

**THE REALISATION OF RIGHTS IN TERMS OF THE CONSUMER PROTECTION
ACT 68 of 2008**

by

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THE REALISATION OF RIGHTS IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

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SUMMMARY

The thesis examines the enforcement of consumer rights in South Africa, and is set against the backdrop of the underlying principles and theories on the enforcement of consumer protection law. It then analyses the various forms of consumer protection law enforcement mechanisms that were in place prior to the implementation of the Consumer Protection Act 68 of 2008, and sets out why there was a need for the enactment of the Consumer Protection Act. The thesis then critically discusses the consumer protection law enforcement mechanisms introduced and/or catered for by the Consumer Protection Act.

The in-depth comparative analysis against the consumer protection law enforcement dispensations in both India and the United Kingdom culminates in a critical analysis of the successes and shortcomings of consumer protection law enforcement regime in present-day South Africa; as well as recommendations (in the form of legislative amendments and practical solutions) on how the South African consumer protection enforcement framework can be improved in order to facilitate the realisation of consumer rights.

KEY TERMS:

Consumer law; realisation of rights; enforcement mechanisms; provincial consumer enforcement framework; provincial consumer law enforcement; national consumer law enforcement; consumer rights; consumer protection bodies.

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LIST OF ABBREVIATIONS

BEIS	Department for Business, Energy and Industrial Strategy
CAFCOM	Consumer Affairs Committee
CGSO	Consumer Goods and Services Ombud
CMA	Competition and Markets Authority
CPA	Consumer Protection Act 68 of 2008
CPUTR	Consumer Protection from Unfair Trade Regulations, 2008
CRA	Consumer Rights Act, 2015
DTI	Department of Trade and industry
ECMs	Enhanced Consumer Measures
ECC-Net	European Consumer Centres Network
ESCP	European Small Claims Procedure Regulation
FCDA	Foodstuff Cosmetics and Disinfectants Act 54 of 1972
Indian CPA	Consumer Protection Act, 1986
KZN-CPA	KwaZulu-Natal Consumer Protection Act 4 of 2013
Limpopo-CPA	Limpopo Consumer Protection Act 4 of 2015
MEC	Member of Executive Council
MOU	Memorandum of Understanding
PAJA	Promotion of Administrative Justice Act 3 of 2000

PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
RMI	Retail Motor Industry Organisation
UK	United Kingdom
UK-CPA	Consumer Protection Act, 1973
VAT	Value Added Tax

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1.1 Problem statement

Before the implementation of the Consumer Protection Act (the CPA),¹ the South African consumer protection landscape was characterised by an array of fragmented laws that sought to regulate various aspects of consumer protection. More often than not, redress for consumers was difficult to achieve owing to a disjointed consumer protection framework and the costly and protracted nature of both criminal and civil litigation.

The CPA ushered in a new consumer protection dispensation, which functions as the principal umbrella statute in the consumer protection space, and regulates most consumer related matters. An important point for consideration, however, is whether the realisation of consumer rights has become more tangible for the ordinary consumer under the CPA. In this regard, section 69 is the main section in the CPA that broadly sets out the enforcement procedure available to an aggrieved consumer. Nevertheless, as will be seen from the critical discussion below, the procedure is far from straightforward and the question of the efficacy of the CPA enforcement regime, remains a point of concern.

1.2 Research aims

The aim of this thesis is to identify the issues within the existing consumer protection law framework in South Africa by: (i) assessing the previous and current enforcement mechanisms in respect of consumer protection law in South Africa; (ii) comparing the enforcement mechanisms established in terms of the CPA to those in place in foreign jurisdictions; and (iii) determining the successes and shortcomings of the current CPA enforcement framework. In response to each of the shortcomings identified, the aim is to put forward recommendations in the form of proposed legislative amendments and practical solutions. The ultimate aim of this thesis is to assist relevant stakeholders in the quest to give full effect to the provisions of the CPA by eradicating barriers to consumer protection law enforcement. As such, this thesis aims to serve as a contribution to the consumer protection milieu by setting

¹ 68 of 2008.

out how access to redress can be improved for the ordinary consumer in South Africa in order to give effect to the laudable objectives of the CPA.

1.3 Motivation

It is common cause that the CPA has introduced a number of changes to the South African consumer protection law dispensation since its full implementation on 31 March 2011. Nonetheless, it is necessary and fitting to investigate whether the realisation of consumer rights under the CPA is a reality and not merely an ideal or a 'public relations' exercise by the state to appear to be in line with international best practice. The CPA must *actually* protect the vulnerable consumer who is the intended beneficiary of the statutory rights it enshrines.

In this regard, it is important to assess whether the executive (through the Department of Trade and Industry (the DTI)) together with the various structures mandated to enforce the CPA, have taken the necessary steps to facilitate the realisation of consumer rights. It ought also to be considered whether the specialised consumer protection law framework that has been set up in terms of the CPA, gives full effect to the realisation of consumer rights. For a well-rounded perspective, this requires due consideration of the consumer protection law enforcement mechanisms in place in foreign jurisdictions so as to conceptualise the level of protection afforded to South African consumers in a global context.

1.4 Hypotheses / assumptions

This thesis is based on the assumption that the CPA does in fact afford consumers adequate rights that are in line with internationally accepted consumer protection standards. However, the redress afforded consumers is not particularly clear under the CPA, and may perhaps even prove ineffective.² Furthermore, it is hypothesised that there are a number of barriers facing consumers who seek justice under current South African consumer protection laws. Finally, it is anticipated that the comparative analysis between South Africa and the Indian and United Kingdom (UK)

² See the discussion under para 3.5 in Ch 3 below.

jurisdictions respectively, will yield a unique perspective regarding a more beneficial and effective consumer law enforcement framework that can be applied in South Africa.

1.5 Methodology / approach

Throughout this discourse a critical approach is followed in respect of the existing literature – accessed primarily through desktop research – relating to the enforcement of consumer protection rights. This thesis is written against the background of the existing South African constitutional dispensation, and is measured against global practices in the consumer protection space through a comparative analysis.

1.6 Chapter overview

1.6.1 Chapter 2: A brief background to the CPA

Chapter 2 of this thesis briefly sets out the underlying philosophical framework of consumer protection law with reference to: the competing ideologies surrounding the aim of consumer protection law enforcement; the various paradigms relating to various consumer protection law enforcement mechanisms; and the multidisciplinary nature of consumer protection law. This chapter also critically discusses the redress that was afforded consumers in terms of the dispensation pre-dating the enactment of the CPA with due regard to the common law, self-regulation in various industries, and the legislative enforcement frameworks at a national and provincial level.

1.6.2 Chapter 3: Redress afforded to consumers in terms of the CPA

Chapter 3 is an essential component of the thesis and provides a comprehensive overview of: the scope of application of the CPA; the protection of consumer rights and the consumer voice; the enforcement procedure prescribed by the CPA as well as the various enforcement bodies established in terms of the CPA (and most importantly, their effectiveness); the redress mechanisms that have been put in place

by the CPA; as well as some key observations on the current consumer protection framework. It is important to note at this stage, that redress in respect of unfair contract terms will not be discussed in significant depth in this thesis as the jurisdiction in respect thereof is limited to the ordinary courts which are not the primary focus of this thesis.³

1.6.3 Chapter 4: Enforcement of consumer rights in foreign jurisdictions: A comparative analysis

This chapter presents a comparative analysis of the enforcement of consumer rights with reference to the consumer protection measures in place in the UK with due consideration to the influence of the European Union, on the UK's consumer protection law enforcement framework. The chapter also provides a comparative analysis of enforcement mechanisms available to consumers in India in order to assess how the consumer protection laws in South Africa compare in the context of another developing country with consumer protection laws in place.

1.6.4 Chapter 5: Consumer protection enforcement regime in South Africa: Successes, shortcomings, and recommendations

Chapter 5 examines both the successes and the shortcomings of the enforcement mechanisms in place in terms of the CPA, by critically assessing whether the procedures and institutions established for the enforcement of consumer rights in South Africa are effective and adequate. This critique is bolstered by the findings of the comparative analysis in the preceding chapter. To the extent possible, recommendations and practical solutions are provided to address the shortcomings identified in respect of the South African consumer protection law framework.

1.6.5 Chapter 6: Conclusion

This chapter addresses the research aims and the hypotheses raised in the introduction. It provides a final conclusion based on the findings of the thesis.

³ See the discussion to this effect in para 3.6.5.1 of Ch 3 below.

CHAPTER 2

A BRIEF BACKGROUND TO THE CONSUMER PROTECTION ACT

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2.1 Introduction

Consumer protection, as we know it today, first emerged during the nineteenth and the twentieth centuries with the spread of the industrial revolution which introduced mass production.⁴ Developments in trade and commerce resulted in profit becoming a primary motive as deceitful traders sought to amass personal wealth by any means.⁵ During this period a ‘consumer movement’ began to take shape across the globe and consumer relational dynamics, existing legal norms, and economic policies were increasingly questioned.⁶ Particularly in the latter half of the twentieth century, there was a move away from a production-centric approach towards a consumer-centric viewpoint, with greater focus falling on the promotion of equality on a socio-economic scale.⁷ The global development of consumer protection legislation is consequently attributable to jurisprudential, historical, economic, and social factors.⁸

This notwithstanding, the consumer protection movement appears not to have reached South Africa at the time when it was developing in the rest of the world; and, as a result, consumer-related laws in this country developed on an *ad hoc* basis and enjoyed little or no efficacy.⁹ Woker submits, in this regard, that “until recently it was probably incorrect to use the term ‘consumer law’ in South Africa because there was no comprehensive and systematic body of law which was designed specifically to deal with consumer issues”.¹⁰ International developments, however, brought a degree of pressure to bear on South Africa to join the global movement and walk the path of most developed countries.¹¹ In addition to the common-law protection available to consumers, certain areas were legislated for, such as credit agreements,

⁴ Lyster et al *Handbook on Public Interest Law* 289. See generally Van Eeden & Barnard *Consumer Protection Law* 20-21. The industrial revolution itself began in the eighteenth to nineteenth centuries. Van Wyk (2015) 15 *WP* 85 at 85.

⁵ See generally Van Eeden & Barnard *ibid*; Gupta *Commentaries on the CPA* 3-5.

⁶ Van Eeden & Barnard *ibid* at 1. This was due to the highly complex nature of mass produced goods as well as a general movement from individualism towards collectivism, see Lowe & Woodroffe *Consumer Law* 2. In Barowalia *Commentary on the CPA* 5-6. Barowalia also cites the following as causes for the consumer protection movement, “(a) ever increasing complexity of legislative controls; (b) the problem of innovation and development; (c) the market information gap; (d) the performance gap; (e) the location of market; (f) the fiscal policy of the government; (g) population explosion; (h) limited means to satisfy unlimited wants; and (i) false and misleading publicity”.

⁷ See Van Eeden & Barnard *ibid* and Naudé & Eiselen “Introduction and overview” Introduction-1 at para 1.

⁸ See Van Eeden & Barnard *ibid* and Lowe & Woodroffe *Consumer Law* 2.

⁹ Naudé & Eiselen “Introduction and overview” Introduction-1 at para 1.

¹⁰ Woker (2010) 31 *Obiter* 218.

¹¹ See Sharrock *Business Transactions Law* 585, where Sharrock submits that there were calls for South Africa to “introduce comprehensive legal measures to protect consumers from exploitation and abuse in the marketplace”.

insurance agreements, promotional competitions, usury price control, and unfair business practices.¹²

In this chapter, the philosophical schools of thought that underpin consumer protection law are discussed along with the enforcement mechanisms available to consumers before the implementation of the CPA.

2.2 Underlying principles and theories of enforcement

2.2.1 Natural justice

The concept of natural justice, which encompasses the notion of fairness, is the golden thread that weaves together the consumer protection law dispensation under the CPA. Two of the foundational principles of natural justice are: (i) the *audi alteram partem* principle, which denotes that both sides have the right to be heard; and (ii) the *nemo iudex in sua causa* principle, which is the rule against bias.¹³ One of the ‘common sense’ principles underlying the rule against bias, is that in order for the public to have faith in the administrative process, “justice must not only be done, but must also be *seen* to be done”.¹⁴ In its Draft Green Paper on the Consumer Policy Framework, the DTI noted that the provision of rights to consumers in theory, has little meaning where those rights cannot be effectively enforced by the consumer.¹⁵ It is, therefore, important that the enforcement mechanisms put in place by the CPA are not only fully-operational, but are also seen by the public to be highly effective, so as to prevent society from questioning the legitimacy of these consumer protection law structures.¹⁶

Undoubtedly, consumer protection legislation is paternalistic in nature as it interferes with the affairs of private persons which is, to some degree, an impediment to their

¹² Naudé & Eiselen “Introduction and overview” Introduction-1 at para 1. Woker (2010) 31 *Obiter* 217 at 218.

¹³ Hoexter, Lyster & Currie *New Constitutional and Administrative Law* 190.

¹⁴ Own emphasis. Hoexter, Lyster & Currie *ibid* at 191.

¹⁵ Draft Green Paper on the Consumer Policy Framework at 37.

¹⁶ *Ibid* where the DTI mentions that: “Because of the broad range of organizations involved in consumer protection, organizational roles and responsibilities must be clearly spelt out. Failure to do so could create many serious problems and could in some instances result in a loss of credibility”.

individuality and contractual autonomy.¹⁷ However, in reality, there are huge power imbalances between contracting parties which warrant a paternalistic approach by the state in an attempt to protect the consumer.¹⁸

2.2.2 Competing theories in consumer protection law

There are competing theories that underlie the purpose of enforcement within the field of consumer protection law.¹⁹ On the one hand, is the school of thought which argues that the enforcement of consumer protection law should be aimed at justice and tackling inequalities,²⁰ whilst, on the other hand, is the school of thought which holds that the enforcement of consumer protection law should be focused on providing efficient and effective solutions within market transactions.²¹ Although these two theories can often exist in harmony, Scott submits, with merit, that the difference in theories speaks to the underlying tensions within the consumer protection law enforcement space.²² Whilst on the one hand there is pressure to grow the economy rapidly, there is, on the other hand, an obligation to ensure that there is accountability and adequate access to redress. Although it involves a delicate balancing exercise, the one theory cannot outweigh the other.

Furthermore, it appears that there are mainly two schools of thought surrounding the realisation of consumer rights, namely the 'preventative control paradigm' *vis-à-vis* the 'reactive paradigm'.²³ The preventative control paradigm speaks to a proactive approach in terms of which active steps are taken to prevent the occurrence of violations of consumer rights.²⁴ In contrast, the reactive paradigm envisages a dispensation that, as the term suggests, reacts to instances where the rights of

¹⁷ Stoop *Concept of Fairness* 13-17. See generally, Rutgers "European contract law and social justice" in Twigg-Flesner (ed) *Research Handbook* 235-248.

¹⁸ See Draft Green Paper on the Consumer Policy Framework at 11-12.

¹⁹ Scott "Enforcing consumer protection laws" 537.

²⁰ Ibid. See Rickett & Tefler "Consumer's access to justice: an introduction" 1 – 13. See also Ramsay "Consumer redress and access to justice" 17-45.

²¹ Scott "Enforcing consumer protection laws" 537.

²² Ibid.

²³ See generally Naudé (2010) 127 *SA Merc LJ* 515 at 516-517.

²⁴ See the example in Hodges "Theme VI. Consumer protection and procedural justice" 621-622.

consumers have been infringed. The preventative paradigm is discussed further where relevant in the chapters below.²⁵

2.2.3 Constitutional framework

In context of the South African constitutional law framework, section 34 of the Constitution of the Republic of South Africa, 1996 (the Constitution),²⁶ gives effect to the *audi alteram partem* principle by providing for the right to access courts.²⁷ Given that the consumer bodies envisaged by the CPA, as well as those established at a provincial level to regulate consumer-related matters, are administrative bodies, their conduct must always be fair and just as contemplated in section 33 of the Constitution,²⁸ and having due regard to the provisions of the Promotion of Administrative Justice Act (the PAJA).²⁹

In some respects, the CPA echoes some of South Africa's constitutionally enshrined human rights.³⁰ For instance, the constitutional right to: (i) privacy, as echoed in sections 11 and 12 of the CPA which regulate direct marketing to consumers; (ii) equality, as echoed in sections 8 to 10 of the CPA which provide for the right to equality in the consumer market; and (iii) bodily integrity, as arguably echoed in section 61 of the CPA which provides for liability for damage caused by goods (and such damages extend to death, sickness, and injury).³¹ It is therefore clear that the CPA was drafted by the legislature within the constitutional paradigm and with a constitutional focus. It is therefore interesting to consider the interplay between pre-constitution statutes that have not been repealed and the CPA.³²

²⁵ See para 2.3.2.2(a) of Ch 2 and para 3.8.1 of Ch 3 below; para 4.3.4.4 (c) and (e) of Ch 4 below.

²⁶ 1996.

²⁷ Section 34 of the Constitution reads as follows: "Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

²⁸ Section 33 of the Constitution, in relevant part, reads as follows: "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair".

²⁹ 3 of 2000.

³⁰ See generally Naudé & Eiselen "Introduction and overview" Introduction-1 at para 29.

³¹ *Ibid.*

³² This is critically discussed in Ch 3 below.

