South Africa. It is submitted that customer-segment pricing, where foreign tourists are asked a higher price for a service or product than South Africans falls foul of the CPA, the Equality Act and the Constitution. The CPA seems to add no additional protection not already provided for by the Equality Act, except for the fact that it

illustrates the type of practices that may offend the CPA by providing examples of potentially discriminatory conduct that may be unfair. These examples may serve to assist the consumer to better know and understand his or her rights. It may also assist the supplier in complying with the Act. It is unlikely, for purely practical reasons such as time, money and convenience, that a foreign tourist will take the customer segment-pricing of an accommodation establishment, or of any other supplier making use of such a policy, to court but this is certainly an issue that tourism organisations and/or consumer protection groups can take up with members so as to discontinue such a practice. This can be done through informal methods but where suppliers are recalcitrant the courts can be approached.

Sections 8(1) and (2) of the CPA are subject to section 9 of the Act, which provides for reasonable grounds for differential treatment in certain cases. So, for instance, section 9(1) provides that it is not a contravention of section 8 if a supplier refuses to supply or provide a minor¹⁷⁰ with specific goods or services, or to require the consent of a parent, guardian or other responsible person before supplying or providing access to particular goods or services in accordance with a public regulation, or as a reasonable precaution to protect the health, welfare or safety of the minor;¹⁷¹ or to refuse on reasonable grounds to enter into, or renew or continue with an agreement unless the supplier reasonably believes the minor to be emancipated;¹⁷² or reasonably designates a facility or service for the exclusive use of minors in general or within specific age groups or adults over the age of 60 years;¹⁷³ or advertise or supply goods or services to consumers at a discounted price solely for the reason that they are minors who have not yet attained a certain age or are persons over the age of 60 years.¹⁷⁴

Some interesting issues arise from section 9(1) of the CPA.¹⁷⁵ The first flows from the provisions of section 9(1)(a) of the Act which provides that it is not a

¹⁷⁰ A minor is a person between the ages of 7 and 18 years. See Kuschke 'Contractual capacity' in Hutchison & Pretorius *op cit* (n 52) 151.

¹⁷¹ S 9(1)(a) of the CPA.

¹⁷² S 9(1)(b) of the CPA.

¹⁷³ S 9(1)(c) of the CPA.

¹⁷⁴ S 9(1)(d) of the CPA.

¹⁷⁵ S 9(1) of the CPA reads as follows:

contravention of section 8 of the Act to refuse to supply particular goods or services to a minor in accordance with any public regulation, or to require parental (or other specified) consent before supplying the goods or services to the minor consumer as a reasonable precaution to protect the health, welfare or safety of the minor. On a first reading of section 9(1)(a)(i) of the CPA it may appear as if the supplier has a discretion to refuse the goods or services. This cannot be correct and it is submitted that a supplier may not supply goods or services to a minor in contravention of a public regulation which prohibits the supply of such goods or services to minors. It would be unlawful. Permission by a parent, for example, cannot negate the requirement to comply with the law, unless of course the public regulation provides specifically for that. Permission by the parent will not be a defence against a violation of the law by the supplier.

The provisions of section 9(1)(a)(ii) of the CPA, in turn, do however seem to provide the supplier with a discretion to refuse the particular goods or services to a minor unless there is parental (or other specified) consent. Before considering this question two points need to be made.

Firstly, section 9(1)(a) of the CPA refers to 'particular goods or services'. The Act does not define this term. The Preamble of the CPA states that one of the goals of

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- (1) It is not a contravention of section 8 for a supplier to-
- (a) refuse to supply or provide access to any particular goods or services to a minor, or to require the consent of a parent, guardian or other responsible adult before supplying or providing access to any particular goods or services to an unemancipated minor-
 - (i) in accordance with any public regulation; or
 - (ii) as a reasonable precaution to protect the health, welfare or safety of a minor;
 - (b) refuse on reasonable grounds to-
 - (i) enter into an agreement with a minor for the supply of any goods or services; or
 - (ii) continue, or renew, an agreement contemplated in subparagraph (i), unless the supplier has reason to believe that the minor is emancipated;
 - (c) reasonably designate any facility or service, permanently, or from time to time, for the exclusive use of-
 - (i) minors generally;
 - (ii) minors who are above or below a specified age, or between specified ages; or
 - (iii) adults who have attained a specified age of at least 60 years; or
 - (d) advertise, offer or agree to supply, or supply, any goods or services at a discounted price solely on the basis that the consumer-
 - (i) is a minor who has not yet attained a specified age; or
 - (ii) is an adult who has attained a specified age of at least 60 years.

the CPA is to 'protect consumers from hazards to their well-being and safety', whereas section 9(1)(a)(ii) refers to health, welfare and safety of the consumer. From the context of the sub-section it then appears as if the term refers to goods and services that seem, in the normal sense of the words, to contain a potential for causing harm to health, well-being and safety.¹⁷⁶ The discretion, to the extent that it does exist, only covers those 'particular goods or services', and not all goods and services. There is clearly no question of a general prohibition against contracting with minors.¹⁷⁷ Secondly, the legislature requires the consent of a parent, guardian or *responsible* adult. The word probably denotes nothing more than the adult who is *in loco parentis*, when requesting the service or product - in other words the adult with the responsibility of caring for the minor at the time and not just any adult.

It is not clear whether this discretion provided for in sub-paragraph (ii) only requires the consent of the specified person and when the consent has indeed been given the provider is obliged then to provide the product or service, or whether the discretion allows the supplier to refuse providing the service or product even where consent has been given by the specified person. If the discretion only extends as far as obtaining consent before providing the goods or services which may be harmful, the supplier cannot refuse to provide those services and a further refusal may constitute a contravention of the equality provisions of the CPA. If the discretion extends to cover the situation that the supplier can refuse to supply the goods or service even where there is consent it would mean that the supplier cannot be held in contravention of section 8 at all, provided that the refusal is a reasonable precaution to protect the minor from harm. However, it would then mean that the supplier has the burden of assessing in each such case whether the minor should be provided with the product or service, despite the consent of the parent. Such an interpretation would place a considerable burden on the supplier and may lead to an absurd situation where the supplier will be required to second guess the consent and approval of a specified person in each case where a product or service is made available to the minor. It is

¹⁷⁶ S 53(1)(c)(ii) of the CPA defines a 'hazard' as meaning a characteristic [of goods or services] that 'presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised'. The term 'unsafe' means that, due to a characteristic, 'particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons'.

¹⁷⁷ See also the discussion on s 9(1)(b) of the CPA below.

submitted therefore that in the presence of the consent having been given, the supplier will not be able to refuse to provide a minor with a product or service unless of course it is contrary to a law. This approach presupposes that the consent given is informed consent. The supplier must therefore ensure that sufficient information is made available to allow the person required to give consent to properly appraise himself or herself of any and all factors that may pose a potential risk to the health and well-being of the child. In the context of an accommodation establishment the problem may be that parents may not necessarily appreciate the dangers involved, whereas the supplier does. This may lead to claims that the consent provided was not an informed one, putting the supplier at risk. Thus, although the supplier does not have to exercise his or her discretion after parental consent has been granted, the supplier does have a duty to ensure that the person giving consent appreciates the potential harm that may result for the minor. It is recommended therefore that a supplier will have to bring to the attention of a parent that a particular facility the minor wants to enter, is used for activities such as skate-boarding by minors of various ages, or that the swimming pool is of a certain depth and that there are no life-guards. This approach is supported by the provisions of section 58(1) of the CPA, which provides:

The supplier of any activity or facility that is subject to any-

- (a) risk of an unusual character or nature;
 - (b) risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or
 - (c) risk that could result in serious injury or death,
- must specifically draw the fact, nature and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49.

Failure to comply with these provisions may negate the parental consent and result the liability of the supplier for resultant in the event of death, injury or other loss.

A further issue is to be found in section 9(1)(b)(i) of the CPA which provides that it is not a contravention of section 8 for a supplier to refuse on reasonable grounds to enter into a contract with a minor, unless the supplier has reason to believe that the minor is emancipated. A supplier may then use as defence against a charge of unfair discrimination that there were reasonable grounds to refuse to enter into the contract with the minor. Refusing to contract with the minor without reasonable

grounds may then lead to a contravention of section 8. What constitutes *reasonable* grounds would depend on the facts of a case, but it would appear that it is not reasonable to refuse to contract with a minor because of his or her minority *per se* (which would in all likelihood offend against the equality provisions of the CPA, the Equality Act and the Constitution in any event). But the particular age may provide reasonable grounds to refuse to contract with a minor in a particular situation. So would the manager of a hotel be justified in refusing to provide an elaborate order for room service or the booking for a luxury spa treatment by the 10-year-old child of a guest without the guest giving consent. For a valid contract to be concluded between the supplier and the minor, the minor's guardian must still consent to or ratify the contract, unless of course it is a contract providing the minor with rights only and no duties. The CPA does not have the effect of removing this common law protection for the minor. Therefore reasonableness will have to be determined objectively in the context of the particular transaction. For instance, the type of transaction; the amount involved; the duties imposed by the agreement; and the type of product or service, may play a role in determining whether the refusal is reasonable.

Section 9(1)(c) of the CPA provides that it is not a contravention of section 8 if a supplier reasonably designates any facility or service, permanently, or from time to time, for the exclusive use of minors generally, or minors above or below or between specific ages, or adults above 60 years of age. This is a very important provision for suppliers of accommodation services. Suppliers are then allowed to provide safe play areas or game rooms for small children without the fear of being subjected to an unfair discrimination charge. Also the Act does allow for services or facilities to be set aside for consumers of 60 years or older. Considering the fact that older people constitute an increasingly important part of the tourism industry, it makes sense to make more and more facilities and services specifically available to them – again without the fear of being subjected to charges of unfair discrimination.

The facility or service must be reasonably designated and can be done so on a permanent or temporary basis for the exclusive use of a certain age category of persons as indicated. This means that an accommodation facility can determine that a facility or service can be provided at certain times for the exclusive use of a specified age group. For example, a particular room can be used exclusively for

children's games in the mornings but in the evenings it can be used exclusively for the 60 years and older age group for bingo. A swimming pool, for instance, can be reserved at certain times for use by children only, and again at other specified times for the exclusive use of persons 60 years and older. A facility or service may be used exclusively for the age groups mentioned also on a permanent basis. So, for instance, a specific swimming pool at an establishment can be set aside for the exclusive use by children under the age of 12 years. However, such a designation must be reasonable. Again, whether there is compliance with the requirement of reasonableness when facilities or services are designated for exclusive use by certain age groups will depend on the facts of each situation. In determining reasonableness of the designation, factors such as the following may have an impact on the decision: whether the designation of the service or facility is permanent or temporary; whether alternative services or facilities are available; the target-market of the establishment, and the size and extent of the establishment. It is probably quite reasonable for a large hotel and entertainment complex with different swimming pools to reserve certain pools for the exclusive use by children, but not so in the case of a small hotel with one swimming pool and whose clientele are mostly business persons.

Lastly, section 9(1)(d) of the CPA provides that it is not a contravention of section 8 of the Act if a supplier provides products or services at a discount to minors who have not yet attained a certain age or to adults who have attained a specified age of at least 60. It is common practice to allow children, or senior citizens, discounted rates at accommodation establishments.¹⁷⁸ In the absence of section 9(1)(d) of the Act, such a practice may have constituted unfair discrimination in that it would have been a violation of section 8(1)(e) of the Act, which disallows price differentiation between different consumers on a prohibited ground (the prohibited ground being age in this scenario).

Section 9(2) of the CPA¹⁷⁹ is very similar in wording to that of section 9(1)(c) with the fundamental difference that whereas the latter deals with the designation of facilities

¹⁷⁸ It is explained above that this is a pricing strategy known as customer-segment pricing.

¹⁷⁹ S 9(2) of the CPA provides that-
It is not a contravention of section 8 for a supplier to reasonably-

and services based on age, the former does so on the basis of gender. The section provides that it is not unfair discrimination if a supplier reasonably provides and designates separate but substantially equivalent facilities for the exclusive use of each gender,¹⁸⁰ or offers to supply or provide access to a facility exclusively to persons of one gender.¹⁸¹ The obvious examples that spring to mind in respect of section 9(2)(a) are toilet and/or change-room facilities. It has been argued that this section may be open to constitutional challenge on the premise that the separate but equal doctrine will not stand constitutional scrutiny in South Africa nor in the USA.¹⁸² It must be borne in mind that the basis for providing separate facilities in this section is gender and not race as was the situation in the USA Supreme Court case of *Brown v Board of Education of Topeka*¹⁸³ in which the separate but equal doctrine was rejected. In South Africa, given its particular history, a separate but equal doctrine on the basis of race will never be considered constitutional. The answer to the question of whether a separate but equal approach in respect of gender will pass constitutional muster is somewhat more complex and it is submitted that it depends to a large extent on each individual case or scenario and on the understanding and imperative of substantive equality. The CPA specifically allows this type of differentiation (provision of separate but substantially equal facilities to persons of each gender) and any challenge to such a practice (or this provision) will require an equality investigation as explained above, with the difference that gender is a prohibited ground specifically mentioned. If one considers the factors mentioned in section 14(2) and (3) of the Equality Act for determination of the fairness or unfairness of separate facilities, such as toilets, saunas and change-rooms, then the conclusion must be that such separate facilities are fair and in line with section 9(2)(a) of the CPA. Whether the same can be argued in respect of section 9(2)(b) of the Act, which allows for the supply or granting of access to facilities exclusively to persons of one gender, is more difficult. As examples one may think of a situation where a facility such as a spa at a hotel is reserved for female guests only or a

-
- (a) provide and designate separate but substantially equivalent facilities for the exclusive use of persons of each gender; or
 - (b) offer to supply or provide access to a facility exclusively to persons of one gender.

¹⁸⁰ S 9(2)(a) of the CPA.

¹⁸¹ S 9(2)(b) of the CPA.

¹⁸² Melville *The Consumer Protection Act Made Easy* (2010) 37.

¹⁸³ 347 US 483 (1954).

smoking lounge is reserved for men only. Within the context of an accommodation establishment it would be very difficult indeed to justify this type of gender discrimination especially if one considers some of the factors mentioned in section 14(3) of the Equality Act.¹⁸⁴ Besides these factors, it must also be considered that guests would pay similar prices and that such a price would include the same services, or at least access to the same services and facilities. Excluding one gender from services or facilities to which the other has exclusive access in accommodation establishment where both are guests, would be a difficult challenge to defend. Such discrimination would not be *reasonable* as required by section 9(2) of the CPA.¹⁸⁵ The establishment would have to make the spa facility, for example, available to both genders or it may be a solution to have it available for the respective genders on alternating times, such as between 10h00 and 12h00 for the use of men and from 14h00 to 16h00 for the use of women. The latter scenario of course then falls within the section 9(2)(a) category of the CPA, namely separate but substantially equivalent, which situation is permitted in terms of the mentioned provision.

A final aspect concerning the right to equality in the consumer market for present purposes is to be found in section 9(3) of the CPA¹⁸⁶ which provides that a supplier

¹⁸⁴ S 14(3) of the Equality Act provides as follows:
The factors referred to in subsection (2)(b) include the following:
(a) Whether the discrimination impairs or is likely to impair human dignity;
(b) the impact or likely impact of the discrimination on the complainant;
(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
(d) the nature and extent of the discrimination;
(e) whether the discrimination is systemic in nature;
(f) whether the discrimination has a legitimate purpose;
(g) whether and to what extent the discrimination achieves its purpose;
(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-
(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
(ii) accommodate diversity.

¹⁸⁵ It would be easier to establish reasonableness where, for instance in the case of a gym facility catering exclusively for women, the facility is situated where there are other gyms reasonably available for use by all.

¹⁸⁶ S 9(3) of the CPA states:
It is not a contravention of section 8 for a supplier to market any goods or services in a manner that implies or expresses a preference for a particular group of consumers who are distinguishable from the general population on the basis of a ground of discrimination set out in section 9(3) of the Constitution, if the particular goods or services are reasonably intended or

may market¹⁸⁷ particular goods or services at a particular segment of consumers if these goods or services are reasonably intended or designed to satisfy any specific needs or interest that are common to, or uniquely characteristic of that particular segment of consumers. It is quite easy to think of examples of products, such as skin and beauty products, that are intended to satisfy the needs of particular segments of consumers on the basis of gender or race. In the context of accommodation establishments this provision may lead to different contestations. Consider a hotel or B&B establishment that markets itself as an establishment for people of the Muslim faith. It may indicate that it serves only halaal food and has a mosque on the premises. Or consider a similar establishment that markets itself as 'pink' thereby expressing a preference for homosexual consumers. Section 9(3) of the CPA requires a closer look.

Firstly, section 9(3) of the CPA limits its scope exclusively to the grounds listed in section 9(3) of the Constitution, namely the so-called specified grounds, and does not apply to the non-specified grounds as provided for in the Equality Act.¹⁸⁸ For purposes of the examples mentioned above (religion and sexual orientation) both can be placed within the ambit of section 9(3) of the CPA. A second important aspect of section 9(3) of the CPA that must not be overlooked is that the subsection provides that a supplier may market goods or services that *implies or expresses a preference* for a particular group. The supplier may indicate a *preference* for a particular group but may not go so far as to exclude persons not falling in the preferred category. So a person of the Christian faith may not be prevented from making use of the services of the Muslim hotel nor a heterosexual person from residing at the 'pink' hotel, or a gay couple from an establishment preferring heterosexuals. Thirdly, the particular goods or services must be reasonably intended or designed to satisfy specific needs or interests that are common to, or uniquely characteristic of that particular group of consumers. This last aspect will be the determining factor to distinguish between conduct that constitutes unfair discrimination and differential conduct permitted in terms of section 9(3) of the CPA. It is the supplier who will have to establish that the

designed to satisfy any specific needs or interests that are common to, or uniquely characteristic of, that particular group of consumers.

¹⁸⁷ "Market' when used as a verb, means to promote or supply any goods or services'. See s 1 of the CPA.

¹⁸⁸ See para (b) of the definition of prohibited grounds contained in s 1 of the Equality Act.

preference implied or expressed is reasonably intended or designed to satisfy a specific need or interest of the preferred group, and that the specific need or interest is common to, or uniquely characteristic of such a group. Such needs or interests will have to be objectively determinable. Again it will be quite easy, regarding the skin, hair and beauty products mentioned earlier, to show objectively a shared need or interest that is common or unique to a particular race group for instance. This may not be the case when it comes to providing accommodation services. It may be that particular services provided can be said to be reasonably intended or designed to address a common need or interest of a particular religion (such as providing particular food; absence of alcohol; prayer areas, and quiet at particular times for prayer, and so on). It would be more difficult in the context of accommodation establishments to prove that goods or services are reasonably intended or designed to satisfy particular needs or interests that are common to, or uniquely characteristic, of a particular racial group or even homosexuals or heterosexuals.¹⁸⁹

Section 10 of the CPA provides specifically that an alleged contravention of the right to equality in the consumer market *may* be brought before the Equality Court in terms of the Equality Act, or a complaint may be filed with the Commission, which is obliged to refer the matter to the Equality Court if the complaint appears valid.¹⁹⁰

A consumer approaching the Equality Court has the benefit of not having to comply with the proviso contained in section 69(d) of the CPA requiring that all other remedies available to such consumer in terms of national legislation must first be exhausted. The Equality Act also provides the Equality Court with jurisdiction to award damages.¹⁹¹ This presents the consumer approaching the Equality Court with

¹⁸⁹ It is not argued that it is impossible that there may be particular goods or services in an accommodation context which goods or services can be reasonably intended or designed to satisfy particular needs or interests that are common to, or uniquely characteristic, of different races or people of different sexual orientation. But it is argued that it will be very difficult to prove objectively that an accommodation establishment can, for instance, expressly prefer a particular race because the establishment provides a service reasonably intended or designed to satisfy, on the basis of a specific need or interest that are common to, or a unique characteristic of, only one particular race. The same, it is submitted, will apply in the case of hetero- and homosexuals. The situation may be different in the case of different language groups. It may be easier to objectively establish that certain language groups are preferred because of the unique characteristic of a particular language and that services are specifically designed to address the unique language and/or cultural needs of such a group.

¹⁹⁰ S 10(1)(a) & (b) of the CPA.

¹⁹¹ S 21(2)(d) of the Equality Act.

another benefit, because the consumer, in the event of wanting to claim damages, does not have to comply with the requirement of filing with the clerk of the relevant court notice from the Chairperson of the NTC certifying that the conduct constituting the basis for the claim has been found to be prohibited conduct.¹⁹²

It is submitted that there are no proscriptions against a consumer complaining about alleged unfair discrimination, whether contemplated in section 8(1) or (2) of the CPA or not, to pursue a resolution to the matter via the other, more informal, means provided for in section 69 of the Act, such as an applicable ombud with jurisdiction. Should the matter then not be resolved the consumer may approach the Equality Court directly or via a complaint to the Commission. Of course the consumer may elect to proceed directly with the complaint to the Equality Court.

4.3.2 Consumer's right to privacy

Direct marketing¹⁹³ has become the fastest growing form of marketing, which development can be ascribed to the rapid advances in database technologies and new marketing media, especially the Internet.¹⁹⁴ Direct marketing includes various different forms such as personal selling; direct-mail marketing; catalogue marketing; telephone marketing; kiosk marketing; direct-response TV marketing, and new digital direct-marketing technologies, as well as online marketing.¹⁹⁵ Direct marketing offers both consumers and suppliers distinct benefits. These include convenience; privacy; very wide selections of products; a wealth of comparative information about products and suppliers, and it is interactive which provides immediate responses. Benefits of direct marketing for the seller or supplier include the fact that it represents a powerful

¹⁹² S 115(2)(b) of the CPA.

¹⁹³ 'Direct marketing' in terms of s 1 of the CPA 'means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of-

- (a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or
- (b) requesting the person to make a donation of any kind for any reason.'

'Electronic communication' is defined in s 1 of the CPA as 'communication by means of electronic transmission, including by telephone, fax, sms, wireless computer access, email or any other similar technology or device'.

¹⁹⁴ Blake 'Direct and online marketing: Building direct customer relationships' in Kotler, Armstrong & Tait *op cit* (n 136) 507-508.

¹⁹⁵ Blake 'Direct and online marketing: Building direct customer relationships' in Kotler, Armstrong & Tait *op cit* (n 136) 511.

tool in building customer relationships; it provides a cost-effective and efficient way of reaching their markets; it is flexible in allowing the supplier to make ongoing adjustments to prices and offerings, as well as to make immediate and timely announcements and offers, and it allows suppliers to access customers who could not be reached through other channels.¹⁹⁶

Effective direct marketing requires a good customer database, which is ‘an organised collection of comprehensive data about individual customers or prospects, including geographic, demographic, psychographic and behavioural data’.¹⁹⁷ The major concern with direct marketing lies with how information is obtained and used for making a sale, since methods and tactics employed by sellers can become an invasion of privacy. The direct-marketing industry has to deal with concerns and complaints ranging from the irritation caused by over-zealous sales persons to instances of unfair practices and even outright deception and fraud.¹⁹⁸ This is especially true in respect of personal selling where consumers often battle to rid themselves of tenacious sales people; telephone marketing where one is often phoned at all hours at home, and also marketing via e-mail, where consumers are often quickly overloaded with ‘junk mail’ and spam. It is against these and similar ills that sections 11 and 12 of the CPA are aimed.¹⁹⁹

Section 11 of the CPA reads as follows:

- (1) The right of every person to privacy includes the right to-
 - (a) refuse to accept;
 - (b) require another person to discontinue; or
 - (c) in the case of an approach other than in person, to pre-emptively block, any approach or communication to that person, if the approach or communication is primarily for the purpose of direct marketing.
- (2) To facilitate the realisation of each consumer’s right to privacy, and to enable consumers to efficiently protect themselves against the activities contemplated in

¹⁹⁶ Blake ‘Direct and online marketing: Building direct customer relationships’ in Kotler, Armstrong & Tait *op cit* (n 136) 508-510.

¹⁹⁷ Blake ‘Direct and online marketing: Building direct customer relationships’ in Kotler, Armstrong & Tait *op cit* (n 136) 510.

¹⁹⁸ See Blake ‘Direct and online marketing: Building direct customer relationships’ in Kotler, Armstrong & Tait *op cit* (n 136) 530-535 for an interesting discussion on the problems faced by the direct-marketing industry.

¹⁹⁹ As will become clear below, ss 11 and 12 are rather narrowly aimed at the approach or communication of the seller to the consumer. Other provisions of the CPA, such as s 40, dealing with unconscionable conduct, may also impact on direct marketing and address some of the other questionable practices used by some direct marketers and will be considered below.

- subsection (1), a person who has been approached for the purpose of direct marketing may demand during or within a reasonable time after that communication that the person responsible for initiating the communication desist from initiating any further communication.
- (3) The Commission may establish, or recognise as authoritative, a registry in which any person may register a pre-emptive block, either generally or for specific purposes, against any communication that is primarily for the purpose of direct marketing.
 - (4) A person authorising, directing or conducting any direct marketing-
 - (a) must implement appropriate procedures to facilitate the receipt of demands contemplated in subsection (2); or
 - (b) must not direct or permit any person associated with that activity to direct or deliver any communication for the purpose of direct marketing to a person who has-
 - (i) made a demand contemplated in subsection (2); or
 - (ii) registered a relevant pre-emptive block as contemplated in subsection (3)
 - (5) No person may charge a consumer a fee for making a demand in terms of subsection (2) or registering a pre-emptive block as contemplated in subsection (3).
 - (6) The Minister may prescribe regulations for the operation of a registry contemplated in subsection (3).

From this wording it is clear that the protection of the consumer's right to privacy as provided for in section 11 of the CPA relates entirely to the issue of direct marketing.

For purposes of section 11(1) and (2) of the CPA, the Consumer Protection Regulations²⁰⁰ provide that if a consumer has informed another,²⁰¹ or has placed any communication or sign on a postal box or container for mail, indicating that the consumer does not wish to receive any material related to direct marketing then the direct marketer may not place any material primarily aimed at direct marketing in or on or near the postal box, postal office box, container or in, on or near the fence, gate or any other part of the premises of the consumer; and the direct marketer must provide the consumer with written confirmation that he or she has received the notice that the consumer does not wish to receive any direct marketing material.²⁰² It is submitted that it is clear from the wording of Regulation 4(1)(ii) that the duty imposed on the direct marketer to give written notice applies only in respect of a notice given

²⁰⁰ The Consumer Protection Act Regulations were published in *Government Gazette* No 34180 on 1 April 2011 (hereafter referred to as the Regulations).

²⁰¹ Regulation 4(1)(a). It is of interest to note that the draft Regulations, published for comment on 29 November 2010 in *Government Gazette* No 33818 (hereafter referred to as the draft Regulations), proposed that the consumer must inform the direct marketer *in writing* that the consumer does not wish to receive direct marketing material. See draft Regulation 4(1)(a). This requirement was not retained in the Regulations.

²⁰² Regulation 4(1)(a) & (b).

in terms of Regulation 4(1)(a) and not in the case where the consumer placed a 'no adverts' notice on the latter's post box in terms of Regulation 4(1)(b).

Two aspects need to be distinguished. The first is that a consumer may place a communication on a post box indicating that the consumer does not wish to receive any direct marketing material. There is then a corresponding duty on a direct marketer to ensure that no direct marketing material is placed in or near such post box. There is sufficient compliance with Regulation 4(1)(b) if a sign is placed displaying the phrase 'no adverts'.²⁰³ Clearly these measures cannot prevent all types of direct marketing. How, for instance, does one prevent flyers being placed under windshields of motor-vehicles?

The second aspect provides that a consumer can inform a direct marketer that the consumer does not wish to receive any direct marketing material. The direct marketer then has the duty to provide the consumer with written confirmation of having received such notice.²⁰⁴ This requirement places a significant (and very costly) burden on the direct marketer. The cost factor is somewhat ameliorated by the fact that 'in writing' includes any electronic means recognised by the Electronic Communications and Transactions Act.²⁰⁵ Some suppliers of accommodation services, such as hotel groups, do make use of direct marketing in that consumers are approached directly to market certain services.²⁰⁶ The purpose of such direct

²⁰³ Regulation 4(2). It is also interesting to note that draft Regulation 4(2) suggested that the sign could be in any of the official languages. This proposal was not incorporated in the Regulations which states that 'any communication or sign' may be utilised. Therefore, either the words 'no adverts' or the image or a similar reproduction of the image prescribed in Annexure of the Regulations can be used. But that image contains only the words 'no adverts' in English. If it was the intention that only English wording may be used in the sign then it is submitted that it is a violation of the constitutional requirement of parity of esteem as regards the other official languages. It is submitted that the words to be used in the image in Annexure A can be in any of the official languages and does not have to be in English only in order to comply with the CPA. Such an approach would be in accordance with the provisions of Regulation 4(1)(b) allowing *any communication or sign* to be placed on the postal box. The only requirement is that the meaning of such communication or sign must be clear.

²⁰⁴ Regulation 4(1)(ii). (The typographical structure of Regulation 4 creates problems. Paragraphs (i) & (ii) are not sub-items of Regulation 4(1)(b), as it seems from the way the Regulation is currently structured, but clearly pertain to both sub-regulations 4(a) & (b). This leads to referencing that is confusing, as can be seen from Van Eeden *A Commentary on the Consumer Protection Act Regulations* (2011) 42 where references are made to, for example, Regulation 4(1)(a) and Regulation 4(1)(i). This is not in line with legislative drafting convention.)

²⁰⁵ Act 25 of 2002 (hereafter referred to as ECTA). See Regulation 1(2).

²⁰⁶ An example is the Protea Hotel group who would contact customers after they have made a reservation for purposes of marketing their loyalty programme, ProKard.

marketing is often to inform the consumer of new offerings or to invite the consumer to become a member of a customer-loyalty programme. Once a consumer, having been subjected to such marketing practice, informs the accommodation establishment that he or she does not want to receive direct marketing, a duty arises for the business to confirm to the consumer in writing that such request has been received. It may be possible and even advisable for accommodation establishments to include a term in their standard form contracts for contracting with consumers in terms of which consumers are given the option to consent or decline to receive direct marketing from the supplier. Where the consumer has given consent the supplier, at least until notice to the contrary is received from the consumer that the consumer does not want to receive direct marketing, will protect the supplier in the event of a registered pre-emptive block against direct marketing.²⁰⁷ The consent so given should override the registered pre-emptive block. But it is imperative that the consumer be given an option in favour of receiving direct marketing from the specific supplier.

Direct marketing in person (as opposed to in writing or telephonically) is particularly difficult to block pre-emptively. This is probably one of the reasons why section 11(2) of the Act provides for the possibility of requesting the direct marketer to desist from further contact during or within a reasonable time after the contact session. As indicated above, this requires that the direct marketer be informed to desist from further contact. How the direct marketer must be informed is not specified, implying that it can be in writing (including by way of electronic data messages) or verbally (including via telephone). Ideally the consumer should inform the direct marketer in such a manner that a record is kept of the fact that notice was given, at least until such time as the direct marketer acknowledges receipt of the notice. Whether the requirement of the supplier having to confirm receipt of the notice from the consumer that the consumer does not wish to receive direct marketing material will actually be effective in practice (be complied with) is very much doubted.

A supplier making use of direct marketing must implement appropriate measures to facilitate the receipt from consumers of demands as provided for in terms of section

²⁰⁷ This latter aspect is referred to further below in the context of a discussion on the registry for pre-emptive blocks.

11(2), and must not allow anyone associated with ‘that activity’ to communicate for the purpose of direct marketing with a person who has made a demand in terms of subsection (2).²⁰⁸ Such a supplier must then have a system in place which will enable the supplier to capture requests as contemplated in section 11(2).²⁰⁹ Suppliers cannot be allowed to use a poor system of administration to escape responsibility.

Section 11(3) of the Act provides for the establishment of a pre-emptive blocking mechanism for the use of the consumer. This mechanism is in the form of a registry from which the direct marketer can establish whether a consumer may be contacted directly.²¹⁰ The National Consumer Commission (NCC) is authorised to establish, or recognise as authoritative,²¹¹ a registry in which a consumer may register a pre-emptive block against any communication that is primarily for the purpose of direct marketing. Such a block may be either a general one or for a specific purpose. Such a pre-emptive block may be for general or specific purposes. It is not immediately clear what is meant by ‘general or specific purposes’. A general block probably means that all (any form) of communication for the purposes of direct marketing in respect of any product or service is not permitted. Greater clarity regarding the operation of this registry is provided particularly by Regulation 4(3). Sub-regulation (3) requires that:

- the registry must be able to accommodate all the people of South Africa and cover the whole geographical area of the Republic;²¹²
- the registry must at all times be accessible to all persons in the Republic and allow them to register a pre-emptive block free of charge, although the consumer must bear the cost of his/her own communication;²¹³

²⁰⁸ S 11(4) of the CPA. The phrase ‘that activity’ in s 11(4)(b) is not explained and must be taken to refer to the process of direct marketing.

²⁰⁹ S 11(4)(a) and s 11(4)(b)(i) of the CPA.

²¹⁰ This registry is accessible on <https://www.nationaloptout.co.za>.

²¹¹ Regulation 4(4) provides the requirements for where the NCC recognises a registry as authoritative.

²¹² Regulation 4(3)(a).

²¹³ Regulation 4(3)(b).

- a consumer may register his or her name, identification number, passport number, telephone number, cell phone number, facsimile number, email address, postal and physical address, website uniform resource locator (URL) or any other identifier which the operator of the registry makes provision for; the consumer's own global address for any website or web application or site on the world wide web; for any time of day or any day of the year if the operator of the registry so allows; or a comprehensive prohibition for any medium of communication, address or time whatsoever;²¹⁴
- any pre-emptive block registered in terms of the Regulation becomes effective 30 days after it has been so registered;²¹⁵
- the administrator of the registry may not provide or dispose of any information of a consumer on the registry to anyone, including an organ of state, except on the express and written authorisation of the consumer or as required by law;²¹⁶
- the administrator may only confirm, upon application, whether a pre-emptive block has or has not been registered by a consumer and no information about any identifier of the consumer may be provided to the direct marketer (i.e. the direct marketer will provide the name or telephone number for instance and the administrator may only indicate whether a block has been registered in respect of the person and/or the number as the case may be);²¹⁷
- the direct marketer must assume that a block exists unless informed to the contrary by the administrator of the registry, or the direct marketer has proof that the consumer has consented expressly to receiving direct marketing and such consent was given after the commencement of the Regulations. It would therefore be advisable for any accommodation business to include in the terms and conditions of the standard form contract normally completed

²¹⁴ Regulation 4(3)(c).

²¹⁵ Regulation 4(3)(d).

²¹⁶ Regulation 4(3)(e).

²¹⁷ Regulation 4(3)(f). In terms of Regulation 4(3)(m) this prohibition does not apply in respect of information requested by a consumer himself or herself.

upon registration by the consumer a term whereby consent is given by the consumer that he or she may be approached for purposes of direct marketing. This will provide the supplier with protection in the event that a pre-emptive block was registered;²¹⁸

- a consumer must, on application, be provided with a copy of such application by a direct marketer, as well as the administrator's response, and also the identity and registered address of the marketer as well as the contact details of the responsible person;²¹⁹
- in order to give effect to the previous provision every direct marketer must register with the administrator and supply addresses, including physical, postal and email, as well as the name and contact details of the person responsible for any applications lodged to the administrator;²²⁰
- these details of the direct marketer must be annually confirmed as correct;²²¹
- the administrator may not entertain any applications of a direct marketer not registered and whose details are not confirmed annually;²²²
- the administrator must allow duly authorised employees of the NCC access to records of the registry, including allowing the making of copies.²²³

The administrator of the registry must further ensure safety measures are in place to the satisfaction of the NCC to safeguard the information of the registry and comply with all legislation regarding the protection of personal information and privacy;²²⁴ provide for a screening and validation process of direct marketers applying for registration;²²⁵ comply with any law providing for the protection of personal

²¹⁸ Regulation 4(3)(g).

²¹⁹ Regulation 4(3)(h).

²²⁰ Regulation 4(3)(i).

²²¹ Regulation 4(3)(j).

²²² Regulation 4(3)(k).

²²³ Regulation 4(3)(l). This appears to a specific exception to Regulation 4(3)(e).

²²⁴ Regulation 4(4)(a).

²²⁵ Regulation 4(4)(b).

information or the protection of privacy;²²⁶ and must from time to time conduct a public information campaign in all the official languages as required and approved by the NCC.²²⁷

How, and if, it will be possible to manage and enforce such a complex system effectively remains to be seen. The true value for most consumers probably lies simply in being able to block direct marketing which is experienced at inconvenient times via telephone. A supplier making use of direct marketing must also ensure that it is not communicated to a consumer who has registered a pre-emptive block.²²⁸ Suppliers will therefore have to ensure that their databases are continuously updated from the central register so as to give effect to the requirements of section 11. It is anticipated that this will lead to many problems and suppliers will have to ensure that their own data is as correct and up-to-date as possible.