For the sake of completeness, it is worth noting that in terms of Part A of Schedule 4 to the Constitution, consumer protection is regarded as a functional area of concurrent national and provincial legislative competence. This is also reflected in the CPA, which envisages the application of national and provincial legislation for purposes of its enforcement.³³ Although conflict provisions are provided for in section 2(9) of the CPA, the Constitution also prescribes that conflicts arising between national and provincial legislation should be resolved in terms of section 146 of the Constitution.³⁴

2.3 Consumer protection law mechanisms before the enactment of the CPA

2.3.1 The common-law position

In terms of the South African common law, the consumer has two avenues of redress available to her, namely the contractual route and the delictual route. Whilst the contractual route is available in instances where there is an agreement between the parties; the delictual avenue is available where there is no underlying contract between the parties.³⁵ The former would be applicable to an ordinary over-the-counter transaction between Ms Khumalo and her local supermarket where, for instance, the supermarket sells her a damaged carton of milk and she wishes to return the milk and receive a refund. The latter would be applicable in instances where Ms Khumalo seeks to hold the milk producer liable for milk that was marked by the producer as suitable for consumption but, as a matter of fact, was not properly pasteurized, with the consequence that Ms Khumalo fell seriously ill and perhaps even incurred medical expenses.

Where the underlying relationship is contractual, ie, between Ms Khumalo and her local supermarket, the consumer may use the *actio redhibitoria* to cancel the contract and claim the purchase price where the product was so defective that she

³³ See s 1 of the CPA, for instance, which defines a ‘consumer court’ as “a body of that name, or a consumer tribunal, that has been established in terms of applicable provincial consumer legislation”. Consumer courts exist concurrently with the National Consumer Commission and the National Consumer Tribunal, which are regulated by national legislation, namely the CPA and the National Credit Act 34 of 2005 respectively, and discussed in further detail in Ch 3 below.

³⁴ See s 2(9) of the CPA and s 146 of the Constitution respectively.

³⁵ Lyster et al (eds) *Handbook of Public Interest Law* 287.

would not have bought it had she been aware of the defect.³⁶ In the event that the effect of the latent defect is such that the consumer would still have purchased the product, but at a decreased price, the consumer may make use of the *actio quanti minoris*.³⁷ Otherwise, if these specific actions are not used (for instance where the claim is not in respect of a defect), the right to cancellation or specific performance, with or without damages (including consequential damages), is available to the consumer.³⁸ Naturally, the consumer may always institute an action based on breach of contract where a supplier or manufacturer breaches a specific term or warranty in a contract.³⁹

Alternatively, the consumer has ordinary delictual remedies at her disposal where there is no direct relationship between the consumer and the manufacturer and/or the supplier, ie, in the scenario of Ms Khumalo and the milk producer.⁴⁰ In such circumstances, the consumer will be required to prove the elements of a delict, including the element of fault on the part of the manufacturer or supplier.⁴¹ The burden of proving fault, in the form of either intention or negligence, lies with the consumer.⁴² This is undoubtedly burdensome in the context of a vulnerable individual who seeks to challenge an often well-resourced manufacturer or supplier. Particularly in the South African context, where literacy and employment levels are low,⁴³ it is highly likely that ordinary consumers would not, in their individual capacities, pursue claims against manufacturers or suppliers as: (i) they would not fully comprehend the nature of their claim or how to pursue it; and (ii) they would not

³⁶ For the common-law roots of the *actio rehibitoria* see *Dibley v Furter* 1951 (4) SA 73 (C) at 82D. See also Lyster et al *Handbook of Public Interest Law* 289 and Van Eeden & Barnard *Consumer Protection Law* 388.

³⁷ For the common-law roots on the *actio quanti minoris* see *Phame v Paizes* 1973 (3) SA 397 (A) 409G-410A. See also Lyster *ibid* at 291 and Woker (2010) 31 *Obiter* 217 at 229. See generally Van Eeden & Barnard *ibid* at 360.

³⁸ Joubert *Law of South Africa* para 247. See also Van Eeden & Barnard *ibid*.

³⁹ Lyster et al *Handbook of Public Interest Law* 291.

⁴⁰ *Ibid* at 295.

⁴¹ *Ibid*.

⁴² *Ibid* at 297 and Woker (2010) 31 *Obiter* 217 at 220. See generally *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) 285 (SCA).

⁴³ The current unemployment rate in South Africa is at 27,7% according to the StatsSA, Statistical release P0211, Quarterly Labour Force Survey, Quarter 2: 2017 at 8-9 available at <http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2017.pdf> (accessed on: 20 April 2018). The current illiteracy rate is at 15,5%, based on the ability of 24,6 million adults to read and write in one of the eleven official languages as well as in sign language and the Khoi, Nama, and San languages. Thus a total of 3 805 851 people within the surveyed group cannot read or write at all. This is according to the StatsSA, Education Series Volume III: Education Enrolment and Achievement, 2016 at 38 available at <http://www.statssa.gov.za/publications/Report%2092-01-03/Report%2092-01-032016.pdf> (accessed on: 20 April 2018).

have the financial resources to seek adequate legal advice on any claims they may possibly have.

To the further detriment of consumers, the common law provides suppliers and manufacturers with certain mechanisms by which to limit their liability.⁴⁴ This is most commonly done by way of exemption clauses and, less overtly, through guarantees and warranties, in which case the liability of the supplier or manufacturer is often excluded in the event that the consumer suffers damages from the product as a result of the consumer's negligence, or due to defects in the product.⁴⁵ Although guarantees and warranties appear, *prima facie*, to favour the consumer, such clauses tend to limit the rights of consumers.⁴⁶ A common example in this regard is the limitation that guarantees often place on a consumer's claim. The ordinary common-law prescription period is three years, whilst warranties and guarantees often limit the consumer's claim to a period of twelve months.⁴⁷

It is therefore clear that the common law affords very little or no protection to the consumer against goods or services of an inadequate quality, unfair contractual terms, unfair promotional activities, unfair discrimination in the marketplace, and a number of other fundamental rights now enshrined in the CPA.⁴⁸ What is also clear from the common-law system is that it is based on the premise of equal bargaining power in business-to-consumer transactions – which in today's context is clearly flawed.

2.3.2 The legislative framework

Prior to the promulgation of the CPA, various industry-specific statutes were enacted in an attempt to regulate different aspects of consumer affairs. What follows

⁴⁴ Lyster et al *Handbook of Public Interest Law* 292.

⁴⁵ Ibid at 293.

⁴⁶ Ibid.

⁴⁷ Ibid at 293-294. Nevertheless, under the current CPA dispensation such a contractual term would not be fair or reasonable as terms of this nature are expressly included as unfair contract terms in reg 44(3)(z) of the CPA Regulations.

⁴⁸ Naudé & Eiselen "Introduction and overview" Introduction-1 at para 1.

immediately below is a discussion of the pre-existing national and provincial legislative frameworks, with a focus on the enforcement mechanisms in place in the predominant consumer-orientated statutes.

2.3.2.1 National legislation

Some of the predominant statutes that affected consumers at a national level include: the Business Names Act;⁴⁹ the Harmful Business Practices Act, later renamed the Consumer Affairs (Unfair Business Practices) Act;⁵⁰ the Price Control Act;⁵¹ the Sales and Service Matters Act;⁵² the Trade Practices Act;⁵³ the Foodstuffs, Cosmetics and Disinfectants Act (the FCDA);⁵⁴ and the Merchandise Marks Act.⁵⁵ The latter two statutes have not been repealed by the CPA and will be discussed briefly in this chapter. Their interaction with the CPA is also discussed in greater depth in Chapter 3 of this thesis.⁵⁶ Of the repealed statutes, only the Consumer Affairs Act will be critically discussed in further detail in this chapter as it appears to have been the latest, comprehensive, and most consumer-orientated statute of its time.

(a) The Foodstuffs, Cosmetics and Disinfectants Act

The FCDA was enacted to regulate the sale, manufacture, importation and the export of foodstuffs,⁵⁷ cosmetics,⁵⁸ and disinfectants,⁵⁹ and to regulate matters

⁴⁹ 27 of 1960. This statute has now been repealed by the CPA.

⁵⁰ 71 of 1988. Hereafter referred to as the Consumer Affairs Act. This statute has now been repealed by the CPA. See Van Heerden “Chapter 3: Protection of consumer’s rights and consumers’ voice” 68-1 at para 2.

⁵¹ 76 of 1976. This statute has now been repealed by the CPA.

⁵² 25 of 1964. This statute has now been repealed by the CPA.

⁵³ 76 of 1976. This statute has now been repealed by the CPA.

⁵⁴ 54 of 1972.

⁵⁵ 17 of 1941.

⁵⁶ See para 3.8.3.1 of Ch 3.

⁵⁷ Section 1 of the FCDA defines ‘foodstuff’ to mean “any article or substance (except a medicine as defined in the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965)) ordinarily eaten or drunk by a person or purporting to be suitable, or manufactured or sold, for human consumption, and includes any part or ingredient of any such article or substance, or any substance used or intended or destined to be used as a part or ingredient of any such article or substance.”

⁵⁸ Section 1 of the FCDA defines ‘cosmetic’ to mean “any article, preparation or substance (except a medicine as defined in the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965)) intended to be rubbed, poured, sprinkled or sprayed on or otherwise applied to the human body, including the epidermis, hair, teeth, mucous membranes of the oral cavity, lips and external genital organs, for purposes of cleansing, perfuming, correcting body odours, conditioning, beautifying, protecting, promoting attractiveness or improving or altering the appearance, and includes any part or ingredient of any such article or substance”.

incidental thereto.⁶⁰ As mentioned above, this statute has not been repealed or directly amended by the CPA. The FCDA creates various offences in relation to dealings with certain articles at various stages in the consumer transaction involving foodstuffs, cosmetics, and disinfectants.⁶¹ There are, however, certain special defences that can be raised where a person faces conviction for an offence as contemplated in the statute.⁶²

The FCDA authorises the Director-General to appoint certain persons to act as inspectors;⁶³ and also vests the powers, duties, and functions of an inspector in respect of certain provisions of the statute in: (i) an officer in the Office for the Commissioner for Customs and Excise (including the Commissioner herself);⁶⁴ (ii) a local authority under section 23, or a medical practitioner, environmental health practitioner, veterinarian, or other person considered fit or who has been authorised by the relevant local authority;⁶⁵ (iii) a member of the South African Police Services;⁶⁶ and (iv) any person appointed under section 28 of the Standards Act⁶⁷ as an inspector for purposes of that statute.⁶⁸ In terms of the FCDA, inspectors have the power to, inter alia, inspect premises, examine articles, and demand information as set out in section 11 of the statute.

⁵⁹ Section 1 of the FCDA defines 'disinfectant' to mean "any article or substance used or applied or intended to be used or applied as a germicide, preservative or antiseptic, or as a deodorant or cleansing material which is not a cosmetic".

⁶⁰ See preamble to the FCDA.

⁶¹ See the FCDA at s 2 (prohibition of sale, manufacture, or importation of certain articles); s 3 (sale of mixed, compounded, or blended foodstuffs); s 4 (use or employment of prohibited process, method, appliance, container, or object); and s 5 (false description of articles).

⁶² Section 6 of the FCDA, which is subject to the conditions in s 7 of the FCDA. For the sake of completeness, s 6 creates the defence that a person will not be guilty of an offence in the event that the article concerned: (i) was not sold for human consumption; (ii) was acquired by such person's employer under a written warranty as contemplated in s 7 FCDA and furnished to that person and had no reason to suspect that the article was prohibited in terms of the FCDA; and (iii) was sold in the condition that it was acquired or imported, and that at no time it has any reason to suspect that the article was in any other condition. In addition, a person would not be charged for publishing a false or misleading advertisement of a foodstuff, cosmetic, or disinfectant, if that person is able to prove that she is not the person selling the foodstuff, cosmetic, or disinfectant that relates to the advertisement concerned (and further that she did not know and could not reasonably have known that the advertisement concerned was false or misleading). However, this defence will not be applicable if it is proved that such person failed to provide the name and address of the person responsible for issuing the advertisement (upon the request of an inspector or a member of SAPS). It is submitted that this caveat to the last defence is somewhat arbitrary. However, a further discussion of this point falls outside the scope of this thesis.

⁶³ The FCDA at s 10(1).

⁶⁴ Ibid at s 10(3)(a).

⁶⁵ Ibid at 10(3)(b).

⁶⁶ Ibid at s 10(3)(c) and (d).

⁶⁷ 29 of 1993. This Act has subsequently been repealed by the Standards Act 8 of 2008. For the sake of completeness, s 28 of the Standards Act 29 of 1993 provided for, and regulated the powers of, inspectors and auditors appointed in terms of that Act.

⁶⁸ The FCDA at s 10(3)(e).

In addition, section 17 of the FCDA provides that interfering with the duties of an inspector in any way, or falsely using any warrant, certificate, report, or other document, constitutes an offence. A person convicted of an offence under the FCDA shall either be imprisoned for a period of between six to 24 months, or be liable to a fine (or be imprisoned and liable to a fine), depending on whether the conviction is a first, second, or third conviction.⁶⁹ A magistrate's court has jurisdiction to impose any penalty provided for by the FCDA,⁷⁰ and a local authority, authorised to administer any provision in the FCDA, has the right to prosecute any failure to comply with any provisions thereof (where such non-compliance has taken place in that local authority's area).⁷¹ The enforcement system envisaged by the legislature in terms of the FCDA appears to be criminal in nature.⁷²

Although by its nature the FCDA is relatively industry-specific in that it focuses on particular goods (ie, foodstuffs, cosmetics, and disinfectants) its provisions indirectly afford certain protections to consumers.⁷³ On the whole, it appears to be an industry regulation statute more than a consumer protection statute. Nevertheless, the slight overlap between the FCDA and the CPA is considered in Chapter 3.⁷⁴

(b) Merchandise Marks Act

The Merchandise Marks Act regulates the marking of merchandise and their packaging, as well as the use of certain words and emblems in connection with a business.⁷⁵ Although many of the sections of this statute have been repealed by the CPA, the remaining effective sections of the Merchandise Marks Act seek to regulate

⁶⁹ Ibid at s 18.

⁷⁰ Ibid at s 19.

⁷¹ Ibid at s 24. Section 23 of the statute provides that the Minister may authorise a local authority to enforce such provisions of the Act as the Minister may set out in such notice. However, it does not appear as if any such notice has to date been issued by the Minister. Section 1 of the FCDA defines a 'local authority' as a municipality as defined in s 1 of the Local Government: Municipal Systems Act 32 of 2000.

⁷² Ibid at s 19 gives the magistrates' courts the power to impose any penalty envisaged in the Act (ie, either a fine or imprisonment)

⁷³ Ibid at s 2 (prohibition of sale, manufacture, or importation of certain articles); s 3 (sale of mixed, compounded, or blended foodstuffs); s 4 (use or employment of prohibited process, method, appliance, container, or object); and s 5 (false description of articles).

⁷⁴ See the discussion in para 3.8.3.1 of Ch 3 below.

⁷⁵ See preamble to the Merchandise Marks Act 17 of 1941.

the unauthorised use of certain emblems in connection with a person's trade, business, profession, or occupation, or in connection with a mark or trade mark that is applied in connection with goods that are made, produced, or sold.⁷⁶ The use of certain marks in contravention of this Act constitutes a criminal offence.⁷⁷ On a first conviction under the Merchandise Marks Act, a person may be liable for a fine not exceeding R5 000 for each article to which the offence relates, or a period of imprisonment not exceeding three years, or to both a fine and imprisonment.⁷⁸ In any other case, a person shall be liable to a fine not exceeding R10 000 for each article that relates to the offence, and imprisonment for a period not exceeding five years, or to both a fine and imprisonment.⁷⁹ Although section 20(1)(b) of the Merchandise Marks Act provides for liability to a fine or imprisonment for a period not exceeding six months where a person is convicted of an offence referred to in section 5, this penalty appears to be a legislative oversight, as section 5 of that statute has been repealed by the CPA. Section 20(2) of the Merchandise Marks Act provides that where a person is convicted of an offence, a court may order confiscation of the goods in respect of which the offence has been committed.

(c) Consumer Affairs Act

The Consumer Affairs Act came into effect on 1 July 1988 and provided for the regulation of certain business practices that may be regarded as harmful to the consumer.⁸⁰ It appears, however, that the Consumer Affairs Act was an enabling rather than a prescriptive piece of legislation.⁸¹ In terms of the Consumer Affairs Act, a Consumer Affairs Committee (CAFCOM) was established to investigate business practices and provide the Minister of Trade and Industry with reports and recommendations on such practices.⁸² If the Minister accepted the recommendations, she could publish a notice in the *Government Gazette* declaring a

⁷⁶ Ibid at ss 14-15A.

⁷⁷ Ibid at ss 15(3) and 18.

⁷⁸ Ibid at s 20(1)(a)(i).

⁷⁹ Ibid at s 20(1)(a)(ii).

⁸⁰ Lyster et al *Handbook of Public Interest Law* 314.

⁸¹ Van Heerden "Chapter 3: Protection of consumer's rights and consumers' voice" 68-1 para 2; Woker (2010) 31 *Obiter* 217 at 219.

⁸² See ss 2, 4, 8 and 10 of the Consumer Affairs Act. See Van Heerden *ibid*. See also Woker *ibid* and Van Eeden & Barnard *Consumer Protection Law* 473.

particular provision unfair and issue directions that persons involved in similar transactions should refrain from applying such terms.⁸³

The theoretical effect of the Minister's notices was that they could result, on the one hand, in a business having the latitude to continue operating, subject to the amendment of the relevant term; and, on the other hand, it could result in the need for a business to cease operating completely.⁸⁴ Ignoring the Minister's notices was a criminal offence which could result in imprisonment for a period not exceeding five years, or a fine of not more than R200 000, or both a fine and imprisonment.⁸⁵ The greatest drawback of the consumer dispensation under the Consumer Affairs Act was the CAFCOM's inability to order redress.⁸⁶ In this regard, the CAFCOM fulfilled a purely advisory role and had no power to make binding decisions.⁸⁷ After the matter had been investigated and handed over to the Minister to issue a declaration on the business practice involved, it was the duty of the police service and the prosecuting authority to follow up on any contraventions.⁸⁸ As is the case in South Africa's criminal justice system today, the police and the prosecuting authorities were burdened with many criminal matters and, consequently, consumer matters received inadequate attention.⁸⁹ There was also reluctance by the criminal courts to focus on consumer matters.⁹⁰ Therefore, the practical effect of the Minister's notices was that the businesses could simply ignore them and continue operating as usual.⁹¹ In light of this, Woker submits, correctly, that the CPA represents a great step forward in that its specialised bodies are authorised to order administrative penalties where the Act has been contravened.⁹²

⁸³ Section 10(4)(b) of the Consumer Affairs Act. See Woker *ibid* at 219.