A consumer will be able to register a general or specific pre-emptive block with the registry or may give notice to a specific supplier (direct marketer). The obligation is on the direct marketer at all times to establish whether notice was given or a block registered.

No fees may be charged by anyone for registering a demand in terms of section 11(2) or for registering a pre-emptive block as provided for in section 11(3) of the Act.²²⁹

In order to further protect consumers against direct marketing practices the Minister may prescribe certain days and/or times during which a supplier may not engage in any direct marketing directed at a consumer at his or her home for any promotional purpose, unless the consumer had consented to or requested such

²²⁶ Regulation 4(4)(c).

²²⁷ Regulation 4(4)(d).

²²⁸ S 11(4)(b)(ii) of the CPA.

²²⁹ S 11(5) of the CPA.

communication.²³⁰ Consumers may not be contacted for purposes of direct marketing on the following days and during the following hours:²³¹

- Sundays and public holidays (the latter as contemplated in the Public Holidays Act, 1994);²³²
- Saturdays before 09h00 and after 13h00;
- all other days between the hours of 20h00 and 08h00 the following day.

The phrase ‘for any promotional purpose’ appears in section 12(1) of the Act as a descriptor of direct marketing. Promotional purpose is not defined and must be understood with reference to the term ‘promote’ which is defined in section 1 of the Act.²³³ However, the definition of direct marketing²³⁴ already contains a reference to ‘promoting’, making the descriptor phrase tautological, unless there is another reasonable interpretation.

The word ‘promoting’ appears in the

- (a) part of the definition of direct marketing, whereas the
- (b) part of the definition refers to approaches requesting donations.

It is not immediately clear if the intention of the Legislature was to exclude ‘promotional’ direct marketing only on these days and times prescribed by the

²³⁰ S 12 of the CPA.

²³¹ These provisions are set out in a Notice entitled ‘Prohibited time for contacting consumers’ published in *Government Gazette* No 34180 (dated 1 April 2011).

²³² Act 36 of 1994.

²³³ In terms of s 1 of the CPA ‘promote’ means to

- (a) 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;
- (b) make 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
- (c) 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’.

²³⁴ See (n 193).

Minister and not direct marketing for charity purposes (donations). Such an understanding will have the effect that the South African National Blood Service, but not a hotel group, is able to contact a person during these specified times. Such an interpretation may explain the use of the phrase ‘for any promotional purposes’, but it runs counter the idea of the section to protect the privacy of the consumer. It is privacy that is sought to be protected and therefore it is submitted that the second interpretation cannot stand, making the use of the mentioned phrase perhaps an example of some imprecise legislative drafting.²³⁵

Section 16(3) of the CPA allows a consumer to rescind any transaction resulting from direct marketing without reason or penalty, provided that the supplier is informed of such rescission in writing, or another recorded manner and form, within five business days of the date on which the transaction was concluded or the goods forming the subject of the transaction were delivered to the consumer. When it comes to transactions for the provision of accommodation services, the effective date will normally be the date on which the transaction is concluded as there is no delivery of goods in question.

This five-day cooling-off period will not apply if section 44 of ECTA applies. This section provides that a consumer can cancel without reason or penalty any (electronic) transaction and any related credit agreement for the supply of goods within seven days of receipt of the goods or after the conclusion of the agreement for the services. Section 44 of ECTA therefore generally provides better protection to a consumer in the case of a transaction resulting from direct marketing, provided it is an electronic contract, compared to section 16 of the CPA. However, section 42(1) of ECTA makes two things clear. Firstly, Chapter VII of ECTA which includes section 44, only applies to electronic transactions. Secondly, section 42(2)(j) goes further and provides that section 44 does not apply to electronic transactions ‘for the provision of accommodation, transport, catering or leisure services and where the supplier undertakes, when the transaction is concluded, to provide these services on a specific date or within a specified period’. For all practical purposes section 44 of ECTA does not apply to the tourism industry. This is quite understandable

²³⁵ See for instance the comments of Van Wyk ‘Is die nuwe Maatskappyyewet ‘n teken dat die kuns van wetsopstelling sterwend is?’ (18 November 2010) *Die Burger (Oos-Kaap)* 16.

considering that cancelling a contract for the provision of accommodation services after the services have been rendered places the supplier in an impossible position. As far as cooling-off is concerned, a tourist can rely only on section 16(3) of the CPA and then only if the transaction is the result of direct marketing. The only other cooling-off that is going to take place will be in the swimming pool of the accommodation establishment or in the ocean!

In terms of section 32(1) of the CPA a supplier who concludes a transaction with a consumer as a consequence of direct marketing must inform the consumer, in the prescribed manner and form, of the latter's right to rescind the agreement in terms of section 16 of the CPA. The problem is that neither the Act nor Regulations prescribe any manner or form requirements. Direct marketers will not consider it in their best interests to publish the right to cancel too widely, which is probably exactly the reason why section 32 was included in the first place. In the absence of stipulated manner and form requirements, it will be advisable for direct marketers to ensure that they do indeed comply with the imperative of informing a consumer of the right to cancel when a contract results from direct marketing. This should be done in a manner that will enable the direct marketer to prove without undue difficulty that such information was provided as the onus will be on the marketer to prove that the consumer was informed of the right to a cooling-off period. Where the contract is concluded in writing, it will be a simple matter to include such information in the contract. However the purpose of section 32 must be considered and that purpose is to ensure that the consumer is actually made aware of the right to cancel. Making it difficult for the consumer to obtain actual knowledge of the right (for instance, by obscuring it in the documentation) may be insufficient for purposes of section 32. It would be advisable for the direct marketer to actually draw attention to the right by making it so noticeable that a reasonably alert consumer will become aware of it. In case where the contract is concluded orally the direct marketer faces a more complicated situation. The best would be for the direct marketer to explicitly mention this right and confirm with the consumer that the latter understands the right. Recording of the conversation could be done (especially if the conversation happens telephonically). If the marketing is done in person and an agreement is concluded the direct marketer should consider providing the consumer with a flyer informing the consumer of the right to cancel.

It is clear that where the direct marketer does not inform the consumer of the right to cancel, such omission will constitute prohibited conduct and will carry the sanctions prescribed by the CPA. However, it is not so clear whether the consumer must be informed of the right to cancel in order for the contract resulting from the direct marketing to be valid. Also, if the contract is valid despite the absence of the required notification, it is not clear whether or not the cooling-off period is suspended and the five-day period only starts running once the consumer becomes aware of his or her right to cancel. A factor further obfuscating the issues is the fact that the Legislature has decided to deal with the right to cooling-off and the notice of the right to the consumer in separate sections. Had the issue of cooling-off been dealt with in its entirety in one section it may have helped to provide answers to the issues raised above.

As far as the first aspect is concerned, it needs to be decided whether the prescribed duty of notification constitutes a requirement for a valid contract flowing from the direct marketing.²³⁶ It is not stated definitively by the CPA that the notification is a requirement for validity. Nor does the CPA indicate that the consequence of non-compliance is invalidity. It would have been easy for the Legislature to have included such a provision. The fact that no such clear indication is provided in section 32 may indicate that failure to comply with the duty to inform will not lead to the agreement or contract being void.²³⁷ The provision therefore can be read that a direct marketer who concludes a transaction with a consumer must inform the consumer after such conclusion of the right to cancel. This interpretation is a first possible understanding of the section.

Section 32(1) does however use the words '[a] person ... who concludes a transaction or agreement with a consumer, must inform the consumer ...'. The verb 'concludes' is in the present tense. Had the past tense been used it would have been clear that notification is to take place after conclusion of the agreement and not

²³⁶ The problem cannot be statutory illegality as the contract as such is not prohibited by the CPA. See Floyd 'Legality' in Hutchison & Pretorius *op cit* (n 52) 179.

²³⁷ Failure to comply with a prescribed formality will render a contract void. See Floyd 'Formalities' in Hutchison & Pretorius *op cit* (n 52) 159.

during the process of concluding it.²³⁸ It may be argued that such an understanding indicates that the notification must take place during the process of concluding the agreement. Consequently, the agreement will not be completed, nor the contract concluded, until notification has taken place. On this construction the provision should then be read that a direct marketer who concludes a transaction with a consumer must inform the consumer during the process of the right to cancel. This is a second understanding of the provision. Such an approach will protect the right of the consumer to cancel which is the ultimate purpose of the consumer protection provisions relating to cooling-off.

The second argument is preferred primarily because it protects the right of the consumer to cancel an agreement resulting from direct marketing, which is the purpose of the cooling-off provisions. This means that the required notification is a formality affecting validity of the contract. A 'contract' resulting from direct marketing without the duty of notification having been complied with will therefore be void.

If however the contract is valid as the notification is only required after the contract (or at least notification is not a formal requirement for a valid contract), then the second issue to be considered is the impact of non-notification on the right of the consumer to cancel. Two possibilities present themselves. The first is that non-notification has no consequence for the consumer. This means the contract is valid and enforceable by both parties and if the consumer does not exercise his or her right to cancel (of which the consumer may or may not be aware) then the contract would proceed as per normal. If it is discovered at some stage that the direct marketer has not notified the consumer as required, then a complaint may be filed and the direct marketer be subjected to the sanctions prescribed. (Such an approach will not give effect to the right to cooling-off and is not preferred for that reason.)

Secondly, the contract may be valid but not enforceable by the direct marketer until notification has occurred as prescribed. The consumer then has the opportunity to exercise the right to cancel irrespective of how long after the conclusion of the contract or delivery of the goods the notification takes place, thereby protecting the

²³⁸ If the present continuous tense had been used, for example 'in the process of concluding the agreement', then it would have been more clear that notification is to take place before the contract is concluded (at least in the absence of a specific provision providing whether or not notification is a requirement).

right of the consumer to cancel the contract. Such an approach would be most effective in ensuring that the direct marketer complies with this statutory duty of notification as there will remain the uncertainty that a contract may be cancelled at any time and monies will have to be restored. (Whether creating this amount of uncertainty is in the public interest is doubtful, however.) The sanctions that may be imposed are in any event substantial enough to act as deterrent against non-compliance.

In order to summarise it is therefore submitted that the approach preferred is that notification of the cooling-off period does constitute a formal requirement for validly concluding a contract between the consumer and the direct marketer. Non-compliance with this requirement will render the contract void with the normal consequences of a void 'contract'.

4.3.3 Bait marketing

Section 30 of the CPA provides:

- (1) A supplier must not advertise any particular goods or services as being available at a specified price in a manner that may result in consumers being misled or deceived in any respect relating to the actual availability of those goods or services from the supplier, at that advertised price
- (2) If a supplier advertises particular goods or services as being available at a specified price, and the advertisement expressly states a limitation in respect of the availability of those goods or services from that supplier at that price, the supplier must make those goods or services available at that price, to the extent of the expressed limits.
- (3) It is a defence to an alleged failure to comply with subsection (1) or (2) if-
 - (a) the supplier offered to supply or 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
 - (b) the consumer-
 - (i) unreasonably refused that offer; or
 - (ii) accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted.

The most common scenario that involves bait marketing is where a supplier will offer a particular product or service at a very low cost to entice consumers to approach that particular supplier. The supplier may then make a very limited number of the products or services available at the special price. Consumers will visit the supplier

only to be informed that all the special items offerings have been sold out. As the consumer is already there he or she will often spend money on similar or other products or services. Similarly a supplier of tourist accommodation can try to improve business by making a number of luxury rooms available at a special price, but the consumer will then be advised that the luxury rooms have all been booked and that there are still some 'almost as luxurious' standard rooms available.

The use of bait marketing *per se* is not prohibited. What is prohibited is giving a false impression or deceiving consumers about the actual availability of those goods or services. The supplier therefore will have to be careful about the offers made in advertisements. Advertising accommodation available at a discounted rate of 50% of the normal rate and then informing the consumer that only two of the rooms of the hotel are on special and that these rooms have already been taken; or advertising a 'Valentine's Weekend Special Offer - Accommodation less 75%' only to inform the consumer on arriving, that this offer only applies to the 'honeymoon suite' and not to all the rooms, will constitute conduct prohibited in terms of this section.²³⁹

Subsection (2) adds nothing substantive to what is already contained in subsection (1). Subsection (2) provides an example of a certain type of misleading or deception that will constitute prohibited bait marketing. Subsection (2) holds that where a supplier advertises goods or services as being available at a specified price and the advertisement expressly states a limitation in respect of the availability of those goods or services from that supplier at that price, then the supplier must make those goods or services available at that price and to the extent of the expressed limits. So, for instance, where a supplier states that accommodation services will be sold at a specific rate for a specific period of time, then all the accommodation capacity of the supplier must be made available for the promotion. Similarly if the supplier advertises accommodation at 50% discount then all the available accommodation must be made so available, unless the advertisement specifically qualifies which type and/or number of rooms are available at the special price. But, as stated above, this is just an example of how consumers can be misled or deceived and does not in any

²³⁹ This type of conduct may also fall foul of other sections of the CPA such as ss 29, 40 & 41.

way extend the meaning and scope of subsection (1). It does however facilitate a better understanding of subsection (1).

It will be exceptionally difficult for the consumer to prove, for example, that all the stock or all the rooms were not made available as advertised. On the other hand, it should be a simple matter for the supplier to prove that the products and/or services were made available as advertised. The result of this situation may well be that the harm the provision seeks to address is not effectively addressed. A possible solution could have been to provide for a reverse onus, namely that the supplier has the burden to establish that there was indeed compliance with the offering in the advertisement.

Section 30(3) of the CPA provides the grounds for a defence against a failure to comply with the provisions of section 30(1) & (2) of the Act. It will be a defence if the supplier offers to supply or offers to procure someone else to supply equivalent services within a reasonable time and at the advertised price, and the consumer unreasonably refuses such offer, or accepts the offer and the services are then supplied or another supplier is procured to supply the services as offered and accepted.

In the context of the supply of tourist accommodation a number of issues may arise from section 30(3). Firstly, the supply by the original supplier or the procurement of the same or equivalent goods or services must be at the same (or lower price), but not at a higher one. Secondly, whether the goods or services are provided or procured within a reasonable time or at reasonable quantity will be factual questions to be determined on a case by case basis. For instance, a reasonable time period to procure alternative accommodation for a tourist arriving at a hotel in response to an advertisement in which it is claimed that the establishment has 'ample rooms' available, only to be informed that the hotel is fully booked - will in all likelihood be measured in minutes rather than hours. Thirdly, whether services provided are the same or equivalent will also be a factual question to be determined on a case by case basis. Where a hotel advertises sea-facing rooms and now provides the consumer with a room overlooking the parking area the alternative service provided

(or offered) will not be equivalent.²⁴⁰ Fourthly, it is submitted that the original supplier (first supplier) should only be able to rely on the defence that another supplier (second supplier) has been procured to supply the service if the procured supplier actually supplies the services – the mere procurement of the alternative supplier cannot be enough to absolve the original supplier of liability.

Consider the following scenario: Mr and Mrs Smith arrive at the hotel in response to an advertisement promising ‘ample rooms available, all with sea-views’, but are informed that the hotel is fully-booked.²⁴¹ Alternative accommodation is procured and the couple accepts it, but discovers on arrival that the new supplier is situated in a dangerous part of town with no sea view. Public policy would dictate that the original supplier should not be off the hook, but should be held responsible for its conduct, which it is submitted, constitutes prohibited conduct for purposes of the CPA under section 30.²⁴² Such an interpretation also appears to be supported by the wording in section 30(3)(b)(ii), specifically the words: ‘the supplier has ... procured another person to supply ...’. This appears to convey the meaning that the second supplier must *supply*, and not be merely promising to supply or agreeing to supply, but actually supply the service for the defence to be operative. The duty of the first supplier arises *ex lege* and this duty remains until such time as satisfactory performance has been provided by the second supplier.

The second supplier also incurs liability. The basis for such liability lies in the fact that the first supplier, in procuring the second supplier, acted as an agent for the second supplier and made an offer to the consumer, which the consumer accepted. Practically what will happen is that the first supplier will agree with the second supplier for the former to make an offer to the consumer on behalf of the second supplier on the same terms as the first supplier had originally promised in the bait marketing. A principal-agent relationship will arise, if not expressly then by implication, between the two suppliers: the first supplier now acting as the agent for the second. Once the agent has performed (in terms of the agency agreement) the

²⁴⁰ The definition of ‘service’ provided in s 1 of the CPA includes the provision of any accommodation.

²⁴¹ It is accepted for current purposes that such a situation will constitute the bait marketing prohibited by s 30 of the CPA.

²⁴² This conduct may constitute prohibited conduct also in terms of other provisions of the CPA.

principal (second supplier) acquires directly all the rights and duties contracted for by the agent.²⁴³ Under normal circumstances the relationship between the agent (first supplier) and principal is then terminated as a result of performance.²⁴⁴ There will now be a contract between the consumer and the second supplier and the duty of the second supplier to perform arises therefore *ex contractu*.

Whether the second supplier can be held responsible for prohibited conduct is, it is submitted, open to argument. On one hand it can be said that the CPA does not seem to suggest such liability. However, on the other hand, the second supplier has now replaced the first supplier and has made similar promises, via an agent, as contained in the original bait marketing advertisement and for that reason the second supplier will now also be susceptible to sanctions for prohibited conduct if failing to deliver as per the promises made. The second supplier may therefore well be liable *ex contractu* the consumer, as well as *ex lege* in terms of the CPA for prohibited conduct.

Suppliers of accommodation establishments will have to be very sure of the representations made on their behalf by the initial supplier, especially as the initial supplier will be trying to extricate himself or herself from an embarrassing position and will therefore paint a very rosy picture of the second supplier.

4.3.4 Consumer's right to cancel advance bookings, reservations or orders

Section 17 provides the consumer with a right to cancel advance booking, reservations, or orders. The relevant part of the section, for purposes of this discussion, reads as follows:

- (2) Subject to subsections (3) and (4), a consumer has the right to cancel any advance booking, reservation or order for any goods or services to be supplied.
- (3) A supplier who makes a commitment or accepts a reservation to supply goods or services on a later date may-
 - (a) require payment of a reasonable deposit in advance; and
 - (b) impose a reasonable charge for cancellation of the order or reservation, subject to subsection (5).

²⁴³ See Van Jaarsveld 'Agency' in Nagel, Boraine, De Villiers, Lombard, Löt, Prozesky-Kuschke, Renke, Roestoff, Van Eck, Van Heerden & Van Jaarsveld *Business Law* (2011) 90.

²⁴⁴ Kerr *The Law of Agency* (2006) 191.

- (4) For the purposes of this section, a charge is unreasonable if it exceeds a fair amount in the circumstances, having regard to-
 - (a) the nature of the goods or services that were reserved or booked;
 - (b) the length of notice of cancellation provided by the consumer;
 - (c) the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation; and
 - (d) the general practice of the relevant industry.
- (5) A supplier may not impose any cancellation fee in respect of a booking, reservation or order if the consumer is unable to honour the booking, reservation or order because of the death or hospitalisation of the person for whom, or for whose benefit the booking, reservation or order was made.

The first important contribution of the right contained in this section is that the consumer has a right to cancel an order, booking or reservation and cannot be forced to go through with such an order, booking, or reservation at the insistence of the supplier. This definitely provides the consumer with some peace of mind when entering into agreements with suppliers for services such as holiday accommodation, flights and travel and tourism packages. There are certain requirements that the consumer will have to comply with in order to be able to rely on this right.

Although probably obvious, the consumer is required to perform an action – the consumer must, firstly, take action and *cancel* the order, booking or reservation;²⁴⁵ secondly, the cancellation must be done in a manner that will ensure that the supplier receives notice of the cancellation, and thirdly, the cancellation must be done *in advance*. This latter requirement is clear from the use of the words ‘any goods or services *to be supplied*’ in section 17(2) of the CPA. Where the booking is not cancelled in advance, the consumer can be held liable for the full price, such as may be the case where the consumer does not arrive at all.

The supplier however is not without protection and is entitled to require the payment of a reasonable deposit in advance,²⁴⁶ and may also levy a reasonable cancellation charge.²⁴⁷ ²⁴⁸ A cancellation charge may however not be levied in the case where

²⁴⁵ To forget about a reservation will therefore not constitute a cancellation.

²⁴⁶ S 17(3)(a) of the CPA.

²⁴⁷ S 17(3)(b) of the CPA.

²⁴⁸ Strict cancellation policies in the accommodation sector have been under fire because it is seen by many in the tourism industry as too strict and actually preventing consumers from booking in advance for fear of forfeiting deposits as a cancellation fee. See the discussion on Southern African Tourism Update Online ‘Are SA cancellation clauses too strict?’

the consumer cannot honour a booking, order or reservation because of the death or hospitalisation of the consumer for whom, or for whose benefit the booking, order or reservation was made.²⁴⁹ The Legislature wanted to achieve a balance between the interests of the consumer and the interests of the supplier by exempting the consumer from having to pay a cancellation fee in certain circumstances, but then only in very particular circumstances.

The exemption in the case of death is presumably easy to ascertain and should not provide interpretational problems. Hospitalisation however is another matter. The Legislature probably opted for the seemingly more precise term of 'hospitalisation' so as to minimise potential interpretational problems with a more vague term such as, for example, 'serious medical condition as certified by a medical practitioner'. Unfortunately the concept 'hospitalisation' is not without problems. It can be understood in a very literal and narrow sense, namely that the consumer is actually in hospital at the time that the supply of the goods or services are to take place and only then may no cancellation fee be levied. If a more generous approach is adopted then it may well be interpreted to include a situation where a person has been hospitalised or has to be hospitalised at a time that will make honouring the booking impossible, even though the person is not actually in hospital at the time for which the booking has been made. Consider the situation of a person who fell seriously ill or had to undergo an urgent operation and had to be hospitalised but has just been released from hospital and is recuperating at home, while not in a condition to honour the booking. Suppliers who are at risk of such cancellations may be tempted to apply the exceptions created in section 17(5) of the Act strictly. If, as it seems, the intention of the Legislature was to minimise uncertainty and limit exceptions to the bare minimum then one will actually have to be in hospital to avoid paying a cancellation fee. If the more generous approach is followed, the consumer is back in uncertain waters as if the Legislature had used (vague) terms such as 'serious medical condition'.

<http://www.tourismupdate.co.za/print/NewsStory.aspx?newsId=22891> (accessed on 2010-11-24).

²⁴⁹ S 17(5) of the CPA.

Applying the strict approach will result in hard cases as the example mentioned above illustrates. As section 17(5) of the CPA can be reasonably interpreted in more than one way the National Consumer Tribunal (NCT) or court must prefer the meaning that best promotes the spirit and purposes of the CPA and will best improve the realisation and enjoyment of consumer rights generally.²⁵⁰ Section 4(3) of the Act must be read with section 4(2)(ii)(bb) which provides that the NCT or court must make an appropriate order to give practical effect to the consumer's right of access to redress, including any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the CPA. This may provide the NCT or court with sufficient leeway to adopt a more generous in interpreting the concept 'hospitalisation'.

It has been argued that it is a requirement that notice be given in advance by the consumer in order to rely on the right to cancel. However, death and hospitalisation are very often occurrences which preclude advance knowledge, making it impossible to comply with the requirement of advance notice. Yet, in most cases advance cancellation will be possible and it will only be reasonable to require of the consumer to provide such advance notice if he or she wants to rely on the exception provided for in section 17(5) of the CPA. It is therefore recommended that the NCT or court adopt a practical approach in a case where the consumer is relying on section 17(5) without having given any advance notice. The test must simply be whether the consumer could reasonably have given reasonable notice or not. If it was possible to have given advance notice then such notice will constitute a requirement for relying on the exception provided for in section 17(5). If advance notice could not reasonably be given then the consumer can rely on section 17(5) without advance notice.

As set out above, section 17(5) of the Act prohibits a supplier from imposing any cancellation fee where the consumer is unable to honour the booking because of the death or hospitalisation *of the person for whom, or for whose benefit the booking was made*. The consumer will not be liable to pay a cancellation fee where the consumer himself/herself died or was hospitalised and therefore unable to honour the booking or reservation, because the person for whom the booking was made is then also the

²⁵⁰ See s 4(3) of the CPA.

consumer who is incapable of honouring the booking. But the consumer and the person for whom, or for whose benefit, the booking was made may not necessarily be the same person. It must be borne in mind that the definition of 'consumer' includes 'a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those ... services'.²⁵¹ The consumer referred to in section 17(5) of the Act may be the consumer in the sense that he or she made the agreement (booking) but also that he or she is a consumer as recipient, beneficiary or user of the service. It seems furthermore that the sub-section anticipates that the consumer referred to in the sub-section and the person who has died or is hospitalised can be different persons (but may of course also be the same person). That being the case the implication is that where a consumer cannot honour the booking because of, for instance, the death of another for whose benefit (also) the booking was made, no cancellation fee may be imposed. Practically the consequence is that where a family booked accommodation for the holiday and then have to cancel because of the death or hospitalisation of one family member, the whole booking can be cancelled without the supplier being entitled to charge a cancellation fee. In this sense it makes no difference whether it is the consumer or the person for whom the booking was made that was hospitalised or died as both are in any event consumers as per the extended definition of consumer referred to above.

Complicating matters further is the phrase 'or for whose benefit' the booking was made. It would appear as if the Legislature anticipated that the consumer and the person for *whom* the booking, reservation or order was made may not necessarily be the same person as the one for *whose benefit* the booking, reservation or order was made, otherwise the use of the phrase 'or for whose benefit' would be unnecessary. A possible example may be where the employer makes a booking or reservation for an employee for the promotion of the business interests of the employer. The person for whom the booking is made is not the same as the one for whose benefit it is made. If the employee is hospitalised then the employer cannot honour the booking and will be able to cancel the booking without having to pay a cancellation penalty.

²⁵¹ S 1 of the CPA.

It is probably conceivable to have a scenario where a child books a trip for the father to the British Open at St Andrews so as to benefit the mother by providing her with some peace and quiet. The child is then the consumer, the father the one for whom the booking was made, and the mother the one who benefits. If this is the case then the death or hospitalisation of the child, the husband or the wife may allow for the cancellation of the trip without having to pay a cancellation fee, provided that the wife, as beneficiary of the booking, is considered a consumer as per the definition of consumer referred to above. The other two characters are clearly consumers in terms of the definition. On a plain reading of the definition a beneficiary is a consumer, and certainly one who benefits is a beneficiary. Therefore the possibility exists that the wife may qualify as a consumer as per the definition of consumer. However, it is submitted that the recipient of an indirect benefit, as the case of the wife in the above scenario, was not intended to be included under the meaning of beneficiary for purposes of the definition of consumer. In the above scenario the benefit the wife derives is from the absence of the husband and not the booking *per se*. That being the case the wife is not a beneficiary for purposes of defining her as a consumer and therefore her death or hospitalisation will not be reason enough to allow the child to rely on section 17(5) so as to prevent the payment of a cancellation fee, should the booking be cancelled for such reason. It is submitted that the 'direct benefit' approach is to be followed as the alternative will open the door to cancellations and refusals to pay cancellation fees based on the death or hospitalisation of very remote beneficiaries.

Excepting section 17(5) of the Act, the supplier may impose a reasonable cancellation charge. The CPA provides guidance in section 17(4)(a)-(d) regarding factors which may be considered in determination of what may be considered reasonable. Before considering section 17(4) in more detail it must be mentioned that it appears that section 17 is subject to an inconsistent use of terminology. Section 17(3)(a) refers to a 'deposit'; section 17(3)(b) refers to a 'charge for cancellation'; section 17(4) uses the term 'charge' whereas section 17(5) talks of 'cancellation fee'. This creates problems. Whether the term 'cancellation fee' used in section 17(5) is the same as the 'charge for cancellation' used in section 17(3)(b) is not necessarily self-evident. From the context it appears as if it must refer to the same thing, making the use of different terms undesirable. It is also not immediately

clear whether the term 'charge' used in section 17(4) refers only to 'charge for cancellation' used in section 17(3)(b), or whether it also refers to 'deposit' used in section 17(3)(a) of the Act. It is not clear whether section 17(4) then only applies to section 17(3)(b) or also to section 17(3)(a). It is submitted that the section should be so understood that the 'charge' mentioned in section 17(4) actually applies to both the deposit and the charge for cancellation mentioned in section 17(3)(a) and (b) respectively. Therefore both the reasonableness of the deposit and the reasonableness of the cancellation charge are guided by section 17(4) to the extent that it is applicable.

It is suggested that this potential uncertainty could have been avoided by using the following wording in respect of section 17(3) and (5) respectively (words in italics are suggested insertions and words enclosed in square brackets [] are suggested deletions):

- (3) A supplier who makes a commitment or accepts a reservation to supply goods or services on a later date may-
 - (a) require payment of a reasonable *charge as* deposit in advance; and
 - (b) impose a reasonable charge for cancellation of the order or reservation, subject to subsection (5).
- (4) ...
- (5) A supplier may not impose *any charge* for cancellation [fee] in respect of a booking, reservation or order if the consumer is unable to honour the booking, reservation or order because of the death or hospitalisation of the person for whom, or for whose benefit the booking, reservation or order was made.

The reasonableness of the charge for a deposit or cancellation will be determined by considering the nature of the goods or services; the length of notice time of the cancellation; the reasonable potential for the service provider,²⁵² acting diligently, to find an alternative consumer between the cancellation and the time of the event; and the general practice of the relevant industry.²⁵³ How to decide whether the next consumer is an 'alternative consumer' may present real and practical problems. Whether the next sale to a consumer after a cancellation constitutes such an

²⁵² The CPA uses the term 'service provider' in s 17(4)(c) as opposed to 'supplier' which is used generally in the Act and specifically in s 17. 'Service provider' is defined in s 1 of the CPA as 'a person who promotes, supplies or offers to supply any service'. It would then seem as if s 17(4)(c) only applies to the situation where an advance booking for the supply of a service (such as accommodation) has been cancelled and not in the case of an advance order for goods. A reason for this distinction is not obvious.

²⁵³ S 17(4)(a)-(d) of the CPA.

alternative consumer or whether it is just a new sale is unsure.²⁵⁴ Whether it will make a difference if the accommodation is fully booked also is not certain. It has been suggested that a cancellation fee can only be reasonable if the establishment was fully booked on the night(s) in question and a consumer then cancelled his or her booking.²⁵⁵ This approach cannot be agreed with. The Act prohibits a supplier from preventing a consumer from cancelling the booking (or charging full price where the consumer did cancel the booking). Any booking that is honoured will in the ordinary course of events result in a profit for the supplier and, on that basis any cancellation will result in a loss of profit. Whether the establishment was full or not may impact on the reasonableness of the cancellation fee but not on whether a loss was made. It must be remembered that a contract was concluded which is now cancelled. Furthermore, the guidelines provided for in the Act do not indicate that the percentage of occupancy should play a role in determining the reasonableness of such a fee. The argument that a cancellation fee can only be charged (meaning that such a charge will only be reasonable) if the accommodation establishment is fully booked, is simply not what the Act provides. It could even then also be argued that if the establishment was fully booked it should be easy to find an alternative consumer negating the need for a cancellation fee.

The phrase 'acting diligently' must also be given meaning. Accommodation establishments will most certainly argue that they are acting diligently as a matter of course (for purposes of survival in a competitive environment). If there is a waiting list then one would expect the supplier to contact the consumers on the waiting list as part of acting diligently.²⁵⁶ But if there is no such waiting list then it is difficult to see what the supplier must do in order to be considered diligent other than what he or she normally does in conducting the business. Suppliers may offer discounted rates for consumers who make a booking after a certain time. This may encourage last-minute customers to make use of such a supplier in order to take advantage of the discount and it will help the supplier to mitigate losses. However, even in such a

²⁵⁴ Melville *op cit* (n 182) 87.

²⁵⁵ See Lewitton 'Consumer Protection Act: What is a reasonable cancellation fee?' <http://www.tourismupdate.co.za/print/NewsStory.aspx?newsId=58845> (accessed on 15 April 2011).

²⁵⁶ One must bear in mind that this will constitute direct marketing and therefore the supplier must comply with the provisions of ss 11 and 12 of the CPA.

case the supplier is still suffering a loss. Where the cancelled booking is easily replaced or replaceable by an alternative consumer (for instance where there is a waiting list), a reasonable cancellation fee will be relatively small – basically it will constitute a fee to cover the additional administrative expenses incurred. Obviously this will only be the case where the establishment is fully booked. The implication then is that where a cancelled booking is replaced with the booking of an alternative consumer the cancellation fee chargeable will have to be relatively small in order to be reasonable. In the final analysis, the requirement that the supplier must act diligently is nothing more than the common law requirement that an innocent party must mitigate his or her losses in the event of a breach of contract.

The length of time the cancellation is done before the date of the booking or reservation will certainly impact on the ability to mitigate losses due to a cancellation. Whether a cancellation is made three months before as opposed to one week before will most certainly impact on the ability to replace that booking or reservation that has been cancelled.

Tourist activities, including the provision of accommodation services are often seasonal in nature. Finding an alternative consumer for a booking cancelled at the last minute at a tourist accommodation establishment in Plettenberg Bay during the December holiday period will in all likelihood be much easier than doing so in the middle of the winter season or in the case of a very expensive luxury lodge on a remote game farm.²⁵⁷ Although not specifically mentioned, the factor of seasonality can be considered under the nature of the service²⁵⁸ or possible as part of the trade practice in the segment.

Suppliers in the travel and tourism industry, particularly in the accommodation segment, will do well to recognise the greater protection provided consumers by the

²⁵⁷ Several tour operators have raised concerns at the Hospitality Investment Company Africa Conference held in 2010 that suppliers often have unrealistic cancellation clauses in their contracts thereby alienating potential clients. See <http://www.tourismupdate.co.za/print/NewsStory.aspx?newsId=22891> (accessed on 2010-11-24).

²⁵⁸ See s 17(4)(a) of the CPA.

CPA when it comes to cancellation of prior bookings, reservations or orders.²⁵⁹ They should develop and/or adapt their cancellations policies accordingly and, where applicable, consider obtaining appropriate insurance cover to protect them against costly cancellations.²⁶⁰

4.3.5 Consumer's right to information in plain and understandable language

Section 22 of the CPA provides the right of a consumer to information in plain and understandable language. The section states that:

The producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation-

- (a) in the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation;
 - (b) in plain language, if no form has been prescribed for that notice, document or visual representation.
- (2) For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to-
- (a) the context, comprehensiveness and consistency of the notice, document or visual representation;
 - (b) the organisation, form and style of the notice, document or visual representation;
 - (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
 - (d) the use of any illustrations, examples, headings or other aids to reading and understanding.
- (3) The Commission may publish guidelines for methods of assessing whether a notice, document or visual representation satisfies the requirements of subsection (1)(b).
- (4) Guidelines published in terms of subsection (3) may be published for public comment.

²⁵⁹ On the NAA-SA website (see <http://www.mybedandbreakfast.co.za/NAA.html> (accessed on 13 September 2010) under the heading 'SAMPLE TEXT AND TEMPLATES: BOOKINGS' some general terms and conditions are provided as examples to be used by members. One of these terms state: 'Deposits are not refundable in the event of a cancellation or "non arrival".' It should be clear that such a blanket term or condition cannot be used any longer in view of the provisions of the CPA as discussed above.

²⁶⁰ Melville *op cit* (n 182) 87.

A requirement that documents and/or notices are to be in plain language is not completely new to South African law and a number of statutes contain requirements for written material to be in plain language. The National Credit Act (NCA)²⁶¹ contains in section 64 a provision very similar in wording to that of section 22 of the CPA.²⁶² Plain and understandable language is a fundamentally important aspect of consumer protection. Where the one party to a contractual relationship does not understand what is being agreed to then that party is very much at the mercy of the other party. Prescribing the use of plain and understandable language therefore empowers the consumer by enabling the consumer to understand the contractual relationship and the potential implications thereof and is therefore to be welcomed.²⁶³ It has been suggested that:

[i]t seems likely that the use of plain language, and the dropping of substantial unfairness, tend to go hand in hand. Doubtless, once terms are seen in the cold light of ordinary language, unfairnesses which were decently veiled by jargon and complexity stand out as the excrescences they are and the scales fall from the suppliers' eyes.²⁶⁴

Any notice, document or visual representation that is required to be made available to the consumer must be in plain language, except where the CPA or other legislation prescribes a particular form. In England, for instance, Regulation 7(1) of the Unfair Terms in Consumer Contracts Regulations 1999 contains a similar provision which states that '[a] seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language'. The ultimate purpose of plain language is to provide the consumer with knowledge in a format that the consumer can read and can understand.

From section 22(2) of the CPA it is quite clear that 'plain language' is not a plain and simple concept and plain language can be interpreted in many ways, depending very much on the audience.²⁶⁵ What is important to clarify immediately is that plain language is not just about short sentences and simple words, although both aspects

²⁶¹ Act 34 of 2005.

²⁶² There are also plain language requirements in the Long Term Insurance Act 52 of 1998; Short Term Insurance Act 53 of 1998, and the Companies Act 71 of 2008.