⁸⁴ *Ibid* at 220.

⁸⁵ Section 15(b) of the Consumer Affairs Act. See Woker *ibid*.

⁸⁶ Van Heerden "Chapter 3: Protection of consumer's rights and consumers' voice" 68-2 para 3; Woker *ibid*.

⁸⁷ See s 10(2) of the Consumer Affairs Act. See also Draft Green Paper on the Consumer Policy Framework at 38.

⁸⁸ Woker (2010) 31 *Obiter* 217 at 220. See also Draft Green Paper on the Consumer Policy Framework at 38.

⁸⁹ Woker *ibid*.

⁹⁰ See *S v Pepsi (Pty) Ltd* 1985 3 SA 141 (C) 142D-F. Woker *ibid*. Although it appears that commercial courts have to some extent been effective in certain areas of the law, it is doubtful whether it would be possible for consumer complaints to be dealt with effectively through the court system, see Draft Green Paper on the Consumer Policy Framework at 38.

⁹¹ Woker *ibid*. See also Draft Green Paper *ibid*.

⁹² Woker *ibid* at 221.

2.3.2.2 Provincial legislation

At a provincial level, there is a statutory framework that preceded the enactment of the CPA. It appears that the bulk of the provincial consumer affairs offices are governed by a provincial Consumer Affairs (Unfair Business Practices) Act, enacted before the commencement of the CPA and adapted for use in each of the nine provinces.⁹³ Given the similarities between the provisions of the various provincial statutes, a detailed discussion of all of these statutes will prove somewhat repetitive. Therefore, only the Gauteng consumer legislation enacted prior to the commencement of the CPA is discussed immediately below. Bearing in mind the scope of this thesis, the focus is on the enforcement mechanisms in this statute. Furthermore, as the Gauteng Consumer Affairs Act has not been repealed, it is important to consider its interaction with the CPA.⁹⁴

(a) Gauteng: Consumer Affairs (Unfair Business Practices) Act 7 of 1996⁹⁵

Gauteng's Consumer Affairs (Unfair Business Practices) Act (the Gauteng Consumer Affairs Act)⁹⁶ was assented to on 6 May 1997 and aims at the investigation, prohibition, and control of unfair business practices in the interests of consumer protection.⁹⁷ At the outset, it is important to understand what the statute envisages as constituting an 'unfair business practice' and a 'consumer' respectively. In this respect, the Gauteng Consumer Affairs Act defines an 'unfair business practice' as "any business practice which, directly or indirectly, has or is likely to

⁹³ See the Consumer Affairs (Unfair Business Practices) Act 4 of 1996 (North West); the Consumer Affairs (Unfair Business Practices) Act 5 of 1998 (Eastern Cape) – it is noted for the sake of completeness that the Eastern Cape issued a Draft White Paper on Consumer Protection in the Eastern Cape for public comment in 2015 (see Gen N 35 of 2015 *PG* 3399 29 May 2015); the Free State Consumer Affairs (Unfair Business Practices) Act 14 of 1998; Consumer Affairs (Unfair Business Practices) Act 7 of 1996 (Gauteng); Consumer Affairs (Harmful Business Practices) Act 8 of 1996 (Limpopo) – it is noted for the sake of completeness that the Limpopo Consumer Protection Act 4 of 2015 has been enacted and will commence on a date to be proclaimed by the Premier of Limpopo in terms of s 51 of that statute (no date had been released at the time of writing); Mpumalanga Consumer Affairs Act 6 of 1998; Northern Cape Consumer Affairs (Unfair Business Practices) Act 7 of 1996; Western Cape Consumer Affairs (Unfair Business Practices) Act 10 of 2002. It is unclear what statute, if any, was in place to regulate consumer-related matters in KwaZulu-Natal before the enactment of the CPA. Nevertheless, the Consumer Protection Act 4 of 2013 is currently applicable in the KwaZulu-Natal province but it appears as if no consumer court has been established at this stage. See also Koekemoer (2017) 40 *JCP* 419 at 435-437 and Woker (2016) 28 *SA Merc LJ* 21 at 43-45. At the relevant parts in the latter article, Woker submits that the provisions of the KwaZulu-Natal provincial legislation set out consumer rights in a simpler form that is not particularly aligned with the CPA.

⁹⁴ See para 3.8.3.2 of Ch 3 below.

⁹⁵ See generally Du Plessis (2008) 20 *SA Merc LJ* 74 at 75-78. For the sake of completeness it is noted that subsequent to this thesis being submitted for examination, the Gauteng provincial government published the draft Gauteng Consumer Protection Bill, 2018. This Bill is not discussed in further detail in this thesis due to the timing of its publication.

⁹⁶ Act 7 of 1996.

⁹⁷ See Preamble to the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

have the effect of unfairly affecting any consumer”.⁹⁸ Furthermore, a ‘consumer’ is defined as:

- (a) any natural person to whom any commodity is offered supplied or made available where that person does not intend to apply the commodity for the purpose of resale, lease, the provision of services or the manufacture of goods for gain;
- (b) any natural person from whom is solicited, or who supplies or makes available, any investment;
- (c) any other person who the responsible member declares to be a consumer in terms of subsection (2).⁹⁹

The Gauteng Consumer Affairs Act contains no provision dealing expressly with its field of application. However, from the above definitions, it is clear that this provincial statute is more focused towards protecting natural persons from unfair business practices, and does not necessarily extend to protecting small juristic persons who may be subject to such business practices. Given the wide nature of transactions entered into by consumers, there will inevitably be some overlap between the field of application of the CPA and the provincial legislation.¹⁰⁰

A consumer affairs court was established as an administrative body in terms of the Gauteng Consumer Affairs Act.¹⁰¹ This Act prescribes that the consumer affairs

⁹⁸ Section 1(xvi) of the Gauteng Consumer Affairs Act. A ‘business practice’ is defined in s 1(iii) of the Gauteng Consumer Affairs Act to include

- (a) any agreement, accord or undertaking in connection with business, whether legally enforceable or not, between two or more persons;
- (b) any scheme, practice or method of trading in connection with business, including any method of marketing or distribution;
- (c) any advertising, type of advertising or any other manner of soliciting business;
- (d) any act or omission in connection with business on the part of any person, whether acting independently or in concert with any other person; and
- (e) any situation in connection with the business activities of any person or group of persons, but does not include a restrictive practice, acquisition or monopoly situation as defined in section 1 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1 979).

⁹⁹ Section 2(1) of the Gauteng Consumer Affairs Act. Section 2(2) of this statute reads as follows: “A responsible Member may, with the concurrence of the committee, declare any person to be a consumer by notice in the Provincial Gazette and may withdraw, vary or amend any such notice”. A ‘responsible member’ is defined in s 1 of the Gauteng Consumer Affairs Act as “the member of the Executive Council of the Province responsible for economic affairs and finance”.

¹⁰⁰ For instance, in the matter of *Esterhuizen v Nelcrete CC* (Case no MPCC58/01/05/12) before the Mpumalanga Consumer Affairs Court, the court was adjudicating an unfair business practice matter under the Mpumalanga Consumer Affairs Act (which is very similar to the Gauteng Consumer Affairs Act in content and form). In that matter the court applied the Mpumalanga Consumer Affairs Act concurrently with the CPA to adjudicate the matter. Although in principle it is unclear whether the provision relied on for the CPA apply was correct (ie, reliance by the court on s 121 of the CPA) the point of an overlap between new and old legislation is illustrated.

¹⁰¹ See s 13 of the Gauteng Consumer Affairs Act.

court shall consist of five members: a chairperson (who can be either a retired judge of the Supreme Court or a seasoned lawyer);¹⁰² and four additional members having special knowledge of consumer advocacy, economics, industry, or commerce.¹⁰³ Three members constitute a quorum,¹⁰⁴ and, unless otherwise provided, a decision of the majority of the members is the decision of the consumer affairs court.¹⁰⁵ Where a matter is heard before an even number of members and there is a split, the decision of the chairperson is decisive.¹⁰⁶ The consumer affairs court has wide powers under the Gauteng Consumer Affairs Act including the power to hear, consider, and decide any matters before it.¹⁰⁷

The enforcement process laid down by the Gauteng Consumer Affairs Act is easy to follow and comprehend. In order to initiate an investigation, any person may lodge a complaint with the Office for the Investigation of Unfair Business Practices.¹⁰⁸ The office may, *mero motu*, institute an investigation where it has reason to suspect that there is, or will be, an unfair business practice.¹⁰⁹ Furthermore, a responsible member¹¹⁰ may also refer a matter to the office for investigation.¹¹¹ The power of the office to institute an investigation has the potential to serve as an effective preventative and pro-active mechanism under the Gauteng Consumer Affairs Act, as, where it has reason to believe that grounds exist, it is not necessary for the office to await a complaint before initiating an investigation. The office may then publish a notice in the *Provincial Gazette* announcing the investigation it is undertaking and

¹⁰² Section 14(2)(a)(ii) of the Gauteng Consumer Affairs Act specifies that such a person should be an attorney, advocate, retired magistrate, or lecturer in law at a university, with not less than ten years cumulative experience in one or more such capacities.

¹⁰³ Gauteng Consumer Affairs Act s 14(2)(b).

¹⁰⁴ *Ibid* at s 16(1).

¹⁰⁵ *Ibid* at s 16(2).

¹⁰⁶ *Ibid* at s 16(5).

¹⁰⁷ See the following provisions of the Gauteng Consumer Affairs Act: s 17 (functions, powers and duties of court); s 19 (summoning of witnesses and production of documents); s 20 (urgent temporary orders); s 21 (confirmation of arrangements negotiated by office); s 22 (order by court prohibiting prohibited practice); and s 24 (declaring of certain business practices to be unlawful).

¹⁰⁸ Section 6 of the Gauteng Consumer Affairs Act. Section 6(2) provides that where the complaint is not in writing, it must be reduced to writing. The office was established in terms of s 3 of the Gauteng Consumer Affairs Act and is defined in s 1 (xi) as “the Office for the Investigation of Unfair Business Practices established by section 3”.

¹⁰⁹ Section 7(1) of the Gauteng Consumer Affairs Act.

¹¹⁰ Section 1(xiv) of the Gauteng Consumer Affairs Act provides that a “‘responsible member’ means the Member of the Executive Council of the Province responsible for economic affairs.”

¹¹¹ Gauteng Consumer Affairs Act s 7(2).

making provision for any person to make written representations to the office within a set period.¹¹²

In order to facilitate the investigation process, the Consumer Protector¹¹³ is authorised to summon persons, and may also require the production of books and documents that may be required in the investigation of the unfair business practice.¹¹⁴ Du Plessis submits, with merit, that this procedure ensures that any information crucial to the consumer’s complaint, is obtained before the trial commences, which has the potential of increasing the likelihood of a settlement being reached between the parties.¹¹⁵ In this regard, the summons procedure also serves a broader purpose – ie, facilitating a meeting between the parties concerned with the view of settling the matter.¹¹⁶ The focus on resolving the dispute ties in well with the notion of a consumer affairs court as an alternative dispute resolution agent under the CPA.¹¹⁷ Any person who does not comply with the summons, or any refusal to cooperate as set out in section 8(4) of the Gauteng Consumer Affairs Act, is guilty of an offence.¹¹⁸ The Consumer Protector is, by default, an investigating officer. She may also appoint persons who are working in the office, or any other suitable persons, to fulfil the role of investigating officer.¹¹⁹ Investigating officers are entitled to conduct searches and seizures in terms of section 10 of the Gauteng Consumer Affairs Act.

¹¹² Ibid at s 7(3).

¹¹³ Ibid at s 1(vii) defines a ‘Consumer Protector as “the person appointed in terms of section 4(1)(a)”. In this regard, section 4(1)(a) of the Consumer Affairs Act provides as follows: “ 4. Consumer Protector and staff of Office. (1) Subject to the laws governing the public service, the responsible Member- (a) Shall appoint a person as Consumer Protector.”

¹¹⁴ Ibid at s 8(1).

¹¹⁵ See generally Du Plessis (2008) 20 SA Merc LJ 74 at 75-78.

¹¹⁶ Du Plessis (2016) 28 SA Merc LJ 147 at 154.

¹¹⁷ See discussion under para 3.6.2 of Ch 3 below.

¹¹⁸ The offences set out in s 8(4) of the Gauteng Consumer Affairs Act reads as follows:

A person shall be guilty of an offence if he or she, have been summoned in terms of this section-

- (a) fails without sufficient cause to attend at the time and place specified in the summons, or to remain in attendance until the conclusion of the proceedings or until he or she has been excused from further attendance;
- (b) refuses to take the oath or make an affirmation;
- (c) refuses to answer, or to answer fully and satisfactorily to the best of his or her knowledge and belief, any question lawfully put to him or her;
- (d) fails to produce any book, document or object in his or her possession or custody or under his or her control, which he or she was required to produce; or
- (e) makes a false statement to the Consumer Protector or other person in the service of the office designated by the Consumer Protector, knowing such statement to be false or not knowing or believing it to be true.

¹¹⁹ Gauteng Consumer Affairs Act s 9(1) and (2).

Certain arrangements may be entered into between a party under investigation and the office.¹²⁰ These arrangements may be aimed at: an unfair business practice being discontinued or avoided; affected consumers being reimbursed, with interest; any aspect of an unfair business practice being discontinued or avoided; or any other matter relating to the unfair business practice.¹²¹ Section 11(2)(a) of the Gauteng Consumer Affairs Act prescribes that the arrangement may be concluded at any point after an investigation has commenced but before a final order has been made by the court. Such an arrangement must be in writing and is subject to confirmation by the court in terms of section 21 of the Gauteng Consumer Affairs Act.¹²²

Once an investigation has been completed, and if an arrangement as contemplated above has not been entered into, the Consumer Protector may institute proceedings in the relevant consumer affairs court.¹²³ This may either be against a person who is alleged to be responsible for the unfair business practice, or generally with the view to prohibiting any business practice or a business practice that relates to a particular commodity or investment.¹²⁴ Where such proceedings have been instituted, the consumer affairs court may declare the business practice unlawful.¹²⁵ The power of the Consumer Protector to institute a general action, is another far-reaching, preventative and pro-active mechanism in place under the Gauteng Consumer Affairs Act.

The matter before the consumer affairs court may either: (i) be brought by the Consumer Protector instituting proceedings in terms of section 12; or (ii) be presented as an urgent matter by the office in terms of section 20; or (iii) be initiated by way of summons in the prescribed form and served on the relevant person (this includes service outside of the province).¹²⁶ Ordinarily, proceedings before the

¹²⁰ Ibid at s 11.

¹²¹ Ibid at s 11(1).

¹²² Ibid at s 11(2)(b) and (c).

¹²³ Ibid at s 12. See also Du Plessis (2016) 28 SA Merc LJ 147 at 152.

¹²⁴ Gauteng Consumer Affairs Act s 12(1)(a) and (b).

¹²⁵ Ibid at s 24.

¹²⁶ Ibid at s 18(1).

consumer affairs court are recorded¹²⁷ and are conducted in public, but may be conducted *in camera* in certain instances.¹²⁸ The office is responsible for prosecuting proceedings before the court and may be assisted by an attorney, advocate, or any person approved by the responsible member.¹²⁹ The procedure before the consumer affairs court is similar to proceedings before an ordinary court. However, the process itself appears to be faster than that in the ordinary courts. As Du Plessis submits, a matter that is not resolved by way of an arrangement generally proceeds to trial within a period of weeks.¹³⁰ The consumer affairs court has the power to summon witnesses and order the production of certain documents in terms of section 19 of the Gauteng Consumer Affairs Act.

Once the proceedings before the consumer affairs court have been concluded, it may make an order prohibiting the unfair business practice as contemplated in section 22 of the Gauteng Consumer Affairs Act. This order must be published in the *Government Gazette* and any other media (including newspapers, magazines, radio or television).¹³¹ Du Plessis correctly submits that the publication requirement ensures that consumers are not only afforded access to justice, but are also provided with access to information.¹³² It is submitted that the use of clear information-sharing mechanisms is a crucial component of consumer awareness, which indirectly facilitates the protection of consumers in business-to-consumer transactions.

Failure to comply with an order of the consumer affairs court is an offence under the Gauteng Consumer Affairs Act.¹³³ Any person who is convicted of an offence under section 30 (ie, contravention or non-compliance with a court order) is liable to a fine not exceeding R200 000, or to imprisonment for a period not exceeding five years, or

¹²⁷ Ibid at s 18(7).

¹²⁸ Ibid at s 18(3).

¹²⁹ Ibid at s 18(4).

¹³⁰ See generally Du Plessis (2008) 20 *SA Merc LJ* 74 at 76.

¹³¹ See s 22 of the Gauteng Consumer Affairs Act. The orders under s 22 are quite comprehensive and include, but are not limited to, ordering involved parties to dissolve the body concerned or sever any connection as may be necessary in order to discontinue or prevent the unfair business practice, terminate any agreement, refrain from using the advertising, applying schemes, or trading methods, or having any interest in business connected with unfair business practices, etc. See also Du Plessis (2016) 12 *SA Merc LJ* 147 at 155-156.