²⁶³ Melville *op cit* (n 182) 157.

²⁶⁴ Woodroffe & Lowe *Consumer Law and Practice* (2007) 168.

²⁶⁵ Melville *op cit* (n 182) 158.

are very important to plain language.²⁶⁶ Plain language includes a number of different aspects, all of which in collaboration contribute to a document, notice or visual representation being in plain language or not. The following are aspects that should be considered for writing in plain language (although it is not suggested that this is an exhaustive list):

The first aspect is the language. The Charrows provide some very helpful guidelines for the simplification of the language to be used in a written legal text.²⁶⁷ Texts are complicated by the use of specific linguistic constructions such as a nominalisation (which is the construction of a noun from a verb, such as by the adding of the present participle 'ing' to a word as in 'the doing of...'; 'whiz' deletions ('whiz' is short for 'which is'); using passive voice; using negatives, embeddings (which is the inclusion of a number of subordinate clauses in the main sentence), and the use of legalese, to name but a few.²⁶⁸

Secondly, consideration should be given to the macro-text structure of the document, notice or visual presentation. Under the macro-text structure, one will consider aspects such as the placement of units of information (for example, is there a logical flow and is the information where one would expect it to be?); the typographical layout of the text, which includes the use of headings; font size; indentations; numbering and bold format will be considered.

Thirdly, it is important to consider the nature of the activity (including the seriousness of potential consequences for the consumer) which the parties are regulating via the document, notice or visual representation. The attention of the consumer must be specifically drawn to these aspects.²⁶⁹

²⁶⁶ Melville *op cit* (n 182) 158.

²⁶⁷ See especially Charrow & Charrow 'Making legal language understandable: A psycholinguistic study of jury instructions' (1979) *Columbia Law Review* 1321-1328.

²⁶⁸ See Charrow & Charrow *op cit* (n 267) 1321- 1328 for a detailed explanation and examples of these and other problematic linguistic constructions. For examples of how the guidelines of the Charrows, amongst others, were used to simplify legal texts see Tait & Van der Berg "n Leesbare en verstaanbare siviele dagvaarding' (1993) *Obiter* 127-147 and Tait & Van der Berg "n Voorstel vir die vereenvoudiging van die artikel 65A(1) redeskennisgewing' (1996) *Obiter* 106-121.

²⁶⁹ See the discussion in para 4.3.16 on the exclusion of liability and warnings concerning risks.

A fourth important aspect is the context within which the negotiation of the agreement is conducted. The context here refers to the actual physical situation within which the consumer is required to sometimes sign a contract such as an indemnity.²⁷⁰

The definition of plain language contained in section 22(2) of the CPA is a broad definition inclusive of the different aspects that constitute plain language communication.²⁷¹ However, a cautionary note is sounded that compliance with the plain language requirement is not a formalistic process to ensure that the supplier has used short sentences and simple words. Rather, it is about 'having the right mindset and understanding your consumers'.²⁷² The presence or absence of plain language will be very relevant to the question of whether the supplier acted fairly and in good faith.

Plain language, in the first part of the definition, requires that the consumer at whom the notice, document of visual presentation is aimed, being of average literacy and with minimal experience of the goods or services, must be able to understand the contract and its significance and importance for the consumer without undue effort. This specific consumer is an ordinary consumer of the class of persons for whom the written communication is intended and with average literacy skills and minimal experience as consumer of those particular goods or services. If it is reasonable to conclude that this consumer could understand the content, significance and importance thereof without undue effort, then the communication passes the test for plain language. In the second part of the definition, specific aspects are mentioned that must be considered when deciding whether it is reasonable to conclude that the consumer will be able to understand the communication within the context of a particular situation.

Because the consumer is the one who must understand the communication, the communication must be written with the consumer in mind. The consumer is an

²⁷⁰ This aspect will also be more fully considered in para 4.3.16. See Vrancken & Tait 'Southern Africa can be a tough country for tourism service providers ... even with an exemption clause *Drifters Adventure Tours CC v Hircock* 2007 1 All SA 133 (SCA)' (2008) *Speculum Juris* 142-143 for a brief discussion on these four aspects.

²⁷¹ Melville *op cit* (n 182) 160.

²⁷² Melville *op cit* (n 182) 160.

ordinary consumer from a class of persons whom the communication is aimed at. This indicates that the market targeted will play an important role in determining what will eventually be considered to be plain language or not. This may mean requiring that written communication (such as a written contract) may (or must) differ because of the different target market. The implication is that the contract between a five star hotel, whose target market is corporate clients and business people, may well be written in different terminology than that of a backpackers' hostel whose target market is low-budget young travellers. The substantive content will be the same but the way it is written and whether what is written will be considered to be in plain language may differ depending on the context. This could complicate things for a supplier. For accommodation establishments the problem may well be ameliorated, as in most cases they will have to cater for a fairly wide variety of clientele even though they may target a particular market segment. Establishments targeting the top end of the market will often be used by either domestic tourists or foreign visitors whose command of English may be limited. This could necessitate a simpler form of plain language being used by such establishment than would be the case if their clients only consisted of, for instance, business people who are proficient in English. As a result of these complexities it would be advisable for accommodation establishments to have their consumer agreements written in as plain a language as possible irrespective of the target market of the establishment.

The consumer is one having average literacy skills. It is by no means clear when a consumer will be considered to have average literacy skills. The fact that literacy levels in South African are generally fairly low makes the situation more complex. Another factor to be considered is that literacy in one language may not mean literacy in the language in which the communication is attempted. A person literate only in Xhosa cannot be considered of average literacy when confronted with an English document.²⁷³ In this context it is interesting to note that the NCA provides that a consumer has the right to receive any document required in terms of the NCA in an official language that the consumer reads or understands, to an extent that is reasonable with regard to certain factors including usage, practicality and expense.²⁷⁴

²⁷³ Melville *op cit* (n 182) 161.

²⁷⁴ S 63(1) of the NCA. See also Jordaan *The Credit Law of South Africa – A Guide to Consumers, Credit Users and Credit Grantors* (2007) 43.

A credit provider, in order to comply with the aforementioned requirement, can propose to the National Credit Regulator (NCR) the use of two official languages.²⁷⁵ The CPA does not contain similar provisions guiding the usage of languages by suppliers.²⁷⁶ One possibility can be that the legislature did not want to create a situation where a supplier would have to provide information on shelves, products, till slips, invoices, quotations and every other conceivable document generated by the supplier and supplied in some manner to a consumer, to be in two or more official languages and/or provided in the preferred language of the consumer. Clearly such a situation will provide all kinds of practical problems for a supplier. However, it may well be that the decision was made not to include a 'right' for a consumer to receive a document in an official language so as to leave the onus on the supplier to make sure that the consumer understands the terms of the agreement, no matter in what language. In other words, the supplier is in a more difficult position than the credit provider as the latter can comply with the NCA by proposing to make use of two official languages and that will be sufficient compliance with the right as to a choice of language. The supplier, in terms of the CPA, does not have this choice and, as indicated, must ensure that the consumer understands - whether it be in an official language or something else. Intentionally or unintentionally it places a very onerous obligation on the supplier. For instance, foreign tourists visiting South Africa, many of whom may well be functionally illiterate in English, and they are often required to sign away certain rights by way of indemnity agreements when taking up accommodation at a hotel or B&B establishment or before participating in some activities offered by an accommodation establishment, such as game drives. If the accommodation establishment is frequented by a relatively high number of, for example tourists from Germany, the supplier will do well to have the agreements available in plain language German or at least to have explanatory notes available in such other language,

²⁷⁵ S 63(2) of the NCA. The sub-section reads as follows:

If the producer of a document that is required to be delivered to a consumer in terms of this Act is, or is required to be, a registrant, that person must-

- (a) make a submission to the National Credit Regulator proposing to make such documents available in at least two official languages; and
- (b) offer each consumer an opportunity to choose an official language in which to receive any document, from among at least two official languages as determined in accordance with a proposal that has been approved by the National Credit Regulator.

²⁷⁶ S 92(4) of the CPA does require that any document that the NCC must provide must be in at least two official languages. See the discussion on this aspect in Chapter 3 *infra*, particularly par 3.3.4 (b). This provision is much more limited in scope than the right provided by the NCA.

drawing the attention of the tourist to the important aspects of the agreement such as the nature of the agreement and that liability is excluded. The cost may be significant but the alternative may be even more so. Even closer to home, a supplier of accommodation services may be frequented by a substantial number of South Africans and these consumers cannot be assumed to necessarily be proficient in English or any other language that the supplier is using to communicate with consumers (other than the home language of the consumers of course). Accommodation establishments in areas such as the Eastern Cape and Western Cape for instance, should therefore use Xhosa in a similar manner to that as suggested above in respect of German, to facilitate the process of understanding the nature and consequences of the agreement the consumer is required to enter into. However, taking these steps cannot guarantee that the consumer will comprehend the document and the information it contains, the consequence being that the supplier may still not be in compliance with the CPA.

The consumer is also one with minimal experience as a consumer of these specific goods or services. This qualification of the consumer 'fundamentally changes the way that we write. Marketers accustomed to writing for the "average" consumer must now shift to consider the person with the least experience'.²⁷⁷ This is particularly important when one considers that many foreign tourists may be on their first overseas trip, and what is more, are substantially if not completely ignorant of the culture, practices and dangers of, for instance, the African bush. Many tourist accidents and ensuing injuries or deaths are the result of tourists being in an unfamiliar environment and participating in unfamiliar activities.²⁷⁸ Examples of such situations in accommodation establishments include the safety of consumers and their property in and around such establishment from crime; exposure to dangerous animals at or near establishments such as game lodges (including taking part in activities offered by such accommodation establishments); as well as more mundane aspects such the different ways in which showers work which may result in burning

²⁷⁷ Melville *op cit* (n 182) 162.

²⁷⁸ Wilks ' "Coroners" Concerns about international visitor deaths in Australia' [2006] *ITLJ* 43, reported that visitors to Australia from countries where cars are driven on the right-hand side of the road are three times more frequently involved in motor-vehicle accidents than visitors from countries where one drives on the left hand side of the road. This is evidence that people who find themselves in an environment that is strange and unknown to them may be more prone to suffer damage or incur a loss.

caused by hot water; or the supply of an electrical current not being suitable for the apparatus for which it is used resulting in damage. These examples obviously do not only apply to foreign visitors but are equally applicable to domestic tourists finding themselves in unfamiliar environments.

The consumer must be able to understand the content of the contract, appreciate how it may impact on him or her, as well as comprehending its relevance and importance. The consumer must therefore be led to understand that the terms contained in the document constitute a legally enforceable agreement; the extent to which it binds the consumer, and the consequences that it may have for the consumer. Accommodation establishments as a rule make use of indemnity provisions when contracting with consumers. This is most often done by way of a term of the contract which is signed when checking-in or by way of notices placed at the entrance and/or in rooms and/or at facilities such as the swimming pool. Provisions that exclude the liability of accommodation establishments in respect of consumers for any loss or damage suffered by a consumer are therefore of particular relevance for such establishments.²⁷⁹

Finally, the consumer must be able to understand and appreciate all that was mentioned in the previous paragraph *without undue effort*. This requirement goes to the heart of the plain language requirement, in that the document, notice or visual presentation must enable the consumer to understand the nature, implications and potential consequences of the written communication. All the methods that can be employed to ensure that the document is in plain language must be considered.²⁸⁰

4.3.6 Disclosure of prices of goods or services

Section 23 of the CPA provides for the disclosure of prices of goods and services, and compels a retailer²⁸¹ not to 'display any goods for sale without displaying to the

²⁷⁹ The contract excluding liability (or indemnity agreement) is discussed below.

²⁸⁰ See further Melville *op cit* (n 182) 163-170, as well as Woodroffe & Lowe *op cit* (n 265) 167-168 for principles and examples on how to write in plain language.

²⁸¹ S 1 provides that a 'retailer, with respect to any particular goods, means a person who, in the ordinary course of business, supplies those goods to a consumer'.

consumer a price in relation to those goods'.²⁸² The section also indicates the circumstances under which it would be considered that the price was adequately displayed.²⁸³ A supplier may not require a consumer to pay a price that is higher than the price displayed or, in the event that two prices are displayed, the consumer may not be asked a price higher than the lowest price displayed.²⁸⁴ There are exceptions to this prohibition, for example, where the first price displayed was fully covered by the new price.²⁸⁵

One provision that is bound to cause some heated arguments in shops (and potentially in consumer forums) is contained in subsection 23(9) of the CPA, which provides as follows:

If a price as displayed contains an inadvertent and obvious error, the supplier is not bound by it after-

- (a) correcting the error in the displayed price; and
- (b) taking reasonable steps in the circumstances to inform consumers to whom the erroneous price may have been displayed of the error and the correct price.

The subsection seems to mean, firstly, that a supplier is bound to a displayed price even where there is an *inadvertent and obvious* error, and will remain bound to that erroneous price until the supplier has corrected the displayed price, and taken reasonable steps to inform consumers to whom the erroneous price may have been displayed of the error and what the correct price indeed is. What will constitute *reasonable* steps will obviously depend on the circumstances of each case. Where

²⁸² S 23(3) of the CPA.

²⁸³ S 23(5) of the CPA provides as follows:

A price is adequately displayed to a consumer if, in relation to any particular goods, a written indication of the price, expressed in the currency of the Republic, is-

- (a) annexed or affixed to, written, printed, stamped or located upon, or otherwise applied to the goods or to any band, ticket, covering, label, package, reel, shelf or other thing used in connection with the goods or on which the goods are mounted for display or exposed for sale;
- (b) in any way represented in a manner from which it may reasonably be inferred that the price represented is a price applicable to the goods or services in question; or
- (c) published in relation to the goods in a catalogue, brochure, circular or similar form of publication available to that consumer, or to the public generally, if-
 - (i) a time is specified in the catalogue, brochure, circular or similar form of publication as the time after which the goods may not be sold at that price, and that time has not yet passed; or
 - (ii) in any other case, the catalogue, brochure, circular or similar form of publication is dated, and in the circumstances may reasonably be regarded as not out of date.

²⁸⁴ S 23(6) of the CPA.

²⁸⁵ S 23(8) of the CPA.

an erroneous price is placed inadvertently on a display then, as soon as the error is discovered, the price can be corrected and through that action reasonable steps are taken to rectify the situation. Until such time as the error is discovered and corrected as indicated consumers will be able to buy the product or service at the displayed price. A consumer who drives past a hotel which has an advertised price on a display board of 'Tonight only R199 per room' will be bound to that price if the consumer then wants to purchase the service at that price. The hotel may now correct the price to the price it was suppose to be, say R799. A later consumer, who heard about the 'special' from the first consumer via Twitter, cannot insist on the erroneous price. But consider reasonableness in the situation where an advertisement is placed and distributed via the morning newspapers. There is an erroneous price advertised by a hotel for an Easter weekend special. A consumer contacts the hotel to a make a reservation and the latter, now realising the error, advises the consumer that the price is an error. It is submitted that this would not be reasonable and that the price will have to be corrected in the next day's paper – for that day the price will have to be as advertised. The foregoing will be the correct approach to the understanding and application of the section as it currently stands, even though the error is obvious. The reason for this is to prevent the deception of consumers through this form of bait marketing.²⁸⁶

If the error is not an inadvertent and/or obvious one, then the supplier will clearly be bound by the price.²⁸⁷ The supplier therefore has a duty to ensure that correct prices are communicated. Failure to do so will result in the supplier having to bear the loss of the incorrectly displayed price. If the incorrect price was displayed intentionally

²⁸⁶ S 30 of the CPA deals with bait marketing. The understanding and application of s 23(9) of the CPA as set out above, it is submitted, is in line with s 30 of the CPA.

²⁸⁷ Melville *op cit* (n 182) 42 states that '[i]f there is an **obvious error** in the price, a supplier will not be bound by the price if the supplier has corrected the error and or taken steps to inform customers that the wrong price has been displayed as a result of an unauthorised person tampering with the price in some way'. There are two problems with this statement. Firstly, the CPA does not provide for 'and or' as indicated. Both actions must take place: correcting the price **and** the taking of reasonable steps to inform consumers – there is no option allowed of one or the other course of action. Secondly, the statement conveys the idea that the obvious error is the result of an unauthorised person tampering with the price thereby causing the wrong price to be displayed. It is submitted that this argument is an unfortunate condensing of ss 23(9) & (10) of the CPA. Section 23(10) of the CPA provides that a supplier is not liable for a displayed price where the price was altered by an unauthorised person. Subsection 23(10) of the CPA does not contain a requirement for the application of ss 23(9) of the CPA. Section 23(10) constitutes a separate ground where the supplier will not be bound to the displayed price.

(not inadvertently) the supplier will be held to that price, or where it is not obvious that there is an error then the supplier will also be held to the erroneous price. Unfortunately for the supplier, whether an error is obvious may not always be so obvious. It can be argued that it will not be an obvious error when a hotel advertises a room per night for R199 per person as opposed to R799 per person especially in the off-peak season and in times when hotel prices are under pressure because of the recession. It may be inadvertent but not so obvious, especially considering that the consumer is one with minimal experience of the service. It is indeed a case where the adage *caveat emptor* has been replaced with *caveat vendor*.

The supplier is the one who wishes to escape being held to the erroneous price displayed and therefore the supplier is the party who carries the burden to prove that the price displayed contains

- (i) an inadvertent and obvious error;
- (ii) that the supplier had corrected the price, and
- (iii) that reasonable steps were taken in the circumstances to inform consumers to whom the incorrect price may have been displayed of the error and of the correct price.

As indicated it may not be so easy to convince a court, the National Consumer Tribunal or a consumer court that an error in price was obvious.

The drafting of section 23 of the CPA is something which requires comment. Firstly, it is submitted that it would have been preferable if the word 'adequately' had been inserted in section 23(3) of the Act. The subsection would then have read as follows:

Subject to subsection (4), a retailer must not display any goods for sale without *adequately* displaying to the consumer a price in relation to those goods.

What 'adequately' means is then explained in section 23(5) of the CPA. In all likelihood the word 'adequately' will be read into subsection (3), otherwise it would

appear that there could be more than one type of displaying a price, over and above the non-displaying or incorrect displaying of a price. There is the displaying of a price in terms of subsection (3), and then there is 'adequate displaying of a price' which may result in unnecessary confusion. Inserting the word 'adequately' in subsection (3) as indicated, and then explaining the meaning in subsection (5) would have avoided this.

A second drafting problem flows from the use of the word 'retailer' in subsections (3) and (4), and by implication in subsection (5), as the latter subsection pertains to the meaning of subsection (3). A 'retailer' is explained in section 1 of the CPA as a person who, in the ordinary course of business, *supplies goods* to a consumer. The rest of section 23, including subsections (1), (6), (9), (10) and (11) uses the word 'supplier'. A supplier has a wider meaning than retailer since a retailer is a person who only supplies goods to a consumer in the ordinary course of the retailer's business, whereas a supplier markets goods *or services*. 'Marketing' means to promote or supply any goods or services.²⁸⁸ If the intention was to limit the application of subsections (3) to (5) to retailers, and therefore to the supply of goods only, then it is not clear why the words 'or services' were included in paragraph (5)(b). This must have been an inadvertent typographical error otherwise there is conflict between the use of the terms 'retailer' and 'or services'. Furthermore section 23(5) stipulates specifically that a price is adequately displayed to a consumer if, in relation to any particular *goods*, the price is indicated in certain ways as set out in paragraphs (5)(a) – (c). The insertion in paragraph (b) of the words 'or services' therefore appears to be a mistake as subsection (5) specifically seems to apply to goods. But why the subsection should be limited only to goods is not clear either. Although not always as straight-forward as is the case with goods, prices can also be displayed in respect of services. Considering the wording of paragraph (5)(a) it is clear that it applies to goods as would be normally found in a shop, but paragraph (5)(b) can easily also apply to services and therefore the inclusion of the words 'or services' would make perfect sense if it was not for the arguments raised above. Paragraph (5)(c) can just as readily apply to services as well (bar the fact that the paragraph specifically makes it applicable to goods and the arguments raised

²⁸⁸ S 1 of the CPA.

above). The apparent application, or limitation, of section 23(5) to goods only is confusing and unnecessary. The subsection can easily apply to services as well. A simple amendment to the section could have made this possible and could have avoided the likely confusion this section is bound to cause. It is submitted that the following amendments to the subsection may adequately address the concerns raised:

A price is adequately displayed to a consumer if, in relation to any particular goods *or services and to the extent applicable*, a written indication of the price, expressed in the currency of the Republic, is-

- (a) annexed or affixed to, written, printed, stamped or located upon, or otherwise applied to the goods or to any band, ticket, covering, label, package, reel, shelf or other thing used in connection with the goods or on which the goods are mounted for display or exposed for sale;
- (b) in any way represented in a manner from which it may reasonably be inferred that the price represented is a price applicable to the goods or services in question; or
- (c) published in relation to the goods *or services* in a catalogue, brochure, circular or similar form of publication available to that consumer, or to the public generally, if-
 - (i) a time is specified in the catalogue, brochure, circular or similar form of publication as the time after which the goods *or services* may not be sold at that price, and that time has not yet passed; or
 - (ii) in any other case, the catalogue, brochure, circular or similar form of publication is dated, and in the circumstances may reasonably be regarded as not out of date.

As the subsection is currently formulated, subsections 23(3), (4) and (5) of the CPA apply only to goods sold by a retailer. Retailers of services are excluded from having to display prices for services advertised, but if a price is displayed then the supplier cannot charge more for that service than advertised as is provided in subsection 23(6) of the CPA.²⁸⁹ The words 'or services' appearing in section 23(5)(b) must then be an inadvertent drafting error. However, the exclusion of suppliers of services from these requirements (of displaying prices) is not to the benefit of consumers.

It can be argued that section 23 must be read so as to include retailers of services for purposes of the section. (Amending the definition of 'retailer' to include the supply of services will solve the problem, of course.) This may be possible in view of the

²⁸⁹ The United Kingdom also struggled with the issue of misleading prices for services as indicated by Woodroffe & Lowe *op cit* (n 265) 256-257. The situation is now regulated by Part 2 of The Consumer Protection from Unfair Trading Regulations 2008, which prohibits commercial practices which are unfair if it is misleading. A commercial practice, which relates to both goods and services, is misleading if it, *inter alia*, contains false information and the false information causes or is likely to cause the average consumer to make a decision s/he would otherwise not have made.

uncertainty that currently exists regarding how to interpret section 23 as argued above. The uncertainty allows for more than one interpretation and the suggested interpretation will give better effect to the purposes of the CPA in widening the scope of the protection afforded consumers and not differentiating in the protection afforded consumers of goods and consumers of services as far as the protection provided by section 23 of the CPA is concerned. The current definition of 'retailer' may operate against such an interpretation and the Legislature should address this issue.

It is a general rule of the South African common law of contract 'that an advertisement constitutes merely an invitation to do business rather than an offer'.²⁹⁰ However, whether a particular statement or communication constitutes an offer or merely an invitation to do business depends on what the intention behind the statement was, or on the impression reasonably created by it in the mind of the person to whom it is directed.²⁹¹ Given that a retailer must not display a product without displaying the price in respect of such product,²⁹² and that a higher price may not be required to be paid for that product²⁹³ it seems as if the statement of the price in such a case will constitute more than just an invitation to do business and does indeed constitute an offer. If the offer is accepted there will be an enforceable contract. This is also in line with the proposed approach to the interpretation of section 23(9) of the CPA suggested above. It seems that the time has gone whereby a retailer could hide behind the fact that the price on the product or shelf or in the newspaper advertisement was just an invitation to do business and now that retailer wants to charge a different (higher) price.

Section 23 of the CPA does not apply to a transaction if section 43 of the Electronic Communications Transactions Act applies to such transaction. The latter section provides that a supplier who, for instance, offers goods or services to consumers via

²⁹⁰ Hawthorne & Hutchison 'Offer and acceptance' in Hutchison & Pretorius *op cit* (n 52) 51. See also Havenga *et al Algemene Beginsels van Kommersiële Reg* (2004) 56 & Christie *The Law of Contract* (2001) 43-46.

²⁹¹ Hawthorne & Hutchison 'Offer and acceptance' in Hutchison & Pretorius *op cit* (n 52) 51.

²⁹² S 23(3) of the CPA.

²⁹³ S 23(6)(a) of the CPA.

an electronic transaction must provide certain information on the website where such goods or services are offered.²⁹⁴

4.3.7 Sales records

Section 26 prescribes that a supplier of goods or services must provide a consumer to whom the goods or services are provided with a written record of each transaction.²⁹⁵ The record of the transaction must at least contain the information as set out in section 26(3). This includes the suppliers' full name or registered business name and VAT number;²⁹⁶ the address of the premises at which, or from which, the goods or services were supplied;²⁹⁷ the date of the transaction;²⁹⁸ a name or description of the goods or services supplied;²⁹⁹ the unit price of the particular goods or services;³⁰⁰ the quantity;³⁰¹ the price before tax;³⁰² applicable taxes;³⁰³ and a total amount inclusive of applicable taxes.³⁰⁴ Section 26 does not apply to transactions if section 43 of ECTA applies thereto, or if the Minister has exempted categories of goods or services from the application of the section.³⁰⁵ The impact of the latter section appears to be quite significant.

Section 43(1) of ECTA requires of a supplier who offers goods or services by way of an electronic transaction to consumers to make available to consumers certain information on the website where such goods or services are offered. The information to be supplied is similar to that indicated in section 26(1)(a) – (r) of the

²⁹⁴ S 43 of ECTA is discussed fully in para 4.3.7.

²⁹⁵ S 26(2) of the CPA. In terms of a Notice contained in the Regulations and issued under s 26(4) of the CPA a 'hawker' is exempted from the application of s 26(2) & (3) of the CPA. A 'hawker' is defined in the Notice as 'a natural person lawfully engaged, solely for his or her own benefit, in the selling of goods on the street or in public places or spaces in respect of which all members of the public enjoy unrestricted and unconditional access subject only to law'.

²⁹⁶ S 26(3)(a) of the CPA.

²⁹⁷ S 26(3)(b) of the CPA.

²⁹⁸ S 26(3)(c) of the CPA.

²⁹⁹ S 26(3)(d) of the CPA.

³⁰⁰ S 26(3)(e) of the CPA.

³⁰¹ S 26(3)(f) of the CPA.

³⁰² S 26(3)(g) of the CPA.

³⁰³ S 26(3)(h) of the CPA.

³⁰⁴ S 26(3)(i) of the CPA.

³⁰⁵ S 26(1) of the CPA. Section 26(1)(b) of the CPA refers to ss (3), but this is clearly an error and should instead refer to ss (4).

CPA and includes the full name and legal status of the supplier;³⁰⁶ its physical address and telephone number;³⁰⁷ its website address and email address;³⁰⁸ membership of self-regulatory or accreditation bodies to which the supplier belongs or subscribes and the contact details of such bodies;³⁰⁹ any code of conduct to which that supplier subscribes and how such code may be accessed electronically;³¹⁰ the full price of the services, including taxes and any other fees or costs;³¹¹ the manner of payment;³¹² the refund policy of that supplier;³¹³ and the rights of consumers to a cooling-off period, where applicable.³¹⁴

Section 43(2) of ECTA further requires of the supplier to provide consumers with an opportunity to review the entire transaction, to correct any mistakes and withdraw from the transaction before finally placing an order.

Section 43(3) of ECTA contains a provision that may have serious consequences for suppliers of services such as accommodation. It provides that if a supplier fails to comply with the provisions of sections 43(1) or (2) of ECTA, the consumer may cancel the transaction within 14 days of receiving the goods or services under the transaction. If so cancelled, the consumer must return the performance of the supplier or, where applicable, cease using the services;³¹⁵ and the supplier must refund all the payments made by the consumer minus the direct cost of returning the goods.³¹⁶ It must firstly be recognised that a substantial number of transactions for the purpose of acquiring tourist accommodation take place via electronic transactions, particularly via the Internet.³¹⁷ All these transactions are therefore

³⁰⁶ S 26(1)(a) of the CPA.

³⁰⁷ S 26(1)(b) of the CPA.

³⁰⁸ S 26(1)(c) of the CPA.

³⁰⁹ S 26(1)(d) of the CPA.

³¹⁰ S 26(1)(e) of the CPA.

³¹¹ S 26(1)(i) of the CPA.

³¹² S 26(1)(j) of the CPA.

³¹³ S 26(1)(n) of the CPA.

³¹⁴ S 26(1)(r) of the CPA.

³¹⁵ S 43(4)(a) of the ECTA.

³¹⁶ S 43(4)(b) of the ECTA.

³¹⁷ Travel bookings on on-line travel sites are increasing significantly. See <http://www.tourismupdate.co.za/print/NewsStory.aspx?newsId=59064> (accessed 2011-05-10).

subject to section 43 of ECTA.³¹⁸ Suppliers of accommodation services must therefore ensure that they comply with the requirements of that section, failing which a transaction may be cancelled within 14 days of receiving the goods or services under the transaction. In the case of an ongoing service, such as provided by an Internet service provider, the consumer must cease using the service,³¹⁹ but a service such as accommodation, which is of a short-term nature, presents a problem. For accommodation suppliers the problem is clear: once the service is provided it cannot be returned but payments may have to be returned if the transaction is cancelled for failing to comply with the provisions of section 43(1) and (2) of ECTA. The rationale for these provisions clearly seems to be to punish the supplier for his or her failure to comply with the requirements of sections 43(1) and (2) of ECTA. Consider the scenario of a tourist, who having obtained all the costs from the website of a hotel, makes a booking only to be confronted on departure with a statement of account including so-called levies and costs not disclosed on the website. The consumer cancels the transaction and demands (re)payment of the deposit paid on making the booking, all within the period of 14 days. The possibility exists that a consumer can even exploit such an oversight in providing all the required information to make use of the accommodation service and then cancel the transaction and even claim the return of any monies paid. The interpretation of section 43(4) of ECTA is therefore important.

It seems clear that section 43(3) of ECTA contemplates that a contract can be cancelled even after the services contracted for in terms of the contract, have been rendered. In the context of an accommodation establishment it means that failure to comply with the requirements of sections 43(1) and (2) of ECTA will enable a consumer to cancel the contract with the supplier of the accommodation service even after the service has been rendered. The question that now arises is to which extent section 43(4) finds application to this situation.³²⁰

³¹⁸ S 42 of ECTA excludes the application of s 44 to certain electronic transactions including the provision of accommodation, but the application of s 43 is not limited in a similar fashion. Section 43 of ECTA therefore does apply to electronic transactions for the provision of tourist accommodation.

³¹⁹ S 43(4)(a) of ECTA.

³²⁰ S 43(4) of ECTA reads as follows:

(4) If a transaction is cancelled in terms of subsection (3)-

It may be argued that section 43(4) of ECTA does not apply in the case where the consumer cancels the transaction after the services were rendered. The supplier may contend that section 43(4)(b)³²¹ of ECTA only allows for the repayment of monies paid by a consumer in respect of goods (and not services) because the wording of the provision only refers to goods. The section refers, for instance, to the repayment of all payments made by the consumer minus certain costs for returning *the*³²² goods. Therefore, the supplier may argue, repayment of monies received has to take place where goods, and not services, are the object of the cancelled transaction. Furthermore can it may be argued that services rendered cannot be returned and therefore it would make no sense including a reference to services in section 43(4)(b). This approach is seemingly supported by the formulation of section 43(4)(a) of ECTA in that the consumer must return the performance received, and *where applicable*, cease using the services performed. There is no reference to making restitution of the services performed or tendering the monetary value thereof.³²³ It may be that the Legislature was fully aware of the problem surrounding services in that their supply can only be stopped if of an ongoing nature. Where the rendered service is of a once-off nature it cannot be returned. At most, ongoing services can be stopped. An argument exists therefore that section 43(4) of ECTA only applies in the case of ongoing services and where goods have been provided, and not in the case of services have already rendered on a once-off basis as in the provision of accommodation services.

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- (a) the consumer must return the performance of the supplier, or where applicable, cease using the services performed; and
 - (b) the supplier must refund all payments made by the consumer minus the direct cost of returning the goods.

³²¹ It is submitted that the wording of s 43(4)(b) of ECTA is somewhat confusing. It provides that the supplier must refund all payments made by the consumer minus the direct costs of returning the goods. Does this mean that the supplier must repay all payments made by the consumer minus the direct costs the *consumer* incurred or the *supplier* incurred in returning the goods? As it makes no sense to deduct costs incurred by the consumer it must refer to costs incurred by the supplier to *recover* the goods. It would therefore have been better had the word 'recovering' been used and not 'returning', as the latter seems to denote that it is a cost incurred by the consumer. Where the consumer incurred the cost it should be added to what has to be refunded by the supplier.

³²² It is submitted that the use of the definite article 'the' refers to the goods in respect of which the payment was made. Had this article not been inserted the link between the payments and the goods would have been weaker.

³²³ In terms of the common law a party cancelling an agreement must tender restitution of the monetary value of the service, as the service itself cannot be restored. See Eiselen 'Remedies for breach' in Hutchison & Pretorius *op cit* (n 52) 326.

Whether section 43(4) of ECTA applies or whether the common law regulates the situation because section 43(4) of ECTA does not apply, will make no difference nor have no real impact if the consumer is to tender payment of the full amount and the supplier is then to make restitution of the full amount. It will balance out because of the fact that the actual service cannot be restored. There will only be an impact if the consumer is excused from making restitution.³²⁴

This does not necessarily impact on the duty of the supplier to repay any payments made by the consumer in respect of a transaction for services, where the services were rendered but the transaction subsequently cancelled because a failure to comply with section 43(1) and (2) of ECTA. Paragraphs (a) and (b) of section 43(4) of ECTA contain the duties of the consumer and supplier respectively. The consumer must return the goods or cease using the services.

In the final analysis, however, one needs to determine what the purpose of the relevant section is and it seems quite clear that the Legislature intended to punish the supplier for non-compliance with the provisions of section 43(1) and (2). The penalty for non-compliance lies in having to return the payment (or at least a part thereof) received from the consumer in terms of the agreement. If the supplier of a service is not forced to return the payment there is actually no punishment for such supplier. There is therefore no incentive to comply with the provisions of the section.³²⁵ Having to return payment for a service already delivered will be more than enough incentive to comply the provisions of ECTA. This is the reason why an interpretation is preferred that requires repayment of payments made for goods and services,

³²⁴ Restitution can be excused where goods have been rendered valueless through its use as contemplated by the parties. See Eiselen 'Remedies for breach' in Hutchison & Pretorius *op cit* (n 52) 326. The same approach could be adopted when dealing with service but for the fact that the service did provide the consumer with value. Invariably a settlement can be achieved in terms of which the supplier will be able allowed to receive a portion of the money charged for the service provided.

³²⁵ S 49 of ECTA, as amended by s 121(1) and read with Schedule 1 of the CPA, provides that a consumer may lodge a complaint with the NCC in respect of any non-compliance by a supplier with the provisions of s 43 of ECTA. Non-compliance with the provisions of the s 43 of ECTA may therefore constitute prohibited conduct and result in the supplier being liable for administrative fines.

irrespective of whether it was a once-off service or an on-going one, despite the seemingly unclear wording of section 43(3) of ECTA.³²⁶

Because of the provisions of ECTA the supplier of accommodation services may find itself in a precarious position and should make absolutely sure that it complies with the requirements of section 43 of ECTA so as to avoid unnecessary – and very costly – problems.

4.3.8 Over-selling and over-booking

Section 47 of the CPA regulates an aspect of the tourism industry that often gives cause for consumer complaints: over-selling and over-booking.³²⁷ The crux of the section is to be found in sections 47(2) and (3) of the Act.

Section 47(2) states:

- (2) A supplier must not accept payment or other consideration for any goods or services if the supplier-
 - (a) has no reasonable basis to assert an intention to supply those goods or provide those services; or
 - (b) intends to supply goods or services that are materially different from the goods or services in respect of which the payment or consideration was accepted.³²⁸

The first aspect of interest is that the section specifically states that the supplier may not *accept payment or other consideration* if the said supplier has no reasonable basis for forming an intention to provide those (accommodation) services, or the supplier intends supplying services that are materially different from the services for which the payment or other consideration was accepted. Prohibited conduct is constituted therefore by the acceptance of payment or other consideration in the

³²⁶ It is submitted that if s 43(3)(b) of ECTA had read as follows, the difficulty in interpreting the section would have been avoided:

- (b) the supplier must refund all payments made by the consumer in respect of such cancelled transaction, minus direct costs incurred by the supplier for recovering goods delivered in terms of a cancelled transaction, where applicable.

³²⁷ In terms of s 47(1) of the CPA the section does not apply to franchise agreements or consumer agreements pertaining to the supply of any special order goods.

³²⁸ As the supply of accommodation services essentially involves the provision of a service, the discussion will not refer to the supply of goods.

circumstances mentioned with the possibility that the prescribed punitive measures can be imposed against the supplier.³²⁹

Section 47(3) provides that:

- (3) If a supplier makes a commitment or accepts a reservation³³⁰ to supply goods or services on a specified date or at a specified time and, on the date and at the time contemplated in the commitment or reservation, fails because of insufficient stock or capacity to supply those goods or services, or similar or comparable goods or services of the same or better quality, class or nature, the supplier must-
 - (a) refund to the consumer the amount, if any, paid in respect of that commitment or reservation, together with interest at the prescribed rate from the date on which the amount was paid until the date of reimbursement; and
 - (b) in addition, compensate the consumer for costs directly incidental to the supplier's breach of the contract, except to the extent that subsection (5) provides otherwise.

Once the supplier makes a commitment or accepts a reservation to supply services at a specified date and time and then fails to do so, the supplier must refund the consumer any monies already paid in respect of such reservation or commitment, if any, together with interest at the prescribed rate from date of payment to date of reimbursement and, furthermore, the supplier must compensate the consumer all costs directly incidental to the supplier's failure to provide the service as reserved.

It is submitted that section 47(3) of the CPA has a general or wide application in the sense that it not only applies to and provides the consumer with protection in the event of a section 47(2) scenario, but it also provides the same protection in cases that do not necessarily entail the prohibited conduct provided for in section 47(2). Thus, the protection (or remedy) provided for in section 47(3) applies, irrespective of whether the supplier accepted payment for a booking even though there existed no reasonable basis for the supplier to accept the booking and therefore the payment (the section 47(2) scenario), or whether the supplier purely through a confluence of circumstances is unable to provide the service as contemplated in the agreement and whether the supplier has accepted money or not.

³²⁹ Accepting a booking, although no payment is required or paid, without any reasonable basis upon which an intention to honour such a booking can be asserted or intending to provide a materially different service than that for which the booking was made, will in all likelihood constitute unconscionable conduct and may well be covered by s 41 of the CPA.

³³⁰ It is not clear why this rather cumbersome phrase is used when it is clear that reference is made to a contract (as is evident from the use of the word 'contract' in ss (3)(b)).

It should be relatively easy for a consumer to establish the reservation and the fact that the service (accommodation) was not supplied, or that it was not supplied as per the reservation or done so in a materially different manner. Once this has been established the supplier will have to refund monies already paid and/or reimburse the consumer for costs incurred as a direct result of the failure of the supplier to provide the service as has been reserved. This may include travelling expenses, such as taxi fare to another accommodation establishment as well as the difference in price where the alternative accommodation is more expensive than what the consumer would have had to pay at the original supplier. This does not mean that the consumer now has a free choice to go to the most expensive hotel after he or she was 'over-booked' at the backpackers lodge. A claim for direct incidental costs (or damages) will be determined by the general principles of contract law relating to breach of contract and resultant claims for damages. The requirement of causation will play a role in this particular situation, specifically the aspect of legal causation. Once factual causation has been established (the *conditio sine qua non*-test), the inquiry will move to the aspect of legal causation, 'where the aim is to protect the party in breach from liability that is too wide-ranging and unreasonable'.³³¹ This entails asking the question whether the causal connection between the breach and the loss is sufficiently close, in other words, not too remote to justify imposing liability. The traditional approach holds that general damages are not too remote and therefore recoverable, but special damages are only recoverable if exceptional circumstances are present. This approach has been succinctly set out in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*³³² as follows:

To ensure that undue hardship is not imposed on the defaulting party ... the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of breach in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded by the law as too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from the breach.

A consumer faced with an over-booking scenario and having to find alternative accommodation therefore will not be allowed costs deemed too remote. In practical

³³¹ Eiselen 'Remedies for breach' in Hutchison & Pretorius *op cit* (n 52) 335.

³³² 1977 (3) SA 670 (A) at 687.

terms, it will mean that the costs of alternative accommodation can be recovered provided it is reasonably similar to what was not provided by the defaulting supplier. However, this will be subject to the circumstances of the particular case. Where, for example, the only alternative accommodation available is in the only other hotel, which happens to be a five star hotel, it may well be argued that the damage was actually foreseen or reasonably foreseeable at the time of the contract (in terms of the contemplation principle) and therefore the defaulting supplier will be liable for those costs.³³³

In summary then, a supplier 'guilty' of prohibited conduct in terms of section 47(2) can be liable for administrative fines as punitive measures for the prohibited conduct, as well as for the repayment of monies already paid by the consumer, and for compensating the consumer for costs directly incidental to the supplier's breach of contract. A breach of contract which does not constitute prohibited conduct will not attract punitive fines but may result in compensation having to be paid as indicated. Failing to pay the compensation may of course constitute prohibited conduct.

It seems clear from section 47(3)(b) of the CPA that the idea is to refund the consumer any monies already paid and compensate the consumer for additional costs the consumer had to incur as a result of the action of the supplier, and not to punish the supplier or award punitive damages to the consumer. (The punitive aspect is reserved for prohibited conduct as provided for in section 47(2) and which may be effected via the imposition of administrative fines.) The damages in question are therefore positive interest damages, or forward-looking damages, which aims to place the consumer in the position he or she would have been had the supplier performed properly.³³⁴ Such positive interest can include both reliance losses (out-of-pocket or wasted expenses), as well as expectation losses (the net profit loss on the contract).³³⁵ In the matters of *Tweedie v Park Travel Agency (Pty) Ltd t/a Park*

³³³ Eiselen 'Remedies for breach' in Hutchison & Pretorius *op cit* (n 52) 335-336.

³³⁴ See Eiselen 'Remedies for breach' in Hutchison & Pretorius *op cit* (n 52) 329.

³³⁵ See Eiselen 'Remedies for breach' in Hutchison & Pretorius *op cit* (n 52) 329-331. The authors (at 331) indicate that 'the misconception that positive interest is concerned only with loss of profit has led some judges to hold that the victim of a breach may elect to have damages measured according to his or her negative rather than his or her positive interest, to enable the recovery of reliance losses'. The matter is controversial and requires clarification by the SCA.

*Tours*³³⁶ and *Masters v Thain*³³⁷ the courts were prepared to award both reliance and expectation losses. This approach is qualified by a proviso that the economic consequences of the contract which the consumer did enter into must be considered so as to prevent an aggrieved party claiming more than he or she is actually entitled to.³³⁸ Practically this means – in terms of the common law – that where the reservation is not honoured the consumer can claim back all monies already paid, as well as expenses incurred in reliance on the supplier fulfilling the agreement. This situation appears now to be codified in section 47(3) of the CPA in respect of agreements for the supply of goods or the rendering of services by a supplier to a consumer. A question which may be asked however, is whether section 47(3)(b), when it refers to reimbursement of ‘costs directly incidental to the supplier’s breach of the contract’ is referring to costs incurred after the fact (such as taxi fare to find another hotel), or to costs incurred both in reliance of the supplier performing as agreed (that is costs normally incurred beforehand, such as visum costs), and costs incurred as a result of the breach. In terms of the common law a consumer would be able to claim both these costs as part of the claim for general damages. It is submitted that section 47(3)(b) of the CPA must be read to refer to costs incurred both before the breach (reliance costs) and after the breach (expenses occasioned by the breach). Such an approach would be in line with both the common law and section 2(10) of the CPA.

Section 47(3)(b) of the Act does not apply if the inability of the supplier to supply the service reserved is due to circumstances beyond the control of the supplier, and the supplier took reasonable steps to notify the consumer of this inability as soon as is practicable in the prevailing circumstances.³³⁹ It will probably not be considered reasonable if a supplier does not avail him or herself of technology such as email, sms, Facebook and/or Twitter to inform consumers of the unavailability of the services.

³³⁶ 1998 (4) SA 802 WLD at 808A-809F.

³³⁷ 2000 (1) SA 467 WLD at 474B-E.

³³⁸ See *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours supra* (n 337) at 808E.

³³⁹ S 47(5) of the CPA.

The supplier however will not be able to claim that the inability is due to circumstances beyond the supplier's control if the said inability is a result of the supplier's failure 'to adequately and diligently carry out any ordinary or routine matter pertaining to the supplier's business'.³⁴⁰ An obvious example would be a situation where the supplier of accommodation service neglects to enter the booking in the system or on the books, resulting in a double booking.

It is a defence to an alleged failure to provide the service, as contemplated in section 47(3) of the Act, if the supplier offered to provide, or procure another to provide, the consumer with comparable services to satisfy the consumer's request, and the consumer accepted the offer, and the service was indeed provided; or the consumer unreasonably refused the offer of comparable services.³⁴¹

A related aspect that warrants mention pertains to the possibility of claiming damages for 'physical inconvenience, vexation and disappointment where hotel accommodation and other facilities have not met the specifications of a contract'.³⁴² It seems as if section 47 excludes the possibility of such a type of claim (at least under that section). (It is submitted that this is an aspect that warrants further discussion because it is only a matter of time before such a claim will be brought before a South African court.³⁴³ Such a discussion is undertaken in paragraph 4.3.7.) Although section 47 of the Act seems quite clear that such a claim will not be allowed in terms thereof, it is safe to say that it certainly does not prohibit such a claim being brought – something that would in any event be in conflict with the Constitution.³⁴⁴

³⁴⁰ S 47(6) of the CPA.

³⁴¹ S 47(4) of the CPA.

³⁴² See for example *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours supra* (n 337) at 807J - 808A.

³⁴³ In the matter of *Jarvis v Swans Tours* [1973] 1 All E.R. 71 the principle was established in English law that a claimant is entitled to damages for distress and disappointment in so-called holiday cases. In *Fraley v Skinner* [2001] 3 W.L.R. 899 the House of Lords decided that the principle in *Jarvis v Swan supra* extended to situations where part of the purpose of the contract was to provide peace of mind or freedom from distress. See Grant & Mason *Holiday Law: The Law Relating to Travel and Tourism* (2007) 16-17.

³⁴⁴ Such a limitation to access the courts will probably constitute a violation of s 34 of the Constitution.

4.3.9 Trade coupons and similar promotions

A form of marketing that is often employed in the tourism industry, also in the accommodation segment of the industry, is the use of trade coupons and similar forms of promotions. An example is a coupon that is placed in a newspaper offering the consumer a discount on making a reservation with the particular establishment.³⁴⁵ Section 34 of the CPA regulates these and similar practices.

Section 34(3) of the CPA provides that a person may not make a promotional offer with the intention of not fulfilling it, or fulfilling it in another way as was offered.

Section 34(4) of the CPA sets out the requirements with which the document that contains such a promotional offer must comply. These are that the document must clearly indicate:

- the nature of the benefit that the consumer will receive by taking up such promotional offer;³⁴⁶
- the goods or services to which the offer relates;³⁴⁷
- the steps that a consumer must follow in order to receive the benefit of the offer;³⁴⁸ and
- the particulars of any person from whom, the place where, and the time when the consumer can claim the benefit in terms of the promotional offer.³⁴⁹

A person who makes or sponsors a promotional offer must ensure that the supply of the offered benefit is sufficient to ensure that the reasonable demand resulting from

³⁴⁵ Other forms of promotion often found in the accommodation segment is where the supplier offers that if the consumer pays for a certain number of nights' accommodation the consumer will receive a free night's stay. Promotions offering free accommodation for children accompanying parents are very popular as are promotions offering free meals (or accommodation) provided the consumer pays for the accommodation (or meals).

³⁴⁶ S 34(4)(a) of the CPA.

³⁴⁷ S 34(4)(b) of the CPA.

³⁴⁸ S 34(4)(c) of the CPA.

³⁴⁹ S 34(4)(d) of the CPA.

the offer can be met.³⁵⁰ This means that the maker or sponsor of the promotional offer has the duty to ensure that there is enough supply of the benefit, whether in goods or services, to provide for any reasonably anticipated demand. In a scenario where the demand outstrips the supply it will be for the offeror or sponsor of the promotional offer to show that the demand was more than what was reasonably anticipated. It will not be enough to say 'we thought we had enough ...'. The offeror or sponsor will bear the burden of proof to show that the supply was adequate to accommodate all reasonable demands resulting from an acceptance of the offer by consumers. In order to discharge the onus the offeror or promoter of the offer will have to present objective evidence on which this claim of adequate supply is based. Factors that may be of assistance include historical patterns of demand; market research conducted to determine potential demand in response to an offer, and other objective criteria to show that the demand was what could reasonably be expected. If there are no such grounds available on which can be relied the offeror and sponsor of the promotional offer may well fall foul of the Act.

Where the consumer accepts the offer and the supplier cannot supply what was offered, then it will be a defence against the failure to comply with section 34(5)(a) of the CPA if the supplier supplies, or arranges for the supply to the consumer of comparable goods or services of the relevant kind to comply with the promotional offer, and the consumer accepts or unreasonably refuses to accept the alternative arrangements.³⁵¹

A person who makes or sponsors a promotional offer must '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'.³⁵² It seems that this rather complexly worded subsection means that the offeror or sponsor of the promotional offer can not in any way limit the supply, or capacity to supply of the goods or services which are offered

³⁵⁰ S 34(5)(a) of the CPA.

³⁵¹ S 34(6) of the CPA. Paragraphs (a) and (b) of this subsection both refer to 'the supplier's offer' without distinguishing between the original promotional offer and the second or 'replacement' offer. Paragraphs (a) and (b) must be understood to refer not to the original promotional offer that was accepted by the consumer but rather to the alternative or replacement offer made by the supplier.

³⁵² S 34(5)(b) of the CPA.

and which offer is accepted in terms of the offer – except to the extent that the supply or capacity to supply is limited similarly for other consumers who pay for the goods or services with cash. Consumers paying, for example, with cash for the goods or services therefore may not be advantaged over consumers accepting the promotional offer in the supply of the goods or services.

The offeror or sponsor of the promotional offer cannot require the consumer to accept inferior quality of such goods or services that will be generally available to any other consumer on the same date and who tenders a different form of consideration.³⁵³ Clearly the idea is to protect the consumer who is making use of a trade or discount coupon as opposed to cash, for instance, from being provided with an inferior product or service when it comes to actually receiving the service or the goods. There may be no distinction between the consumer ‘paying full price’ and the consumer who is making use of a promotional offer or trade coupon when it comes to any material aspect of the service or goods to be provided.

The person making the offer or the sponsor may also not impose an administration or handling fee for a transaction in respect of which the consumer is tendering a trade coupon.³⁵⁴ This protects the consumer against taking up the offer and claiming the benefit only to be confronted by a ‘minimal’ administration fee for processing the transaction, which then is just paying for the ‘free gift’ by another name.

A question that is sure to arise in the context of promotional offers concerns a situation when the benefit of the promotional offer is aimed at a particular segment of the population such as women, for instance. One must be mindful of the requirements of section 8 of the CPA, which, for example, prohibits a supplier of goods or services from treating any person differently from any other in a manner that constitutes unfair discrimination in the provision of any services to a consumer.³⁵⁵ From the above it would seem that promotional offers cannot discriminate between consumers in the provision of services unless the situation is

³⁵³ S 34(5)(c) of the CPA.

³⁵⁴ S 34(5)(d) of the CPA.

³⁵⁵ See s 9(2)(e) of the CPA.

covered by one of the exceptions provided for in section 9 of the CPA, including the provisions concerning age.

In the context of the accommodation segment two scenarios often present themselves. Firstly, accommodation establishments regularly promote their services by offering that 'kids stay for free'. As discussed earlier³⁵⁶ the CPA specifically allows as an exception to the general prohibition against unfair discrimination contained in section 8 of the CPA that a supplier may advertise or offer a service or a discounted price solely on the basis that the person is a minor (or a minor who has not yet attained a specific age).³⁵⁷ The same will apply in respect of persons of age 60 years and over.³⁵⁸ A promotional offer in terms of which children receive accommodation for free will not present any problems.

In the second scenario, accommodation establishments also often promote their services by, for example, offering females certain benefits such as a free spa treatment or free drinks. The question is really whether such an offer will fall within the ambit of section 9(3) of the CPA.³⁵⁹ Section 8 of the CPA will not be contravened if the promotional offer is aimed at promoting or supplying goods or services in a manner that implies or expresses a preference for a particular group of consumers distinguishable from consumers in general on the basis of a prohibited ground of discrimination, provided the goods or services are reasonably intended or designed to satisfy any specific needs or interests that are common to, or uniquely characteristic of, that particular group.³⁶⁰ Whether a free spa treatment or free drinks can be said to be reasonably intended or designed to satisfy any specific needs or interests that are common to, or uniquely characteristic of, that particular group of consumers (in this case being women), is doubtful. (It is hard to imagine either the

³⁵⁶ See para 4.3.1.

³⁵⁷ S 9(1)(d)(i) of the CPA.

³⁵⁸ S 9(1)(d)(ii) of the CPA.

³⁵⁹ S 9(3) of the CPA reads as follows:

It is not a contravention of section 8 for a supplier to market any goods or services in a manner that implies or expresses a preference for a particular group of consumers who are distinguishable from the general population on the basis of a ground of discrimination set out in section 9(3) of the Constitution, if the particular goods or services are reasonably intended or designed to satisfy any specific needs or interests that are common to, or uniquely characteristic of, that particular group of consumers.

³⁶⁰ See s 9(3) of the CPA.

women or the men, for that matter, complaining of such a practice.) Of course the principle *de minimus non curat lex* will serve to prevent negligible claims of unfair discrimination as an objection to the promotional offer under discussion may well be.

It is unfortunate that terminology has not been used consistently in section 34 of the CPA. Section 34(3) of the CPA refers to a person making a promotional offer, whereas section 34(5) of the Act uses 'a person who makes or sponsors a promotional offer' as subject. The term 'sponsor' is not defined and it is therefore not immediately evident what the difference is between the person making the offer and the sponsor.³⁶¹ In the ordinary course of events it will happen that a producer of goods or services will want to promote specific goods or services and do so via retailers. The producer could then be the sponsor and the retailer the person making the offer. A person can only make an offer on behalf of him or herself or through an agent acting on behalf of him or her. So the retailer is really acting as agent for the producer. By specifically naming both role-players both can be held liable in terms of the section and the retailer, for instance, cannot claim that he or she was merely the agent who had acted on behalf of the principal and who disappears from the relationship once the offer has been accepted and an agreement comes into being between the sponsor and the consumer. This may have the advantage where the consumer is sent from pillar to post between a sponsor and an agent, each trying to pass liability onto the other and the consumer left stranded in the middle.

But, if it was deemed necessary to include this term then it should have been included in subsection (3) as well, even if only for the sake of consistency. It is submitted however that this problem could have been avoided if the word 'supplier' had been used consistently throughout the section. Why 'person' and 'person who makes or sponsors' are used in subsection (3) and (5) respectively but then 'supplier' is used in subsection (6) is not clear. What is clear is that the term 'supplier' used in subsection (6) refers to the same person mentioned in section 34(5)(a). This inconsistent use of terminology creates confusion and could easily have been avoided.

³⁶¹ 'Sponsor' is defined as 'a person or company that pays for a radio or television programme, or for a concert or sporting event, usually in return for advertising'. See Wehmeier *Oxford Advanced Learner's Dictionary of Current English* (2005) 1424.

A final aspect in this discussion of section 34 of the CPA relates to the use of plain language and whether section 34 of the CPA actually requires the document setting out the promotion to be in plain and understandable language. Section 34(4) of the CPA³⁶² states that '[a]ny document setting out a promotional offer must clearly state ...'. The section does not specifically require that there must be a document or that any such document must be in plain language. Section 22 of the CPA requires that the producer of a document that is *required, in terms of this Act or any other law*, to be in plain and understandable language. The result seems to be that if a document is not required to be provided, it does not have to be in plain and understandable language. The aim and purpose of the CPA is primarily concerned with protecting consumers from unfair business practices. Having a promotional offer (or customer loyalty programme) in a non-document format will open the door for so much uncertainty and abuse that the Legislature could not possibly have intended for promotion offers and customer loyalty programmes not to be in a documented format. Therefore it is argued that the documents referred to in section 34(4) and section 35(3) of the CPA respectively are indeed *required* documents and therefore have to be in plain and understandable language.

4.3.10 Customer loyalty programmes

In order to retain consumers as clients many businesses make use of customer loyalty programmes.³⁶³ There are a number of customer loyalty programmes offered to consumers in the accommodation segment of the tourism industry in South Africa. Examples include the Privileged Guest Club of the African Hotels and Adventures,³⁶⁴ the Kashback loyalty card programme operated by the Chakela Hotels and Resorts (being part of the Leisure Hotels),³⁶⁵ and the frequent guest programme of the

³⁶² S 35 of the CPA contains a similar provision and therefore the arguments made here apply *mutatis mutandis* to the discussion on customer loyalty programmes.

³⁶³ 'Loyalty programme' in terms of s 1 of the CPA 'means any arrangement or scheme in the ordinary course of business, in terms of which a supplier of goods or services, association of such suppliers, or other person on behalf of or in association with any such suppliers, offers or grants to a consumer any loyalty credit or award in connection with a transaction or an agreement.'

³⁶⁴ <http://www.ahagroup.co.za/loyalty-club> (accessed on 2012-08-10).

³⁶⁵ <http://www.leisurehotels.co.za> (accessed on 2012-08-10).

Tsogosun Hotels.³⁶⁶ The ProKard Loyalty programme of Protea Hotels is probably the best-known loyalty programme in this segment. It is claimed to be the first and most successful of its kind in South Africa with over 100 000 members.³⁶⁷ Loyal customers are rewarded with benefits such as free or discounted accommodation.

Section 35(1) of the CPA provides that loyalty credits or awards³⁶⁸ are a legal medium of exchange when offered or tendered as consideration for any goods or services offered, or transaction contemplated, in terms of such loyalty programme. Credits or awards are therefore legal tender, like cash, when offered in payment for any goods or services in terms of a loyalty programme.³⁶⁹

A person may not offer participation in a loyalty programme, or offer any loyalty credits or awards with the intention of not actually providing it, or providing it in a manner other than as offered.³⁷⁰ A loyalty programme may therefore not, for example, offer an award of free accommodation at any of a group of hotels, but when claimed by the consumer the supplier insists that the free accommodation be taken at a specific hotel that has a low occupancy rate.

An offer to a consumer to participate in a loyalty programme must set out clearly the nature of the programme, as well as the credits or awards that is offered; the goods or services to which the offer relates; the steps that are required of the consumer to participate in the programme or to receive any benefit in terms of the programme; and precise detail of how the consumer may gain access to the programme, or to any loyalty credits or awards in terms of the particular programme.³⁷¹ In this respect one must bear in mind the requirements of section 22 of the CPA as it pertains to the right

³⁶⁶ www.tsogosunhotels.com/frequent-guest/pages/loyalty-partners.aspx (accessed on 2012-08-10).

³⁶⁷ See <http://www.proteahotels.com/> (accessed on 2012-08-10).

³⁶⁸ 'Loyalty credit or award' in terms of s 1 of the CPA 'means any-

- (a) benefit accruing to a consumer;
- (b) right to any goods, service or other benefit granted to a consumer; or
- (c) point, credit, token, device or other tangible or intangible thing which, when accumulated in sufficient quantities, entitled the holder to seek, request or assert a claim for any goods, service or other benefit, allocated to a consumer'.

³⁶⁹ Melville *op cit* (n 182) 62.

³⁷⁰ S 35(2) of the CPA.

³⁷¹ S 35(3) of the CPA.

of consumers to receive information in plain and understandable language.³⁷² Simply put, the Act requires that the document containing the offer – which must be in writing – must explain how the programme works; it must describe the goods and/or services to which the offer relates (and by necessary implication, to which goods and services it does not relate); how the consumer can participate in the programme; and how the consumer must go about receiving the credits and rewards in terms of the programme; and how, where and when the consumer can access the programme or credits and/or awards.

The sponsor of a customer loyalty programme or any other supplier who offers or holds out a willingness to accept any loyalty credits or awards as consideration or payment for any particular goods or services must, subject to section 35(5) and (6), comply with certain requirements.

Section 35(4) of the Act imposes a number of duties on the sponsor of a loyalty programme or a supplier willing to accept loyalty credits or awards as consideration for goods or services. Firstly the sponsor or supplier must ensure that the supply of such goods or services available at any one time is sufficient to accommodate all reasonably anticipated demand in exchange for loyalty credits or awards.³⁷³ In the accommodation industry loyalty programmes are offered in most if not all instances by hotel groups, with a number of hotels belonging to the group offering the programme. This spreads the risk of not being able to provide a reasonable demand as there are a number of hotels available to provide the accommodation. A consumer will not be able to insist on accommodation at a particular hotel if that hotel is fully booked in the ordinary course of its business. The consumer, if he or she wants to exchange his or her loyalty awards or credits at that particular hotel will have to make arrangements for a time when accommodation is available (as will the next consumer).

Secondly, a supplier or sponsor may not limit their capacity to supply accommodation services in exchange for credits or awards on a basis that is different from that used to limit or restrict the supply of those goods or services in exchange for any other

³⁷² The aspect of plain and understandable language is more fully dealt with in para 4.3.5.

³⁷³ S 35(4)(a) of the CPA.

form of consideration.³⁷⁴ This means that a sponsor or supplier is not permitted to restrict the accommodation made available for consumers paying with loyalty programme credits as opposed to consumers paying with money.

Thirdly, (and essentially the other side of the coin) the sponsor or supplier must accept any tender of sufficient loyalty credits or awards as adequate consideration for the price of those particular goods or services if, at that time, the supplier has sufficient capacity available for the supply in exchange for any other form of consideration.³⁷⁵ If the supplier has sufficient accommodation available to supply a consumer paying with money then the supplier has sufficient accommodation available for a consumer paying with loyalty credits or awards. Simply put, the supplier of accommodation services must, if there is accommodation available, make it available to a consumer irrespective whether the consumer is paying with money or loyalty credits or awards.

Fourthly, a sponsor or supplier must not require the consumer to accept inferior quality of goods or services than those generally available to other consumers tendering a different form of consideration.³⁷⁶ In essence then, a consumer may not be discriminated against in the quality of goods or services because of the fact that the consumer is paying with loyalty programme credits or awards. There may be a tendency with suppliers in some cases to provide those consumers paying with loyalty credits or awards, with the accommodation facing the parking lot as opposed to the rooms with a sea view, the argument being that those consumers being members of the loyalty programme will in any event return. This practice is not permitted under this provision.

In the fifth place the sponsor or supplier may not demand an administrative charge of the consumer for processing the transaction (of exchanging the credits or awards for goods or services) where the consumer is required to pay a periodic fee to remain a member of the programme.³⁷⁷ Where the consumer has to pay a yearly membership

³⁷⁴ S 35(4)(b) of the CPA.

³⁷⁵ S 35(4)(c) of the CPA.

³⁷⁶ S 35(4)(d) of the CPA.

³⁷⁷ S 35(4)(e) of the CPA.

fee (or card renewal fee) no further fee may be levied against the consumer for the transaction involving exchanging the credits or rewards for goods or services.

Lastly, the sponsor or supplier may not demand that the consumer purchase any other goods or services in connection with that transaction.³⁷⁸ This provision means, in the context of accommodation service providers that an exchange of loyalty credits and awards cannot be made subject to the imposition of a further goods or services. It can happen that the use of loyalty credits or awards in exchange for free accommodation for example, is linked to a requirement that the consumer can only get the free accommodation provided the consumer stay for a further two or three nights which must be paid for, or a requirement that all meals must be taken at the hotel and paid for. It is suggested that the use of the word 'other' in section 35(4)(f) of the CPA does not refer necessarily to goods or services different in nature to the goods or services for which the loyalty credits or awards are exchanged, but of course it can be different (for example, the loyalty credits are exchanged for accommodation and then the other service that must be purchased may be undertaking a game drive). The 'other goods or services' can be different in nature as indicated but can just be more of the same goods or services for which the loyalty credits or awards were exchanged (for example more nights' accommodation). This is an important aspect to be considered by the suppliers of accommodation establishments making use of loyalty programmes.

The sponsor of a loyalty programme, or a supplier of goods or services who accepts loyalty credits or awards as payment for any goods or services, may impose a partial or complete restriction on the availability of any such goods or services in exchange for credits or awards during any specific period, provided the sponsor or supplier has directly or indirectly given notice in writing to the members of the programme at least 20 business days before the beginning of that period. The total of all such days may not be more than 90 days within a calendar year.³⁷⁹ What is understood by giving notice 'directly' and 'indirectly' is not explained. 'Directly' in all likelihood means that a written communication is sent to the address of the consumer provided on becoming a member or contact via telephone, whereas an indirect communication

³⁷⁸ S 35(4)(f) of the CPA.

³⁷⁹ S 35(5) of the CPA.

could mean a notice published in the media. Suppliers of specifically accommodation services therefore will be able to restrict supply of accommodation services in exchange for loyalty credits or awards over certain periods when demand for accommodation is high, for instance over the December holiday season, provided there is compliance with the requirements of notice and length of time.

It will be a defence to an alleged failure to comply with section 35(4)(a) of the Act if the supplier offered to supply or procure another person to supply a consumer with comparable goods or services of the relevant kind to satisfy the consumer's request, for no consideration more than the advertised price expressed in loyalty awards, and the consumer accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted; or the consumer has unreasonably refused the offer.³⁸⁰ As indicated earlier, the defence can only be valid in the case where another person was procured to supply the goods or services, the goods or services were in fact supplied and/or delivered. Procuring another person alone should not relieve the sponsor or supplier of his or her obligation under section 35(4)(a) of the Act.

4.3.11 Consumer's right to demand quality service

Part H of Chapter 2 of the CPA contains a number of provisions relating to the right of consumers to receive fair value, good quality and safe products and services.³⁸¹ For present purposes the discussion will be limited to a discussion of section 54 because the focus of the study is on the provision of accommodation services.³⁸²

Section 54 of the CPA provides:

- (1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to-
 - (a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;
 - (b) the performance of the services in a manner and quality that persons are generally entitled to expect;

³⁸⁰ S 35(6) of the CPA.

³⁸¹ Part H of Chapter 2 of the CPA includes ss 53-61.

³⁸² S 58 is discussed in the context of s 49 of the CPA in para 4.3.16.

- (c) the use, delivery and installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and
 - (d) the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services, having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services.
- (2) If a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either-
- (a) remedy any defect in the quality of the services performed or goods supplied; or
 - (b) refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

Firstly then, if a supplier undertakes to perform a service, such service must be performed timeously. This is a codification of the common law requirement that a debtor must perform timeously and a failure to do so will constitute a breach of contract in the form of *mora debitoris*.³⁸³ Timeous performance does however require certainty regarding the exact time for performance. This certainty is established by having the time fixed in the agreement (which in turn can be done explicitly or by implication), or where no time has been fixed, by making a demand on the debtor (supplier) by way of an *interpellatio*, the effect of which is to give the debtor an exact date for performance. If the debtor then fails to perform by that date the debtor will be *in mora*.³⁸⁴ The provision of accommodation services normally by its very nature would be linked to a specific time for performance. Any late performance will result in the supplier being *in mora* and in violation of the CPA. A short delay of a few minutes may well fall within the scope of the *de minimus non curat lex* rule, but even a short delay can in certain instances constitute a delay sufficiently serious for purposes of the Act.

Section 54(1)(a) of the CPA contains a further aspect namely 'the timely notice of any unavoidable delay'. This provision places an obligation on the supplier to inform the consumer *timeously* of any unavoidable delays. It may be argued that the use of the term 'unavoidable' seems to indicate that the timeous notice must be provided if there was no fault on the part of the supplier (for instance, the delay is occasioned by

³⁸³ See generally Hutchison 'Forms of breach' in Hutchison & Pretorius *op cit* (n 52) 278-282.

³⁸⁴ Hutchison 'Forms of breach' in Hutchison & Pretorius *op cit* (n 52) 280.

vis maior). Timeous notification will only assist the supplier to prevent liability in terms of section 54(2) of the Act if the supplier was not at fault in causing the delay. Where there is fault on the part of the supplier and which fault resulted in the delay, then it cannot be said that there was timely performance, whether notice was given or not. The giving of timeous notice in all likelihood will (and should) play a role in mitigating the extent of the liability of the supplier where the delay is the result of fault on the part of the supplier, particularly when it comes to determining the extent of an administrative fine.

When a notification will be timeous is unclear. It is probably safe to say that what will constitute timeous notification about an unavoidable delay will be dictated by the facts of each case but when timeous will be timeous is not certain. Something can only be timeous in relation to another determined or determinable time. In the context of the provision of accommodation services one may argue that a notification will be timeous when the consumer is afforded a reasonable time to consider his or her options and to make alternative arrangements before the time has arrived at which point the service required is to be provided. Clearly a number of variables may impact on whether a notification will be timeous.

It is easy to see the application of this provision in the case of the suppliers of tourism services such as airlines, travel agents and tour operators, but less so in respect of the accommodation sector. It is however not completely impossible that the provision may play a role in the accommodation sector especially where accommodation booked is not ready for occupation or specific arrangements have been made and these arrangements are not performed in a timeous fashion. Examples may be where check-in at an accommodation establishment is stated to be from 14h00 but the rooms have not been cleaned and are not ready and the consumer is only allowed occupancy at 17h00 or the next day because of renovations to the establishment.

Services, secondly, must be performed in a manner and be of a quality that persons are generally entitled to expect.³⁸⁵ This provision may well prove to be quite difficult

³⁸⁵ S 54(1)(b) of the CPA.

to interpret. In case of a complaint in terms of the provision a determination will have to be made as to what the manner and quality is of a service that people are entitled to expect. One way to address this problem is to establish clear standards and levels of performance. A step in this direction is the use of the star-grading system in the accommodation segment to provide standards of service and which provides the consumer with a guide as to what standard of service can be expected.

In this regard, the Department of Tourism has taken a proactive role. Through initiatives such as the proposed new Draft Tourism Bill, 2011;³⁸⁶ the National Tourism Sector Strategy³⁸⁷ and the National Tourism Service Excellence Strategy,³⁸⁸ efforts are underway to facilitate the development and establishment of generic standards which may be used for guiding customer service.³⁸⁹ A factor contributing negatively to the current levels of service delivery is the absence of integrated standards and norms that can be used for guiding customer service.³⁹⁰ This void provides the rationale for the introduction of a South African National Standard on Tourism Excellence. The purpose of this standard is to:

- (a) Introduce generic standards for planning, developing, implementing and improving service excellence in the tourism value chain;
- (b) Introduce specific minimum requirements for the performance of organisations measurement and monitoring of service standards in the tourism value chain;
- (c) Introduce a credible service standard that includes, credible marketing, quality products, and excellent service; and to
- (d) Introduce a performance system that enables effective monitoring and evaluation.³⁹¹

The standard states specifically that it is intended 'to provide guidance to organisations to align and apply agreed standards and practices in the tourism value

³⁸⁶ The Draft Tourism Bill, 2011 was published on 5 August 2011 for public comment in *Government Gazette* No 34506.

³⁸⁷ http://www.tourism.gov.za:8001/PublicDocuments/2011_07_19/FinalNTSSApproved%20Cabinet.PDF (accessed on 2011-12-08).

³⁸⁸ South African Bureau of Standards 'South African Standard on Tourism Service Excellence' SANS 1197:2012. (The standard in draft form was published for public comment on 27 December 2011 with the closing date for such commentary being 27 February 2012. The standard was approved on 19 March 2012.)

³⁸⁹ The World Travel and Tourism Competiveness Report of 2009 ranked South Africa 61 out of 133 countries underscoring the need for efforts to improve the quality of services delivered.

³⁹⁰ SANS 1197:2012 *op cit* (n 391) Introduction.

³⁹¹ SANS 1197:2012 *op cit* (n 391) 1.

chain'.³⁹² It is clear that organisations within the tourism industry are expected to draft codes of practice for such organisations and their members by using the Standard on Tourism Excellence as guide.³⁹³ It is specifically mention that 'service delivery in the tourism sector is regulated in terms of the Consumer Protection Act, 2008 ..., which places emphasis on the establishment of national norms and standards that relate to the protection of consumers by providing for improved standards of consumer information in order to prohibit unfair marketing and business practices'.³⁹⁴ The National Standard on Tourism Service Excellence provides guidance in the form of stated tourism service excellence requirements in respect of marketing, products, service delivery and monitoring, evaluation and improvement.³⁹⁵ Significant impetus is therefore provided for the development of measurable standards of service or, as stated in terms of section 54, the manner and quality of service that persons are generally entitled to expect. When considering the meaning of particularly section 54(1)(b) of the CPA, the Standard on Tourism Service Excellence is very likely to play an instructive role in shaping an understanding of the manner and quality of service that consumers of tourism services can expect.

Section 54(1), thirdly,³⁹⁶ requires that goods used, delivered or installed as needed in the performance of the services undertaken must be free of defects and of a quality that persons are generally entitled to expect.³⁹⁷ As far as the accommodation segment is concerned this provision may relate to diverse goods such as food served; bedding, and amenities such as the sauna, gymnasium and swimming pool.