¹³² See generally Du Plessis (2008) 20 *SA Merc LJ* 74 at 78.

¹³³ Gauteng Consumer Affairs Act s 30.

to both imprisonment and a fine.¹³⁴ In respect of any other provision of the Act, such person shall be liable to a fine or imprisonment not exceeding five years, or both a fine and imprisonment.¹³⁵ The consumer affairs courts are regarded by the DTI as quasi-judicial in nature, and thus often have to refer the administration of punitive measures to magistrates' courts.¹³⁶ As mentioned above, however,¹³⁷ there has been a general reluctance by criminal courts to focus on consumer matters and this would, therefore, slow down a consumer's access to redress.

Section 25 of the Gauteng Consumer Affairs Act provides parties with an option to appeal to a specialised court established in terms of the national Consumer Affairs Act 71 of 1988. Given that the latter statute has been repealed by the CPA, as mentioned above, it may be prudent for the section to be amended to provide for an appeal process to the relevant bodies created by the CPA.¹³⁸ Nevertheless, the Gauteng Consumer Affairs Act appears, on the whole, to be a statute that is easy to follow and comprehend.

2.3.3 Self-regulation

In addition to the legislative framework, various industry-specific ombuds have been put in place to regulate various sectors of the economy that affect consumers.¹³⁹ At the outset, it is important to note that there is a distinction between a regulator and an ombud in that while the regulator sets the applicable rules and guidelines, an ombud interprets and applies these rules and guidelines to particular scenarios.¹⁴⁰ In South Africa, there are several functioning ombuds including: the short-term insurance ombud; the long-term insurance ombud; the motor industry ombud; the Financial Services (FAIS) ombud; the Advertising Standards Authority; the

¹³⁴ Ibid at s 31(a).

¹³⁵ Ibid at s 31(b). No capped amount for the fine is set out in respect of this provision.

¹³⁶ Draft Green Paper on the Consumer Policy Framework at 39.

¹³⁷ See the discussion under para 2.3.2.1(c) above in this chapter.

¹³⁸ See discussion under para 5.5 in Ch 5 below.

¹³⁹ For the sake of completeness it is worth noting that there are additional categories of ombud, including legislative ombuds, organisational ombuds, and international ombuds – industry ombuds are only one of these. See Melville (2010) 22 *SA Merc LJ* 50 at 51-53.

¹⁴⁰ Ibid at 56.

Consumer Goods and Services ombud; and the ombud for banking services.¹⁴¹ Certain of these ombuds have introduced industry-specific codes, which operate on a contractual basis between the ombud concerned and the relevant industry members.¹⁴² Before the enactment of the CPA, the Business Practices Committee – the predecessor of the CAFCOM – approved numerous industry-specific consumer codes, including codes in the areas of credit, debt recovery, advertising, vehicle recovery services, franchising, and time-share.¹⁴³ This endorsement of industry codes is a practice that has been carried through into the current consumer protection dispensation by the accreditation provisions of the CPA.¹⁴⁴ Although the overall efficacy of industry codes is questionable, they remain important for consumer protection as they regulate industry members and, in most instances, provide consumers with a first point of call to lodge complaints they may have regarding industry members.¹⁴⁵

It appears that the most effective industry body in this regard has been the Advertising Standards Authority. This is closely linked to the meaningful sanction the ASA is able to impose by withholding ‘advertising time and space’, in respect of its members.¹⁴⁶ However, the other industry bodies often do not have such powerful sanctions available to them and their codes have not been particularly effective in controlling abuses.¹⁴⁷ Woker nevertheless submits that “self-regulation is often more effective than government regulation because experts in the industry are able to identify genuine abuses far more readily than government officials and there is less control over legitimate activities”.¹⁴⁸ Woker’s submission also speaks to the consumer protection set-up in the United Kingdom, which makes use of specialised

¹⁴¹ For a comprehensive list of the ombuds see Ombudsmen in SA available at http://ombudsman.ombudsmen.co.za/find-an-ombudsman/index.php?option=com_content&view=article&id=150:consumer-protection-act&catid=38:consumer-alerts&Itemid=69 (accessed on: 20 April 2018); ASA available at <http://www.asasa.org.za/> (accessed on: 20 April 2018), CGSO available at <http://www.cgso.org.za/> (accessed on: 20 April 2018). See also Melville (2010) 22 *SA Merc LJ* 50 at 57-59.

¹⁴² For instance the ASA has a number of codes which bind its members, the consumer code is in the ASA Codes available at <http://www.asasa.org.za/codes/consumer-code> (accessed on: 20 April 2018). See also the CGSO Code.

¹⁴³ Woker (2010) 31 *Obiter* 217 at 221.

¹⁴⁴ See the discussion under para 3.6.2.1 in Ch 3 below.

¹⁴⁵ See Woker (2010) 31 *Obiter* 217 at 221.

¹⁴⁶ *Ibid* at 222 and Scott *Influence of the Consumer Protection Act on Promotional Activities* 17. *ASA v Herbex (Pty) Ltd* [2017] ZASCA 132 at para 13.

¹⁴⁷ Woker (2010) 31 *Obiter* 217 at 222.

¹⁴⁸ *Ibid*.

regulatory bodies to operate as enforcers under the Consumer Rights Act dispensation.¹⁴⁹

Nevertheless, there are benefits to and shortcomings in the enforcement of rights by way of ombuds as opposed to ordinary court systems. Some of the benefits that have been observed include their ability to avoid legal costs, their informal nature which results in their being non-threatening, non-confrontational and cooperative, access to expertise in the relevant industry to assess and assist in the resolution of disputes, as well as the speed at which disputes are resolved.¹⁵⁰ From an academic-legal perspective, one of the primary shortcomings of ombuds is that they often inhibit the development of legal precedent.¹⁵¹ The potential practical effect of such a limitation is that ombuds run the risk of dealing with the same matters over and over again, simply because there is no standard that guides the behaviour of the parties concerned. This could be addressed by requiring that ombuds keep records of their hearings, where possible, and publish relevant matters for the industry in their annual reports for distribution through relevant bodies or fora. Further disadvantages of self-regulation include the possibility of developing an industry body that is focused on the promotion of its own interests; the perception of bias due to its being funded by industry; the lack of resources due to unsustainable funding models; and the ineffective relief arising from non-compliance by industry members.¹⁵²

2.4 The need for the CPA

The ‘mischief’ that existed prior to the implementation of the CPA may be condensed in three main points. Firstly, there is often reluctance by consumers to pursue claims that are legitimate in their individual capacities as they are often under-resourced, lack technical expertise, and are strangers to the mechanics of the law.¹⁵³ Secondly, the absence of organised consumer organisations to stand up against highly organised and large business units, adds to the challenge posed to consumers when

¹⁴⁹ See the discussion under para 4.3.4.4(c) in Ch 4 below.

¹⁵⁰ See Melville (2010) 22 *SA Merc LJ* 50 at 54 and 56 and Woker (2016) 28 *SA Merc LJ* 21 at 33.

¹⁵¹ See Melville *ibid* at 54.

¹⁵² See also Woker (2016) 28 *SA Merc LJ* 21 at 33-34.

¹⁵³ Naudé & Eiselen *Commentary on the CPA* Introduction 10 at para 16.

attempting to enforce their rights against such institutions.¹⁵⁴ Thirdly, consumers seeking to enforce their rights are often faced with the absence of adequate enforcement mechanisms.¹⁵⁵ Although these key points may be viewed as an oversimplification of the problems faced by consumers, they do summarise the problems inherent in the enforcement aspect of consumer protection law.

Furthermore, rapid industrialisation and an increase in globalisation have had the effect that the common-law remedies as developed by the trading merchants, and premised on dealings between parties on an equal footing, no longer adequately protect consumers.¹⁵⁶ In addition, the fragmented legislative framework that sought to regulate aspects of consumer protection was equally inadequate and predicated on principles that predated our constitutional democracy.¹⁵⁷ Often consumers would not lodge complaints as: (i) they were often unaware of the rights and remedies available to them; and (ii) it was not always clear which bodies had jurisdiction to hear a particular consumer-related complaint.¹⁵⁸ Consequently, a more comprehensive legislative framework was indeed necessary to bring clarity for consumers, manufacturers, and suppliers alike, and to facilitate the full realisation of consumer rights.¹⁵⁹

2.5 Conclusion

Consumer protection as we know it today in South Africa, has evolved and been substantially shaped by our Constitution. It is evident that the consumer protection law mechanisms that preceded the CPA were not all geared towards ‘justice and tackling inequalities’, but rather towards providing solutions that were efficient and effective in the market.¹⁶⁰ As consumer protection grew as a distinct concept in South African law, there was a movement towards addressing justice and inequality,

¹⁵⁴ Ibid.

¹⁵⁵ Ibid at Introduction 11 at para 16.

¹⁵⁶ Ibid at Introduction 11 at para 17. See Woker (2010) 31 *Obiter* 217 at 227. See also Howells & Weatherill *Consumer Protection Law* 1-77.

¹⁵⁷ See generally Draft Green Paper on the Consumer Policy Framework at 37.

¹⁵⁸ Ibid.

¹⁵⁹ Stoop *Concept of Fairness* 30. See generally Naudé & Eiselen “Introduction and overview of the Consumer Protection Act” 19-20 at para 31. Woker (2010) 31 *Obiter* 217 at 230.

¹⁶⁰ This is particularly in light of legislation such as the Foodstuffs and Cosmetics Act, the Merchandise Marks Act, and the various self-regulatory bodies as discussed above in paras 2.3.2.1(b) and 2.3.3. See generally Scott “Enforcing consumer protection laws” at 537.

which is evident from statutes such as the Consumer Affairs Act and the resulting provincial statutes.

Although consumers still have recourse at common law, the common law has been left behind by industry development and is unable to offer effective solutions for consumers who are in disempowered positions. As highlighted by the DTI in its Green Paper,

in order to enhance the enforcement capacity of consumer protection laws, foster co-ordination and give consumers access to effective redress mechanisms, it is therefore necessary to put in place a streamlined and more effective institutional framework for consumer protection.¹⁶¹

Therefore, not only was there space for the enactment of the CPA, it was essential for the growth of the consumer protection law dispensation in South Africa and, most importantly, the realisation of consumer rights.

¹⁶¹ Draft Green Paper on the Consumer Policy Framework at 39.

CHAPTER 3

ENFORCEMENT MECHANISMS AFFORDED TO CONSUMERS IN TERMS OF THE CONSUMER PROTECTION ACT

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3.1 Introduction

The CPA has repealed much of the fragmented legislation that was in effect prior to its coming into operation and attempts to act as the umbrella legislation in the field of consumer protection law.¹⁶² From 2000 onwards, South Africa started to see the development of comprehensive consumer protection legislation in the form of the Electronic Communications and Transactions Act,¹⁶³ the National Credit Act,¹⁶⁴ and finally, the CPA.¹⁶⁵

The CPA appears to be multidisciplinary in nature, as it spans law, economics, and social welfare.¹⁶⁶ The CPA affords consumers certain fundamental rights that are listed in Parts A to I of its Chapter 2. These rights include the right of equality in the consumer market,¹⁶⁷ the consumer's right to privacy,¹⁶⁸ the consumer's right to choose,¹⁶⁹ the right to disclosure and information,¹⁷⁰ the right to fair and responsible marketing,¹⁷¹ the right to fair and honest dealing,¹⁷² the right to fair, just, and reasonable terms and conditions,¹⁷³ the right to fair value, good quality, and safety,¹⁷⁴ and the supplier's accountability to consumers.¹⁷⁵

Considering the wide definition of a 'consumer',¹⁷⁶ the application of the CPA is far-reaching and it regulates a wide range of matters affecting consumer relations, including the law of contract in general,¹⁷⁷ specific contracts,¹⁷⁸ franchising,¹⁷⁹ and

¹⁶² Van Heerden "Chapter 3: Protection of consumer's rights and consumers' voice" 68-3 at para 5.

¹⁶³ 25 of 2002. This Act provides for some protection in the area of online and electronic transacting.

¹⁶⁴ 34 of 2005, which now regulates the consumer credit environment.

¹⁶⁵ The CPA tries to cater holistically for consumer protection. See generally Naudé & Eiselen "Introduction and overview" Introduction-1 at para 2.

¹⁶⁶ See generally Van Eeden & Barnard *Consumer Protection Law* 1-5.

¹⁶⁷ Consumer Protection Act Part A Ch 2.

¹⁶⁸ Ibid Part B Ch 2.

¹⁶⁹ Ibid Part C Ch 2.

¹⁷⁰ Ibid Part D Ch 2.

¹⁷¹ Ibid Part E Ch 2.

¹⁷² Ibid Part F Ch 2.

¹⁷³ Ibid Part G Ch 2.

¹⁷⁴ Ibid Part H Ch 2.

¹⁷⁵ Part I under Ch 2 of the CPA.

¹⁷⁶ See discussion under para 3.2 of this chapter.

¹⁷⁷ Naudé "The impact of the CPA on the law of contract and on specific contracts" Contract-1 – Contract-14.

¹⁷⁸ Ibid.

¹⁷⁹ Woker "The impact of the CPA on franchising" Franchising-1 – Franchising-28.

marketing.¹⁸⁰ Section 5 of the CPA, however, carves out the statute’s specific field of application and provides for certain exclusions from its application.¹⁸¹

Van Heerden correctly submits that in order to allow consumers fully to enjoy their rights, it is essential that we have an “efficient system of redress that is not too costly or dilatory”.¹⁸² If this is not the case, the realisation of consumer rights remains merely a ‘lofty ideal’ that does not lead to the improvement of the life of a consumer.¹⁸³ The importance of access to redress was also emphasised in the matter of *Ngoza v Roque Quality Cars* where the National Consumer Tribunal (the Tribunal)¹⁸⁴ indicated that:

An extremely important aim of consumer protection legislation is access to justice. The improvement of access to justice is regarded as one of the ‘over-arching goals of consumer protection legislation’. In the policy document setting out the reasons why the South African legislature deemed it necessary to introduce consumer protection legislation, the drafters highlighted in particular the difficulties that South African consumers face when it comes to accessing justice. This includes having to approach the normal civil courts if suppliers fail to deal with legitimate complaints. Even when claims are sufficiently large to be of some serious concern to consumers, approaching the civil courts is notoriously expensive. Litigation is also very intimidating and most consumers have no idea about how to launch civil proceedings. Consumers who do take the time to complain often find that their complaints are ignored and they do not know who to turn to next. In the case of *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and another* the court pointed out that “the purposes of the CPA are to promote and advance the social and economic welfare of consumers in South Africa by, amongst others, providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and an accessible, consistent, harmonised, effective and efficient system of redress for consumers.”¹⁸⁵

This chapter critically examines the current consumer protection framework in South Africa, with a particular focus on the redress mechanisms introduced by the CPA. This critical examination is followed by a comparative analysis involving two foreign

¹⁸⁰ Van Heerden “The regulation of marketing under the CPA” Marketing-1 – Marketing-13.

¹⁸¹ See s 5(2) of the CPA. See discussion under para 3.2 of this chapter.

¹⁸² Van Heerden “Chapter 3: Protection of consumer’s rights and consumers’ voice” 68-1 at para 1.

¹⁸³ Ibid.

¹⁸⁴ See discussion below in para 3.6.4 of this chapter.

¹⁸⁵ *Ngoza v Roque Quality Cars* [2017] ZANCT 104 at para 26 (footnotes omitted).

jurisdictions: India and the United Kingdom.¹⁸⁶ Thereafter, having regard to the enforcement frameworks in place in these foreign jurisdictions, the successes and shortcomings of the current enforcement mechanisms under the CPA are highlighted and recommendations made on how the realisation of rights under the CPA can be improved.¹⁸⁷

3.2 Scope of application: A brief overview

There are some key definitions that ought to be considered for purposes of determining the scope of application of the CPA.¹⁸⁸ The first is the definition of a ‘consumer’. A ‘consumer’ is defined in section 1 of the CPA to refer to: (i) a person to whom goods or services are marketed in the supplier’s ordinary course of the business; (ii) a person who has entered into a transaction with a supplier in the ordinary course of such supplier’s business (save for instances where the transaction is exempt from the CPA’s application in terms of s 5(2) or (3) of the CPA);¹⁸⁹ (iii) a user of those goods or a recipient or beneficiary of services, regardless of whether such user, recipient, or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and (iv) a franchisee in terms of a franchise agreement, in accordance with section 5(6)(b) to (e) of the CPA.¹⁹⁰

¹⁸⁶ Chapter 4 below.

¹⁸⁷ Chapter 5 below.

¹⁸⁸ See generally Sharrock *Business Transactions Law* 590-595.

¹⁸⁹ See subsections as set out in n 218 under this paragraph.

¹⁹⁰ For the sake of completeness, s 5(6) of the CPA reads as follows:

- (6) For greater certainty, the following arrangements must be regarded as a transaction between a supplier and consumer, within the meaning of this Act:
 - (a) 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 other collectively, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity;
 - (b) a solicitation of offers to enter into a franchise agreement;
 - (c) an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;
 - (d) a franchise agreement or an agreement supplementary to a franchise agreement; and
 - (e) the supply of any goods or services to a franchisee in terms of a franchise agreement.

Related to the definition of a consumer is that of a ‘person’, which is defined to include a juristic person.¹⁹¹ A ‘juristic person’, in this regard, is defined to include: (i) a body corporate; (ii) a partnership or association; or (iii) a trust as defined in the Trust Property Control Act 57 of 1988.¹⁹² Another definition used to give meaning to the term ‘consumer’, and relevant in considering the scope of application of the CPA is the term ‘transaction’, which is defined as follows:

- (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 services at the direction of a consumer for consideration; or
 - (iii) the performance by, or at the direction of, that person of any service 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).¹⁹³

As Sharrock correctly points out, it is possible for a transaction as contemplated in the CPA to occur in multiple locations.¹⁹⁴ As such, even where an agreement is concluded outside of South Africa, should the delivery of such goods or services take place in South Africa, the transaction will be regarded as having occurred in South Africa and the CPA will apply.¹⁹⁵

Another relevant definition is that of ‘supplier’, which refers to “a person who markets any goods or services”.¹⁹⁶ In this regard, ‘market’, when used as a verb, is defined in the CPA to refer to the promotion or supply of any goods or services.¹⁹⁷ ‘Supply’, when used as a verb, is defined to include the sale, rental, exchange, and hire of goods in the ordinary course of business for consideration; or, in relation to services,

¹⁹¹ Section 1 of the CPA.

¹⁹² *Ibid.* In terms of s 5(2)(b) of the CPA, only juristic persons that are below the R2 million threshold (the current threshold set out in the Threshold Determination (GN 294 in GG 34181 of 1 April 2011) are considered as consumers for purposes of the CPA.

¹⁹³ Section 1 of the CPA. See n 190 above for the provisions of s 5(6) of the CPA.

¹⁹⁴ Sharrock *Business Transactions Law* 594.

¹⁹⁵ *Ibid.*

¹⁹⁶ The CPA s 1.

¹⁹⁷ *Ibid.*

refers to the sale or performance of services, or the granting of access to any premises, event, activity, or facility in the ordinary course of business for consideration.¹⁹⁸ For the sake of completeness, it is noted further that ‘supply chain’ refers collectively to all the suppliers who contribute to the ultimate supply of goods or services, either directly or indirectly, and includes a producer, an importer, a distributor, a retailer, or a service provider.¹⁹⁹ Importantly, suppliers who reside or whose places of business are located outside of South Africa, may still be caught by the application of the CPA as per the provisions of section 5(8)(a) of the CPA.²⁰⁰

The phrase ‘in the ordinary course of business’ is referred to in the definition of a ‘consumer’, as well as the definitions of ‘supply’ and ‘transaction’. However, this phrase is not defined in the CPA.²⁰¹ The use of this phrase may undoubtedly restrict the scope of application of the CPA. Questions around the interpretation of this phrase have also been raised by Jacobs, Stoop and Van Niekerk where they ask whether it can be said that

a private seller of a home sells it in the ordinary course of his/her business, and that such a seller is therefore a ‘retailer’ for purposes of that agreement? Or does ‘ordinary course of business’ require the seller to be in the business of selling homes, for example, a developer, before he/she will qualify as a retailer, if at all?²⁰²

Sharrock submits that there is room to argue that in order for the supply of goods and services to be in the ordinary course of business, there ought to be a certain degree of regularity if such a supply is to be considered ‘ordinary’ or ‘commonplace’.²⁰³ This argument is based on the definition of a ‘business’ as contemplated in the CPA where the term is defined to mean “the continual marketing of goods or services”, suggesting an activity that is repeated.²⁰⁴ However, Sharrock submits further that a wide interpretation of this phrase may be preferred for

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Section 5(8)(a) of the CPA reads as follows: “(8) The application of this Act in terms of subsections (1) to (7) extends to a matter irrespective of whether the supplier— (a) resides or has its principal office within or outside the Republic”.

²⁰¹ See also Sharrock *Business Transactions Law* 591.

²⁰² Jacob, Stoop & Van Niekerk (2010) 13 *PELJ* 302 at 375.

²⁰³ Sharrock *Business Transactions Law* 591.

²⁰⁴ Ibid.

purposes of protecting consumers – with the implication that even a ‘once-off’ transaction would be considered as being in the ordinary course of business.²⁰⁵

In the matter of *Doyle v Killeen and Others*,²⁰⁶ the Tribunal was of the view that an objective test ought be applied, and that the following considerations need to be taken into account when determining whether a person has acted ‘in the ordinary course of business’:

- (i) Whether the person has a registered business;
- (ii) The nature of the business that the person engages in;
- (iii) The nature of the goods normally sold by the person;
- (iv) The frequency with which the goods are sold by the person; and
- (v) Whether the person advertises or markets his goods or services.²⁰⁷

Given that no evidence or arguments were put before the Tribunal indicating that the party concerned had sold the property in the ordinary course of business; and, further, the available evidence indicated that the party concerned had sold her property as a once-off transaction (and was not in any way involved in the business of selling properties), the Tribunal found that the CPA did not apply to the sale of the property concerned.²⁰⁸ The Tribunal, therefore, interpreted this phrase narrowly.²⁰⁹

Although, in theory, there is arguably room for two schools of thought regarding the interpretation of this phrase – one that favours commercial certainty, and another that is particularly consumer-centric²¹⁰ – it is submitted that the former school of thought is to be preferred and is also aligned with one of the aims of the CPA, namely the promotion of fair business practices.²¹¹ Accordingly, the narrow interpretation applied by the Tribunal when considering this phrase is also preferred.

²⁰⁵ Ibid.

²⁰⁶ [2014] ZANCT 43.

²⁰⁷ *Doyle v Killeen and Others* [2014] ZANCT 43 at para 59. See also *Richter NO and Others v Schatheuna Boerdery CC* [2017] ZANHC 60 at para 60.

²⁰⁸ *Doyle v Killeen and Others* [2014] ZANCT 43 at para 60.

²⁰⁹ For a detailed discussion of interpretations of this phrase in the context of different statutes as well as in the *Doyle* case, see De Stadler “Purpose, policy and application of the Act” 5-17 at para 41.

²¹⁰ See generally *ibid* 5-17 – 5-18 at para 43.

²¹¹ Section 3(c) of the CPA.

Put into perspective, it would be unreasonable to expect Ms Radebe, who is registered as a full-time LLB student and decides to sell her textbooks at the end of her third year (in order to raise funds to purchase her final year textbooks), to be regarded as acting in the ‘ordinary course of business’. This could not have been the intention of the legislature. It may, however, be worthwhile for the legislature to consider including a definition for this phrase in the CPA for greater clarity.²¹²

Section 1 of the CPA proceeds to define ‘goods’ as:

- (a) anything marketed for human consumption;
- (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
- (c) any literature, music, photograph, motion picture, game, information, data software, code or other intangible product written or encoded on any medium or a licence to use any such intangible product;
- (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of ‘service’ in this section; and
- (e) gas, water and electricity.

It is worth noting that the term ‘used goods’ is also defined in the CPA and refers to goods previously supplied to a consumer, but does not extend to goods that have been returned to the supplier in accordance with any right of return provided for under the CPA.²¹³ However, this term is not used anywhere else in the CPA.²¹⁴ This appears to have been an oversight on the part of the legislature, and it is submitted that the failure by the legislature to use the term should not be taken to imply that second-hand goods do not fall within the scope of the CPA. This would undoubtedly be prejudicial to the vulnerable members of society to whom the CPA intends to extend its protection as was confirmed in the matter of *Vousvoukis v Queen Ace CC t/a Ace Motors*.²¹⁵ For legal and commercial certainty on this point, it may be useful

²¹² See recommendation under para 5.4.2(d) of Ch 5 below.

²¹³ Section 1 of the CPA.

²¹⁴ See Sharrock *Business Transactions Law* 593.

²¹⁵ See *Vousvoukis v Queen Ace CC t/a Ace Motors* 2016 (3) SA 188 (ECG) at paras 77-93. See also the discussion of this decision by Sharrock *ibid* and Van Eeden & Barnard *Consumer Protection Law* 360.

for the legislature to consider including the term ‘used goods’ in the definition of goods.²¹⁶

Lastly, ‘services’ are defined as including but not being 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 that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002);
- (c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service—
 - (i) constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); or
 - (ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), or the Short-term Insurance Act, 1998 (Act No. 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

²¹⁶ See recommendation under para 5.4.2(d) of Ch 5 below.

participates in, supervises or engages directly or indirectly in the service.²¹⁷

The key definitions set out above indicate that the scope of application of the CPA is intended to be wide, subject to the qualifications to its application in terms of section 5. In this regard, section 5 provides that the CPA applies to every transaction that takes place within South Africa, unless that transaction is exempted in terms of subsections (2), (3) or (4).²¹⁸ The CPA also applies to the promotion or supply of any goods or services within South Africa, unless such goods or services could not reasonably be the subject of a transaction to which the CPA applies, or the promotion of those goods or services has been exempted in terms of subsections (3) and (4).²¹⁹ Furthermore, the CPA applies to goods or services that are supplied or performed in terms of a transaction to which it applies (irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services).²²⁰ Finally, the CPA

²¹⁷ Section 1 of the CPA. See n 190 above for the provisions of s 5(6)(b)-(e) of the CPA.

²¹⁸ See s 5(1)(a) of the CPA. In this regard, subsection (2) provides that:

- (2) This Act does not apply to any transaction—
- (a) in terms of which goods or services are promoted or supplied to the State;
 - (b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6;
 - (c) if the transaction falls within an exemption granted by the Minister in terms of subsections (3) and (4);
 - (d) that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act;
 - (e) pertaining to services to be supplied under an employment contract;
 - (f) giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (Act No. 66 of 1995); or
 - (g) giving effect to a collective agreement as defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995).

Subsection (3) reads as follows:

“A regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of this Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of—

- (a) any other national legislation; or
- (b) any treaty, international law, convention or protocol.

Subsection (4) reads as follows:

“The Minister, by notice in the *Gazette* after receiving the advice of the Commission, may grant an exemption contemplated in subsection (3)—

- (a) only to the extent that the relevant regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and
- (b) subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act.

²¹⁹ Section 5(1)(b) of the CPA. See n 218 above for reference to relevant subsections.

²²⁰ Section 5(1)(c) of the CPA.

applies to goods that are supplied in terms of a transaction that is exempt from the application of the CPA, but only to the extent provided for in subsection (5).²²¹

3.3 The realisation of consumer rights

The realisation of consumer rights in terms of the CPA is addressed in: (i) Chapter 3, which provides for the protection of consumer rights and the consumer's voice;²²² (ii) Chapter 5, which provides for national consumer protection institutions;²²³ and (iii) Chapter 6, which provides for the enforcement of the CPA.²²⁴ Various sections from these chapters are critically discussed in this chapter in order to establish the enforcement mechanisms that have been introduced by the CPA, and whether these mechanisms are effective and adequate.

Section 68 of the CPA includes a protection mechanism which seeks to ensure that consumers who raise their voices, or seek to assert their rights, are not penalised by the supplier for doing so.²²⁵ This is a very important provision because consumers

²²¹ Section 5(1)(d) of the CPA. In this respect, subsection (5) of the CPA reads as follows:

If any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of this Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 60 and 61.

²²² Chapter 3 of the CPA comprises the following parts: Part A (Consumer's right to be heard and obtain redress); Part B (Commission investigations); Part C (Redress by court); and Part D (Civil society support for consumer's rights).

²²³ Chapter 5 of the CPA comprises the following parts: Part A (National and provincial co-operation); Part B (Establishment of the Commission); and Part C (Functions of the Commission).

²²⁴ Chapter 6 of the CPA comprises the following parts: Part A (Enforcement by Commission); Part B (Powers in support of investigation); Part C (Offences and penalties); and Part D (Miscellaneous matters).

²²⁵ Section 68(1) of the CPA reads as follows:

- (1) If a consumer has exercised, asserted or sought to uphold any right set out in this Act or in an agreement or transaction with a supplier, the supplier must not, in response—
 - (a) discriminate directly or indirectly against that consumer, compared to the supplier's treatment of any other consumer who has not exercised, asserted or sought to uphold such a right;
 - (b) penalise the consumer;
 - (c) alter, or propose to alter, the terms or conditions of a transaction or agreement with the consumer, to the detriment of the consumer; or
 - (d) take any action to accelerate, enforce, suspend or terminate an agreement with the consumer.
- (2) If an agreement or any provision of an agreement is, in terms of this Act, declared to be void, or is severed from the agreement in terms of section 52(4), the supplier who is a party to that agreement must not, in response to that decision—
 - (a) directly or indirectly penalise another party to that agreement;
 - (b) alter the terms or conditions of any other transaction or agreement with another party to the impugned agreement, except to the extent necessary to correct a similarly unlawful provision; or
 - (c) take any action to accelerate, enforce, suspend or terminate another agreement with another party to the impugned agreement.

should not be afraid to voice their concerns for fear of being subjected to prejudicial conduct for doing so.²²⁶

Section 4 of the CPA is titled ‘The realisation of consumer rights’ and provides for a closed list of persons who have *locus standi* to approach the forums established in terms of, and empowered by, the CPA for redress.²²⁷ In this regard, section 4(1) of the CPA provides that the forums established for the enforcement of consumer rights, as contemplated in the CPA, may be approached by: (i) persons acting on their own behalf;²²⁸ (ii) authorised persons acting on behalf of another person who cannot act in her own name;²²⁹ (iii) a person acting as a member or in the interest of an affected group;²³⁰ (iv) persons acting in the public interest with either the leave of the Tribunal or the court;²³¹ and (v) an association acting in the interest of its own members.²³² The provisions of the CPA are strongly reminiscent of section 38 of the Constitution in so far as *locus standi* is concerned.²³³ Van Heerden submits that the

²²⁶ See Van Heerden “Chapter 3: Protection of consumer’s rights and consumers’ voice” 68-7 at para 1.

²²⁷ Van Heerden & Barnard (2011) 6 *JICLT* 131. See also De Stadler & Du Plessis “Chapter 1: Interpretation, purpose and application” 4-3 at para 2.

²²⁸ Section 4(1)(a) of the CPA. By way of example, this would include Ms Radebe who has purchased a defective motor vehicle from a dealership and seeks to enforce her implied warranty of quality in terms of s 56 of the CPA within six months of the purchase.

²²⁹ Section 4(1)(b) of the CPA. By way of example, this would include an instance where Ms Radebe’s 16-year old minor son, Bheki Radebe, purchased and consumed a bunnychow containing processed meat, in the form of polony and russians, which was contaminated with the listeria bacteria and resulted in his hospitalisation for listeriosis. In this regard, Ms Radebe would have the *locus standi* to approach the relevant forum to enforce her son’s right to claim on the basis of the s 61 provision for liability in respect of damage caused by goods (which specifies that harm includes the illness or death of any natural person, see s 61(5)(a) and (b) of the CPA). Ms Radebe, as Bheki’s mother, will be able to institute proceedings on Bheki’s behalf against the producer, importer, distributor, or retailer of the contaminated processed meat. Ms Radebe would, however, be required to apply to the Tribunal in terms of rule 4A of the Tribunal Rules for leave to appear in this representative capacity.

²³⁰ Section 4(1)(c) of the CPA. By way of example, this would include an instance where persons who, like Bheki Radebe (see illustrative example n 229 above), have incurred medical expenses as a result of being hospitalised for the listeriosis infection. Persons in this position may organise themselves to institute proceedings as a group before the relevant consumer protection forum, in order to establish that a prohibited practice has occurred and that the relevant producer, importer, distributor, or retailer is liable. These persons may also seek to obtain a certificate from the Tribunal, in terms of s 115 of the CPA, in order to pursue a claim for damages. Similarly, the group would need to make the necessary application in terms of rule 4A of the Tribunal Rules.

²³¹ Section 4(1)(d) of the CPA. By way of example, a consumer protection advocacy group may institute proceedings, based on s 61 of the CPA, on behalf of all the families who have lost their family members to the listeriosis outbreak and move for a damages claim. This would also require a rule 4A-application in terms of the Tribunal Rules.

²³² Section 4(1)(e) of the CPA. By way of example, this would include a voluntary association, such as a church, which collects food parcels for indigent members of its congregation. Where part of their food parcels include processed meat infected with the listeria bacteria, and result in a number of the congregants who had consumed such meat falling ill or dying, the church, as a voluntary association, would be able to claim on behalf of its affected members on the basis of s 61 and also move for a damages claim. Once again, this would require a rule-4A application in terms of the Tribunal Rules.

²³³ Section 38 of the Constitution is headed ‘Enforcement of rights’ and provides that the following persons may approach a competent court with regard to an alleged infringement of a right in the Bill of Rights:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;

rationale behind the wide *locus standi* provisions, is to ensure that access to redress is not restricted, particularly as regards low-income consumers who would not be able to approach the courts without the group-litigation mechanisms contemplated in section 4(1) of the CPA.²³⁴

Part A of Chapter 2 of the CPA (which protects the consumer's right equality in the consumer market) is a unique and original provision that points to a further alignment of the CPA with the Constitution.²³⁵ Barnard and Kok highlight, and correctly so, that this is

the first time in the history of consumer protection law in South Africa that the right to equality entrenched in section 9 of the Bill of Rights... is now also a specific fundamental consumer right available to consumers in terms of the CPA.²³⁶

The uniqueness of Chapter 2, Part A of the CPA is carried through to its enforcement mechanisms in that the Equality Court exercises exclusive jurisdiction in respect of matters falling within this Part.²³⁷ This forum is discussed in further detail below.²³⁸

3.4 Consumer advocacy

The CPA makes provision for accredited consumer protection groups,²³⁹ with which the National Consumer Commission (the Commission)²⁴⁰ may cooperate in terms of:

(i) providing consumer advice and education activities and consumer-related

-
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
 - (d) anyone acting in the public interest; and
 - (e) an association acting in the interest of its members.

²³⁴ Van Heerden "Chapter 3: Protection of consumer's rights and consumers' voice" 69-3 at para 4.

²³⁵ See para 2.2.3 of Ch 2 above.