Whether any of the rights provided for in section 54(1) of the CPA have been infringed is to be determined with reference to the circumstances of the supply and any specific terms agreed to by the supplier before or during the performance of delivery of the services.³⁹⁸ This qualification may seem to allow substantial room on

³⁹² SANS 1197:2012 *op cit* (n 391) 3.

³⁹³ 'Code of Practice' is defined in SANS 1197:2012 *op cit* (n 391) 3 as '[w]ritten guidelines issued by an official body or a professional association to its members to help them comply with its ethical standards'.

³⁹⁴ SANS 1197:2012 *op cit* (n 391) Foreword.

³⁹⁵ SANS 1197:2012 *op cit* (n 391) 14-17.

³⁹⁶ S 54(1)(d) of the CPA is not considered relevant for current purposes.

³⁹⁷ S 54(1)(c) of the CPA.

³⁹⁸ S 54 (1) of the CPA.

the part of the supplier for negotiating out of the protection provided consumers by the section. It is likely that suppliers will seek to protect themselves against complaints about inadequate service or defective goods used in the delivery of such service by having the consumer agree to a number of provisos. A supplier may, for instance, include a term in the agreement with the consumer in the following terms: 'although every effort is made to provide a service in a manner and of a quality that consumers are used to receive from the supplier it may be that for reasons such as labour action; ongoing renovations; staff shortages and/or staff training, or for whatever reason, it will not always be possible to deliver the services in the same manner and of the same quality as customers have come to expect'.

One must however bear in mind the provisions in other sections of the Act such as section 51 which provides for prohibited transactions, agreements and terms and conditions. The section states that a supplier may not make a transaction or agreement subject to any term or condition if the general purpose or effect thereof is to defeat the purposes and policy of the Act, mislead or deceive the consumer, or subject the consumer to fraudulent conduct, or to deprive a consumer of a right in terms of the Act or avoid a supplier's obligation or duty in terms of the Act.³⁹⁹ It appears that section 51 may prevent the use by suppliers of terms such as stated above to escape their obligations in terms of section 54. The latter section, however, will permit a deviation from the standards and duties the section imposes, provided that such deviation is not prohibited by section 51 of the CPA. A deviation may however entail that a higher standard of service quality can be expected. This will be the case where the consumer has a special request conveyed to the supplier before or during the supply of the service and the supplier consents to supply such special requirement.

Failing to provide the consumer with the standards contemplated in section 54 of the CPA entitles the consumer to elect to require of the supplier to either remedy the defect in the quality of the service performed or the goods supplied, or to refund the consumer a reasonable portion of the price paid for the service performed or the

³⁹⁹ See s 51(1)(a) and (b) of the CPA.

goods supplied.⁴⁰⁰ The election belongs to the consumer who can prefer to require of the supplier to refund him/her a portion of the price as indicated. How it is to be determined what portion is to be refunded in the case of poor service may prove to be quite difficult. This must, by necessary implication, entail a process in terms of which the difference in value of the service the consumer is entitled to expect and the actual service delivered is determined. Quantifying the damages is to be done in terms of the normal contractual rules for determining damages and would in such a case depend on an application of the difference principle. This requires that the extent of the consumer's patrimonial or financial loss is determined by comparing the patrimonial position the consumer now occupies after the breach, with the (hypothetical) patrimonial position the consumer would have been in had the breach not occurred.⁴⁰¹ In very practical terms this would entail determining what the difference in price (market value) would be of the service the consumer had received as opposed to the market value of the service the consumer was supposed to have received or expected to receive, had the breach not occurred. Obviously the rates of the accommodation establishment will be based upon the market value of the expected service and a reduced value is then to be determined for the actual service (or lack thereof). Calculation of damages remains a practical matter and there are no hard-and-fast rules that provide quick-fix answers.⁴⁰²

However, the election must be exercised reasonably. Consider the following example: Mr A checks into a hotel. He immediately discovers that the television in the room or the air-conditioning does not work. He remains silent about the problem and on checking-out a few days later, brings the problem to the attention of the hotel management and 'elects' a partial refund of the price. It cannot be said that Mr A has exercised his election reasonably. The situation would have been different had he brought the problem to the attention of the supplier within a reasonable time. He could then elect either to be placed in another room or to have his rate reduced. Whether the consumer will be able to refuse to move to another available room and still claim a refund or reduction in price also can become a bone of contention. If there is a good reason for refusing, the consumer will be allowed to do so. So, for

⁴⁰⁰ S 54(2) of the CPA.

⁴⁰¹ Eiselen 'Remedies for breach' in Hutchison & Pretorius *op cit* (n 52) 333.

⁴⁰² Eiselen 'Remedies for breach' in Hutchison & Pretorius *op cit* (n 52) 333.

instance, may the consumer be justified in refusing to move to another room if a sea view is to be sacrificed for a view of the parking area. However, without a reasonable basis for refusing it seems unlikely that the consumer will be able to then claim a refund. The CPA must be given a purposive interpretation and that does not include an interpretation allowing the consumer to act unreasonably.

The election that the consumer is allowed is not subject to a prescribed time-limit.⁴⁰³ The question has been asked whether this was an oversight on the part of the Legislature as it may lead to abuse on the part of the consumer.⁴⁰⁴ As it stands, the normal period of prescription will apply, namely three years. Considering a contract for building alterations, such a length of time is arguably necessary for problems caused by the use of defective products or products of a quality that consumers can generally expect, or service (workmanship) that was not performed in a manner or of a quality that consumers are generally entitled to expect, to manifest itself. But in the case of the accommodation segment, it is difficult to imagine a situation where a claim is instituted after such a length of time. Lodging a complaint or an action (almost) three years after having received poor quality service from a supplier of accommodation services will have little chance of being successful. A consumer wishing to do so would be confronted with serious difficulties in proving his or her case, making it near impossible in the scenario sketched to think that such a consumer can ever be successful. It is therefore submitted that few practical problems will result for the accommodation segment from the absence in section 54 of the CPA of a prescribed time-limit for exercising the election allowed.

It appears as if section 54 of the CPA applies in respect of a breach of the contract (for the provision of certain agreed services) that is not material in nature and rather in a situation where the *actio quanti minoris* in the ordinary course of events would be employed to claim a reduction in price. A material breach will more often than not result in the cancellation of the agreement with a return of the entire price paid. Cancellation as a remedy is not provided for in section 54(2) of the Act, and that fact

⁴⁰³ Compare for instance sn 56(2) of the CPA that specifies a time-limit within which the consumer has to exercise his/her right in terms of that section.

⁴⁰⁴ Jacobs, Stoop & Van Niekerk 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis' 2010 *PER* 366.

supports the view that section 54 is intended to apply to less serious breaches which can be remedied by a reduction in price. It cannot be argued that the Legislature had intended the exclusion of the remedy of cancellation in the event of a material breach as such a change to the common law would have necessitated clear language to that effect. Cancellation is a drastic remedy that is available only in exceptional circumstances. Whether a breach is sufficiently serious to justify cancellation will of course depend on the facts of each case.⁴⁰⁵ But this common law remedy remains unaffected by section 54 of the CPA and can still be used in appropriate cases. Of course the consumer could make use of other sections of the CPA when confronted with an alleged material breach such as section 41 of that Act. In this section it is provided that a supplier must not express a false or misleading representation and that it will be a false or misleading representation to state falsely that services are of a particular standard, quality or grade.⁴⁰⁶

The real benefit of section 54 lies in that consumers can demand a reduction in price in the event of poor quality service. Whereas poor service quality has thus far only had an indirect impact on the profit margin of accommodation businesses (with consumers not returning), the impact may now be more directly felt in a demand for price reduction where the service leaves something to be desired.

4.3.12 Right to fair and honest dealing

The right to fair and honest dealing is provided for in Part F of Chapter 2 and includes sections 40 to 47.⁴⁰⁷ Section 47 deals with over-booking and over-selling and is

⁴⁰⁵ Eiselen 'Remedies for breach' in Hutchison & Pretorius *op cit* (n 52) 322-323.

⁴⁰⁶ S 41(1)(a) read with s 41(3)(b)(ii) of the CPA.

⁴⁰⁷ See s 4(5) of the CPA. Part F of Chapter 2 seems to be containing the details of the general prohibition contained in s 4(5)(b) and (c) of the CPA. Section 4(5) of the CPA contains a qualification namely that in any dealings with a consumer *in the ordinary course of business* a person may not perform certain actions as indicated in s 4(5), and which is spelled out in more detail in s 40-47 of the CPA. Although ss 40-47 of the CPA themselves do not contain the phrase 'in the ordinary course of business' the definitions of 'market', 'promote' and 'supply' do contain this phrase directly or indirectly. This does not mean that the law allow unconscionable conduct; misleading, false or deceptive representations in transactions outside the ordinary course of business. However, the provisions of the CPA will only apply where the transaction or the promotion takes place within the ordinary course of business, which in turn makes what is understood by this term of great importance. See the discussion on the meaning of this phrase in para 4.3.13.

discussed in paragraph 4.3.5. Of relevance for the accommodation segment for present purposes are sections 40 and 41 of the CPA.

Section 40 bears the heading 'Unconscionable conduct'.⁴⁰⁸ The section provides as follows:

- (1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any-
 - (a) marketing of any goods or services;
 - (b) supply of goods or services to a consumer;
 - (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
 - (d) demand for, or collection of, payment for goods or services by a consumer; or
 - (e) recovery of goods from a consumer.
- (2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.

Section 1 of the CPA defines 'unconscionable' as follows:

- 'unconscionable', when used with reference to any other conduct, means-
- (a) having a character contemplated in section 40; or
 - (b) otherwise unethical or improper to a degree that would shock the conscience of a reasonable person.⁴⁰⁹

⁴⁰⁸ Du Plessis 'Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008' (2012) *THRHR* 27 points out that the term 'unconscionable conduct' is not well-known in South African law and was probably the result of common-law consumer protection legislation such as the Australian Trade Practices Act of 1974 which uses the term. See also Glover 'A tangled web: Issues surrounding unconscionability in the SA Consumer Protection Act' (2012) a paper delivered at the NMMU Conference on Private Law and Social Justice, 20-21 August 2012. Glover explains that the traditional or 'true' doctrine of unconscionability as it appears in the jurisdictions of Australia, Canada, New Zealand and the United States have two main requirements, namely procedural and substantive unconscionability. Procedural unconscionability refers to a problem during negotiations leading to the conclusion of the contract. This problem may entail that the consumer or aggrieved party must have suffered from some 'special disadvantage' or a 'cognitive defect', which may include disadvantages such as illness, ignorance, impaired faculties or financial need. The problems must have prevented the consumer from effectively negotiating on an equal level and with full knowledge of what was in the best interest of the consumer. But then there also had to be something substantively unconscionable about the resultant contract. Glover summarises the position neatly as follows: 'In other words, the other party must have abused this cognitive disadvantage unconscionably, to impose contractual terms upon the other party that are unacceptably unfair.' According to Glover the difference between s 40(1) of the CPA and the traditional doctrine of unconscionability lies therein that s 40 does not require substantive unconscionability to bring the behaviour of a supplier within the ambit of conduct prohibited by s 40(1) of the CPA.

Conduct that is generally felt to be unfair will not be sufficient to constitute unconscionable conduct, but the conduct has to display a 'high degree of impropriety' and this impropriety can be brought about through both the extreme nature of the conduct or the resultant impact of the conduct on the will of the consumer.⁴¹⁰

In terms of the common law, duress and undue influence are grounds for having a contract rescinded.⁴¹¹ Generally, because the consensus was obtained in an improper manner, the contract is voidable and the threatened or influenced party may elect to have the contract rescinded.⁴¹² (It is only in extreme cases where absolute power is used to overcome the resistance of the threatened party that the contract will be void *ab initio*.) As indicated, section 40 of the CPA refers to both duress and undue influence and in that sense codifies the position of these two grounds, but the section also includes a number of other grounds. Most of these may well fall within the ambit already covered by duress and undue influence, depending on the facts of each case.⁴¹³ As far as the issue of consensus is concerned it may be argued that the Legislature has reflected the common law position regarding a general ground for the rescission of a contract, namely that a contract may be rescinded by a contractant whose consent was obtained by unconscionable means.^{414 415} If this is a

⁴⁰⁹ Du Plessis *op cit* (n 408) 27 points out the circularity of the definition in that the first part of the definition of 'unconscionable conduct' is a reference back to s 40, and that it is therefore of no assistance in interpreting s 40.

⁴¹⁰ Du Plessis *op cit* (n 408) 27.

⁴¹¹ See Hutchison 'Improperly obtained consensus' in Hutchison & Pretorius *op cit* (n 52) 136-144; Christie *op cit* (n 291) 349-362 and Van der Merwe, Van Huyssteen, Reinecke & Lubbe *Contract – General Principles* (2007) 117-129.

⁴¹² See *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A) at para 848 where the Appeal Court, as it then was, pointed out that rescission of a contract should not be restricted to the three traditional grounds of duress, undue influence and misrepresentation. Van der Merwe, Van Huyssteen, Reinecke & Lubbe *op cit* (n 411) 130 suggest that the reference by the court *in casu* to the improper method by which consensus was obtained seems to have referred to a general ground for rescission of a contract. The specific improper conduct (namely bribery of the agent of the one party) was then just an indication of the impropriety of the conduct involved. See the discussion of Van der Merwe, Van Huyssteen, Reinecke & Lubbe *op cit* (n 411) 130-135 on a general ground for the rescission of contracts.

⁴¹³ Glover *op cit* (n 409) states that '[I]argely, the terms overlap, but this raises the difficulty of the interpretive presumption that each word used in a statute is supposed to be there for a specific reason. Perhaps it is more sensible, though, to treat them *ex abundantia cautela*. But nevertheless, this repetitive use of similar concepts is clumsy'.

⁴¹⁴ See Van der Merwe, Van Huyssteen, Reinecke & Lubbe *op cit* (n 411) 131-132 who refer to conduct which is unconscionable, improper, *contra boni mores*, abusive, lacking in good faith, as well as circumstances such as inequality in bargaining power. Jacobs, Stoop & Van Niekerk *op cit* (n 404) 347 have argued that s 40 of the CPA 'reinforces the idea that parties to a

correct approach to the understanding of section 40 of the CPA, then its contribution is indeed significant in the certainty that it will bring in this respect. This provision is likely to provide further impetus to the development of a more general ground for the rescission of a contract based on improperly obtained consensus.⁴¹⁶ However, in the mean time one has to understand the meaning of the types of unconscionable conduct listed in section 40.

The use of physical force against a consumer may include a situation where a consumer is physically restrained from leaving the premises of an accommodation establishment until a disputed amount is paid. The physical force may be of an absolute nature (*vis absoluta*) as well as *vis compulsive*, or threats of physical force thereby subjecting the will of the consumer to the wishes of the supplier.⁴¹⁷ Clearly such threats can overlap with the concepts duress and coercion.⁴¹⁸

Coercion does not have a defined meaning in the context of South African contract law.⁴¹⁹ Coercion is defined as ‘the action of making somebody do something they do not want to do, using force or threatening to use force’.⁴²⁰ Hutchison and Pretorius state that ‘[d]uress necessarily involves an element of coercion, but it is a coercion of the will rather than the body of the victim’.⁴²¹ This reflects the close relationship and overlap – or rather the uncertain boundaries – between these concepts. It has been argued that the inclusion of the term ‘coercion’ together with duress makes the former superfluous.⁴²² The ground of coercion can similarly be employed as is the

contract should act in good faith, and that their conduct should not be improper, unconscionable and against the *boni mores*’.

⁴¹⁵ See for Hutchison ‘Improperly obtained consensus’ in Hutchison & Pretorius *op cit* (n 52) 144 who argue that the provisions of s 40 of the CPA do not go much further than the existing common law.

⁴¹⁶ See Hutchison ‘Improperly obtained consensus’ in Hutchison & Pretorius *op cit* (n 52) 143-144. Du Plessis *op cit* (n 408) 42 seems to be a similar view stating ‘South African law may now have moved very close to what the courts have thus far avoided, namely the recognition of a general principle that consent must be obtained in a proper manner’.

⁴¹⁷ See Hutchison ‘Improperly obtained consensus’ in Hutchison & Pretorius *op cit* (n 52) 137-138.

⁴¹⁸ Du Plessis *op cit* (n 408) 29.

⁴¹⁹ Du Plessis *op cit* (n 408) 29.

⁴²⁰ Wehmeier *op cit* (n 362) 275.

⁴²¹ Hutchison ‘Improperly obtained consensus’ in Hutchison & Pretorius *op cit* (n 52) 137.

⁴²² Du Plessis *op cit* (n 408) 30.

use of physical force in the example in the discussion of the latter concept above to establish unconscionable conduct for purposes of section 40.

Undue influence is also a form of improper pressure that is brought to bear on the victim in order to induce such a person to contract, but rather than using threats of intimidation or force, the pressure is more subtle, 'involving an insidious erosion of the victim's ability to exercise a free and independent judgment'.⁴²³ Undue influence mostly finds application in a context where there is a close, often emotional, relationship between the parties but it may find application in so-called 'fictive friendships'⁴²⁴ situations, where a supplier or supplier's agent will pressure a consumer in, for instance, not complaining about poor quality service as the agent will lose his or her job as result.⁴²⁵

One must agree with Du Plessis when he states that '[e]ven the most progressive regime of consumer protection must acknowledge that some degree of pressure is inherent in the supplier-consumer relationship'.⁴²⁶ He then concludes that it is difficult to foresee a situation where pressure could be seen as unconscionable without such conduct of the supplier also covered by other types of conduct listed in section 40 of the Act.⁴²⁷ The distinction between the different types of unconscionable conduct listed is difficult to discern. While agreeing with this conclusion, one must bear in mind that in an accommodation context the consumer is in an environment where the supplier generally has complete control and this can make the consumer vulnerable to being pressured into doing or not doing things at the will of the supplier. Pressure may therefore denote a subtler form of undue influence but without the emotional relationship between the parties being present or required.

In order to rely on duress to rescind a contract, a party must show that unlawful threats had been used to induce a person into concluding contract and therefore its meaning overlaps significantly with coercion, as indicated above.⁴²⁸

⁴²³ Hutchison 'Improperly obtained consensus' in Hutchison & Pretorius *op cit* (n 52) 141.

⁴²⁴ See Du Plessis *op cit* (n 408) 30.

⁴²⁵ See s 40(1)(b) of the CPA.

⁴²⁶ Du Plessis *op cit* (n 408) 31.

⁴²⁷ Du Plessis *op cit* (n 408) 31.

⁴²⁸ Du Plessis *op cit* (n 408) 31.

The next term included is 'harass' which means 'to annoy or worry somebody by putting pressure on them or saying or doing unpleasant things to them'.⁴²⁹ Harassment will most often involve an invasion of privacy,⁴³⁰ and to this end the CPA does contain provisions to protect against it, such as the provisions to limit direct marketing. It is submitted that harassment will in most cases significantly overlap with pressure. Pressure is more often than not brought about through the constant or repeated invasion of private space, and such behaviour will also constitute harassment.

The last type of unconscionable conduct listed in section 40(1) is 'unfair tactics'. Du Plessis unpacks this concept by explaining 'tactics' to mean 'that available means are artfully and skilfully used to achieve a particular end', whereas the word 'unfair' seems to 'suggest that there is something unacceptable about the use of these means'.⁴³¹ Again the author argues that it is difficult to see how this concept adds a different dimension not already covered by the other types of conduct listed in section 41(1) or (2), or by other prohibited conduct provided for in the Act such as, for example, the making of false, misleading or deceptive representations provided for in section 41 of the CPA.⁴³²

As indicated, in terms of subsection 40(1) a supplier or the agent of a supplier is prohibited from the use of physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics or similar conduct⁴³³ in connection with the marketing or supply⁴³⁴ of any goods or services; negotiating, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer; demand for, or collection of, payment for goods or services by a consumer; or the recovery of goods from a consumer. Unconscionable conduct is then prohibited during any part of the entire supplier-consumer interaction and does not solely relate to the question whether the consensus of the consumer was obtained in an improper manner with

⁴²⁹ Wehmeier *op cit* (n 362) 678.

⁴³⁰ Du Plessis *op cit* (n 408) 33.

⁴³¹ Du Plessis *op cit* (n 408) 33.

⁴³² Du Plessis *op cit* (n 408) 33.

⁴³³ The use of the words 'or similar conduct' makes it clear that the types of conduct mentioned do not constitute a *numerus clausus*.

⁴³⁴ The definition of 'marketing' also includes the supply of goods or services to consumers, making the inclusion of s 40(1)(b) of the CPA unnecessary.

the potential consequence that a resultant contract may be rescinded. Therefore section 40 of the CPA is not restricted in its application only to improperly obtained consensus and the resultant voidness or voidability of contracts, but also with the behaviour of suppliers.⁴³⁵ Where, for instance, a consumer is harassed by a supplier or the supplier in another manner behaves improperly or unethically in the marketing of goods or services (whether a contract results or not) or in the enforcement of a contract that was completely lawfully concluded, section 40 may be used to act against such supplier. The application of section 40 of the CPA is thus much wider than only in the context of a contract brought about by improperly obtained consensus.⁴³⁶

Unconscionable conduct would also be constituted by a supplier knowingly taking advantage of the fact that a consumer was substantially prevented from protecting his/her own interests because of a physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.⁴³⁷ Only if the presence of the weakness resulted in the consumer being *substantially unable* to protect his or her own interests and the supplier *knowingly* took advantage of this weakness will the consumer be able to obtain relief in terms of the section.⁴³⁸ Many a grave injustice has been perpetrated because of the inability of persons to understand the language in which a contract was concluded, a factor which is often exacerbated by factors such as illiteracy and/or low levels of education. As can be seen from the preamble of the Act, it is such exploitative practices which the CPA seeks to eradicate. Although tourists, particularly foreign tourists, will generally not be considered as either illiterate or subject to low levels of education, they often may not be able to (fully) understand the language in which negotiations are being

⁴³⁵ See Jacobs, Stoop & Van Niekerk *op cit* (n 404) 347.

⁴³⁶ Du Plessis *op cit* (n 408) 34 states that '[i]t is possible that the unconscionable conduct may have been causally irrelevant with regard to the consumer's behaviour. For example, it may be that a consumer would have entered into an agreement even if the consumer were not subjected to pressure by the supplier. It is doubtful whether section 40 should apply in these circumstances'. It is submitted that s 40 of the CPA can, and should apply even in cases where the agreement was not concluded as a result of the unconscionable conduct. Section 40, it has been argued, has a wider application than only to provide remedies when a contract was concluded as a result of unconscionable conduct. This much is clear from the fact that the section applies also in situations concerning the marketing of goods and services and the process of negotiation, as well as the demand for, or collection of, payment for goods or services, *etcetera*.

⁴³⁷ S 40(2) of the CPA.

⁴³⁸ Du Plessis *op cit* (n 408) 36.

conducted or understand the language of a written contract. Clearly there is scope for exploiting foreign tourists in such a situation. Section 40 of the CPA may therefore have implications for foreign tourists in particular. And, of course, it places a burden on suppliers when dealing with foreign tourists to ensure that the lack of understanding on the part of consumers is not exploited. Although section 40(2) of the CPA does not specifically require of a supplier to ensure the consumer understands the contract, it may well have this implication since a supplier's best defence against a complaint of unconscionable conduct brought about through the lack of understanding by a consumer of a contract will be by ensuring that the consumer actually understands the contract and its meaning and implications.

Taking advantage of a specific weakness of a consumer, as contemplated by section 40(2) of the CPA, probably bears a negative meaning of 'to seize an accidental or unintended opportunity of profiting, to overreach'.⁴³⁹ Section 40(2) of the CPA does not qualify the extent of the advantage that must be taken. This seems to indicate that any advantage taken in a manner contemplated in section 40(2) will be considered unconscionable, presumably because it will be an affront to the dignity of such a consumer. However, the advantage taken will be subject to the limitation of the maxim *de minimus non curat lex*.

Section 40(3) of the CPA provides that section 51 of the Act applies to court proceedings concerning this section. The reference to section 51⁴⁴⁰ must be a mistake, and should be a reference to section 52⁴⁴¹ of the Act.

Section 52(1) of the Act provides that in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, if a person alleges that the supplier contravened section 40, 41 or 48, and the CPA does not provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability, the court may make an order contemplated in subsection (3) of the

⁴³⁹ Du Plessis op cit (n 408) 37.

⁴⁴⁰ S 51 of the CPA deals with prohibited transactions, agreements, terms and conditions.

⁴⁴¹ S 52 of the CPA provides for the powers of the court to ensure fair and just conduct, terms and conditions.

Act, after having considered the principles, purposes and provisions of the Act, as well as the matters set out in section 52(2) of the Act.

The matters set out in section 52(2) of the Act that a court must consider when dealing with a matter in terms of section 52 of the CPA are:

- the fair value of the goods or services in question;⁴⁴²
- the nature of the parties to that transaction or agreement, their relationship, to each other and their relative capacity, education, experience, sophistication and bargaining position;⁴⁴³
- the circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made;⁴⁴⁴
- the conduct of the supplier and consumer respectively;⁴⁴⁵
- whether there was any negotiation between the supplier and the consumer and the extent of that negotiation;⁴⁴⁶
- whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier;⁴⁴⁷
- the extent to which any documents relating to the agreement or transaction satisfied the plain language requirements of section 22;⁴⁴⁸
- whether the consumer knew or reasonably should have known about the existence and extent of any particular provision of the agreement that is

⁴⁴² S 52(2)(a) of the CPA.

⁴⁴³ S 52(2)(b) of the CPA.

⁴⁴⁴ S 52(2)(c) of the CPA.

⁴⁴⁵ S 52(2)(d) of the CPA.

⁴⁴⁶ S 52(2)(d) of the CPA.

⁴⁴⁷ S 52(2)(e) of the CPA.

⁴⁴⁸ S 52(2)(f) of the CPA.

alleged to have been unfair, unreasonable, or unjust considering the custom of trade and any previous dealings between the parties;⁴⁴⁹

- the amount for and circumstances under which the consumer could have acquired identical or equivalent goods or services from a different supplier;⁴⁵⁰ and,
- in the case of the supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.⁴⁵¹

Section 52(3) of the CPA authorises the court, when it has determined that a transaction or agreement was wholly or partly unconscionable, unjust, unreasonable or unfair, to

- make a declaration to that effect;⁴⁵²
- to make any further order that the court considers just and reasonable in the circumstances, which may include an order to restore money or property to the consumer;⁴⁵³
- to compensate the consumer for losses or expenses relating to the transaction or agreement, or the court proceedings;⁴⁵⁴ and
- to require of the supplier to cease or alter any practice, form or document so as to avoid a repetition of the particular conduct.⁴⁵⁵

From the wording of section 52(1) of the Act it seems as if only a court other than a consumer court has the authority to make an order in terms of section 52(3), including an order that is just and reasonable where the agreement or transaction

⁴⁴⁹ S 52(2)(h) of the CPA.

⁴⁵⁰ S 52(2)(i) of the CPA.

⁴⁵¹ S 52(2)(j) of the CPA.

⁴⁵² S 52(3)(a) of the CPA.

⁴⁵³ S 52(3)(b)(i) of the CPA.

⁴⁵⁴ S 52(3)(b)(ii) of the CPA.

⁴⁵⁵ S 52(3)(b)(iii) of the CPA.

was found to be, for instance, unconscionable. Despite only a court having this power a consumer may only approach the court when all other available remedies in terms of national legislation have been exhausted.⁴⁵⁶ Section 52 of the CPA however only applies in respect of proceedings relating to an (existing) agreement or transaction between the supplier and consumer. Unconscionable conduct that has not yet resulted in an agreement or transaction may still be addressed by other ways, such as a compliance notice issued by the Commission.⁴⁵⁷

In proceedings before a court concerning an agreement or transaction between a consumer and supplier where it is alleged that an agreement or term of the agreement, or a notice to which the agreement is subject is void in terms of the Act or does not comply with the requirements of section 49, then the court may make an order severing any part of the agreement, provision or notice, or alter it to the extent required to make it lawful, provided that it is reasonable to do so having regard to the transaction, agreement, provision or notice as a whole;⁴⁵⁸ or the court can declare void the whole agreement, provision or notice as from the date it took effect.⁴⁵⁹ In the case where a provision or notice fails to satisfy the requirements of section 49 of the Act, the court may sever the provision or notice from the agreement, or declaring it to have no force or effect with respect to the transaction.⁴⁶⁰ Lastly, the court can also make any further order that is just and reasonable in the circumstances.⁴⁶¹

Where a court has declared an agreement void in terms of the CPA or has severed a provision from an agreement in terms of section 52(4) of the Act the supplier, as party to the agreement, may not in response to that decision directly or indirectly penalise the other party to the contract; may not alter the terms of any agreement with another party to the impugned contract except to the extent necessary to correct unlawful provisions, and may not take any action to accelerate, enforce, suspend or

⁴⁵⁶ See s 69(d).

⁴⁵⁷ Ss 99(e) and 100(1) of the CPA. See Du Plessis *op cit* (n 408) 38-40.

⁴⁵⁸ S 52(4)(a)(i)(aa) of the CPA. See also s 115(1) of the CPA and which is been discussed in Chapter 3 *infra*.

⁴⁵⁹ S 52(4)(a)(i)(bb) of the CPA.

⁴⁶⁰ S 52(4)(a)(ii) of the CPA.

⁴⁶¹ S 52(4)(b) of the CPA.

terminate another agreement with another party to the impugned agreement.⁴⁶² The purpose of these provisions is clearly to prevent the supplier from acting detrimentally to the interest of the consumer from possible notions of spite. A supplier will have to be very careful when considering performing any actions that may be to the disadvantage of the consumer, even if such actions are allowed in terms of the agreement, if such actions are in reaction to the agreement being declared void or some terms of the agreement being severed.

Section 41 of the CPA prohibits false, misleading or deceptive representations.⁴⁶³ When marketing⁴⁶⁴ any goods or services a supplier (or a person acting with the permission of the supplier) must not by words or conduct directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;⁴⁶⁵ use exaggeration, innuendo or ambiguity as a material fact, or fail to disclose a material fact if that failure amounts to a deception;⁴⁶⁶ or fail to correct an apparent misapprehension on the part of the consumer, amounting to a false, misleading or deceptive representation.⁴⁶⁷

A person acting on behalf of a supplier may not falsely represent that such person (the agent) has any sponsorship, approval or affiliation, or engage in any conduct that the supplier is prohibited from doing, as set out in section 41(1) of the Act.

Section 41(3) of the Act provides examples of what may constitute false, misleading or deceptive representations. This subsection provides that it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect that:

⁴⁶² S 68(2) of the CPA.

⁴⁶³ S 41 of the CPA.

⁴⁶⁴ Marketing includes the promotion and supply of goods or services. See the definitions of 'market'; 'promote' and 'supply' in s 1 of the CPA.

⁴⁶⁵ S 41(1)(a) of the CPA.

⁴⁶⁶ S 41(1)(b) of the CPA.

⁴⁶⁷ S 41(1)(c) of the CPA.

- the supplier has any particular status, affiliation, connection, sponsorship or approval that they do not have;⁴⁶⁸
- any goods or services are of a particular standard, quality, grade, style or model;⁴⁶⁹
- any goods or services are available or can be delivered or performed within a specified time;⁴⁷⁰
- a specific price advantage exists;⁴⁷¹ or
- the transaction affects, or does not affect, any rights, remedies or obligations of a consumer.⁴⁷²

If a consumer can establish therefore that a representation has been made as provided for in section 41(3) of the CPA then a presumption of it being a material misrepresentation will arise.

Section 52 of the Act also applies to court proceedings concerning this section.⁴⁷³

Closely linked to the provisions of section 41 of the CPA is section 29 of the Act providing for general standards for marketing of goods and services, as part of the right to fair and responsible marketing.⁴⁷⁴ Section 29 prohibits a producer, importer, distributor, retailer or service provider from marketing goods or services in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services as contemplated in section 41 of the Act;⁴⁷⁵ or in a manner that is misleading, fraudulent or deceptive in any way, including in respect of the nature, properties, advantages or uses of the goods or services; the manner in or

⁴⁶⁸ S 41(3)(a) of the CPA.

⁴⁶⁹ S 41(3)(b)(ii) of the CPA.

⁴⁷⁰ S 41(3)(b)(vi) of the CPA.

⁴⁷¹ S 41(3)(f) of the CPA.

⁴⁷² S 41(3)(i) of the CPA.

⁴⁷³ S 41(5) of the CPA. This subsection also refers to s 51 of the Act but, it is submitted, this is similar mistake as appears in s 40(3) of the CPA and should be a reference to s 52 of the Act.

⁴⁷⁴ Part E of Chapter 2.

⁴⁷⁵ S 29(a) of the CPA.

conditions on which those goods or services may be supplied; the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor's price for comparable or similar goods or services; the sponsoring of any event; or any other material aspect of the goods or services.⁴⁷⁶

From the titles of Part E (Right to fair and responsible marketing) and Part F (Right to fair and honest dealing) of Chapter 2, it is quite obvious that aspects of these parts will overlap substantially and this is the case with sections 29 and 41. Comparing these two sections rather begs the question why this aspect was not dealt with in one section rather than two separate ones. Section 29 of the CPA refers to a producer, importer, distributor, retailer or service provider separately whereas section 41 of the Act refers to supplier only. On reading the definitions of the terms used in section 29 it is clear that all these terms are encapsulated by the term 'supplier'. Why this elaborate formulation is used is not clear. Both sections also apply to the marketing of goods and/or services. As far as the conduct that is prohibited is concerned, section 29(a) is almost a copy of section 41(1)(a) of the Act, and then section 29(a) of the Act still requires that section 41 be read into section 29. Further to section 29(a) of the CPA section 29(b)(i)-(v) of the Act provide more specific guidelines (or examples) of false, misleading or deceptive representations that will be in violation of the section. These examples are similar to the examples mentioned in section 41(3) of the Act – which is already required to be read into the section 29 in any event.

This does not mean that the two sections cover exactly the same conduct. It is submitted that section 41 of the Act is wider in scope than section 29. The latter prohibits marketing of goods or services in a manner that is reasonably likely to imply a false or misleading representation concerning marketed goods or services, or the marketing of goods or services that is misleading, fraudulent or deceptive in any way. Section 41(1)(a) of the Act also prohibits the marketing of goods or services by making use of false, misleading or deceptive representations. The subsection then in paragraph (b) prohibits the use of words or conduct by way of exaggeration, innuendo or ambiguity as to any material facts, or failure to disclose a material fact if that failure amounts to deception; or in paragraph (c) prohibits the failure to correct

⁴⁷⁶ S 29(b) of the CPA.

an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive misrepresentation. As section 29 however incorporates section 41 the end result is that they are substantially the same. Chances are that these two sections will obfuscate rather than clarify issues when it comes to the interpretation, and inevitable comparison, of the two sections.

But the net effect of these sections is that the tourism industry, and accommodation establishments in particular will have to be very careful in how they market themselves. Where, for instance, an accommodation establishment makes use of a brochure advertising itself by showing a beautiful sea view whereas in reality the establishment does not have a sea-view it may be considered a misleading or a deceptive misrepresentation resulting in the court making an order in terms of section 52(3) of the Act. More problematic could be where the brochure shows beautiful sea views and in reality the sea view can be enjoyed from some but not all rooms.

This type of conduct will firstly constitute a misrepresentation which will allow for the rescission of the contract and further alternative relief, but secondly, it is again important to note that this type of misrepresentation constitutes prohibited conduct even where it does not lead to a contract. What is significant about the protection provided by section 41 of the CPA concerning misrepresentations, is that no distinction is made between fraudulent, negligent or innocent misrepresentations. The consumer may therefore be awarded damages in terms of section 52(3)(ii) of the CPA even in a case of an innocent misrepresentation.⁴⁷⁷ A further potentially problematic issue may result from the use of the words 'exaggeration, innuendo or ambiguity' in section 41(1)(b) of the CPA. Whether using 'exaggeration' refers to the concept *simplex commendatio* (or 'puffing')⁴⁷⁸ of the common law is not obvious. If so, the use of puffing in consumer agreements is prohibited if, and where, it relates to a material fact. Puffing, in terms of the common law, does not constitute a misrepresentation provided that it is confined to indiscriminate puffing that does not relate to particulars.⁴⁷⁹ It may well be that puffing as such is not now prohibited by

⁴⁷⁷ Normally damages cannot be claimed in terms of the common law in the event of an innocent misrepresentation. See Hutchison 'Improperly obtained consensus' in Hutchison & Pretorius *op cit* (n 52) 131-133.

⁴⁷⁸ See Hutchison 'Improperly obtained consensus' in Hutchison & Pretorius *op cit* (n 52) 119.