²³⁶ Barnard & Kok (2015) 78 *THRHR* 1 at 11.

²³⁷ See s 10(1) of the CPA. See also Barnard & Kok *ibid* at 2 and 10. Section 16 of Promotion of Equality and Prevention of Unfair Discrimination Act (read together with s 31 thereof) provides that every High Court is an Equality Court for the area of its jurisdiction and further that the Minister of Justice and Constitutional Development must designate one or more magistrates' courts in an administrative region as Equality Courts.

²³⁸ See the discussion under para 3.6.5.2 of this chapter.

²³⁹ Section 1 of the CPA provides that an 'accredited consumer protection group' means a consumer protection group that has been accredited by the Commission in terms of s 78 for the purposes contemplated in that section or elsewhere in the statute. Related hereto is the definition of 'consumer protection group', which refers to an entity that promotes the interests or protection of consumers as contemplated in s 77 of the CPA.

²⁴⁰ Discussed in further detail in para 3.6.3 of this chapter.

publications;²⁴¹ (ii) undertaking research, market monitoring, surveillance, and reporting;²⁴² (iii) promoting consumer rights and the advocacy of consumer interests;²⁴³ (iv) representing consumers in court, either specifically or generally;²⁴⁴ (v) providing alternative dispute resolution through mediation or conciliation;²⁴⁵ and (vi) participating in national and international associations, conferences, or forums concerned with consumer protection matters.²⁴⁶

The CPA caters for the accreditation of consumer protection groups and gives the Commission the power to accredit such groups where the person or association concerned, promotes the interests of all or a particular category of consumers,²⁴⁷ is committed to realising the purposes of the Act,²⁴⁸ and is involved in actions to promote and advance the consumer interests of vulnerable persons.²⁴⁹ Accredited consumer protection groups are also authorised to initiate actions in order to protect the interests of consumers, and to intervene in any matter before any forum contemplated in the Act, if the interests of the consumer are not adequately represented in that forum.²⁵⁰

Where it is necessary to further the purposes of the Act, it is within the discretion of the Commission to impose reasonable conditions on the accreditation of consumer protection groups.²⁵¹ The CPA envisages consumer protection groups as fulfilling a very important function in civil society. This is emphasised by the provisions of section 77 which allow for the Commission's support in respect of specified activities carried out by consumer protection groups.²⁵² There is a further duty on the

²⁴¹ The CPA s 77(a).

²⁴² Ibid s77(b).

²⁴³ Ibid s 77(c).

²⁴⁴ Ibid s 77(d).

²⁴⁵ Ibid s 77(e).

²⁴⁶ Ibid s 77(f).

²⁴⁷ Ibid s 78(3)(a).

²⁴⁸ Ibid s 78(3)(b).

²⁴⁹ Ibid s 78(3)(c).

²⁵⁰ Ibid s 78(1).

²⁵¹ Ibid s 78(4).

²⁵² See generally s 77 of the CPA, which has been discussed earlier in this paragraph.

Commission to monitor the effectiveness of any accredited consumer protection group in light of the purposes and policies of the CPA.²⁵³

The Minister²⁵⁴ is authorised to prescribe standards, procedures and related matters for the Commission to follow when assessing whether an applicant for accreditation meets the requirements of section 78 of the CPA.²⁵⁵ In this regard, the Minister²⁵⁶ has prescribed certain standards and procedures regarding accredited consumer protection groups in the CPA Regulations.²⁵⁷ These Regulations provide that once a consumer protection group has been accredited, the Commission must, inter alia, add the name of the consumer protection group to its website in a list of all accredited consumer protection groups.²⁵⁸ At the time of submitting this thesis, no such list was available on the Commission’s website, and it thus appears as if no consumer protection groups have been accredited at this stage.²⁵⁹

3.5 Enforcement procedure under the CPA

As mentioned above, Chapter 3 of the CPA makes provision for the protection of consumer rights and the consumers’ voice.²⁶⁰ Section 69 of the CPA falls within the ambit of Chapter 3 and provides for the enforcement of rights by consumers.²⁶¹ In this regard, persons with *locus standi*, as contemplated in section 4(1) of the CPA, may seek to enforce their rights in terms of the CPA or under a transaction or agreement.²⁶² This may be done by:

- (a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;
- (b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;

²⁵³ The CPA s 78(5)(a).

²⁵⁴ The term ‘Minister’ is defined in the s1 of the CPA as “the member of cabinet responsible for consumer protection matters”, which is currently the Minister of Trade and Industry.

²⁵⁵ The CPA s 78(6).

²⁵⁶ See n 254 above.

²⁵⁷ These standards have been published in reg 38 of the CPA Regulations.

²⁵⁸ See reg 38(12) of the CPA Regulations.

²⁵⁹ See accredited consumer protection group search results on the Commission’s website available at <http://www.thecc.gov.za/search/node/accredited%20consumer%20protection%20group> (accessed on: 20 April 2018).

²⁶⁰ See reference above in para 3.3 of this chapter.

²⁶¹ See also Van Heerden & Barnard (2011) 6 *JICLT* 131 at 132-133.

²⁶² See s 69 of the CPA. *Locus standi* is elaborated on above in para 3.3 of this chapter.

- (c) if the matter does not concern a supplier contemplated in paragraph (b)—
 - (i) referring the matter to the applicable industry ombud, accredited in terms of section 82(6), if the supplier is subject to any such ombud; or
 - (ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;
 - (iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or
 - (iv) filing a complaint with the Commission in accordance with section 71; or
- (d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.²⁶³

This section is aimed at setting out the redress avenues available to consumers. The nature and the powers of the bodies contemplated in section 69 are elaborated on below.²⁶⁴ However, in respect of the process a consumer should follow in order to seek redress under the CPA, section 69, read alone, does not propound a clear hierarchy. In this regard, Koekemoer correctly highlights that it will not be possible for a consumer to institute proceedings before a civil court, either: (i) while an appeal or application for review in respect of an order made by the Tribunal is pending (unless the court orders otherwise);²⁶⁵ or (ii) where all the other remedies available to the consumer have not been exhausted.²⁶⁶ It appears that most authors are *ad idem* that the implied hierarchy for redress in terms of the CPA is that the sectoral regulators are approached first, followed by the consumer courts and provincial authorities, then the Commission, the Tribunal, and, as a matter of last resort, the ordinary courts.²⁶⁷

²⁶³ Section 69 of the CPA. It is worth noting that s 1 of the CPA provides that a ‘court’ does not include a ‘consumer court’, which is particularly relevant with regard to s 69(d).

²⁶⁴ See discussion below under para 3.6 of this chapter.

²⁶⁵ Section 115(4) of the CPA.

²⁶⁶ Section 69(d) of the CPA. Koekemoer (2017) 40 *JCP* 419 at 423. See generally Du Plessis (2008) 20 *SA Merc LJ* 74 at 80. See also Du Plessis (2016) 28 *SA Merc LJ* 147 at 148.

²⁶⁷ See Mupangavanhu (2012) 15 *PELJ* 320 at 336. Van Heerden “Chapter 3: Protection of consumer’s rights and consumers’ voice” 69-2 at para 3.

Interestingly, Melville indicates that the enforcement steps prescribed by section 69 of the CPA do not require consumers first to approach the supplier before reaching out to any of the forums contemplated in the Act.²⁶⁸ In the same vein, Mupangavanhu submits that most businesses have internal complaint handling measures in place which consumers can use to resolve disputes, as consumers often prefer quick solutions to their issues, as opposed to enforcing their rights through enforcement bodies. Indeed, an attempt first to resolve the matter with the supplier could be beneficial to the consumer engaging with a cooperative supplier, as the dispute may then be resolved expeditiously and without incurring significant costs. In this regard, the Consumer Goods and Services Ombud (the CGSO), an accredited industry ombud, requires consumers first to go through the supplier's internal complaints handling procedure, before the CGSO attempts to resolve the matter.²⁶⁹ However, where the consumer is engaging with a recalcitrant supplier (and there are many such suppliers),²⁷⁰ such a requirement may unnecessarily delay a consumer's access to redress. Accordingly, it is submitted that it may not be beneficial to the consumer for the legislature to revise section 69 to factor in such an internal complaints handling process – this is a step best left for inclusion by the ombuds.²⁷¹

An interesting question arises as to whether the restriction imposed by section 69(d) is an undue infringement on a consumer's right to access the courts as contemplated in section 34 of the Constitution.²⁷² In this regard, section 69 implies that a consumer would not even have the opportunity to approach the small claims court to resolve a dispute, which may be perceived as an undue limitation on a consumer's constitutional right to access courts.²⁷³ Mupangavanhu submits that this "denial of consumers' access to redress or justice through the courts is an unintended

²⁶⁸ Melville *Consumer Protection Act* 126.

²⁶⁹ See discussion under para 3.6.2.1.1 below.

²⁷⁰ Some recent cases which display the behaviour of recalcitrant suppliers include: *Commission v Western Car Sales* [2017] ZANCT 102; *Ngoza v Roque Quality Cars* [2017] ZANCT 104; and *Perumal v Big Boy Scooters (SA Motorcycles (Pty) Ltd)* [2017] ZANCT 117.

²⁷¹ In any event, there are measures in the CPA that filter out frivolous and vexatious claims – see s 72(1)(a)(i) of the CPA which provides that the Commission may issue a notice of non-referral for a frivolous and vexatious application.

²⁷² Section 34 reads as follows: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." See also See Van Heerden "Chapter 3: Protection of consumer's rights and consumers' voice" 69-16 – 69-20.

²⁷³ See Mupangavanhu (2012) 15 *PELJ* 320 at 336 and Van Heerden *ibid* 69-17 at para 27.

consequence of the desire expressed in the Act to ensure that the consumer has access to quick effective and efficient redress of disputes”.²⁷⁴ It is submitted in this regard, that bodies such as the consumer courts and the Tribunal would constitute “independent and impartial tribunal(s) or forum(s)” which give effect to a consumer’s right to have her dispute resolved in a fair public hearing by application of law (ie, the relevant provincial or national legislation). This suggests that section 69 can be interpreted to give effect to section 34 of the Constitution; and, accordingly, would not necessarily constitute a limitation on this right as a consumer is not precluded by section 69 from approaching a consumer court or the Tribunal, as the case may be, for the resolution of her dispute.

Koekemoer raises a further interesting question as to whether a consumer would be able to approach the ordinary courts as an initial complaint forum, where the matter is intended to be referred to court-annexed mediation.²⁷⁵ Van Heerden also raises important questions with regard to certain instances where the courts may have exclusive jurisdiction, such as in matters concerning claims for damages stemming from prohibited conduct,²⁷⁶ as well as the courts’ powers in respect of fair and just conduct, terms, and conditions.²⁷⁷ These instances of exclusive jurisdiction certainly pose challenges in so far as the current wording of section 69 is concerned. Sharrock submits, on the basis of a reading of section 51(a) and (b), that, in instances where the matter in dispute is an alleged contravention of sections 40 (unconscionable conduct), 41 (false representations), or 48 (unfair terms), it appears that a consumer is permitted to approach the court where the remedies provided for by the CPA “are not sufficient to correct the relevant prohibited conduct or unfairness”.²⁷⁸ This interpretation accords with section 4(3) of the CPA.²⁷⁹ However, from a practical perspective, it is unclear whether the consumer must first exhaust the section 69 ‘extra-judicial remedies’ in order to come to a finding that the CPA remedies are inadequate, or whether this may be inferred by virtue of the prohibited

²⁷⁴ Ibid.

²⁷⁵ Koekemoer (2017) 40 *JCP* 419 at 438.

²⁷⁶ See s115 of the CPA, regarding the certificate required to confirm the existence of prohibited conduct. Van Heerden “Chapter 3: Protection of consumer’s rights and consumers’ voice” 69-19 at para 31.

²⁷⁷ See s 52 of the CPA. Van Heerden *ibid* 69-17 at para 28. See also Naudé (2010) 127 *SA Merc LJ* 515 at 525.

²⁷⁸ Sharrock *Business Transactions Law* 637.

²⁷⁹ See para 3.8.2 of this chapter for the provisions of s 4(3) of the CPA (at n 766).

conduct falling within these sections. A legislative amendment to section 69 would, therefore, be preferable for commercial certainty in this regard.²⁸⁰

With respect to the implied hierarchy of section 69 of the CPA, Van Heerden submits, with merit, that the other sections in the CPA ought to be read together with section 69 in order to determine the steps a consumer seeking redress ought to follow.²⁸¹ In this regard, the enforcement steps set out in section 69, should be read together with sections 70-78 and 83-118 of the CPA.²⁸² Van Heerden submits further that section 4(3) should be used as an interpretative aid for section 69, and therefore that, where it would be most expeditious and cost-effective for the consumer to make use of the small claims court as a first point of call – for instance, the ADR agents set out in section 69(a) to (c) need not necessarily be a precursor.²⁸³

The implied hierarchy applicable from a reading of section 69 of the CPA was confirmed by the High Court in the matter of *Joroy 4440 CC t/a Ubuntu Procurement v Potgieter NO and Another*.²⁸⁴ In determining whether a matter could be brought before the ordinary courts before the other remedies provided for in section 69(a) to (c) had been exhausted, the court in *Joroy* was of the view that the meaning of section 69(d) is clear and unambiguous and it was therefore unnecessary to venture into the rules of interpretation to determine its meaning.²⁸⁵ The court held as follows:

It is specifically stated that the consumer may approach the court *if* all the aforementioned avenues of redress have been exhausted. The legislature was very specific in prescribing the redress that a customer has in terms of this section.²⁸⁶

It is worth noting, at this stage, that the Constitutional Court has pronounced more than once – in the labour law context – that where a specialised framework has been created for purposes of resolving a dispute, the parties must, as a general rule, first

²⁸⁰ See discussion under para 5.5 in Ch 5 below.

²⁸¹ Van Heerden “Chapter 3: Protection of consumer’s rights and consumers’ voice” 69-2 at para 1.

²⁸² *Ibid* at 69-2 at para 2. See also Sharrock *Business Transactions Law* 637-641.

²⁸³ Van Heerden *ibid* at 69-19 to 69-20.

²⁸⁴ 2016 (3) SA 465 (FB). See also *Richter NO and Others v Schatheuna Boerdery CC* [2017] ZANCHO 60 at para 55.

²⁸⁵ *Joroy 4440 CC t/a Ubuntu Procurement v Potgieter NO and Another* at para 8.

²⁸⁶ *Ibid* (original emphasis). See also Sharrock *Business Transactions Law* 637.

exhaust the remedies provided for under that framework.²⁸⁷ This reasoning of the Constitutional Court, in matters such as *NEHAWU* and *Chirwa*, can be applied equally in the consumer protection law context, as the intention is not to deprive consumers of their right to access redress, but rather to ensure that consumers are provided with expedient, cost-effective and meaningful redress in respect of their disputes.²⁸⁸ Furthermore, section 2(10) of the CPA makes it clear that no provision in the CPA must be interpreted as excluding the application of the common law. As such, a consumer is also entitled to pursue her ordinary common-law remedies with the effect that the procedure prescribed for redress in the CPA will not apply and the consumer will be entitled to approach the ordinary courts directly.²⁸⁹

On the whole, the challenges highlighted in the above discussion indicate that it would be helpful for the section 69 procedure to be set out in clearer terms.²⁹⁰

3.6 Enforcement bodies contemplated by the CPA to facilitate the realisation of consumer rights

3.6.1 Introduction

An obligation is placed on the courts to develop the common law where necessary, in order “to improve the realisation and enjoyment of consumer rights” in general, and particularly for disadvantaged persons contemplated in section 3(1)(b) of the CPA.²⁹¹ There is a further obligation on both the courts and the Tribunal to promote

²⁸⁷ See generally *NEHAWU v UCT* 2003 (3) SA 1 (CC) and *Chirwa v Transnet Limited* 2008 (4) SA 367 (CC). See also *Joroy 4440 CC t/a Ubuntu Procurement v Potgieter NO and Another* at para 10 and *Ngoza v Roque Quality Cars* [2017] ZANCT 104 at para 31.

²⁸⁸ See Mupangavanhu (2012) 15 *PELJ* 320 at 322.

²⁸⁹ Van Heerden “Chapter 3: Protection of consumer’s rights and consumers’ voice” 68-5 at para 11. See also Sharrock *Business Transactions Law* 637.

²⁹⁰ See Ch 5 below.

²⁹¹ See s 4(2) of the CPA. Section 3(1)(b) of the Act provides as follows:

- (1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—
- (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—
 - (i) who are low-income persons or persons comprising low-income communities;
 - (ii) who live in remote, isolated or low-density population areas or communities;
 - (iii) who are minors, seniors or other similarly vulnerable consumers; or
 - (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy,

the spirit and purpose of the CPA.²⁹² Importantly, the courts and the Tribunal are afforded wide discretionary powers when making an order, and may make any innovative orders to ensure that practical effect is given to the consumer's right to access redress as contemplated in the CPA.²⁹³

In so far as the interpretation of the CPA gives effect to the realisation of consumer rights, sections 4(3) and 4(4) of the CPA provide that where a provision of the CPA or a standard form contract or document is ambiguous, the interpretation that best promotes the purposes of the CPA, and will result in the general realisation of consumer rights, should be preferred by the courts or Tribunal. An analysis of the enforcement bodies that are intended to facilitate the realisation of consumer rights follows.

3.6.2 Alternative dispute resolution agents

At the outset, the purpose of alternative dispute resolution as a concept should be briefly discussed. The term 'alternative dispute resolution' (ADR) is not defined in the CPA, but is generally accepted to refer to the resolution of disputes through the use of mediation, conciliation, or arbitration. Generally, ADR is perceived to be more cost-effective (compared to the resolution of disputes through the traditional courts) with the added advantage of being confidential.²⁹⁴ Mupangvanhu submits in this regard, that ADR is 'relatively affordable', which is empowering for consumers as it increases their access to redress and justice.²⁹⁵

Woker submits, with merit, that the aim of ADR is to "provide a bridge between no action at all" on the one hand, and "complicated court procedures" on the other.²⁹⁶ Broadly speaking, mediation or conciliation refer to a process in terms of which a

vision impairment or limited fluency in the language in which the representation is produced, published or presented.

²⁹² Section 4(2)(b)(i) of the CPA.

²⁹³ Section 4(2)(b)(ii) of the CPA.

²⁹⁴ Pillay-Shaik P & Mkiva C "Litigation and enforcement in South Africa: overview" (2015) *Thomson Reuters: Practical law 1* at para 30 available at [https://uk.practicallaw.thomsonreuters.com/0-502-0205?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/0-502-0205?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (accessed on: 20 April 2018).

²⁹⁵ Mupangvanhu (2012) 15 *PELJ* 320 at 329.

²⁹⁶ See also Woker (2016) 28 *SA Merc LJ* 21 at 26.

third party, who is acceptable to all parties to the dispute, assists in bringing the parties to workable solution.²⁹⁷ The mediator generally has no decision-making powers and can thus not impose binding decisions on the parties.²⁹⁸ Arbitration, on the other hand, refers to an adjudication process based on agreement between parties to a dispute, in terms of which the dispute is referred to an independent arbitrator for final determination, subject to further terms agreed to between the parties.²⁹⁹ That said, Woker highlights that the European Commission has cautioned against being pre-occupied with pinning exact definitions in respect of the meaning of ADR and its various forms, when the focus should be on putting in place processes that are accessible to consumers and easy for them to use (as consumers merely want solutions).³⁰⁰ It is submitted, nonetheless, that a clear legal framework with clear definitions may assist those tasked with facilitating the realisation of consumer rights.

Section 70(1) of the CPA provides that an ADR agent includes: (i) an ombud with jurisdiction to hear a matter; (ii) an industry ombud accredited in terms of section 82(6); (iii) any other person or entity providing conciliation, mediation or arbitration services with the view to assisting in the resolution of consumer disputes; and (iv) a relevant provincial consumer court. Each of these ADR agents is discussed below in so far as they are relevant.

3.6.2.1 Ombuds

A distinction should be drawn between an ombud with jurisdiction, and an industry ombud.³⁰¹ In this regard, an ‘ombud with jurisdiction’ refers to an ombud whose jurisdiction over an agreement or transaction is created by statute (also referred to

²⁹⁷ See Pillay-Shaik & Mkiva “Litigation and enforcement in South Africa: overview” (2015) *Thomson Reuters: Practical law Practical 1* at para 30 available at [https://uk.practicallaw.thomsonreuters.com/0-502-0205?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/0-502-0205?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (accessed on: 20 April 2018). See also Tokisa Dispute Settlement website available at <https://tokiso.co.za/> (accessed on: 20 April 2018).

²⁹⁸ See Pillay-Shaik & Mkiva *ibid.*

²⁹⁹ *Ibid.* See also AFSA arbitration and mediation page available at <http://www.arbitration.co.za/pages/about.aspx> (accessed on: 20 April 2018) and Tokisa Dispute Settlement website available at <https://tokiso.co.za/> (accessed on: 20 April 2018).

³⁰⁰ Woker (2016) 28 *SA Merc LJ* 21 at 27 with reference to the 2005 Report by the European Commission.

³⁰¹ Section 70(1)(a) and (b) of the CPA.

as a statutory ombud).³⁰² On the other hand, an ‘industry ombud’ is not defined in the CPA but generally refers to an ombud-scheme that is not regulated by statute but is self-regulated by a particular industry.³⁰³ Ombuds with jurisdiction or statutory ombuds will not be considered further in this thesis given that their jurisdiction is based on a separate statute and they therefore fall outside of the scope of this thesis.

The CPA endorses self-regulation indirectly as a part of its legislative scheme.³⁰⁴ Self-regulation arises when an industry takes responsibility for its own regulation by establishing its own rules and regulating its dispute resolution processes.³⁰⁵ The advantages and disadvantages of a self-regulatory scheme have been discussed in Chapter 2, and are not considered here,³⁰⁶ save to mention that the disadvantages of self-regulation necessitated the CPA’s ‘external supervision and control’ in the hope of reducing the challenges it presents whilst preserving its benefits.³⁰⁷ Accordingly, the CPA indirectly endorses voluntary industry codes³⁰⁸ and makes provision for, inter alia, the accreditation of the schemes.³⁰⁹ An industry code is required to be consistent with the purposes and policies of the CPA.³¹⁰ An obligation is placed on the Commission to monitor the effectiveness of any industry code in relation to the purposes and policies of the CPA.³¹¹ In line with this obligation, the

³⁰² Section 1 of the CPA defines an ‘ombud with jurisdiction’ to refer, “in respect of any particular dispute arising out of an agreement or transaction between a consumer and a supplier who is— (a) subject to the jurisdiction of an ‘ombud’, or a ‘statutory ombud’, in terms of any national legislation, means that ombud or statutory ombud; or (b) ‘financial institution’, as defined in the Financial Services Ombud Schemes Act, 2004 (Act No. 37 of 2004) means ‘the ombud’, as determined in accordance with section 13 or 14 of that Act)”.

See Woker (2016) 28 SA Merc LJ 21 at 38-41.

³⁰³ Ibid at 41-43.

³⁰⁴ See generally ss 70(1)(a) and (b) and 82 of the CPA.

³⁰⁵ See Woker (2016) 28 SA Merc LJ 21 at 31.

³⁰⁶ See discussion under para 2.3.3 of Ch 2.

³⁰⁷ See also Woker (2016) 28 SA Merc LJ 21 at 34.

³⁰⁸ Section 82(1) of the CPA provides that an industry code refers to a code that regulates the interaction: (i) between or among persons conducting business within an industry; or (ii) provides for alternative dispute resolution, between persons conducting business within an industry and consumers.

³⁰⁹ Section 82 of the CPA makes provision for the regulation of industry codes. In particular s 82(6) provides that where:

(a) a proposed industry code provides for a scheme of alternative dispute resolution; and

(b) the Commission considers that the scheme is adequately situated and equipped to provide alternative dispute resolution services comparable to those generally provided in terms of any public regulation,

the Commission, when recommending that code to the Minister, may also recommend that the scheme be accredited as an ‘accredited industry ombud’.

See Van Heerden “Chapter 3: Protection of consumer’s rights and consumers’ voice” 68-5 at para 5.

³¹⁰ The CPA s 82(4).

³¹¹ Ibid s 82(7)(a).

CPA provides the Commission with the power reasonably to request information in order for it to meet its obligation.³¹² A prohibition is also placed on suppliers to prevent them from contravening an applicable industry code in the ordinary course of their businesses.³¹³

Mupangavanhu submits, with merit, that the inclusion of the ombud is commendable as it provides consumers who would otherwise not be in a position to enforce their rights, access to justice.³¹⁴ As pointed out in Chapter 2, a number of industry ombuds operate in South Africa and it is unnecessary to repeat them here.³¹⁵ Currently, there are only two accredited industry ombuds, namely the CGSO, and the Motor Industry Ombud of South Africa (the MIOSA).³¹⁶ Both ombud schemes are fully operational and are the Commission's key referral partners.³¹⁷ There are also two industry codes which the Commission recommended to the Minister during the 2016/7 financial year for accreditation.³¹⁸ These codes relate to ombuds in the advertising and franchising industries.³¹⁹ It is necessary, however, to examine at least one of the accredited industry ombuds in order to establish whether they are appropriate mechanisms for purposes of improving consumer access to redress. The CGSO, is an appropriate ombud to examine for purposes of this thesis as it has a broad impact across most consumer agreements in multiple sectors. It consequently offers a broad overview of how accredited industry ombuds can function under the umbrella of the CPA in order to realise consumer rights.³²⁰

³¹² Ibid s 82(7)(b).

³¹³ Ibid s 82(8).

³¹⁴ Mupangavanhu (2012) 15 *PELJ* 320 at 330.

³¹⁵ See the discussion under para 2.3.3 of Ch 2 above.

³¹⁶ Commission Annual Report 2016/7 at 22. See generally Koekemoer (2017) 40 *JCP* 419 at 428-432 and Koekemoer (2014) 30 *JABR* 659.

³¹⁷ Commission Annual Report 2016/7 at 22.

³¹⁸ Ibid. See n254 for definition of the term 'Minister'.

³¹⁹ Ibid.

³²⁰ The CGSO Annual Report 2016/7 at 8 indicates that in the 2016/7 year, there were 5 595 complaints in total with the main complaints being lodged in relation to cell phones (1459), services (1273), and electrical appliances (578). Other sectors in which complaints were lodged were: furniture, computer and accessories, building material, clothing, footwear apparel, timeshare, food and beverage, hardware supplies, home décor, cosmetics, linen and bedding, jewellery, home care products, sport goods, tools, stationery, medical equipment, toys, tobacco products, textiles or fabrics, pet food and products and power tools.

3.6.2.1.1 Consumer Goods and Services Ombud

(a) Introduction

The CGSO is an ombud that appears to be benefitting from the statutory backing of the CPA.³²¹ The CGSO and its code were set up and accredited in terms of section 82 of the CPA.³²² The CGSO Code is all-encompassing and sets out, inter alia: the purpose, objective, and application of the code;³²³ the establishment and powers of the CGSO;³²⁴ and the complaints handling process.³²⁵ The background to the CGSO Code is briefly considered below for better contextualisation and, thereafter, the consumer protection enforcement mechanisms provided for in the CGSO Code are set out in further detail in the paragraphs immediately following.

(b) Purpose, objectives, and scope of application

The purpose of the CGSO Code is to regulate the interaction between participants³²⁶ who do business within the Consumer Goods and Services Industry,³²⁷ and the consumer.³²⁸ In addition, the CGSO Code provides for an ADR mechanism as contemplated in section 82(6) of the CPA in the event that there is a dispute between a participant and the consumer³²⁹. The main purpose of the Code is: to raise the standard of goods and services in the consumer goods and services industry; to contribute to the growth of this industry by increasing the level of commercial certainty for all parties; to facilitate industry compliance with, and consumer awareness of, the CPA; and to provide for an ADR scheme.³³⁰ The interplay between the CPA and the CGSO Code is evident throughout this Code. For instance, the CGSO Code goes so far as to place an obligation on participants to

³²¹ This is particularly so given that the CPA gives it ‘teeth’ by providing that certain recommendations accepted by the complainant and the participant, may be made consent orders as contemplated in the CPA.

³²² Clause 1 of the CGSO Code. See also Koekemoer (2017) 40 *JCP* 419 at 428.

³²³ The CGSO Code cls 2 and 4.

³²⁴ Ibid cl 6.

³²⁵ Ibid cl 11.

³²⁶ Ibid cl 3.1.29 provides that a ‘Participant’ means “any entity operating within the [Consumer Goods and Services Industry] bound by the Code unless expressly excluded by clause 4.1 [of the Code].”

³²⁷ Ibid cl 3.1.10 provides that ‘Consumer Goods and Services Industry’ refers to “all Participants and/or entities involved in the Supply Chain that provides, markets and/or offers to supply Goods and Services to Consumers, unless excluded in terms clause 4.4 hereof”.

³²⁸ Ibid cl 2.2. Clause 3.1.8 of the Code provides that the term ‘Consumer’ shall have the meaning ascribed thereto in s 1 of the CPA.

³²⁹ Ibid cl 2.2. See also s 86(2) of the CPA.

³³⁰ Ibid cl 2.3.

pursue the objectives set out in section 3 of the CPA.³³¹ This is but a single example of the interplay between the CGSO Code and the CPA.

In so far as the scope of application is concerned, the CGSO Code applies to all participants, unless such participants are regulated by another public regulation or code approved by the Minister in terms of the CPA.³³² All participants are required to comply with the provisions of the CGSO Code and to register on the CGSO's website in terms of the prescribed procedures, and must also fund the CGSO.³³³ However, the CGSO Code will apply to participants regardless of whether or not they are registered as participants.³³⁴ The annual fee payable by participants ranges from R200 000 for those turning over R3 billion or more per annum, to no cost for those turning over between R1 to R1 million.³³⁵ According to the CGSO's 2016/17 annual report, a major milestone for the financial year ending February 2017 was the increase in paying participants.³³⁶ This number rose from 24 founding members before 29 April 2015 (the date on which the CGSO was accredited), to 650 members at the end of February 2017.³³⁷

(c) Structure of the CGSO

The CGSO is operated by a board of a non-profit company incorporated in terms of the Companies Act.³³⁸ As mentioned above,³³⁹ it is set up in accordance with and accredited in terms of section 82(6) of the CPA, and its code is enforceable against participants.³⁴⁰ In this regard, a participant is defined as any entity that operates within the consumer goods and services industry and is bound by the CGSO Code,

³³¹ Ibid cl 2.4.

³³² Ibid cl 4.1. See n 254 for definition of the term 'Minister'.

³³³ Ibid cl 4.2. Clause 6.2 sets out a 'Sustainable Funding Model' in terms of which participants are required to contribute towards the funding of the operations of the CGSO through the payment of the joining fee and an annual levy and, where necessary, a special levy. Such fees and levies shall be determined by the CGSO board from time to time with regard to the respective market share of the participants, the anticipated complaints to be handled by the CGSO in a given year and the operating costs of the CGSO. The mechanisms used to calculate the fees and levies shall be published on the website of the CGSO. See also Koekemoer (2017) 40 *JCP* 419 at 429.

³³⁴ See cl 3.1.29 of the CGSO Code. See n 326 above. See also Koekemoer *ibid*.

³³⁵ See CGSO participation fees website at <http://www.cgso.org.za/participation/> (accessed on: 20 April 2018).

³³⁶ CGSO Annual Report 2016/7 at 4.

³³⁷ *Ibid*.

³³⁸ 71 of 2008. See definition of 'board' in cl 3.1.2 of the CGSO Code.

³³⁹ See para 3.6.2.1.1(a) of this chapter.

³⁴⁰ Clause 3.1.3 of the CGSO Code.

unless such entity is expressly excluded by clause 4.1 thereof.³⁴¹ It is worth noting that there is a distinction in the CGSO Code between the CGSO and the ombudsman. Whilst the CGSO refers to the office of the CGSO as an institution,³⁴² the ombudsman refers to the person who is appointed, from time to time, as the ombudsman and head of the office of the CGSO by the board, and who is required to act in accordance with Annexure A of the CGSO Code headed 'Matters relating to the appointment, tenure and powers of the ombudsman'.³⁴³ The composition of the CGSO board is prescribed by clause 14 of its memorandum of incorporation which provides for a minimum of nine and a maximum of fifteen directors.³⁴⁴ These directors should be from the retail and manufacturing sectors, consumer and industry association bodies, and, in certain instances, representatives who are considered fit and proper persons as agreed to by the board.³⁴⁵

(d) The operation of the CGSO

In terms of the CGSO Code, the CGSO is authorised to assist in disputes that arise within the Consumer Goods and Services Industry.³⁴⁶ In fulfilling its mandate, there is an obligation on the CGSO to act honestly, independently, and objectively, with due regard to the principles of fairness, justice, and equity.³⁴⁷ Koekemoer highlights, in this regard, that the website of the CGSO specifically provides a detailed explanation as to why it should be regarded as independent.³⁴⁸ She submits, with merit, that such a detailed explanation contributes to the perceptions of consumers as regards the transparency of the CGSO, particularly given that it is an industry-funded ombud.³⁴⁹ When considering disputes, the CGSO must throughout consider the law (particularly the CPA and the CGSO Code), other applicable industry codes and guidelines, as well as the principle of fairness.³⁵⁰

³⁴¹ See n 326 above.

³⁴² The CGSO Code cl 3.1.11 of.

³⁴³ Ibid cl 3.1.12.

³⁴⁴ The CGSO MOI cl 14.3.

³⁴⁵ Ibid. The MOI prescribes the number of representatives from each sector depending on the total composition of the board.

³⁴⁶ The CGSO Code cl 8.1.

³⁴⁷ Ibid cl 8.5.

³⁴⁸ Koekemoer (2017) 40 *JCP* 419 at 430. See <http://www.cgso.org.za/what-makes-us-independent/> (accessed on: 9 March 2018).

³⁴⁹ Koekemoer *ibid*.

³⁵⁰ Clause 8.6 of the CGSO Code.

Related to its operations is clause 8.3 of the Code, which provides that the ombudsman, who is required to act objectively and independently in resolving disputes, may only be dismissed in accordance with ‘fair administrative procedures’ as provided in the PAJA “on the grounds of incompetence, gross misconduct, or inability to effectively carry out his duties”. *Prima facie*, there appears to be a conflation with regard to labour and administrative law, as the grounds for dismissal referred to are regulated by a separate statute, namely the Labour Relations Act,³⁵¹ whilst the PAJA addresses administrative action. However on a closer reading of the CGSO Code, it is clear that the ombudsman is appointed as an employee of the CGSO and clearly does not form part of its board of directors.³⁵² As such, the standard labour law grounds for dismissal should apply. However, a question that remains is whether the removal of the ombudsman would trigger the application of the PAJA, given that the CGSO is an industry-funded body and its board (which appoints the ombudsman) comprises primarily of industry representatives together with consumer and industry association body representatives.³⁵³

Guidance on this point can be found in the Western Cape High Court’s decision in *Steenkamp v The Central Energy Fund*.³⁵⁴ The facts in this case differed from the scenario under consideration, in that the question before the court was whether the decision to remove directors of a state-owned company would constitute administrative action. However, the principles referred to in *Steenkamp* find application. The point of departure is whether the removal would constitute administrative action which would require a consideration of whether the seven elements of administrative action have been met. These are:

- (a) a decision of an administrative nature;
- (b) by an organ of state or a natural or juristic person;
- (c) exercising a public power or performing a public function;
- (d) in terms of any legislation or an empowering provision;

³⁵¹ 66 of 1995.