⁴⁷⁹ Hutchison 'Improperly obtained consensus' in Hutchison & Pretorius *op cit* (n 52) 119.

the CPA provided that it is a general exaggeration and does not relate to a material fact. This may well be where the problem lies for accommodation establishments as representations about uninterrupted sea views, peaceful tranquillity, vibrant nightlife and so on, may well relate to a very material aspect of why people choose a particular accommodation establishment or holiday package. Using such language to induce consumers to select a particular establishment will in the context of tourist accommodation very often constitute something more than mere puffing and commendation, but rather a material statement made to the consumer with a bearing on the quality of the tourist product or service being sold.⁴⁸⁰ Again, suppliers of these services will have to carefully consider the type of language used in advertising their services and products. Using apparent sea views in marketing material and then selling accommodation without sea views will in all likelihood constitute a breach of the requirements of the provisions considered. A supplier will have to indicate in its brochure that some rooms do not enjoy a sea view.

4.3.13 Right to fair, just and reasonable terms and conditions⁴⁸¹

Section 48 of the CPA is titled 'Unfair, unreasonable or unjust contract terms' and contains probably one of the most significant provisions of the whole Act. For the first time, South Africa has specific legislation that provides a party to an agreement with a right to challenge such an agreement on the basis that the agreement is unfair, unreasonable or unjust.⁴⁸² The section provides that:

⁴⁸⁰ Such terminology may well constitute *dicta et promissa* entitling the consumer to the *actio redhibitoria* or the *actio quanti minoris*. See Hutchison 'Improperly obtained consensus' in Hutchison & Pretorius *op cit* (n 52) 119.

⁴⁸¹ It is interesting to note that the heading of s 48 of the CPA refers to 'contract terms' as does Regulation 44, which contains a list of contract terms which are presumed not to be fair and reasonable. However, neither the section nor the regulation uses the term 'contract' in the text of either, but rather prefer 'transaction or agreement' in the case of the section, or just 'agreement' in the case of the regulation. The definition of agreement in s 1 of the CPA conveys the idea of something wider than the traditional understanding of a contract, namely 'an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them'. The use of the more extensive concept of agreement is understandable as it would include something that purports to be a contract but is indeed not a contract, thereby denying a party the somewhat technical defence that the CPA may not be applicable as the relationship is not a contract. Why use was made of different and/or inconsistent terminology is unclear and unsatisfactory.

⁴⁸² Floyd 'Legality' in Hutchison & Pretorius *op cit* (n 52) 182-185 describe s 48 of the CPA as a radical departure from the law as it related to unfair terms prior to the coming into effect of the CPA.

- (1) A supplier must not
- (a) offer to supply, supply, or enter into an agreement to supply, any goods or services-
 - (i) at a price that is unfair, unreasonable or unjust; or
 - (ii) on terms that are unfair, unreasonable or unjust;
 - (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
 - (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer-
 - (i) to waive any rights;
 - (ii) assume any obligation; or
 - (iii) waive any liability of the supplier,
 on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.
- (2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if-
- (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
 - (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
 - (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
 - (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49(1), and
 - (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
 - (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

It has been pointed out that South Africa has not had legislation dealing with unfair contracts or contractual terms in general.⁴⁸³ This has left it largely to the courts to develop jurisprudence concerning unfair contracts. Such development has culminated in the Constitutional Court decision in *Barkhuizen v Napier*,⁴⁸⁴ in which the Court made it clear that the proper approach to challenging a contract that is unfair or unjust must be based on public policy which, in turn, imports the notions of fairness, justice and reasonableness.⁴⁸⁵ The challenge, however, is based on public policy, not on grounds of unfairness, unjustness or unreasonableness. Whether the impact of section 48 of the CPA will be to elevate unfairness, unreasonableness and/or unjustness to separate and independent grounds for challenging (consumer) contracts or whether these grounds will merely be considered to be expressions of

⁴⁸³ See Chapter 3 para 3.2.3.

⁴⁸⁴ *Supra* (n 160).

⁴⁸⁵ See the discussion in para 3.2.3.

public policy and therefore allowing for the position on public policy expressed by the Constitutional Court to be reconciled with the CPA, remains to be seen.⁴⁸⁶ An answer may be gleaned from the provisions contained in section 48(2) of the CPA. This section provides guidance as to what may be considered to be unfair, unjust and unreasonable terms. Terms such as 'excessively one-sided'⁴⁸⁷ and 'so adverse as to be inequitable'⁴⁸⁸ are employed to describe terms of an agreement which are unfair, unjust and unreasonable. But these examples may just as well have been used to guide a decision on what is contrary to public policy. A term of a contract that is for instance excessively one-sided will be considered to be unfair, unreasonable and/or unjust because the one-sidedness thereof (in the context of supplier-consumer relations) is ultimately against the public policy of the people of South Africa as informed by the values of the Constitution. Whether a term of a contract is severed from the agreement or the whole agreement is set aside will ultimately be determined by public policy. It is submitted therefore that unfairness, unreasonableness and/or unjustness will continue to be manifestations of public policy and not distinct from it.

The section provides that if the term is excessively one-sided in favour of any party other than the consumer, or the terms of the agreement are so adverse to the consumer as to be inequitable, or if a consumer had relied to his/her detriment on a false, misleading or deceptive representation or a statement of opinion provided by or on behalf of a supplier - such a term will be considered unfair, unreasonable and/or unjust.⁴⁸⁹ Where a consumer had entered into an agreement to his/her detriment because of a false, misleading or deceptive representation, as contemplated in section 41 of the Act, or a statement of opinion by the supplier to the detriment of the consumer, such agreement will be considered unfair, unreasonable and/or unjust.⁴⁹⁰

⁴⁸⁶ S 52(2)(b) of the CPA, which is applicable also to a matter before a court in terms of s 48, as well as ss 40 and 41 of the CPA, requires that certain factors are to be considered when deciding whether a contract or term of contract is unfair, unjust or unreasonable. This includes the relative bargaining position of the parties, which is a reference to the equality of the parties. This is an explicit indication that constitutional values will play a role in determining unfairness, unjustness or unreasonableness in the context of consumer protection as with all other law. Any argument to the contrary ignores the constitutional principle that the Constitution is the supreme law of the country.

⁴⁸⁷ S 48(2)(a) of the CPA.

⁴⁸⁸ S 48(2)(b) of the CPA.

⁴⁸⁹ S 48(2)(a)-(c) of the CPA.

⁴⁹⁰ S 48(2)(c) of the CPA. Section 41 of the CPA deals with false, misleading or deceptive representations, and is considered in para 4.3.7.

In terms of the common law statements of opinion will not usually amount to misrepresentations leading to the contract being voidable, unless the party expressing the opinion does not in fact hold the opinion or belief expressed in which case the party is misrepresenting his/her own state of mind, for which the party may then be held liable.⁴⁹¹ It seems now as if the CPA has changed the common law position in that a statement of opinion (that turns out to be wrong or false) will indeed constitute a misrepresentation that will render the contract unfair, unjust and/or unreasonable. This will be the case even where the person expressing the opinion truly believed in its correctness. The section therefore has extended the potential liability in cases of opinions considerably. It is an aspect of which service providers in the tourism industry in general need to take careful note, especially as they are often asked to express an opinion on aspects such quality and suitability of accommodation; proximity to attractions, and the like.⁴⁹² In the hospitality industry specifically personnel of accommodation establishments often have to advise prospective consumers on certain matters, such as prevailing conditions at the establishment (Is it peaceful and quiet?) or the proximity of the establishment to certain amenities (Is the hotel within walking distance of the beach?) or on safety matters (Is the hotel in a safe area? Is it safe to walk in the vicinity at night? Is the beach safe for swimming?) All that a consumer will have to show is that an opinion was expressed on which the consumer had relied to his/her detriment. Having established this, a court may impose the remedies as provided for in section 52(3) of the Act.

Section 2(10) of the CPA provides that the CPA must not be interpreted to preclude a consumer from exercising any rights afforded such a consumer in terms of the common law. The implication is that a consumer will have all the remedies in the event of a misrepresentation under the common law, but also the remedies provided for by the Act.⁴⁹³ This could have the effect of the consumer being able to claim damages in the event of an innocent misrepresentation, in respect of which the position in common law is that consequential damages cannot be claimed.⁴⁹⁴ It is not

⁴⁹¹ Hutchison 'Improperly obtained consensus' in Hutchison & Pretorius *op cit* (n 52) 118.

⁴⁹² See also Stoop, Jacobs & Van Niekerk *op cit* (n 404) 355-356.

⁴⁹³ See s 52(3) of the CPA.

⁴⁹⁴ Hutchison 'Improperly obtained consensus' in Hutchison & Pretorius *op cit* (n 52) 131-133.

a stated requirement of the false or misleading representation that induces the consumer to contract that it be made negligently or intentionally.⁴⁹⁵ This would then allow the court to compensate the consumer for losses relating to the transaction which resulted from an innocent misrepresentation.⁴⁹⁶

It must be remembered that the ambit of section 48 of the Act⁴⁹⁷ extends beyond its application to contracts only. It extends in application to the *offer* of the supply of goods and services at a price or on terms that are unfair, unreasonable or unjust,⁴⁹⁸ as well as the *marketing* of goods or services, the *process of negotiation* and/or the *administration* of an agreement for the supply of goods or services in a manner that is unfair, unreasonable and/or unjust.⁴⁹⁹ If these activities are performed, even where no contract is concluded, the supplier can be in violation of the requirements of the section and face censure for such prohibited conduct.⁵⁰⁰

Regulation 44 to the Act provides an extensive list of contract terms which are presumed not to be fair and reasonable.⁵⁰¹ The list is not exhaustive and other terms may also be considered unfair.⁵⁰² Nor does it mean that a term listed will necessarily be unfair – the circumstances may dictate otherwise.⁵⁰³

Something that is immediately worthy of note concerning this regulation is the description of what the regulation relates to, namely ‘a term of a consumer agreement between a supplier operating on a for-profit basis and acting wholly or

⁴⁹⁵ See s 48(2)(c) and s 41(1) of the CPA.

⁴⁹⁶ See s 52(3)(b)(ii) of the CPA.

⁴⁹⁷ See in particular s 48(1)(a) & (b) of the CPA.

⁴⁹⁸ S 48(1)(a) of the CPA.

⁴⁹⁹ S 48(1)(b) of the CPA.

⁵⁰⁰ S 52 of the CPA only applies to proceedings before a court concerning a transaction or agreement allegedly in violation of ss 40, 41 and 48. Violations of the mentioned sections outside of the context of a transaction or agreement will then have to be dealt with in terms of Chapter 6 of the Act. Of course Chapter 6 can be used to address a contravention of s 40, 41 and 48, but s 52 provides additional remedies that a court may use to address such a violation in the context where there is a transaction or agreement.

⁵⁰¹ S 120(d) of the CPA, as read with regulation 44(3). It is evident that regulation 44 has been drafted to give effect to s 120(d) of the CPA which in turn pertains to s 48 of the CPA. That being the case it is strange that the heading of regulation 44 refers only to terms that are presumed not fair and reasonable and does not contain a reference to terms that are presumably unjust, as does s 48. This inconsistent use of terminology is unfortunate.

⁵⁰² Regulation 44(2)(a).

⁵⁰³ Regulation 44(2)(b).

mainly for purposes related to his or her business or profession and an individual consumer or individual consumers who entered into it for purposes wholly or mainly unrelated to his or her business or profession ...'.⁵⁰⁴ It may be that this provision provides a description or guidance as to what the Legislature considers to be, or not to be, 'in the ordinary course of business' without that being the actual purpose of the provision. Considering that the regulation uses the term 'supplier' (which is defined in section 1 of the Act) it may be argued that it is unnecessary to describe or qualify the supplier as is done in the regulation. However, by describing or qualifying the supplier clarification is provided for what is meant by 'in the ordinary course of business'.⁵⁰⁵ For purposes of the application of regulation 44 to a consumer agreement the supplier concluding the agreement must act wholly or mainly for purposes related to the business of the supplier, whereas at the same time the consumer, as the other party to the agreement, is entering the agreement for purposes wholly or mainly unrelated to his/her business or profession.⁵⁰⁶

A most significant implication of this wording is that transactions between suppliers and small businesses (those businesses falling below the threshold set in terms of section 5(2)(b) of the CPA) are excluded from the application of regulation 44(3) of the CPA, and the protection afforded by the regulation thus extends only to an individual or private consumer who is not concluding an agreement as part of his or her business or profession.

The effect of regulation 44(3) of the CPA is that a term that falls within the provisions of that regulation is presumed unfair and unreasonable. Regulation 44(3) therefore contains a so-called 'grey list'. It creates a presumption where, once the term is placed within the ambit of regulation 44(3), the supplier will have the onus to prove the term is not unfair and unreasonable. Small businesses will therefore be denied the protection of the regulation to the extent indicated. Regulation 44(3) thus does not apply between businesses.

⁵⁰⁴ Regulation 44(1).

⁵⁰⁵ See the definition of 'supply' as it appears in s 1 of the CPA. See also the argument raised earlier about the difficulty that may result from the use of the phrase 'in the ordinary course of business' without it being defined.

⁵⁰⁶ This may well clarify the question raised earlier about the individual selling his or her house or car. Such a transaction will not constitute an agreement for purposes of the CPA.

The regulation also does not seem to apply in respect of a transaction concluded with a not-for-profit organisation.

The courts and other relevant adjudicating bodies could still consider terms falling within the ambit of the provisions of regulation 44(3) to be unfair and unreasonable in contexts excluded from the application of the regulation (such as between a supplier and a small business consumer) but it will be for the consumer to establish that such a term is unfair and/or unreasonable. In these cases the consumer will not have the benefit of the presumption established by regulation 44(3).

Regulation 44(3) provides that a term will be considered to be unfair if it has one or more of the purposes or effects as set out in regulation 44(3)(a)-(bb), provided the term does not fall within the ambit of regulation 44(4). Some of the types of terms listed specifically in regulation 44(3) may be of particular relevance for the accommodation segment.⁵⁰⁷ So for instance, a term of an agreement will be presumed to be unfair if the effect thereof is to limit 'the supplier's obligation to respect commitments undertaken by his or her agents'.⁵⁰⁸ Where the supplier makes use of agents or middle-men to sell its services and products, the supplier cannot exclude liability for the promises made by such agents; or stated differently, the supplier will be able to include a term to exclude such liability but such term will be presumed to be unfair and it will be for the supplier to prove that it was not unfair.

A term of an agreement that permits the supplier to increase the price initially agreed with the consumer without allowing the consumer a right to cancel the agreement will also be presumed unfair.⁵⁰⁹ If a supplier therefore wants to make a price agreed with a consumer subject to certain price increases, such a supplier will have to allow the consumer a right to cancel such a contract if the price is increased. Whether this means that the cancellation can now be considered to be an advance cancellation is not clear. Consider the situation of an accommodation establishment agreeing a price with a consumer subject to a condition that the price may be increased if a

⁵⁰⁷ Regulation 44(3)(a) is very likely to have a significant impact on the accommodation sector. This provision is considered as part of the discussion in para 4.3.17.

⁵⁰⁸ Regulation 44(3)(c).

⁵⁰⁹ Regulation 44(3)(h).

rumoured hike in municipal service charges and property taxes is introduced. The rates and taxes are indeed increased substantially and the supplier informs the consumer of a corresponding increase in the originally agreed price. The consumer now cancels the agreement. The supplier may view this as an advanced cancellation and may want to impose a reasonable cancellation fee. It is submitted that when a supplier advises the consumer of the price increase and the consumer decides to cancel such an agreement, the supplier will not be permitted to impose a reasonable cancellation fee as is provided for in terms of section 17 of the CPA. The main reason for the submission is that allowing for a cancellation fee to be imposed will effectively do away with the protection of the provision. It would be very easy to find a reason for increasing the price and then to impose a cancellation fee in the event of cancellation. It may leave the supplier at a disadvantage in that the supplier will have to bear the risk of absorbing certain price increases such as those mentioned. However, that is the nature of business. It would in any event be better for the supplier to have a higher occupancy (at the originally agreed price) than not to have clients because they do not want to expose themselves to the risk of a price that may be substantially increased by the supplier for a variety of reasons.

The legislation itself probably provides the clearest indication that regulation 44(3)(h) must not be understood to allow for a supplier to impose a cancellation fee. This regulation specifically states that the supplier may only include a term allowing for an increase of the initially agreed price if the consumer has a corresponding right to terminate the agreement. In the context of an accommodation business this will only make sense if the consumer is advised in advance of the increase and then has the opportunity to exercise the right to cancel the agreement. If the intention was to consider such a cancellation the same as an advance cancellation as provided for in section 17 of the CPA then it would not have been necessary to even make reference to a right to cancel, because the consumer in any event has the right to cancel any advance booking, subject then to the possible payment of a cancellation fee. In terms of section 17 of the CPA the consumer exercises the option at his or her initiative. The position in terms of regulation 44(3)(h) is different in that the consumer is in a sense confronted by a unilateral change in the contract brought about by the supplier. To give effect to the purposes of the CPA, such as achieving a consumer market that is fair and for the benefit of consumers; that promotes fair business

practices; that protects consumers from unfair and improper trade practices, and promotes consumer confidence,⁵¹⁰ the consumer is provided with a right to terminate because of the actions of the supplier and therefore a cancellation fee cannot be imposed.

Section 51 of the CPA contains a number of provisions relating to transactions, agreements, terms and/or conditions that are prohibited, or a so-called 'black list'. It provides that a supplier must not make an agreement subject to any term or condition if the general purpose or effect thereof will be to defeat the purposes and policy of the Act;⁵¹¹ mislead or deceive the consumer;⁵¹² or subject the consumer to fraudulent conduct.⁵¹³

An agreement or term of agreement is prohibited if it directly or indirectly purports to waive or deprive a consumer of any of his or her rights in terms of the Act;⁵¹⁴ purports to avoid a supplier's obligation or duty in terms of the Act;⁵¹⁵ purports to set aside or override the effect of any provision of the Act;⁵¹⁶ or purports to authorise the supplier to do anything unlawful in terms of the Act or fail to do anything that is required in terms of the Act.⁵¹⁷

An agreement or term of agreement is prohibited if it purports to exclude the liability of the supplier for any loss directly or indirectly attributable to the gross negligence of the supplier or someone acting for the supplier or under the control of the supplier;⁵¹⁸ or purports to constitute an assumption of risk or liability by the consumer for any loss contemplated as a result of the gross negligence of the supplier;⁵¹⁹ or imposes an obligation on a consumer to pay for damage or assume the risk of handling any

⁵¹⁰ See s 3(1) of the CPA.
⁵¹¹ S 51(1)(a)(i) of the CPA.
⁵¹² S 51(1)(a)(ii) of the CPA.
⁵¹³ S 51(1)(a)(iii) of the CPA.
⁵¹⁴ S 51(1)(b)(i) of the CPA.
⁵¹⁵ S 51(1)(b)(ii) of the CPA.
⁵¹⁶ S 51(1)(b)(iii) of the CPA.
⁵¹⁷ S 51(1)(b)(iv) of the CPA.
⁵¹⁸ S 51(1)(c)(i) of the CPA.
⁵¹⁹ S 51(1)(c)(ii) of the CPA.

goods displayed by the supplier, except as contemplated in section 18(1) of the Act.⁵²⁰

Section 51(1)(d) provides that a supplier may not make an agreement subject to any term or condition if it results from an offer prohibited in terms of section 31 of the Act, the latter section prohibiting negative option marketing.⁵²¹ Also an agreement may not be made subject to the conclusion of a supplementary agreement.⁵²² An example of what is prohibited by this provision may be where a bank requires in a bond agreement that the consumer concludes another agreement for insurance to cover the repayment of the bond in the event of certain occurrences taking place. In the context of tourism an accommodation establishment cannot require the consumer to conclude an agreement with a particular tour operator to provide certain services to or for the consumer as a condition to the provision of accommodation.

Section 51(1)(g) of the CPA contains an interesting provision. It reads

- (1) A supplier must not make a transaction or agreement subject to any term or condition if-
 - (g) it falsely expresses an acknowledgement by the consumer that-
 - (i) before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier; or
 - (ii) the consumer has received goods or services, or a document that is required by this Act to be delivered to the consumer.

A provision in a contract to the effect that neither party has made any misrepresentations to the other party is effective, in the absence of fraud, to exclude reliance on misrepresentation as a cause of action at common law.⁵²³ It has been argued that such clauses are now prohibited by section 51(1)(g) of the CPA.⁵²⁴ Although, on a plain reading of the provision what seems to be prohibited is *falsely* providing that no representations were made, and not the inclusion of such a term *per se*. Such a term may therefore still be included provided that it reflects the truth.

⁵²⁰ S 51(1)(c)(iii) of the CPA.

⁵²¹ This subsection is extremely clumsily worded and probably just intends that no transaction or agreement can result from negative option marketing.

⁵²² S 51(1)(e) of the CPA.

⁵²³ Hutchison 'Improperly obtained consensus' in Hutchison & Pretorius *op cit* (n 52) 121.

⁵²⁴ Hutchison 'Improperly obtained consensus' in Hutchison & Pretorius *op cit* (n 52) 121 fn 46.

It may have some evidentiary value for the supplier when faced with an allegation of a misrepresentation having been made. But a consumer will be able to prove that representations were made and such proof will have the effect of establishing a contravention of section 51(1)(g) of the CPA. It would then be immaterial whether the representation was true or false. The fact will be that it was false to represent that no representations were made. For one to understand the provision as prohibiting a term that would exclude reliance on misrepresentations, the qualifying word 'false' should rather have been employed as an adjective to describe 'representations' where it appears in section 51(1)(g)(i) of the CPA (or the word 'misrepresentation' should have been used). Before including such a term the supplier will have to be very sure that no representations were made. It may well be prudent for the supplier not to make use of such a term in an agreement.

An agreement that requires the consumer to forfeit any monies to a supplier if the consumer exercises any rights in terms of the Act or to which the supplier is not entitled in terms of the law are prohibited.⁵²⁵ So is a term prohibited that expresses an authorisation for the supplier or someone acting on his/her behalf to enter premises for the purpose of taking possession of goods;⁵²⁶ an undertaking to sign in advance documents relating to enforcement; consent to a predetermined value of costs relating enforcement;⁵²⁷ or a term expressing an agreement by the consumer to deposit a bank card or identity document with the supplier, or provide the supplier with a pin code or number to be used to access an account.⁵²⁸

An agreement or term thereof is void to the extent that it contravenes section 51 of the CPA.⁵²⁹

⁵²⁵ S 51(1)(h) of the CPA.

⁵²⁶ Summary execution clauses (*parate executie*) are examples of agreements that excludes the jurisdiction of the courts and are considered for that reason to be against public policy under the common law. See Floyd 'Legality' in Hutchison & Pretorius *op cit* (n 52) 177-178. Section 51(1)(i) of the CPA therefore seems to be a codification of the common law to the extent that the rule applies to consumer agreements.

⁵²⁷ S 51(1)(i) of the CPA.

⁵²⁸ S 51(1)(j) of the CPA. See Stoop, Jacobs & Van Niekerk *op cit* (n 405) 360.

⁵²⁹ S 51(3) of the CPA.

4.3.14 Pre-paid certificates, credits and vouchers

Section 63 of the CPA pertains to the common practice of suppliers making use of pre-paid instruments that can be exchanged for goods or services. The section applies only to transactions in which a supplier accepts payment from a person in exchange for a pre-paid certificate, voucher or similar device, and agrees to provide goods or services to any person who subsequently presents that certificate, voucher or device up to the value represented by it.⁵³⁰ The most common example is the gift voucher purchased at, for example, a bookshop. Accommodation establishments can also make use of prepaid vouchers.

Such a pre-paid certificate, voucher or device does not expire until the earlier of: the date by which the full value represented by the device has been redeemed in exchange for goods or services, or three years after the device has been issued or such longer period the parties may have agreed to.⁵³¹ This brings much-needed certainty to the period of validity of prepaid certificates or vouchers.

Subsection (3) provides that:

[a]ny consideration paid by a consumer to a supplier in exchange for a prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) is the property of the bearer of that certificate, card, credit voucher or similar device to the extent that the supplier has not redeemed it in exchange for goods or services, or future access to services.

It has always been normal practice that such devices are not permitted to be exchanged for cash as that would defeat the whole object of providing such a product or service. This situation, it is submitted, has not changed. There is, firstly, nothing to indicate that the Legislature has intended to limit the contractual freedom of the parties in the agreement other than to, amongst other, prescribe a minimum period of validity. It is therefore fully within the rights of the parties to make the contract subject to a term that does not allow exchanges for cash. Of course the parties may agree that a voucher may indeed be exchangeable for cash, although it can be stated with certainty that such an agreement will not be standard practice.

⁵³⁰ S 63(1) of the CPA.

⁵³¹ S 63(2) of the CPA.

Furthermore, section 63(1)(b) of the CPA makes it clear that one is dealing with a situation where a supplier expressly or implicitly agrees to provide *goods or services* to any person who presents the certificate or voucher. The definition of 'goods', as read with the definition of 'consideration',⁵³² seems to indicate that money is not a 'good' for purposes of the Act. A consumer therefore will not be able to demand that the voucher be exchanged for cash or even that remaining 'change' be provided in cash.

The fact that the consideration paid for the device remains the property of the bearer of the device to the extent that it has not been redeemed for goods or services means, it has been argued, that the supplier must hold such consideration in trust for the bearer.⁵³³ The administrative burden and additional costs brought about by such an interpretation may be considerable. It is submitted however that there is another way to interpret this requirement which is considered below as it applies equally to the provisions of section 65, particularly section 65(2)(b) of the CPA which is discussed next.

4.3.15 Suppliers to hold and account for consumer's property

Section 65(2) of the CPA states:

When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the supplier-

- (a) must not treat that property as being the property of the supplier;
- (b) in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and
- (c) is liable to the owner of the property for any loss resulting from a failure to comply with paragraph (a) or (b).

⁵³² See section 1 of the CPA for the definitions of these concepts.

⁵³³ Stoop, Jacobs & Van Niekerk *op cit* (n 404) 392-393.

Section 65 of the CPA does not apply to banks, mutual banks and similar financial institutions and which are authorised to take deposits from the public in terms of national legislation.⁵³⁴

In the normal course of events section 65 of the CPA may have implications for accommodation businesses in two types of scenarios. Firstly, accommodation establishments often require that deposits are to be paid when advance bookings or reservations are made. Secondly, guests of such establishments bring their property onto and into such establishments as a matter of course when staying or visiting there.

The first duty imposed is that the supplier is not to treat the property as the property of the supplier.⁵³⁵ This requirement should not provide too many problems when it comes to property brought onto the premises: the supplier cannot wear the clothes of the consumer, use the consumer's camera or computer, or drive his or her car. But money received into the bank account of the supplier, through the process of *confusio*, becomes indistinguishable from the money of the supplier. If the supplier then uses his or her account to make a payment, some of the consumer's money will be used. Unless the money of the consumer is placed in a separate (trust) account it is unavoidable that the money will be treated as part of the supplier's property. It is difficult to see why the Legislature used the formulation as in section 65(2)(a) of the Act if the intention was that monies held by the supplier for the consumer are to be held in trust. An explanation could be because the provision does not only refer to monies but also to other property. However, it is submitted that another reasonable interpretation of the requirement could be that the Legislature did not intend such a strict (or technical) interpretation (of keeping the money in a separate trust account) but merely that the monies must be separately accounted for. Practically this will mean that the supplier must keep proper account of the monies received from consumers and is always in a position to show what has been received from the consumer. This will not add to the administrative burden or costs of the supplier.

⁵³⁴ S 65(1) of the CPA. Attorneys, who may receive trust funds in terms of the Attorneys Act 53 of 1979 will be exempted from the provisions of s 65(2) of the CPA. See Stoop, Jacobs & Van Niekerk *op cit* (n 404) 395.

⁵³⁵ S 65(2)(a) of the CPA.

This is what happens practically in any event in a normal situation. It just prohibits a situation where monies are received, especially in cash, and not properly receipted and accounted for. Such an interpretation, it is submitted, also answers the difficult question of whether it was the intention of the Legislature that suppliers must keep these monies in a separate trust account. The answer is that it is not a requirement to do so. Had the Legislature intended such a dramatic deviation from the current general practice it would have stated such a requirement much more categorically. (It is submitted that this argument applies equally to the interpretation of section 63 of the CPA discussed in the previous section).

The second duty demands that the supplier must exercise the care, diligence and skill that can reasonably be expected of a person managing property belonging to another person in the handling, safeguarding and utilisation of that property.⁵³⁶

When considering the impact of section 65(2) of the Act on these situations it must be remembered that section 2(10) of the CPA provides that the Act must not be interpreted to exclude any rights of a consumer in terms of the common law. Such rights will include the rights a consumer has under the praetorian edict *de nautis, cauponibus et stabulariis*, as well as *depositum*.⁵³⁷

Section 65(2) of the CPA limits the application of the section to a supplier that *has possession* of the property of the consumer. In the context of a guest at a hotel or other accommodation establishment it may generally mean one of two things. Firstly, a guest may hand an item of property to the establishment in terms of an explicit agreement for safekeeping (such as in the case of *depositum*). Secondly, the guest will bring items onto the premises that are not handed in specifically but are kept by the guest in his/her room. Clearly, in the first instance the supplier has possession of the property handed in for purposes of section 65 of the CPA. Whether the supplier has possession of the property of the consumer for purposes of section 65 of the Act where the consumer brings the property onto the premises but it is kept in the room of the consumer is not self-evident. It is submitted that even goods in the room of the guest should be considered to be in the possession of the supplier. This submission

⁵³⁶ S 65(2)(b) of the CPA.

⁵³⁷ These remedies were discussed in para 4.2.4(c).

is based on two grounds. Firstly certain indicators in section 65(2) of the CPA seem to support the argument. Section 65(2) of the CPA refers to property 'ordinarily under the control of a consumer', and in subsection (2)(b) the word 'handling' is used. If property is in the room it is ordinarily under the control of the guest, but while on the premises the property is (also) under the control of the establishment and may even be handled by the staff, such as during the cleaning of the room. Such an understanding would be in line with the policy consideration underlying the praetor's edict, namely that the traveller had to deliver his property into the custody of the innkeeper or servants of the innkeeper (accommodation establishment) and had to depend on their good faith and honesty as he or she had brought his or her property into a sphere which was under the control of the innkeeper. The second ground is to be found in *Davis v Lockstone*⁵³⁸ namely, that if the praetorian edict does not apply to property of the guest kept in his or her room, where the property is required by the guest, the law would be of very little effect. Based on the foregoing arguments section 65(2) of the CPA would then apply to property in the room of the guest, whether the latter is present or not. Where a guest suffers a loss (for instance, where property is stolen from the room of the guest) both section 65 of the CPA and the praetorian edict may apply and therefore require comparison.

The consumer (or guest) will have the onus to prove that his or her property was in effect received into the possession of the innkeeper (including possession in the wide sense of not physically handing the property over to the innkeeper, but where the property remains in the actual possession of the guest but brought onto the premises of the innkeeper such as clothing, jewelry, money or cameras being kept by the guest in his or her room or on his or her person). This will be the case whether the praetor's edict or section 65 of the CPA applies.⁵³⁹

As indicated,⁵⁴⁰ the praetorian edict imposes strict liability on the innkeeper. Absence of negligence or due diligence is not enough to absolve the innkeeper of losses suffered to the property of the guest brought onto the premises. To escape liability the innkeeper must establish that the loss or damage to the property of the guest was

⁵³⁸ *Supra* (n 61) 161.

⁵³⁹ See in this regard *Hamilton-Smythe v Grand National Hotel* 1949 4 SA 464 WLD.

⁵⁴⁰ See para 4.2.4.

the result of an occurrence that was unforeseen and/or unexpected and/or irresistible and/or something that human foresight could not guard against. It has been pointed out however that the absence of negligence (or, stated differently, the taking of reasonable precautions to prevent loss as in the case of theft and burglary) will serve as a defence against a claim in terms of the praetorian edict.⁵⁴¹ The absence of negligence may therefore be a factor in determining liability in terms of the praetor's edict.

Section 65(2)(b) of the CPA seems to indicate that the innkeeper can escape liability by showing that he or she was not negligent and/or acted with due diligence, which will not be enough to allow the innkeeper to escape liability in terms of the praetor's edict. Therefore, although the innkeeper in terms of both section 65(2) of the CPA and the praetor's edict bears the onus of proof, what has to be established to escape liability differ with the consequence that (seemingly) the praetorian edict provides a guest with better protection than section 65(2) of the CPA.

However, the supplier must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing the property belonging to another person.⁵⁴² This paragraph has a couple of significant consequences. Firstly, the degree of care, diligence and skill that a consumer can reasonably expect from the supplier in the handling of the property of the consumer is of a person handling the property of another. The section does impose a 'special' legal duty of care on the supplier. This means that what will be considered a breach of the supplier's duty in the event of damage to the property of the consumer while in the care of the supplier, will be subjected to a higher standard of conduct than the standard required when taking care of the supplier's own property. A risk that one will expose one's own property to may not be acceptable if the property in one's care of another person is similarly exposed to that risk. This must mean that the consumer can expect the supplier not to be negligent (and the supplier cannot contractually exclude this right). This has significant implications for hotels, B&B's,

⁵⁴¹ See Van der Bijl *op cit* (n 74) 570 who points out some of the problems with the use of strict liability in the context of the praetorian edict, such as that the absence of negligence can be an excuse in certain circumstances. See also *Gabriel v Enchanted Bed and Breakfast supra* (n 61).

⁵⁴² S 65(2)(b) of the CPA.

restaurants, pubs and similar establishments as the praetor's edict as well as section 65 of the CPA will apply to a situation when the property of a guest is, for example, stolen while the guest is staying at or visiting the establishment. Contractual terms in a written agreement or notice excluding liability used by an accommodation establishment, may exclude the operation of the praetor's edict but not section 65(2) of the CPA.

Where the property is handed to the supplier for safekeeping there will be a contract of *depositum*. As indicated above⁵⁴³ the contract of *depositum* requires of the *depositarius* to keep the object deposited in his or her custody; to take proper care of the object so entrusted to him or her; and to restore the thing unimpaired to the depositor. The *depositarius* does not have a duty of special care in respect of the object deposited. What is required is the same care and vigilance that the *depositarius* would apply in respect of his or her own property. The depositary is under a duty to exercise reasonable care with regard to the goods entrusted to him or her and who, in the event of the goods being damaged or destroyed, is liable in damages to the owner thereof unless he or she can show that the damage or destruction occurred without *culpa* or *dolus* on his or her part.

If *depositum* is used to claim damages from the *depositarius* (or supplier, in the context of the CPA) the onus is on the supplier to prove an absence of negligence, which is similar to the position in terms of section 65(2) of the CPA. In other words, the supplier will have to establish an absence of negligence and it is not for the consumer to establish negligence.

An important difference between the two mechanisms is the fact that the common law provides that no special duty of care vests in the *depositarius* and that the latter is to care for the property *as if it his or her own*. Section 65(2)(b) of the CPA requires that the supplier is to exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing the property *belonging to another person*. It is submitted, as has been argued above, that the duty imposed by section 65(2)(b) of the CPA (namely, a degree of care that can be expected in the

⁵⁴³ Para 4.2.4(c).

managing of another's property) when taking care of the property of another is a higher duty than that expected by the common law under *depositum* (caring for the property as if it one's own). It is therefore submitted that section 65(2) of the CPA provides a guest with better protection than does the common law contract of *depositum*.

A breach of the legal duties imposed by section 65(2)(a) or (b) of the CPA results in the supplier being liable to the consumer for *any loss* resulting from such breach.⁵⁴⁴ The use of the words 'any loss' may be open again to at least two interpretations. The first would be a restricted interpretation in terms of which 'any loss' is read to be 'any loss or damage to the property'. In this sense the liability of the supplier will be restricted to only the direct costs of repairing or replacing the specific property. Secondly, the phrase could be given the normal meaning in the context of a claim for damages in terms of the law of contract where the damage will be determined with reference to the questions of factual and legal causation.⁵⁴⁵ Where, for instance, the travel documents of the guests were destroyed as a result of breach of the duty imposed by section 65(2) of the CPA, the supplier will be liable not only for the direct costs of replacing the documents but for additional costs such as the extra accommodation costs the consumer incurred because he or she had to stay in the country longer; travelling costs to and from the consulate to arrange replacement documents; and costs incurred due to a necessary change of flights.

It may be worthwhile to consider some of the past case law in view of the discussion above in order to ascertain whether the CPA would have lead to an alternative result if it had been in operation at the time a particular matter was heard.

In *Crocker v Doig & Murray*,⁵⁴⁶ the plaintiff placed two horses with the defendant, being a hotel and stable-keeper, with a view to selling the horses. After the horses were lost, apparently as a result of a theft, the plaintiff claimed damages on the basis

⁵⁴⁴ S 65(2)(c) of the CPA.

⁵⁴⁵ See para 4.3.5 for a more detailed discussion on determination of damages.

⁵⁴⁶ 1880 NLR 111.

that the defendant was a *stabulariis* and therefore strictly liable for the loss under the praetor's edict.⁵⁴⁷ The Court, in deciding for the defendants stated as follows:⁵⁴⁸

In ... the civil action for the property's value, shipowners, innkeepers, and stable-keepers, were supposed to have impliedly contracted that the property should be kept safely; and this was held to make them liable absolutely, unless the loss was occasioned by something in the way of inevitable fate or *vis major*, which would not include mere theft, as distinguished from robbery with violence not to be resisted.... .

One reason given in the *Digest* for this extensive liability in stable-keepers, &c. was that it was often necessary to trust them ..., and so, we find it was provided that if the property was received in a manner outside their ordinary business of stable-keeper, &c. (*extra negotium*) they would not be then exceptionally extensively liable ... but might be sued in ordinary form, with ordinary liabilities. ... when horses are taken to, and left in a stable, for the mere purposes of sale, the special liability imposed by the edict in question on stable-keepers. &c., does not apply – that the stable-keeper, in that case, is to be regarded as an agent of the owner of the horses ...

In short then, because the stable-keeper did not receive the horses in the ordinary course of a stable-keeper's business, the edict does not apply and therefore the stable-keeper was not strictly liable. In a more modern idiom, if a person had left a motor-vehicle with a B&B establishment to sell on behalf of the person and the vehicles were stolen, neither the edict nor the CPA, at least not section 65 of the Act,⁵⁴⁹ would apply as it can certainly not be argued that such an activity would fall in the ordinary course of business of the accommodation establishment.

In *Frank v Biden*⁵⁵⁰ the plaintiff forgot his rifle in the accommodation establishment on departure. He enquired about it a number of days later only to be informed that it was stolen the day before. The plaintiff claimed from the defendant (innkeeper) on the basis of the praetor's edict. The Court confirmed that the liability of the innkeeper in terms of the edict did not extend beyond the departure of the traveller.⁵⁵¹ It is necessary to determine whether the duty imposed by section 65 of the CPA extends beyond the departure of the guest as is the situation in terms of the praetorian edict. Section 65(2) of the CPA specifically provides that the duty exists when the supplier is in possession of the property of another. On a plain reading of the section it would

⁵⁴⁷ *Supra* (n 547) 117.

⁵⁴⁸ *Supra* (n 547) 118.

⁵⁴⁹ See the definition of 'transaction' in s 1 of the CPA providing that a transaction to which the Act is applicable is something done in the ordinary course of business.

⁵⁵⁰ *Supra* (n 92).

⁵⁵¹ *Supra* (n 92) 18.

seem that the duty would continue until such time as the property is uplifted, provided the supplier came into possession of the property as a result of a supplier-consumer relationship existing or having existed. In the context of a supplier of accommodation services and/or catering services the legal duties in terms of section 65(2) of the CPA arise because the supplier has possession of the property because the consumer was a guest or visitor. Possession alone without the *causa* of a transaction cannot incur for the supplier the obligations provided for in section 65(2) of the CPA. Conversely the departure of the guest will not bring the legal duty imposed by section 65(2) of the CPA to an end. It is a common occurrence that guests forget property in an accommodation establishment on departure and it would lead to all kinds of unfairness if the supplier has no duty in respect of those goods and it, for instance, be considered *res derelictae*. This interpretation may appear quite onerous for the supplier having to remain subject to the onerous provisions of section 65(2) of the CPA until such time as the guest decides to recover his or her property, if ever. It must be remembered though that the duty is not one of strict liability and that negligence on the part of the guest can exclude the liability of the supplier. The very act of forgetting the property will not *ipso facto* constitute negligence on the part of the guest but may very well be the case in appropriate situations.

Section 65(2) of the CPA has not affected the common law position that negligence on the part of the guest can in appropriate cases be considered for purposes of determining liability.⁵⁵² In view of the severe liability imposed on suppliers of accommodation, these suppliers will have to rely on the negligence of the guest or visitor to limit the liability of the supplier. It may be beneficial for these suppliers to provide notices requiring guests to comply with certain rules, such as not leaving property unattended and locking the doors of rooms when not in the room.⁵⁵³ But

⁵⁵² See for instance *Glover v Finch supra* (n 82) at 361 where the Court held that negligence of the guest is a consideration that can be taken into account in determining the liability of the innkeeper. *In casu* the Court found that a hotel room door that was left unlocked resulting in a suit of clothes being removed from the room did not constitute negligence in the context of that case and the innkeeper was held liable for the loss. See also *Sinclair v Grand National Hotel* 1944 TPD 397 at 401.

⁵⁵³ See in this regard *Toy v Blake* 1923 CPD 98. In this matter (at 99-100) goods were stolen from the plaintiff's room whilst he was sleeping at night with the door of the hotel bedroom unlocked (although keys had been provided). The Court stated (at 102):
'But there is nothing to show that the plaintiff's attention was called to the fact that he ought to lock his room whether he was in or out. ... Of course, if the management brought it to his notice that he must lock his room, otherwise they would not be responsible, then

negligence on the part of the consumer will be determined on a case by case basis and different factors may play a role. In *Koenig v Godbold*⁵⁵⁴ the plaintiff openly left rings on the dressing table of her hotel bedroom - which room had no key to lock it with - for quite some time and which rings disappeared from the room. The Court said about the negligence of the plaintiff:⁵⁵⁵

One has to look to the circumstances of the particular article in question. If an article is one not easily concealed about the person, not easily taken away, one may take less precaution than one would with a small article like a ring, which can be concealed about the person, and is therefore easy to take away. The temptation to any servant, guest, or other person, to take a valuable ring which is exposed, is far greater than the temptation to take suit of clothes. It is probably more valuable, and it is also more easily taken away, and consequently the negligence in leaving such an article so as to tempt people is great.

At this stage the issue must be considered whether there is a difference in dealing with a guest staying overnight (i.e. someone who takes accommodation) or a guest merely visiting the establishment without staying overnight, such as a person just visiting a bar or restaurant, when there is damage to or loss of the property of such a guest or visitor. The *Digest*⁵⁵⁶ expresses the praetor's edict in the following words: 'Where mariners, innkeepers or stable-keepers have received the property of any one for safekeeping, then, unless they restore it, I will give judgment against them.'⁵⁵⁷ What is required is some form of agreement (transaction) in terms of which the property is taken into possession by the establishment, and not necessarily the taking-up of accommodation.

In *Sinclair v Grand National Hotel Ltd*⁵⁵⁸ the Court stated that for the purpose of applying the praetor's edict there is no difference between a guest of a hotel that makes use of overnight accommodation and one that just visits the hotel for entertainment and does not stay at the hotel. Both will be equally entitled to the protection of the edict if it finds application. It is submitted that section 65 of the CPA

another question arises. The common law which has been laid down in a number of cases is that the proprietor receiving the guests is responsible for the loss of their property while it is in the hotel, provided they are not guilty of negligence which caused or contributed to the loss.'

⁵⁵⁴ 1923 CPD 526.

⁵⁵⁵ *Supra* (n 555) 528.

⁵⁵⁶ 4.9.1.

⁵⁵⁷ See *Davis v Lockstone supra* (n 61) 157.

⁵⁵⁸ *Supra* (n 553) 399.

will apply equally to the situation where loss or damage occur in respect of the property of the person, whether an overnight guest or not.

In *George v Fairmead*⁵⁵⁹ property of the guest was stolen from his room in the hotel where he was lodging and he claimed damages in terms of the strict liability of the praetor's edict that the innkeeper was subject to. The defendant relied on a term of the contract between the parties excluding liability and which term was contained in the hotel register which the guest had signed. Even though the plaintiff argued that he was not aware of the term the Court found that the guest was aware 'that he was signing a document which contained terms of his contract' and if he chose not to read what was stated in the contract then he is taking the risk of being bound by such terms. His ignorance cannot be said to be an *iustus error*.⁵⁶⁰ Of relevance for present purposes is the fact that the supplier was able to contract out of the strict liability of the praetor's edict. As it is common practice for accommodation establishments to include an indemnity clause in their terms and conditions, which guests are required to sign when registering, the strict liability of the praetor's edict may find application in very few instances.⁵⁶¹ As has been argued above the provisions of section 65 of the CPA cannot be excluded by such an indemnity agreement and therefore, if the CPA was applicable to the relationship, the guest would have enjoyed the benefit of its protection and the decision *in casu*, it is submitted, may well have been different.

The same may be said in respect of the decision in *Glenburn Hotels (Pvt) Ltd v England*.⁵⁶² In this matter the respondent had sued the appellant for damage resulting from the theft of the former's camera from his room which he occupied in the appellant's hotel. The basis for the claim was the strict liability of the innkeeper in terms of the common law.⁵⁶³ The appellant replied that the respondent had signed the hotel register which contained a clear notice excluding the liability of the appellant

⁵⁵⁹ 1958 2 SA 465 AD.

⁵⁶⁰ *Supra* (n 560) 472G-473A.

⁵⁶¹ These exclusions of liability is of course now subject to the provisions of s 49 of the CPA, which is discussed in para 4.3.17.

⁵⁶² 1972 2 SA 660 RAD.

⁵⁶³ *Supra* (n 563) 661G.

for any such loss as claimed for.⁵⁶⁴ The respondent alleged that his attention was not drawn to the notice and that there was therefore no agreement on the exclusionary clause. The Court found that ‘the plaintiff [respondent] cannot avoid the limitation of liability expressly set out in the contract unless he can set up some special reason for doing so, such as fraud or misrepresentation on the part of the defendant [appellant]’.⁵⁶⁵ The outcome, it is submitted, may have been different if section 65(2) of the CPA had applied to the case, because the operation thereof cannot be excluded by agreement.

The outcome of *Gabriel v Enchanted Bed and Breakfast*,⁵⁶⁶ it is submitted, would not have been different. The property of the plaintiffs was stolen from the room they occupied in the B&B establishment during the night as they were sleeping. In a claim for damages based on the strict liability of the innkeeper the Court found that there was no agreement to exclude liability of the innkeeper⁵⁶⁷ and that the plaintiffs were not negligent⁵⁶⁸ (the Court indicated *obiter* that if there was to be negligence it was on the part of the defendants who, knowing that a number of non-violent break-ins had occurred, failed to take reasonable precautions there against.⁵⁶⁹) The innkeeper was held to be strictly liable. Under section 65(2) of the CPA the existence of an exclusionary agreement would have been impossible, and as there was no negligence on the part of the plaintiffs the defendant could only escape liability by showing an absence of liability on his or her part. Considering the observations about the negligence of the defendant, it seems very likely that the Court would have found negligence to have existed (or rather that the defendants would not have been able to show an absence of negligence) with the result that the defendant would in any event have been held liable.

In *Roy v Basson*⁵⁷⁰ there was no liability found in terms of the praetor’s edict for the innkeeper in respect of the loss suffered by the plaintiff, caused by the fire that

⁵⁶⁴ *Supra* (n 563) 661G.

⁵⁶⁵ *Supra* (n 563) 662H.

⁵⁶⁶ *Supra* (n 61).

⁵⁶⁷ *Supra* (n 61) 601C.

⁵⁶⁸ *Supra* (n 61) 605C-D.

⁵⁶⁹ *Supra* (n 61) 605G-H.

⁵⁷⁰ *Supra* (n 61).

destroyed the inn, because the damage was the result of an unforeseen occurrence. The outcome of the case would not have been any different under section 65 of CPA.

It must be remembered that the CPA does not apply to all relationships between accommodation suppliers and consumers as certain categories of consumers are excluded from the ambit of the Act, such as government servants and certain business travellers for instance. These relationships may still be regulated by the praetorian edict *de nautius, cauponibus et stabulariis* and *depositum*. These common law protections are therefore still relevant.

4.3.16 Exclusion of liability and warnings concerning risks

It is common practice for accommodation establishments to insert into their contracts with consumers a provision in terms of which the liability of the supplier is excluded (or at least limited) in respect of death, personal injury and/or any damage to property suffered by the consumer whilst being a guest of the particular accommodation establishment. This is normally accomplished by the supplier requiring the consumer to conclude an indemnity agreement having the effect of the consumer excluding liability on the part of the supplier for any damages the consumer may suffer while a guest at the establishment. These agreements are often referred to as 'exemption agreements' or *pacta de non petendo in anticipando*. Exemption agreements can be concluded in a formal manner in that the parties sign a written exemption agreement. This usually happens at the time that the consumer arrives and checks into the establishment. As part of the process the consumer normally is required to sign a written agreement, which agreement often contains an exemption provision. However, exemption agreements can be concluded also by the incorporation of an express exemption provision in a contract, which may or may not be in writing, between the parties by the placing of a notice or notices on the premises of the supplier to the effect that liability on the part of the supplier is excluded.⁵⁷¹

The consumer making use of the service will be bound then by the terms of the notice if such consumer was in fact aware of the notice. If the consumer was not

⁵⁷¹ See for example *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (A). See also Maxwell 'Obligations and terms' in Hutchison & Pretorius *op cit* (n 52) 238-239.

aware of the terms then the supplier may still avoid liability if it can be shown that the supplier did all that could reasonably be expected to ensure proper notice to the consumer.⁵⁷²

Exemption clauses are generally regarded as valid agreements and are enforced by the courts.⁵⁷³ A reason for enforcing contracts, including exemption agreements, is the fact that it gives effect to the constitutional values such as dignity, equality and freedom.⁵⁷⁴ Thus, the courts have enforced exemption agreements excluding liability for harm caused negligently and even for harm caused through gross negligence, but not for harm caused intentionally.⁵⁷⁵

The courts will not enforce an exemption agreement if it is contrary to public policy. In *Barkhuizen v Napier*⁵⁷⁶ the Constitutional Court said that ‘... a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable’. The Legislature has now, through the CPA, introduced a further limitation to the use of exemption clauses by providing that a supplier may not exclude liability for damage caused through gross negligence on the part of the supplier or any person acting for or controlled by the supplier.⁵⁷⁷

The courts also interpret exemption clauses in favour of the consumer where the language, because of ambiguity, allows for such a favourable interpretation. If the language is clear and unambiguous then the court will give effect thereto, but if there is ambiguity then the court will interpret the agreement against the *proferens*.⁵⁷⁸ In section 4(3) the CPA contains a similar provision thereby codifying the common law *contra proferentem* rule, at least to the extent that it may find application to the interpretation of a consumer contract.

⁵⁷² Maxwell ‘Obligations and terms’ in Hutchison & Pretorius *op cit* (n 52) 239.

⁵⁷³ See for instance *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) & *Barkhuizen v Napier supra* (n 160).

⁵⁷⁴ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) par 94.

⁵⁷⁵ Loubser & Midgley *The Law of Delict in South Africa* (2009) 197.

⁵⁷⁶ *Supra* (n 160) par 29.

⁵⁷⁷ S 51(1)(c) of the CPA.

⁵⁷⁸ *Durban’s Water Wonderland (Pty) Ltd v Botha supra* (n 572) 989G-I. See also *Drifters Adventure Tours CC v Hircock* [2007] 1 All SA 133 (SCA) par 13.

The CPA, in section 49, also contains specific prescriptions for the use of exemption provisions. The quintessence of the section is that an exemption provision in an agreement with a consumer must be drawn to the attention of the consumer.

For purposes of this discussion section 49 can be divided into three basic parts. Section 49(1) contains the general requirement that exemption provisions must be drawn to the attention of the consumer; section 49(3) – (5) provides for the manner in which the notice must be drawn to the attention of the consumer; whereas section 49(2) of the CPA prescribes additional requirements as far as the manner in which the notice must be drawn to the attention of the consumer is concerned when dealing with a special class of exemption notices, namely exemption notices pertaining to activities and/or facilities constituting an unusual, unexpected risk and/or a risk that can result in serious injury or death.

Section 49 (1)(a) and (b) of the CPA provides that:⁵⁷⁹

- Any notice to consumers or provision of a consumer agreement that purports to-
- (a) limit in any way the risk or liability of the supplier or any other person;
 - (b) constitute an assumption of risk or liability by the consumer;

...
must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).

Paragraphs (a) and (b) of section 49(1) of the CPA both refer to exemption provisions and that there is legally no significant difference between these two paragraphs: whether the agreement excludes the liability of the supplier or whether it provides that the consumer carries the risk for any death, injury loss or damage resulting from making use of the services and/or facilities, the intention is the exclusion for the supplier of any liability resulting from an act or omission on the part of the supplier resulting in loss or damage to the consumer. Including both paragraphs in the section therefore is unnecessary. However, although there is then no fundamental difference between the two paragraphs, there may be a practical value in that it may help to indicate to consumers and suppliers alike that both a notice or provision excluding liability and a notice or provision providing for the consumer to bear the risk are

⁵⁷⁹ The present discussion will be limited to s 49(1) (a) and (b) of the CPA as these paragraphs specifically pertain to exemption provisions.

covered by the section and require that the proscriptions of the section be applied in respect of both mechanisms, whichever is employed.

Subsection 49(1) of the CPA requires that the notice or provision excluding liability must be drawn to the attention of the consumer in the manner and form prescribed in subsections (3) to (5) of the section.

Section 49(3) of the CPA provides that '[a] provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22'.⁵⁸⁰

Over and above the grammar, syntax, readability and other aspects discussed above pertaining to plain language, the aspect of the specific language or languages used bears re-iteration. The plain language requirements of the Act do not prescribe a language to be used or whether more than one must be used.⁵⁸¹ An initial draft of the CPA contained provisions about different languages to be used but these provisions were not retained in the Act.⁵⁸² The argument has been made that it is for the supplier to ensure that the consumer understands the provision. It may be that a provision can be considered to be unfair if it is provided in a language that the consumer cannot understand. This may often be the case when service providers deal with overseas tourists but often also when dealing with domestic tourists. Although the impossible will not be expected of the supplier, the supplier will be well-advised to provide the provision in the language of the regular client base. So, if a substantial number of the visitors are, for example German or Xhosa-speaking, then it would be advisable to have the document available in that language. It may well be that, depending on the context, suppliers may be expected to use more than one language (which may be official languages or not) to be determined by having regard to usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population ordinarily served by the supplier. It may be worthwhile for bodies representing the common interest of accommodation

⁵⁸⁰ Plain language was considered in para 4.3.5 of this study.

⁵⁸¹ The Consumer Protection Regulations also do not contain such guidelines.

⁵⁸² Such a formulation appeared in an earlier draft of the CPA that was published at http://www.thedti.gov.za/ccrdlawreview/CPBillSept21_06.pdf.

establishments to invest in the drafting of standard exemption provisions (and notices for that matter) and having these translated into a number of languages, which translations can be made available to all members. Members may then have the different translations available and advise consumers to read the provisions in their home language (for example German or Xhosa) before they are required to sign one version. Notices put up can also be prepared in more than one language depending on the customer base. Such practices may go a long way in appropriate instances to establish the *bona fides* of the supplier and to counter a possible claim that the contract (exemption provision) and its potential consequences were not understood.

Section 49(4) of the CPA provides that:

The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer-

- (a) in a conspicuous manner and form that is likely to attract the attention of an ordinary alert consumer, having regard to the circumstances; and
- (b) before the earlier of the time at which the consumer-
 - (i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or
 - (ii) is required or expected to offer consideration for the transaction or agreement.

Practical implications for the supplier flow from these requirements. Some of these will now be considered.⁵⁸³ The notice or provision must be drawn to the attention of the consumer in a conspicuous manner, meaning in a manner that is easy to see or notice or is likely to attract attention.⁵⁸⁴ In a document it may mean that the provision excluding liability may have to be placed on the very first page and be formatted in a manner that will result in the likelihood of it being noticed, such as putting it in a larger font, in bold lettering and placed in a box with a clear heading '**LIABILITY OF THE SUPPLIER IS EXCLUDED**'. In the situation where notices are erected, such notices will have to appear in a number of places, depending on the circumstances, such as at the entrance and at reception. The attention of the consumer must be drawn to the indemnity provision before the consumer enters into the transaction, or begins to engage in the activity or enters the facility, or before the consumer is expected to pay for the activity or entry into the facility. With on-line bookings this

⁵⁸³ See in this regard also the suggestions of Corrada 'Liability waivers in the United States travel and adventure sports industry' (2006) *ITLJ* 156-161 and Vrancken & Tait *op cit* (n 271) 143-145.

⁵⁸⁴ See Wehmeier *op cit* (n 362) 310.

may be quite easy to achieve in that the website can be set-up in a manner that it requires that the consumer read and acknowledge that the indemnity clause has been read and understood before proceeding to make a booking and/or paying any money. Telephonic bookings on the other hand will have to be handled carefully. If a consumer indicates that a booking is required the supplier will first of all have to warn the consumer that before a booking can be made the consumer must understand that an indemnity clause is part of the contract and will then have to explain the indemnity provision to the consumer, and get an indication from the consumer that the provision is understood before proceeding with the booking. It may be well worth it to confirm to the consumer via sms or email that the indemnity provision has been explained and understood. Such a message should include the wording of the indemnity provision. Even if this occurs after the transaction has been concluded it should have significant evidentiary value to show that the indemnity provision was explained and the consumer did indicate that it was understood.

A practical problem faced by accommodation establishments pertains to the provision that the notice must be brought to the attention of the consumer before entering or assessing the facility. In the case of many accommodation establishments, particularly B&B's, this may mean that the notice will have to be placed outside the premises on a wall next to or affixed to an entrance gate. Besides the fact that such a notice may detract from the aesthetic appeal of the establishment, it will in all likelihood have a dissuasive potential for prospective guests if the first thing they see about an establishment is a conspicuous notice excluding the liability of the supplier for losses or damages which may befall the consumer whilst staying there. However, this may be the price to be paid for compliance with the Act.

Section 49(5) of the CPA provides that

The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1).

This means that consumers confronted with an exemption provision must be given sufficient opportunity to read, query and consider the provision before being required to sign it.

It may be instructive to consider this requirement in the context of participating in an activity offered by an accommodation establishment. Accommodation establishments often offer extra activities to consumers, such as mountain-biking, horse-riding, quad bike rides, game drives, and so on. Consumers usually are required to sign an exemption agreement before being allowed to participate in the activity. It will be sound practice and in line with the requirements of section 49(5) of the CPA to provide the consumers with the document containing the exemption provision some time before they are required to sign and submit the document. When handling the reception of the consumer at the time of checking-in the consumer can be advised of these additional activities and be advised of the exemption form to be completed and signed. At that stage the consumer can be provided with a copy of the document. This will allow some time to consider the provisions and reflect on them, and allow opportunity to question the supplier about, for example, the risks involved before even deciding to participate in the activity. What section 49(5) of the CPA most certainly is trying to prevent is the situation where the consumer is already on or in the vehicle en route to the game drive and consumers are then requested to sign an indemnity agreement. Again, tourists should be provided with the indemnity forms where reasonably possible even prior to departing on their holiday by the supplier via the travel agent or tour operator and/or websites. The consumer can even be advised well before departing for the holiday that certain activities are available and that should the consumer opt to participate in a specific excursion or activity or use a certain facility an exemption provision will have to be signed. At the very least the exemption provision, possibly with explanatory notes and translated into more than one language, can be made available via the website of the establishment or when confirming a booking via email at very little cost or inconvenience.

Section 49(2) of the CPA provides that:

In addition to subsection (1), if a provision or notice concerns any activity or facility that is subject to any risk-

- (a) of an unusual character or nature;
 - (b) the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or
 - (c) that could result in serious injury or death,
- the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsections (3) to (5), and the consumer must have assented to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.

This subsection imposes, in addition to the manner and form requirements contained in subsection (1), as well as subsections (3), (4) and (5), further requirements in the situation where the supplier seeks to limit his or her liability in respect of any activity or facility that is subject to any risk of an unusual character or nature; or the presence of which the consumer could not reasonable be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or, that could result in serious injury or death.

Clearly subsection (2) aims to provide for more serious situations and therefore imposes further and stricter requirements which entail, firstly, that the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in the manner as provided for in section 49(3) to (5) of the Act. Secondly, the consumer must assent to such a provision or notice by signing or initialling the provision or acting in a manner that reflects that the consumer acknowledges the provision, is aware of the risk and accepts the exclusion of liability on the part of the supplier.⁵⁸⁵ The consumer must be made aware of two risks: the first is the risk of suffering a loss or injury or even death. The second risk is the one constituted by agreeing to the exemption provision. This risk requires that the consumer must be made aware of the fact that he or she is entering into a legally binding agreement the effect and impact of which is that the consumer will not be able to recover damages

⁵⁸⁵ It is interesting to note that ss (2) prescribes the same manner and form requirements as do ss (1), i.e. the requirements as set out in ss (3) – (5). However, although ss (2) specifically requires that the consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as provided for in ss (5), the latter subsection itself only refers to a provision or notice as contemplated in ss (1) and not also to a provision or notice in terms of ss (2). In view of the specific reference to the application of ss (5) to a notice or provision contemplated in ss (2), ss (5) should have incorporated a reference to ss (2) as well.

from the supplier for any loss or damage resulting from participating in the activity which is the object of the exemption provision or notice. The supplier must take all reasonable steps necessary to ensure that the consumer comprehends both these aspects.

It is the context within which the provision or notice is used that will determine the exact requirements with which the supplier will have to comply. If the provision or notice is used in a general and 'low risk' context then the requirements of subsection (1), incorporating the requirements of subsections (3) to (5), must be complied with, whereas if the provision or notice is used in a 'high risk' scenario⁵⁸⁶ the supplier must comply with the requirements of subsection (1), also incorporating the requirements of subsection (3) to (5), as well as the additional requirements as provided for in subsection (2).

A problem that accommodation establishments may face in implementing the provisions of section 49 is the difficulty encountered when trying to determine whether in a particular situation the requirements as provided for in subsection (1) or subsection (2) must be complied with. It may well mean that such establishments will have to comply with both sets of requirements depending on the context. A hotel may make use of a general exemption clause which is part of the contract concluded with the consumer at time of registration at the accommodation establishment. This provision must then comply with the requirements of section 49(1) of the CPA. However, the hotel may also make use of a provision or notice in respect of particular activities at the accommodation establishment that may require the application of section 49(2) and the requirements provided therein. For instance, where the hotel offers game drives it may require that consumers sign an exemption agreement complying with section 49(2) of the Act.

From this flows the question whether the hotel in the above scenario cannot use one indemnity form drafted and applied in a manner that kills the proverbial two birds with one stone. Although such a possibility cannot be excluded there exists the danger that by taking this route the protection sought to be provided by section 49(2) of the

⁵⁸⁶ The provisions of s 49(2) (a)-(c) of the CPA will determine whether one is dealing with what is herein termed a 'high risk' scenario.

CPA, in particular, may be undermined. It may well happen that at the time of concluding the initial contract for accommodation services, the consumer does not contemplate participating in any activities offered by the establishment constituting a risk of an unusual nature or character. A few days later the consumer decides to pursue such an activity and at this stage the attention of the consumer is not drawn to the fact, nature and potential effect of the risk constituted by the activity. The situation will be exacerbated if there are a number of different activities on offer. It is therefore submitted that, depending on the circumstances, it would be in the best interests of both the supplier and the consumer to have dedicated provisions and/or notices. This may mean a general provision at the time of initial checking-in or registering, as well as specific provisions and/or notices at the separate activities or facilities. One possible way of dealing with this could be that the supplier makes brochures available at the time of registration providing details of the different activities available, including the exemption provision that the consumer would be required to sign if and when deciding to participate in a particular activity. The brochure then contains an explanation of the fact, nature and potential effect of the risk for the consumer. At the point of offering the activity, the same information can again be made available and the consumer can then be required to sign the exemption provision. Such an exemption provision will then pertain to that specific high-risk scenario or activity and will have to comply with the requirements of section 49(2) of the CPA. The general or low-risk exemption provision will still be agreed to at the time of contracting for the provision of accommodation services, which provision or notice will have to comply with the requirements of section 49(1) of the Act.

Although how to deal with the exclusion of liability in respect of the different types of risks have been considered the problem mentioned above of distinguishing between the different types of risk (namely section 49(1) or (2) risk types) remains. It is therefore necessary to consider what risk section 49(1) and (2) of the CPA cover respectively. As already indicated subsection (2) provides for specific types of risks and it can therefore be said that whatever risk falls outside the ambit of subsection (2) will be covered by subsection (1). For this reason the guidance provided in subsection (2) is considered to determine the ambit of each subsection.

The guidelines stated in section 49(2) of the CPA relates to an activity or facility that is subject to a risk:

- of an unusual character or nature;⁵⁸⁷
- the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances;⁵⁸⁸ or
- that could result in serious injury or death.⁵⁸⁹

What is of an 'unusual character or nature' is not defined in the Act but paragraph (a) seems to refer to a risk that is intrinsic to that activity or facility and which is 'different from what is usual or normal'.⁵⁹⁰ In other words where the activity is itself unusual the provisions of section 49(2) must be complied with because the risks will therefore be unusual. The risks may even be self-evident but because the activity or facility is of an unusual character or nature, the provisions of subsection (2) must apply. It appears that the risks contemplated in paragraph (a) are the risks that may flow from a dangerous activity, and it is dangerous mostly because it is unusual or not normal. The unknown aspect or unusual nature of the activity holds the danger or risk for the consumer. The rationale for this paragraph probably is that, even though the potential for risk may be self-evident, it is considered necessary to draw the attention of the consumer to that fact to ensure that the consumer is indeed aware and fully understands the nature thereof, and also understands the potential effect of the risk for the consumer.

Paragraph (b), in turn, provides for the situation where the risk is not evident and risk would not normally, even objectively, be associated with the activity or facility as it is a risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate in the

⁵⁸⁷ S 49(2)(a) of the CPA.

⁵⁸⁸ S 49(2)(b) of the CPA.

⁵⁸⁹ S 49(2)(c) of the CPA.

⁵⁹⁰ Wehmeier *op cit* (n 362) 1622 defines 'unusual' as 'different from usual or normal'.

particular circumstances. However, the supplier of the activity or facility is aware of the potential for risk, or is at least in a position to foresee the risk because of the experience or specialised knowledge that the supplier has. The supplier will therefore have to draw the attention of the consumer to the fact, nature and potential effect of the risk (which the consumer cannot foresee but the supplier should or does foresee) in the prescribed form.

Paragraph (c) can be distinguished from the others in that the risk provided for in this paragraph is qualified in that it could cause *serious* injury or death. As subsection (2) is worded, a warning must be sounded in terms of paragraph (a) in the case of a risk of unusual nature or character; paragraph (b) requires that a warning must be sounded if the risk cannot be foreseen or is not reasonably foreseeable, and paragraph (c) requires a warning in the event of a risk that may have as consequence serious injury or death. So, where there is an unusual risk or one that cannot be reasonably foreseen, even if the risk is such that it will not result in serious injury or death, the supplier must provide the warning. Furthermore, a warning must be provided when any risk exists, whether of unusual character or nature or not, and whether it can be foreseen or is not reasonably foreseeable by the consumer, which may indeed result in serious injury or death. Understood in this manner there is a distinction between the different paragraphs. However, there remains a significant overlap between paragraph (c) and the other paragraphs. The problem created for the supplier by paragraph (c) is that just about any activity can result in serious injury or death. Many accommodation establishments have a swimming pool. Swimming pools may constitute a risk that can lead to serious injury or death, whether from drowning or diving into the pool or slipping on wet surfaces. It may be argued that these risks are not of an unusual character or nature and are in all likelihood reasonably foreseeable but may still result in serious injury or death. It is therefore submitted that where accommodation establishments do have swimming pools to which guests have access, the supplier will have to make use of exemption provisions and/or 'use of pool at own risk' notices that are compliant with section 49(2) of the CPA. This interpretation does place a significant responsibility on the supplier to carefully consider the potential risks (and the potential seriousness) of the facilities and activities provided, in order to ensure that the required warnings are displayed. Failing to do so can be extremely costly.

In *Birchwood Hotel v Naidoo*⁵⁹¹ the Court held that enforcing the exemption clause would have been unfair and unjust because it would have had the effect of denying the plaintiff (or the consumer for present purposes) access to the courts. The Court came to this conclusion in the specific circumstances of the case where the consumer sustained his injuries in the process of exiting from the hotel. In this regard the Court stated:⁵⁹²

To enter and egress is an integral component of his stay. A guest in a hotel does not take his life in his hands when he exists through the hotel gates. To deny him judicial redress for injuries he suffered in doing so, which came about as a result of the negligent conduct of the hotel, offends against notions of justice and fairness.

In this decision the Court provided some guidance as to the application of exemption provisions in 'normal' and 'high' risk scenarios.⁵⁹³ (It is assumed at this stage that the use of an exemption provision by a supplier excluding liability of the supplier for personal injury or death of a consumer is not *per se* invalid as was stated *obiter* stated by the Court.⁵⁹⁴)⁵⁹⁵ Normal activities like taking a bath, switching on a kettle or television set, exiting or entering through a gate or door, and perhaps swimming in the swimming pool of the hotel are activities 'that could by no stretch of the imagination be considered dangerous'.⁵⁹⁶ These and similar activities could be covered by an exemption provision complying with the requirements of section 49(1) of the CPA, although a specific context may dictate a different conclusion. It is important also to remember in this context that property-owners are under a legal duty to ensure that their property is maintained in a safe condition and 'that their property does not present undue hazards for the public who enter and use the

⁵⁹¹ Case no. 2010/47765 SGHC (unreported) para 53B. (In the unreported record of the case there appear two consecutive paragraphs numbered 53. For that reason reference will be made to para 53A and 53 B, reflecting the first and second para 53 respectively).

⁵⁹² *Supra* (n 591) para 53A.

⁵⁹³ The facts of the *Birchwood Hotel v Naidoo supra* (n 591) case arose before the CPA came into effect and the potential impact of the CPA is therefore not considered in the decision. (The CPA may in any event not have found application as the plaintiff in the matter was an employee of a company which may have resulted in the relationship between the hotel and the consumer falling outside the scope and application of the CPA.)

⁵⁹⁴ The Court in *Birchwood Hotel v Naidoo supra* (n 591) para 45 stated that '... I am of the view that the exemption clause in which liability for negligently causing bodily injuries or death is excluded will not pass constitutional muster ...'.

⁵⁹⁵ See Letzler 'The law of contract, the Consumer Protection Act and medical malpractice law' Issue 520 (2012) *De Rebus* 23 who argues that the use of exemption provisions in the context of hospital contracts are no longer valid.

⁵⁹⁶ See *Birchwood Hotel v Naidoo supra* (n 591) para 45.

premises. This duty is even greater in respect of property such as a hotel which is designed for use by the public. The hotel is obliged to take reasonable steps to ensure that the public is safe'.⁵⁹⁷

However, it must immediately be considered what the impact of section 48 of the CPA, as read with regulation 44(3)(a), in such a situation will be. Regulation 44(3)(a) may have a significant impact on exemption clauses. The provision provides as follows:

A term of a consumer agreement subject to the provisions of subregulation (1) is presumed to be unfair if it has the purpose or effect of-

- (a) excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier subject to section 61(1) of the Act.

The inclusion of a term in a contract which excludes liability for death or personal injury, be it through means of an express term in a written contract or incorporated as a term of a contract in the form of a notice, is presumed to be unfair. Therefore a supplier, in the event of a claim arising from an act or omission of the supplier which resulted in the death or personal injury of the consumer, will bear the onus to prove that the exclusionary clause is fair. This presumption, further supported now by the *obiter* view of the Court in *Birchwood Hotel v Naidoo* on the lack of validity of these clauses, will present the supplier with a significant challenge indeed. It may well be that disclaimers of liability in respect of 'normal' activities (section 49(1) activities) will be found not to be fair. The likelihood is better that exemption provisions in respect of 'high' risk activities (or section 49(2)) will more readily be considered fair because these activities may often entail a considered decision by the consumer to expose himself or herself to dangerous activities. This difference may be explained with reference to an example. Consider the scenario of a hotel offering accommodation services ('normal' risk) and other related ('high' risk) activities, such as game drives or quad bike rides. The contract with the consumer (for accommodation and general services of the hotel) is made is subject to an exemption provision in favour of the supplier excluding the liability of the supplier in the event of personal injury or death of the consumer. The supplier (hotel) will bear the onus to show that the exemption

⁵⁹⁷ *Birchwood Hotel v Naidoo supra* (n 591) para 24.

provision is fair should the supplier want to rely on the provision when faced with a claim for damages from a consumer who suffered personal injury or death as a result of an act or omission by the supplier. As indicated, this may be a difficult task.

Where a supplier (hotel) offers certain 'high-risk' activities, such as exposure to wild animals, then the supplier may be more likely to show that the exemption provision is indeed fair in the specific circumstances. But of course the supplier will also have to establish that there was complete compliance with section 49 of the CPA, particularly since a significant part of the supplier's case that the exemption provision is fair will rely on the consumer making an informed decision to participate in the 'high-risk' activity.

A further aspect about regulation 44(3)(a) to be considered is the fact the regulation only applies to exemption provisions applicable in the event of death or personal injury, and not to damage to or loss of property. Thus an exemption provision incorporated into a contract with a consumer may be considered fair as far as it excludes liability for damage to property⁵⁹⁸ but will be presumed unfair as far as it excludes liability for death or personal injury.⁵⁹⁹

Section 48(2) of the CPA in any event provides that a term or agreement will be considered unfair, unreasonable or unjust if the term or notice had to be drawn to the notice of the consumer in the manner contemplated in section 49 of the CPA, and the fact, nature and effect of the term or notice was not so drawn to the attention of the consumer so as to satisfy the relevant requirements of section 49.⁶⁰⁰ A consequence of this will be that a court can make an order in terms of section 52(3) of the CPA.⁶⁰¹

⁵⁹⁸ In this context one must consider the impact of s 65 of the CPA with regards to property and the argument that the protection provided in terms of s 65 of the Act cannot be excluded by means of an exemption provision. Seemingly the exclusion of liability for property damage in the context of accommodation establishments is severely curtailed by the CPA.

⁵⁹⁹ One must bear in mind the discussion in para 4.3.13 about the application of regulation 44. As indicated the regulation does not apply to all consumer agreements.

⁶⁰⁰ S 48(2)(d)(ii) of the CPA.

⁶⁰¹ The authority of the court in terms of s 52(3) of the CPA was considered in para 4.3.12 of this study.

Over and above the provision of section 52(3) of the CPA, section 52(4) of the CPA provides that in proceedings before a court where it is alleged specifically that any agreement, term or condition of an agreement, or notice does not comply with the applicable requirements of section 49 of the Act, the court may make certain orders. These include, in respect of a provision or notice that is void for being in conflict with the Act, severing any part of the agreement, provision or notice, or altering it to render it lawful if it is reasonable to so considering the agreement, provision or notice as a whole,⁶⁰² or declaring the entire agreement, provision or notice void.⁶⁰³ Particularly in respect of a provision or notice which fails to comply with the provisions of section 49 of the CPA, a court may sever such provision or notice from the agreement or declaring it to have no force or effect with respect to the transaction as a whole.⁶⁰⁴ Not complying with the requirements of section 49 can therefore have serious consequences for the supplier in that the exemption clause can be declared as having no force and effect in which event the supplier may be held liable for the damages suffered by the consumer. The days of a quickly drafted exemption of liability clause and a general warning of risk are gone and suppliers will have to carefully consider both the warning against certain risks and the exemption provisions or notices and how these are to be presented to consumers.

4.4 Summary

Chapter 4 provides a brief overview of the accommodation segment of the tourism industry and how this segment was regulated prior to the coming into effect of the CPA. The chapter focuses mainly on analysing selected consumer rights provided by the CPA, and the impact of these rights on the accommodation segment of the tourism industry.

The chapter indicates that the influence of the CPA on the accommodation segment is widespread and has the potential to fundamentally change the way this segment does business. The Act applies to the whole range of relations between the supplier and the consumer, from the marketing of products and services to potential

⁶⁰² S 52(4)(a)(i)(aa) of the CPA.

⁶⁰³ S 52(4)(a)(i)(bb) of the CPA.

⁶⁰⁴ S 52(4)(ii) of the CPA.

consumers to the making of reservations, the use of pre-paid vouchers, customer loyalty programmes, the handling of the property of consumers, and the cancellation of bookings.

Unsurprisingly, given the particular history of South Africa and the inherent inequality in the market, the first substantive consumer right provided for in the Act is the right of equality in the marketplace. In following the lead of the Constitution and the Equality Act, section 8 of the CPA provides for the protection against discriminatory marketing on grounds provided for in the Constitution and the Equality Act. The right to equal treatment has important implications for the suppliers of accommodation services as it affects many diverse aspects of the business of accommodation establishments. These aspects include expressing a preference in the marketing of the services of the establishment for a particular group of consumers distinguishable from the general population; designating facilities for use by a particular age group and/or gender; and price differentiation between consumers.

The right to privacy of the consumer is protected essentially through the regulation of direct marketing, which is provided for in sections 11 and 12 of the CPA. This is an aspect that accommodation establishments, especially hotel groups making use of direct marketing for their services (including customer loyalty programmes), must take careful note of.

The CPA contains a number of provisions relating to marketing practices. One aspect that suppliers of accommodation establishments must be particularly wary of is falling foul of the prohibition of bait marketing. When advertising special offers to the public, a supplier will have to be very specific about what is offered, for how long and how many. Advertising an accommodation establishment with a beautiful sea view in the brochure or on the website, when the reality is that the sea cannot be seen from the establishment, may constitute a violation of the provisions of the CPA.

The Act introduced much-needed certainty as far as pre-paid vouchers and similar devices are concerned, particularly regarding the period of validity. The Act makes it clear that such a pre-paid voucher is valid for at least a period of three years if not exchanged for its full value before the expiry of three years.

Over-selling and over-booking - notorious practices often employed in the tourism industry to the great chagrin of tourists and travellers - are also addressed by the CPA. Consumers are to be reimbursed for costs directly incidental to the supplier's breach of the contract.

An aspect that causes many problems in the accommodation segment for both suppliers and consumers of accommodation services is the cancellation of advance bookings and reservations. The matter is now regulated by section 17 of the CPA. This section is however not without its problems and raises almost as many questions as it answers.

Section 51 of the CPA provide for a so-called 'black' list of contractual terms. Of particular relevance for this study is the fact that section 51 of the CPA expressly prohibits a supplier excluding liability for any damage caused through the gross negligence of the supplier. Section 48 of the CPA, in turn, establishes a so-called 'grey' list, providing that a term of a consumer agreement that excludes the liability of the supplier for personal injury or death to a consumer resulting from the negligence of the supplier, is presumed to be unfair. Clearly the provisions of section 51 and section 48 have significant implications for the scope and application of exemption provisions in the accommodation segment.

Section 49 of the CPA provides specific details of how suppliers, such as hotels or B&B establishments, must utilise exemption provisions and/or notices excluding the liability of the supplier. Not complying with the onerous and technical requirements of section 49 may result in an exemption provision being void.

Poor service quality has for a long time been the Achilles heel of the tourism industry, including the accommodation segment. Section 54 of the CPA now entitles a consumer to quality service (or service of a standard that may reasonably be expected) and therefore contains the potential to significantly impact on service delivery in the segment.

The CPA, particularly section 65 of the Act, provides guests of accommodation establishments with protection in the event of the loss of or damage to property

brought onto the premises of an accommodation establishment. The main benefit of section 65 of the CPA lies therein that the protection offered by the section cannot be excluded by agreement, as is the case with the protection offered by the praetor's edict. Section 65 of the Act imposes a stricter duty of care on the supplier than does *depositum*. However, *depositum* and the praetorian edict remain relevant as not all transactions are subject to the CPA.

In terms of section 23 of the CPA, an accommodation establishment advertising or otherwise displaying prices will be bound to those prices even where the price displayed is incorrect due to an inadvertent and obvious error, at least until such error has been corrected and reasonable steps have been taken to inform consumers. An error made which is not inadvertent and/or obvious will mean that the supplier is bound to such displayed price.

Section 26 of the CPA provides that a supplier must provide a consumer with a written record of each transaction containing certain specified information. However, section 26 does not apply if section 43 of ECTA applies. Accommodation establishments often make use of electronic transactions to sell their services via their websites. If the stated requirements are not met, the consumer can, in terms of section 43(4) of ECTA, cancel the transaction within 14 days of the services being delivered and both parties must then make restitution.

Section 34 of the CPA provides for trade coupons and similar promotions. Accommodation establishments making use of trade coupons and similar promotions must not treat consumers accepting the promotional offer and 'paying' with a coupon any differently from consumers paying with cash.

Section 35 of the CPA regulates the use of customer loyalty programmes. Such programmes are quite popular amongst hotel groups. If such a programme is offered then all relevant information concerning the programme and how to make use of it must be provided to consumers in plain language. Section 35 imposes certain obligations on the sponsor and/or the person providing the customer loyalty programme.

Plain and understandable language, provided for in section 22 of the CPA, requires that suppliers of accommodation services give careful consideration to the macro- and micro-text structures of documents such as customer loyalty programmes and provisions and notices provided for in terms of section 49 of the CPA.

The next chapter contains the summary, conclusions and recommendations of the study.

CHAPTER 5

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

5.1 Summary

The introduction of the Consumer Protection Act¹ (CPA) was bound to affect the legal environment within which the suppliers of tourist accommodation operate. The potential impact and consequences of the CPA are still far from being fully appreciated. The need to clarify the impact of the Act for both consumers and suppliers of tourist accommodation services provides the rationale for this study.

Chapter 1 provided the background, contextualisation and problem statement reflecting the motivation and need for conducting the research. It set out the primary and secondary research objectives of the study. The primary research objective, which also constituted the empirical object, was to conduct a critical analysis of selected consumer rights provided for by the CPA in order to enable consumers and suppliers of tourist accommodation services to understand their rights and responsibilities in terms of these rights.

The secondary objectives, which constituted the cognitive object of the study, were:

- To provide an explanation of the tourism industry and how the industry is regulated both internationally and in South Africa;
- To provide an overview of the consumer protection regime applicable to consumers of accommodation services in the accommodation segment of the tourism industry prior to the coming into effect of the CPA;

¹ Act 68 of 2008.

- To explain how the CPA must be interpreted and when the CPA finds application, both of which are critical aspects for determining the potential impact of the Act; and
- To explain how the CPA is to be enforced, including the powers and functions of the bodies established to implement and enforce the Act.

The secondary strategic objectives were:

- To provide this particular segment of the tourism industry with greater certainty regarding consumer protection in South Africa, through the systematic explanation of the impact of the CPA on the accommodation sector, thereby fulfilling one of the main functions of the law, which is to provide greater certainty for all role players in this segment (and to a large extent for other sectors of the industry); and
- To influence policy when regulating tourism consumer protection.

Chapter 2 consisted of two parts. The first presented an overview of the tourism industry, commencing with a discussion of the different definitions of tourism. There appears to be a growing consensus around the definition of tourism in South Africa. This consensus may serve to counter the allegation that the study of tourism suffers from a certain basic lack of focus and rigour. A brief overview of the history and development of tourism was then provided.

The tourist as a consumer was then considered and it was pointed out that the development of a consumer culture has led to a more experienced, demanding and discerning tourist. As a consequence, the suppliers of tourism services have been forced to become increasingly consumer-orientated to meet the demands of an increasingly sophisticated market. It was argued that a more sophisticated market will more readily make use of consumer protection rights to protect their interests. The second part of Chapter 2 provided an overview of the regulation of the tourism industry from the international to the local level.

Chapter 3 of the study commenced with an overview of the consumer protection regime that prevailed generally prior to the coming into effect of the CPA. This discussion set the context for the second part of the chapter, which introduced the CPA. The second part of Chapter 3 provided an overview of the structure of the CPA, followed by a consideration of the purposes and interpretational imperatives of the Act. A very important aspect then discussed was the application of the CPA: determining whether the Act finds application in a given situation will always be the logical first step in any consumer complaint scenario. The chapter concluded with a discussion of the regulatory framework established by the Act for consumer protection focusing specifically on the mechanisms established to enforce the Act.

The overview presented in Chapter 3 of the prevailing consumer protection regime before the coming into effect of the CPA, also served as an introduction to Chapter 4, which commenced with a brief consideration of the accommodation segment of the tourism industry and how this segment was regulated prior to the coming into effect of the CPA. Primarily however, Chapter 4 was devoted to a critical analysis of selected consumer rights provided for by the CPA and the impact of these rights on the accommodation segment of the tourism industry.

5.2 Conclusions and recommendations

Unsurprisingly, the first consumer right to be provided for by the CPA is the right to equality in the consumer market. The constitutional imperative of ensuring and promoting equality is now carried into the consumer market. Section 8 of the CPA provides for protection against discriminatory marketing on the prohibited grounds provided for in the Constitution of the Republic of South Africa, 1996 and the Promotion of Equality and the Prevention of the Unfair Discrimination Act² (Equality Act). These grounds include both listed and unlisted grounds. The listed grounds include those specifically mentioned in the Constitution and the Equality Act, namely race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The Equality Act anticipates that discrimination may also be practised on grounds

² Act 4 of 2000.

other than the listed grounds and for that reason includes a general ground on which a claim to unfair discrimination can be based, provided the impact of the discrimination is to cause or perpetuate systemic disadvantage, undermine human dignity, or adversely affect the equal enjoyment of rights and freedoms in a serious manner that is comparable to discrimination based on one or more of the specified grounds. Section 8 of the CPA incorporates the prohibited grounds into the ambit of the CPA.

Section 8(1) and (2) of the CPA provide a number of situations which will constitute unfair discrimination if there is differential treatment of consumers based on a prohibited ground. It was argued that these lists contained in section 8(1) and (2) of the CPA do not serve any purpose other than providing examples or illustrations of what may constitute unfair marketing practices. The Act itself states that these lists are not closed. A suggestion was made for a simpler formulation which could have replaced section 8(1) and (2) of the CPA and which would have had the same effect (except for the potential advantage of providing illustrative examples).

Any challenge to a marketing practice alleging that it constitutes unfair discrimination in the market, will place such a challenge squarely within a constitutional equality challenge. Section 10(2)(a) of the CPA, following the Equality Act, creates a presumption of unfairness where any differential treatment contemplated in section 8 of the CPA takes place, be it on a listed or unlisted ground. Thus, any price differentiation as contemplated by section 8(1)(e) of the CPA between different consumers on a listed ground creates a presumption of unfair discrimination. The consumer only has to show that there was a differentiation in price and that the differentiation was based on a listed ground for the presumption of unfairness to arise. If the differentiation in price is based on an unspecified ground, the consumer still will have to establish that the unspecified prohibited ground caused or perpetuated systemic disadvantage and/or undermined the human dignity and/or adversely affected the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a specified ground. In this endeavour the consumer can be assisted by the factors mentioned in subsections 14(2) and (3) of the Equality Act. It was concluded that the practice of some accommodation establishments of differentiating in price on the basis of residency or

citizenship does not have a legitimate purpose, is systemic in nature and serves to impair the dignity of people and therefore violates the provisions of the Constitution, the Equality Act and the CPA as it is unfairly discriminatory. The recommendation therefore is that accommodation establishments must not make use of marketing practices in terms of which there is a price differentiation between consumers based on the residency or citizenship of the consumer.

The CPA provides for certain exceptions to the general prohibition against discrimination. Section 9(1)(c) of the CPA allows suppliers to designate a service or facility for the use of specified age groups provided that it is reasonable to do so. It was concluded that a supplier of accommodation services can determine that a facility or service is to be provided at certain times for the exclusive use of minors, minors of a specified age group or persons of 60 years and older as long as it is reasonable to do so. A particular room can be used exclusively for children's games in the mornings, but in the evenings it can be used exclusively for the 60-years-and-older age group for bingo. A swimming pool could be reserved at certain times for use by children only and again at other specified times for the exclusive use of persons 60 years and older. A facility or service may be reserved exclusively for the age groups mentioned also on a permanent basis. A swimming pool at an establishment may therefore be set aside for the exclusive use by children under the age of 12 years, again provided that such designation is reasonable. Determining reasonableness will occur on a case-by-case basis, but the following factors may have an impact on the decision: whether the designation of the service or facility is permanent or temporary; alternative services or facilities available; the target-market of the establishment and the size and extent of the establishment. It is probably quite reasonable for a large hotel and entertainment complex with different swimming pools to reserve certain pools for exclusive use by children, but not necessarily so in the case of a small hotel with one swimming pool.

Section 9(1)(d) of the CPA provides that it is not a contravention of section 8 of the Act if a supplier provides products or services at a discount to minors who have not yet reached a certain age, or to adults who have attained a specified age of at least 60. Clearly the common practice by accommodation establishments of offering children and people over 60 years of age special discounted rates is specifically

excluded from what is considered to be unfair discrimination and accommodation establishments may therefore continue to market their services by offering discounted rates to these categories of people.

Section 9(3) of the CPA allows for a supplier of accommodation services to market such services in a manner that prefers a group of consumers distinguishable from the general population on one of the *listed* grounds of discrimination, provided such services are reasonably intended or designed to satisfy a specific need or interest that is common to, or uniquely characteristic of that particular group of consumers. It is concluded that a *preference* for a particular group distinguishable on a listed ground may be expressed or implied, but the marketing or conduct of the supplier may not amount to a *prohibition* against people not from the targeted group. In an accommodation context this implies that an accommodation establishment may express a preference, for example, for heterosexual couples through its marketing but may not prevent homosexual couples from making use of the services of the establishment. It is recommended that an accommodation establishment be very careful if it wants to target a particular market segment or group of consumers distinguishable from the general population on a listed ground because it will bear the onus to show that the service it provides is reasonably intended or designed to address a specific need of that group, and not aimed at excluding other groups. The nature of accommodation services does not easily lend itself to addressing specific needs of a group distinguishable on a listed ground.

The CPA seeks to protect the right to privacy of the consumer through regulating direct marketing. In terms of sections 11 and 12 of the CPA provision is made for a registry where a consumer can register to pre-emptively block direct marketing via electronic communications, including the telephone, cellphone and electronic mail. Specific times are also prescribed for when a person may not be contacted for purposes of direct marketing. It is recommended that suppliers of accommodation services who wish to make use of direct marketing to a client base, obtain written permission from guests that they may be approached for direct marketing purposes. Guests can also indicate the preferred method of such an approach. In this way the supplier can develop his/her own database. Where a consumer has registered a pre-emptive block but provides the accommodation establishment with written

permission to be approached for direct marketing purposes such permission may serve as a defence in the event of a complaint about unwanted direct marketing.

Where an agreement results from direct marketing the consumer has a right in terms of section 16 of the CPA and read with section 32 of the Act, to be informed of a cooling-off period of five days within which the agreement may be cancelled. It was concluded that notification of the cooling-off period must occur before conclusion of the contract and does therefore constitute a formal requirement for validly concluding a contract between the consumer and the direct marketer. Non-compliance with this requirement will render the contract void with the normal consequences of a void 'contract'. Of course, non-compliance with the CPA constitutes prohibited conduct which has its own consequences.

An aspect that suppliers of accommodation establishments must be particularly careful of is falling foul of the prohibition of bait marketing which is regulated in terms of section 30 of the CPA. When advertising special offers to the public, a supplier will have to be very specific about what the special offer entails and must make the services available to the extent offered. This also links up with a consumer's right to fair and responsible marketing (such as section 29 of the CPA) and the right to fair and honest dealing (particularly section 41 of the Act), which prohibits false or misleading representations. Advertising an accommodation establishment with a beautiful sea view in the brochure or on the website, while the reality is that the sea cannot be seen from the establishment, may constitute a violation of the provisions of the CPA. It is recommended that suppliers consider their marketing material in all respects carefully to avoid falling foul of the bait marketing and/or fair and responsible marketing provisions of the Act.

Where a supplier cannot provide the service as advertised, it will be a defence against an allegation of prohibited bait marketing for the supplier to procure another supplier to provide a similar or equivalent service. It was concluded that the original supplier (first supplier) can only rely on the defence if the procured supplier actually supplies the services – the mere procurement of the alternative supplier cannot be enough to absolve the original supplier of liability.

Over-selling and over-booking – a practice often encountered in the tourism industry and which causes significant frustration – is addressed by section 47 of the CPA. It was noted that the Act does not prohibit over-selling or over-booking *per se* but rather the accepting of consideration for services for which no reasonable basis exists for the supplier to assert an intention to supply those services, or where the supplier intends supplying services materially different from those in respect of which the consideration was accepted. Consumers are now to be reimbursed for costs directly incidental to the supplier's breach of the contract. It was concluded that these provisions do not provide protection beyond that of the common law. However, the fact that the position is now codified in the CPA may encourage consumers to make use of the remedy.

One of the most problematic issues in the accommodation segment of the tourism industry is that of advance cancellations of bookings and reservations. Section 17 of the CPA regulates this aspect. The section now guarantees a consumer the right to cancel a booking or reservation prior to the time when the service in terms of the booking has to be provided. Consumers cannot be forced to proceed (or pay in full) for a booking or a reservation made in advance. In order for the consumer to rely on the protection of the right, certain requirements must be met: the consumer must perform a positive act of cancelling the reservation; the cancellation must be brought to the notice of the supplier; and this must happen before the time the service is to be provided. An implication is that 'no-show' guests of an accommodation establishment cannot generally rely on the protection of section 17. It was concluded that the situation of a 'no-show' guest is regulated in terms of the common law, which means that the parties can agree that a pre-paid deposit will be forfeited *in toto* in the event of a 'no-show' scenario.

Although a consumer now has the right to cancel in advance a booking or reservation at an accommodation establishment, the supplier of that service is provided with significant options to protect his or her interests. The supplier may require a reasonable deposit as a condition for accepting a booking or reservation and impose a reasonable cancellation fee in the event of a cancellation. The reasonableness of a deposit or cancellation fee will be determined by considering the nature of the goods or services; the length of notice time of the cancellation; the

reasonable potential for the service provider, acting diligently, to find an alternative consumer between the cancellation and the time of the event; and the general practice of the relevant industry. These factors allow significant scope for interpretation but it may help to guide suppliers in determining what may constitute a reasonable deposit and/or cancellation fee. One must consider that in the context of an accommodation establishment the nature of the service is such that it cannot be stored – once the time has passed, that opportunity cannot be sold later as is the case with many types of goods. Accommodation services can be seasonal in nature, which may mean that charges may differ depending on the season. In most cases in the context of accommodation establishments there will be a direct inverse relationship between the length of time between the cancellation and the time the service is to be provided and the cancellation fee: the shorter the notice period the greater will be the cancellation fee payable. The supplier is also under an obligation to mitigate his or her loss by acting diligently in endeavouring to find a replacement guest. It is recommended that suppliers keep record of the guests who could not be accommodated because of limited capacity and follow-up with these potential guests in the event of a cancellation. This will constitute evidence that the supplier took reasonable steps to find alternative guests. The final factor to be considered is the trade practice. This may differ between locations and types of accommodation. Therefore it is strongly recommended that bodies representing the interests of specific types of accommodation establishments should develop a sliding scale for determining deposits and cancellation charges. This will assist in establishing a uniform industry practice.

Where a consumer cannot honour a booking or reservation because of death or hospitalisation, no cancellation fee may be imposed. Uncertainty surrounds some aspects of these exceptions. Although 'hospitalisation' sounds like a very precise term it is not certain whether the consumer must actually be in hospital at the time the service was to be delivered, or whether a serious illness or even recuperation at home after being hospitalised, fall within the meaning of the term. It has been suggested that a generous approach should be adopted when interpreting the concept.

Section 23 of the CPA provides for the disclosure of prices of goods and services, and compels a retailer not to display any goods for sale without displaying a price in relation to those goods. In terms of section 23 of the CPA, an accommodation establishment advertising or otherwise displaying prices will be bound to those prices even where the price displayed is incorrect due to an inadvertent and obvious error, at least until such time as the error has been corrected and reasonable steps have been taken to inform consumers. An error made which is not inadvertent and/or obvious will mean that the supplier is bound to such displayed price.

It was concluded that section 23(9) of the CPA means, firstly, that a supplier is bound to a displayed price even where there is an *inadvertent and obvious* error, and will remain bound to that erroneous price until the supplier has corrected the displayed price, and taken *reasonable* steps to inform consumers to whom the erroneous price may have been displayed of the error and what the correct price indeed is. What will constitute reasonable steps will depend on the circumstances of each case. The supplier therefore has a duty to ensure that correct prices are communicated. It was concluded that a displayed price no longer constitutes an invitation to do business but indeed constitutes an offer - and if accepted, even where the displayed price is an inadvertent and obvious error, the supplier is bound thereto. It is indeed a case where the adage *caveat emptor* has been replaced with *caveat vendor*.

Section 23 of the CPA suffers from problematic drafting. The uncertainty makes it unclear to which extent the section applies to suppliers of services. It was concluded that more than one interpretation is possible and therefore it was recommended that the section must be interpreted in favour of the consumer so as to include suppliers of services in the meaning of section 23(3) – (5) of the CPA. Such an interpretation will give better effect to the purposes of the CPA in widening the scope of the protection afforded consumers and not differentiate in the protection afforded consumers of goods and consumers of services.

Section 26 of the CPA requires a supplier to provide a consumer with a written record of each transaction containing certain specified information. The required information is straightforward and should not give any problems in complying with it.

However, section 26 does not apply if section 43 of Electronic and Communications Transactions Act (ECTA) applies. Section 43(1) and (2) of ECTA require that a supplier who offers goods or services by way of an electronic transaction to consumers provide consumers with certain information on the relevant website, including an 'opt out' option for the consumer before finally placing an order or making a booking. Accommodation establishments often make use of electronic transactions to sell their services via their websites or through email. If the stated requirements are not met, the consumer can cancel the transaction within 14 days of the services being delivered and both parties must then make restitution. It was concluded that it makes small sense for a consumer of accommodation services to cancel an agreement for the provision of accommodation services after the services have been rendered, particularly if the consumer has to tender a monetary equivalent of the services rendered, as restitution of the services is not possible. The purpose of providing the consumer with a right to cancel an agreement is to punish the supplier for non-compliance. Therefore an approach is preferred that requires repayment of payments made for goods and services, irrespective of whether the nature of the service was once-off or on-going. It was recommended that suppliers of accommodation establishments must be very careful to ensure that they comply with the requirements of section 43 of ECTA as non-compliance may result in having to refund consumers and incurring administrative fines.

Section 34 of the CPA regulates trade coupons and similar promotions. A supplier may not make a promotional offer without the intention of fulfilling it, or fulfilling it in a manner different to what was being offered. Clear guidance is provided in the section concerning the specific information that must be provided in any document containing a promotional offer. The document containing the offer, it has been concluded, must be in plain language. It is recommended that suppliers making use of trade coupons and/or similar promotions need to be careful to ensure that a promotional offer does not perhaps unfairly discriminate between groups on the grounds provided for in section 8 of the CPA.

Section 35 of the CPA regulates the use of customer loyalty programmes. Such programmes are quite common amongst hotel groups. The requirements which section 35 imposes on a supplier making use of a customer loyalty programme are

substantially similar to those of section 34 of the Act. It was concluded that the customer loyalty programme must be in writing and presented in plain and understandable language. Section 35 imposes certain obligations on the sponsor and/or the person providing the customer loyalty programme. Capacity to provide accommodation services may not be limited to give preference to consumers paying with hard currency over those paying with customer loyalty credits. Suppliers may not charge an administrative fee in handling a customer loyalty transaction if a periodic membership fee is payable. A consumer may not be required to purchase other goods or services in connection with a customer loyalty transaction, such as requiring the consumer to purchase all meals at the hotel when using free accommodation provided in terms of a loyalty programme.

Suppliers of accommodation services are permitted to restrict the supply of accommodation services in exchange for loyalty credits or awards over certain periods when demand for accommodation is high, provided proper notice is given. It is recommended that suppliers must ensure that they have an adequate database for purposes of communicating with their loyalty programme members. This will eliminate charges of prohibited conduct in terms of section 36.

Unconscionable conduct of suppliers is dealt with in section 40 of the CPA. What constitutes unconscionable conduct is unclear and the many terms used to describe it have been justifiably criticised, particularly because of the interpretational problems they create rather than resolve. The benefit of this provision, however, is that unconscionable conduct is prohibited during the entire supplier-consumer interaction. Unconscionable conduct does not solely pertain to improperly obtained consensus with the potential consequence that a resultant contract may be rescinded. Therefore section 40 of the CPA covers any form of unconscionable behaviour of suppliers in respect of consumers, irrespective of whether a contract resulted from the conduct. This development is to be welcomed.

Section 63 of the CPA introduced much-needed certainty as far as the matter of pre-paid vouchers and similar devices are concerned, particularly regarding the period of validity. The Act makes it clear that such a pre-paid voucher is valid for at least a

period of three years if not exchanged for its full value before the expiry of such a time period.

Section 51 of the CPA provides for a black list of contractual terms. Of particular relevance for this study is the fact that this section expressly prohibits a supplier from making any agreement with a consumer in terms of which the purposes and policy of the CPA is defeated, or a consumer's right provided in terms of the Act, is waived. Furthermore, a term purporting to exclude liability for any damage caused through the gross negligence of the supplier, is prohibited.

Section 48 of the CPA provides a grey list of terms, specific examples of which are provided in regulation 44(3). Regulation 44(3)(a) provides that a term of a consumer agreement that excludes the liability of the supplier for personal injury or death to a consumer resulting from the negligence of the supplier is presumed to be unfair. It was concluded that it is difficult to see how the exclusion of liability can be considered fair in the context of a normal risk situation, the latter being a context that cannot be considered dangerous under ordinary circumstances. Accommodation establishments have a legal duty to provide a safe environment and will not be allowed to escape this duty by means of an exclusionary provision in a contract. However, certain activities may present a greater risk and therefore the use of an exemption provision or notice in these cases may be considered to be fair.

The fact that an accommodation establishment cannot exclude liability in respect of gross negligence, and the exclusion of ordinary negligence resulting in death or personal injury is presumed to be unfair, severely restricts the protection provided by an exemption clause or notice for a supplier of accommodation services.

Section 49 of the CPA provides specific details of how a supplier, such as a hotel or B&B establishment, must utilise exemption provisions and/or notices in order to exclude the liability of the supplier for loss or damage suffered by the consumer. A distinction is made between so-called 'normal' and 'high' risk situations. Section 49 has a number of implications for accommodation establishments. Consumers will have to be informed of the existence of an exemption provision or notice before entering into an agreement or entering the facility. In the context of an

accommodation establishment it will be advisable to have such a provision displayed on its website, where the consumer will have to indicate that the notice has been read and understood before proceeding to make a booking. Where possible it is recommended that exemption notices be displayed on the outside of the premises in order to draw the attention of consumers before entering the facility or concluding an agreement. Particularly problematic for accommodation establishments will be telephone bookings. It is recommended that suppliers inform consumers of the exemption provision before concluding an agreement with the consumer via telephone and/or email.

Another problem for accommodation establishments will be to determine whether an exemption provision or notice is to comply with the requirements for a 'normal' risk scenario or for a 'high' risk scenario. It may be difficult to determine whether a swimming pool, for instance, presents a normal or high risk. Suppliers will have to err on the conservative side. Some guidance to distinguish is provided in the case law, such as the matter of *Birchwood Hotel v Naidoo*.³

Section 65 of the CPA provides consumers with the right that a supplier having possession of the property of another must not treat that property as the supplier's; and in the handling, safeguarding and utilisation of the property must deal with it as can reasonably be expected of a person when caring for the property of another. In the context of accommodation establishments, section 65 can have significant consequences. The praetorian edict *de nautius, cauponibus et stabulariis* imposes strict liability on the accommodation establishment for any loss to the property of the consumer brought onto the premises. The problem with the edict is that it can be excluded by way of an exemption agreement. In contrast, section 65 of the CPA cannot be excluded by an exemption agreement. Section 65 of the CPA does not impose strict liability. However, the section requires that the supplier must care for the property in his or her possession with a degree of care and skill that can reasonably be expected of a person caring for the property of another. This is quite an onerous duty and will greatly assist a consumer in proving that the supplier is in breach of the duty, thereby establishing liability. After applying section 65(2) of the

³ Case no. 2010/47765 SGHC (unreported).

CPA to past cases, it was concluded that the CPA may have brought about different results in specific instances.

Having considered the impact of sections 48, 49, 51 and 65 of the CPA on exemption clauses in respect of liability for death, personal injury and property of a consumer, it is clear that the CPA has significantly limited the use of exemption provisions by accommodation establishments specifically. It is recommended that accommodation establishments ensure that they fully understand the impact of these provisions and adapt the manner in which they use these provisions accordingly to ensure they comply with the requirements of the Act to ensure maximum protection. Accommodation establishments must also appreciate that they now have greater exposure to damage claims and must ensure that their public liability insurance is adjusted accordingly.

Any document which must be provided to a consumer and that does not have to be in a prescribed form must be in plain and understandable language as provided for in section 22 of the Act. Provisions and notices falling within the ambit of section 49 of the CPA are prime examples. From section 22(2) of the CPA it is quite clear that 'plain language' is not a plain and simple concept and plain language can be interpreted in many ways, depending very much on the audience. The definition of plain language contained in section 22(2) of the CPA is a broad definition and inclusive of the different aspects that constitute plain language communication. Compliance with the plain language requirement is not simply a formalistic process to ensure that the supplier has used short sentences and simple words, but is rather about having the right mindset, and understanding the consumers. Accommodation establishments are often organised in local and national bodies whose aim it is to promote the interests of its members. These bodies can promote the industry and the interests of its members by assisting members to have documents and notices drafted in plain language and translated into different languages to ensure compliance with the Act but also to provide consumers with a better service and protection. As indicated earlier, plain language is more about being consumer-focused than about a formal process of writing in short sentences using simple words.

Section 54 of the CPA entitles a consumer to demand quality service, which includes services in a manner and quality that persons are generally entitled to expect. What exactly this entitles a consumer to, may be open to wide interpretation and therefore it runs the risk of becoming meaningless. The success and positive impact of this section may depend to a large extent on the development of norms and standards for service delivery in particular industries and segments thereof. In this regard the Department of Tourism has taken proactive steps to give meaning to what constitutes quality service. The development of a national standard of tourism service excellence may provide the catalyst for the development of norms and standards of service delivery within the accommodation segment of the tourism industry thereby giving practical content and meaning to the right to performance of services in a manner and quality that persons are generally entitled to expect from the tourism industry at large, and specifically from the accommodation segment.

The selected consumer rights were critically analysed in Chapter 4 and the implications of these rights were clarified for both suppliers and consumers within the context of the accommodation segment of the tourism industry. By having done this, the primary research objective of the study was achieved.

The stated secondary academic objectives were also accomplished. The first of these was addressed in Chapter 2 by providing an overview of the tourism industry and how the industry is regulated. The second secondary academic objective was achieved by providing an overview of the consumer protection regime applicable in South Africa generally – done in Chapter 3 – and by providing an overview of the consumer protection regime applicable to consumers of accommodation services in the tourism industry prior to the coming into effect of the CPA, which was presented in Chapter 4. The third secondary academic objective was achieved in Chapter 3 by explaining how the interpretation of the CPA is to be approached, as well as when the Act is applicable. The fourth secondary academic objective of the study was addressed in Chapter 3 by providing an analysis of the processes and mechanisms for enforcing the consumer rights provided by the CPA.

5.3 Significance of the study

From a strategic perspective it is believed that the study has made a significant contribution to the small but growing body of legal literature on consumer protection law in South Africa. Particularly significant for the study is the contribution it has made to a better understanding of consumer rights within the context of the accommodation segment in particular and the tourism industry in general. The greater certainty the law provides, the greater the efficacy thereof. To this end the study has made some contribution. Finally, it is hoped that bodies tasked with the interpretation, implementation and enforcement of the CPA will be informed by the study in order that a greater consensus may be facilitated on the meaning of the CPA and the rights it contains.

Accommodation establishments are impacted upon by the Act in wide-ranging and significant ways and they need to take cognisance of the implications of the Act. The CPA promises a new dispensation for consumers in South Africa, including consumers of tourism services. These consumers (or tourists) are the life-blood of an all-important but sensitive tourism industry. To realise the purposes and aims of the Act, including the achievement of a consumer market that is fair, a number of role-players will have to play their part. Government (particularly at national and provincial level) must ensure that the necessary infrastructure is provided and managed effectively so as to provide the mechanisms needed to give effect to the Act. If this responsibility is not taken seriously, the CPA in particular and the law in general, will sacrifice legitimacy. The tourism industry with its diverse segments must be proactive in developing industry codes of norms and standards, and codes of good practice to ensure compliance with the Act, not just to comply with the letter of the law but also with the spirit thereof. Consumers who can see and feel that they are considered and treated fairly, will return to this country and/or a specific accommodation establishment.

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ANNEXURE A

BABASA Code of Conduct

BABASA GUEST ACCOMMODATION SOLUTIONS

Post: P.O. Box 1125 Mobile: 072 947 8514 Fax: 086 602 8521

Wingate Park 0153 Telephone: 082 239 2111 Number to change shortly

E-mail: babasa@babasa.co.za web: www.babasa.co.za

Company details: Registration Number: 1998/08147/08 Section 21 Non Profit Company. VAT number: Not VAT registered.

BABASA CODE OF CONDUCT (Revised 2002)

BABASA approved Member Establishments and their owners undertake to:

Offer hospitality and comfort to satisfy the needs of their guests.

Offer what they advertise.

Maintain the standards set to become a member of BABASA.

Comply to all national, provincial & local legislation governing the industry.

Always act in an ethical way towards fellow members as well as the guest.

Adhere to sound employment practices

Provide appropriate training and resources to implemented responsible tourism by all Employees.

Balance environmental, economic and social issues towards 'Responsible Sustainable Tourism'.

Comply with environmental legislation and promote sound practices of

Reducing waste and pollution and minimising the use of energy, water and materials.

Promote a proud service ethic amongst the Tourism Industry participants.

Respect and nurture local cultures so that they enrich the tourism experience.

Encourage pride and confidence among local communities.

Conserve our South African Heritage by working together with communities and other organisations.

BABASA recognises the culture of "Rather Refer than Refuse"

Management 2002