³⁵² See cl 1.4.3 of Annexure A to the CGSO Code which provides that “[the] Ombudsman will be required to sign an employment contract stating the terms of his or her employment and same will be subject to an annual performance review”.

³⁵³ See cl 14.3 of the CGSO MOI.

³⁵⁴ 2018 (1) SA 311 (WC).

- (e) that adversely effects rights;
- (f) that has a direct, external legal effect; and
- (g) that does not fall under any of the listed exclusions.³⁵⁵

Without entering into a detailed analysis of each of these elements, on a brief consideration it emerges that all of these elements are present in the removal of an ombudsman. However, as was the case in *Steenkamp*, it would need to be determined whether (a) and (c) are present. In this regard, Bozalek J pointed out that the courts have, in the past, found that a stock exchange, being a non-statutory body, was in fact under a statutory duty to act in the public interest and, consequently, its decisions were open to administrative review.³⁵⁶ Bozalek J indicated further that the court has found a voluntary association – the national soccer league – to be performing a public function, and that its activities were matters of public interest.³⁵⁷ This approach has been upheld by the Constitutional Court.³⁵⁸ At the risk of over-simplification, it is submitted that what is key in terms of the removal of the CGSO’s ombudsman, is that this conduct has an effect on the regulation of an industry, which is also accredited, and which acts in accordance with the provisions of the CPA. As such, a decision to remove an ombudsman would constitute administrative action that is subject to the provisions of the PAJA.³⁵⁹ Nevertheless, it may still be worthwhile for the provision to be given some thought when the CGSO Code is revised in order to distinguish between these legal concepts. The scope of this thesis does not warrant further discussion under the recommendations.

(e) The CGSO’s complaints handling process

³⁵⁵ *Steenkamp v The Central Energy Fund* 2018 (1) SA 311 (WC) at para 48.

³⁵⁶ *Ibid* at para 56.

³⁵⁷ *Ibid*.

³⁵⁸ *Ibid*.

³⁵⁹ Section 1 of the PAJA defines ‘administrative action’ as “any decision taken, or any failure to take a decision, by –

- (a) an organ of state, when
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect” (subject to certain exclusions which would not find application *in casu*).

It is a part of the CGSO's function to handle complaints lodged with it as set out in the CGSO Code.³⁶⁰ The CGSO is required to receive and deal with complaints and disputes lodged with it, in accordance with the process set out in the CGSO Code, free of charge.³⁶¹ In line with the CPA, the CGSO Code also provides for a prescription period and stipulates that the CGSO shall not consider complaints or disputes that occurred before 1 April 2011, or more than three years prior to the date on which the complaint was lodged.³⁶² There are a number of scenarios contemplated by the CGSO Code that would result in a consideration of the complaint or dispute by the CGSO being unwarranted – for instance, where a complaint is vexatious or frivolous, or is under consideration by a legal practitioner or another dispute resolution body with jurisdiction.³⁶³ The complainant may also terminate the handling of a complaint by the CGSO at any time by withdrawing the complaint in writing to the CGSO.³⁶⁴

The complaints handling procedure is set out quite coherently in the CGSO Code and follows four stages: (i) stage 1: laying the complaint; (ii) stage 2: referral to the Office of the CGSO; (iii) stage 3: complaint resolution by the participant; and (iv) stage 4: investigation and complaint resolution by the CGSO.³⁶⁵ The exact steps to be followed at each of these stages are set out in detail in the CGSO Code and are readily comprehensible for businesses and consumers.³⁶⁶ Koekemoer submits, with merit, that the ability of consumers to lodge and manage complaints online; the nature of the language used on the CGSO's website; as well as the call centre that is well-staffed with persons fluent in many languages, mean that the complaint process under the CGSO can be regarded as user-friendly.³⁶⁷ Each of the stages in the CGSO complaint process is now discussed in turn.

³⁶⁰ Clause 9 of the CGSO Code. See also Koekemoer (2017) 40 *JCP* 419 at 429.

³⁶¹ Clause 9.2 of the CGSO Code.

³⁶² Clause 10.3.2 of the CGSO Code. This clause provides further that the three year period "commences on the date that the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first". In the event that the complaint or dispute concerned is older than two years, there is a duty on the CGSO to advise the complainant that prescription is imminent.

³⁶³ The CGSO Code cl 10.3.3 and 10.3.4.

³⁶⁴ *Ibid* at cl 10.3.5.

³⁶⁵ *Ibid* at section F.

³⁶⁶ *Ibid*.

³⁶⁷ Koekemoer (2017) 40 *JCP* 419 at 431.

Stage 1: Laying the complaint

The CGSO Code explicitly attempts to ensure that the parties take steps to resolve their dispute before referring it to the CGSO. In this regard, clause 11.1.1 of the CGSO Code provides that a complainant must first attempt to address the matter in accordance with the participant's internal complaints handling process before referring the matter to the CGSO.³⁶⁸ Where the complainant initiates her complaint with the CGSO before having referred it to the participant, the CGSO is required to refer the matter back to the participant.³⁶⁹ Such complaints must be lodged within three years from the date on which the complainant became aware, or ought reasonably to have become aware, of the complaint (provided that the cause of complaint did not occur before 1 April 2011).³⁷⁰ It is submitted that the clause 11.1.1 of the CGSO Code does not take into account instances where participants may not have an internal complaints handling process.³⁷¹ In such instances, a referral back to the participant may result in undue delay. However, it is noted for the sake of completeness that step 2, which is discussed below, provides that where a complaint, after having being referred to the participant, is not resolved within fifteen business days, the complainant may lodge a complaint with the CGSO.³⁷² In addition, step 2 allows the CGSO to exercise its discretion when dealing with a vulnerable complainant where it would cause 'undue hardship or inconvenience' for the complainant first to refer the matter to the participant, before seeking the assistance of the CGSO.³⁷³ In such circumstances, the CGSO is permitted to handle the complaint as if the complainant had already approached the participant.³⁷⁴ It is submitted that this discretion should be extended to situations where the participant has no internal complaints handling process in place so that it is unnecessary wait for the fifteen business-day period to elapse.

³⁶⁸ During the Commission's seminar titled 'Common approach, understanding and interpretation on the Consumer Protection Act (CPA)' held on 22 and 23 February 2018 at the Premier Hotel, Pretoria, a panel discussion anchored by Adv Neville Meville, a representative of CGSO, Ms Magauta Mphahlele, confirmed that in practice, the CGSO does not deal with a complaint unless attempts have been made to resolve it through the internal complaints handling process of the respondent.

³⁶⁹ See cl 13.1.1 of the CGSO Code.

³⁷⁰ See cl 10.3.2 of the CGSO Code.

³⁷¹ This may be the case where the participant is not registered with the CGSO and thus does not have such mechanisms in place. Although cl 5.1.1 places an obligation on participants to have an internal complaints handling system in place, where a participant has not registered with the CGSO, there is a real possibility that a participant may not have an internal complaints handling system in place.

³⁷² The CGSO Code cls 11.2.1 and 11.2.7.5.

³⁷³ Ibid at cl 11.2.7.

³⁷⁴ Ibid.

Stage 2: Referral to the office of the CGSO

Clause 11.2.1 of the CGSO Code provides that once a complainant has referred the complaint to a participant and: (i) the complainant is not satisfied with the manner in which the participant is dealing with, or has dealt with, the complaint; or (ii) the complainant is not satisfied with the outcome of the internal complaints handling system; or (iii) if a matter is not resolved by the participant within fifteen business days or such extended period as agreed to between the parties, the complainant may refer the complaint to the CGSO using the complaint form or their call centre number. The CGSO complaints form is available as an annexure to the CGSO Code.³⁷⁵ The form may then be submitted to the CGSO either by hand, e-mail, mail, fax, or any other format that is acceptable to the CGSO.³⁷⁶ The CGSO Code provides for a two-business-day turnaround time for the acknowledgment of receipt of each complaint.³⁷⁷ Once the complaint has been received, it must be assessed by the CGSO in order to establish whether it falls within its jurisdiction.³⁷⁸ A complaint should be resolved within 60 business days from the date on which it is received by the CGSO.³⁷⁹ Furthermore, an ‘up-to-date status report’ must be made available to the complainant at regular intervals or upon request.³⁸⁰

Stage 3: Complaint resolution by the participant

Clause 11.3.1 of the CGSO Code provides for intervention by the participant.³⁸¹ This step places an obligation on participants to make information regarding their complaints handling processes available to complainants.³⁸² As mentioned above, this presupposes that all participants have complaints handling processes in place

³⁷⁵ Ibid Annexure B.

³⁷⁶ All the relevant addresses in this respect are set out in cls 11.2.1.1 – 11.2.1.4 of the CGSO Code.

³⁷⁷ The CGSO Code cl 11.2.3.

³⁷⁸ Ibid at cl 11.2.4. This clause provides that the CGSO will consider the complaint’s “severity, safety implications, complexity, impact and the need and the possibility of immediate action”.

³⁷⁹ Ibid at cl 11.2.5.

³⁸⁰ Ibid at cl 11.2.6.

³⁸¹ For the sake of completeness it is noted that the reference made to cl 11.2.7.6 in this clause appears to be a cross-referencing error, as this clause refers to the CGSO’s discretion to treat a complaint involving a vulnerable consumer as if the consumer concerned has already approached the participant. The context in which this clause is used is with regard instances where the complaint is referred to the participant. In order to avoid confusion on this point, it may be prudent to update the code accordingly in order to refer to the correct clause (which appears to be clause 11.2.7.3 of the CGSO Code). This is discussed in brief in Ch 5 below.

³⁸² The CGSO Code cl 11.3.1.8.

which is not always the case especially where participants are operating informally and fall within the lower end of the annual turnover bracket.

Where a complaint is referred to a participant, the participant is requested to take steps to contact the complainant in order to clarify any issues and to identify the crux of the complaint and attempt to settle the complaint “to the reasonable satisfaction of the complainant”.³⁸³ The participant may then undertake an investigation where necessary.³⁸⁴ Where the participant is able to resolve the matter, then the CGSO must be provided with reasonable proof that the complaint has been resolved and that the participant has complied with any undertaking it made.³⁸⁵ If the participant is unable to resolve the matter, then it shall provide the CGSO with a report that outlines, inter alia, the investigation that it undertook and the reasons why it could not resolve the matter.³⁸⁶ However, failure by the participant to provide such a report does not prevent the CGSO from proceeding to make a recommendation on the basis of the information before it.³⁸⁷ It is submitted that this is a useful and necessary provision, particularly bearing in mind that participants may be uncooperative. In addition, where the participant is unable to resolve a complaint, the CGSO Code stipulates that the participant should provide the complainant with the details of the CGSO and advise the complainant of her right to refer the matter to the CGSO.³⁸⁸ In instances where the CGSO is of the view that the participant has provided the complainant with the appropriate assistance, or that the participant has provided a suitable explanation for the complaint that has been made, then the CGSO is permitted to inform that complainant and the participant accordingly and to indicate that, unless the complainant challenges its view or provides the CGSO with new information within ten business days, the file will be closed.³⁸⁹ If the CGSO is of the view “that it would be appropriate and helpful to do so”, it is empowered to facilitate a settlement between the complainant and the participant.³⁹⁰

³⁸³ Ibid at cl 11.3.1.1.

³⁸⁴ Ibid at cl 11.3.1.3.

³⁸⁵ Ibid at cl 11.3.1.2.

³⁸⁶ Ibid at cl 11.3.1.4.

³⁸⁷ Ibid at cl 11.3.1.5.

³⁸⁸ Ibid at cl 11.3.1.9.

³⁸⁹ Ibid at cl 11.3.1.6.

³⁹⁰ Ibid at cl 11.3.1.7. This clause also refers to cl 11.7.6 in respect of timeframes which appears to be an error as discussed in n 381 above.

Stage 4: Investigation and complaint resolution by CGSO

Clause 11.4 of the CGSO Code grants the CGSO certain investigative powers which include the powers to: request certain documents;³⁹¹ request statements from relevant personnel of the participant;³⁹² request comments or clarification as may be necessary from the complainant or the participant;³⁹³ request the relevant goods for testing or inspection purposes;³⁹⁴ and consult with any suitably qualified persons.³⁹⁵ The participant and the complainant are required to make every effort to comply with the requests that the ombudsman may make within ten business days, unless the participant or complainant shows cause to the contrary.³⁹⁶

The CGSO is also empowered to facilitate the resolution of the dispute between the parties without conducting an investigation, by suggesting to the parties how the matter should be settled.³⁹⁷ The CGSO Code contains possible outcomes that the CGSO may recommend and communicate to the participant and the complainant for their consideration.³⁹⁸ The complainant and the participant are then required to advise the CGSO regarding their acceptance or rejection of the terms of the CGSO's recommendations within ten business days of receiving the communication from the CGSO.³⁹⁹ Where the matter is resolved, either by the parties accepting the resolution proposed by the CGSO, or by reaching a settlement that is mutually acceptable with the assistance of the CGSO, that resolution must be recorded and carried out accordingly.⁴⁰⁰ The CGSO may, at the request of the parties, record the resolution of the dispute as an order in terms of section 70(3)(a) of the CPA.⁴⁰¹ If the dispute is not resolved at this stage, the CGSO may inform the parties of additional options available to them.

³⁹¹ Ibid at cl 11.4.1.1.

³⁹² Ibid at cl 11.4.1.2.

³⁹³ Ibid at cl 11.4.1.3.

³⁹⁴ Ibid at cl 11.4.1.4.

³⁹⁵ Ibid at cl 11.4.1.5.

³⁹⁶ Ibid at cl 11.4.1.6.

³⁹⁷ Ibid at cl 11.5.1.

³⁹⁸ Ibid at cls 11.5.2 and 11.5.3.

³⁹⁹ Ibid at cl 11.5.4.

⁴⁰⁰ Ibid at cl 11.5.5.

⁴⁰¹ Ibid at cl 11.5.5. In this regard, s 70(3)(a) provides that: "If an alternative dispute resolution agent has resolved, or assisted parties in resolving their dispute, the agent may—

(a) record the resolution of that dispute in the form of an order".

Step 4 of the complaints handling procedure prescribed in terms of the CGSO Code, also makes provision for mediation by the CGSO.⁴⁰² In this regard, clause 11.6.1 of the CGSO Code provides the CGSO with the power to mediate any matter, without conducting an investigation, where the ombudsman considers it appropriate for the matter to be dealt with by way of mediation. Ordinarily, legal representation is not permitted at this stage, unless the mediator decides otherwise.⁴⁰³

In any case where the matter has not been settled either through facilitation or mediation, the ombudsman may issue written recommendations setting out how the matter should be resolved, as well as reasons for the recommendation.⁴⁰⁴ In instances where the matter has been referred to the retailer and the manufacturer, the ombudsman's recommendation should set out which of the two will be liable, if either is liable.⁴⁰⁵ Within ten business days of receiving the recommendation, the participant and the complainant must indicate whether or not they accept the terms of the ombudsman's recommendations.⁴⁰⁶ However, there is no obligation on either the complainant or the participant to do so.⁴⁰⁷ Where the parties accept the ombudsman's recommendation, the CGSO may, at the parties' request, record the resolution of the dispute in the form of an order in terms of section 70(3)(a) of CPA.⁴⁰⁸ If either of the parties fails to comply with the recommendation, the CGSO is required to inform the parties of the options available to them. These options include a referral to the Commission or Tribunal. Referrals of this nature are at the parties' own expense.⁴⁰⁹ If the complainant rejects the recommendation or fails to respond within ten business days, the recommendation falls away and the file is closed.⁴¹⁰ On the other hand, if the participant rejects a recommendation that has been accepted by the complainant, the number of such cases and their details will

⁴⁰² The CGSO Code cl 11.6. Koekemoer (2017) 40 *JCP* 419 at 430.

⁴⁰³ The CGSO Code cl 11.6.1.

⁴⁰⁴ *Ibid* at cl 11.7.1.

⁴⁰⁵ *Ibid*.

⁴⁰⁶ *Ibid* at cl 11.7.3.

⁴⁰⁷ *Ibid* at cl 11.7.4.

⁴⁰⁸ *Ibid* at cl 11.7.6. Koekemoer (2017) 40 *JCP* 419 at 431.

⁴⁰⁹ The CGSO Code cl 11.7.7.

⁴¹⁰ *Ibid* at cl 11.7.5.

be published in the CGSO's annual report, at the discretion of the ombudsman.⁴¹¹ Should the matter remain unresolved at this stage, the CGSO must, once again, advise the parties of the further options available to them, including a referral to the Commission and the institution of legal proceedings at the parties' own expense.⁴¹² Koekemoer highlights that consumers have experienced difficulties with referring matters to the Commission, which is a matter that the CGSO is looking to resolve.⁴¹³

(f) Effectiveness of the CGSO

There has been an increase in the number of matters heard by the CGSO.⁴¹⁴ Whilst during the 2015/6 financial year a total of 3 495 cases were received, in the 2016/7 financial year, the total increased to 5 595 cases (an increase of 60 per cent).⁴¹⁵ Furthermore, while during the 2015/6 financial year only 2 192 cases were closed, this increased to 5 974 cases in the 2016/7 financial year (an increase of around 173 per cent).⁴¹⁶ The ombudsman indicated in the CGSO's 2016/7 Annual Report that of the 4 650 cases that fell within the jurisdiction of the CGSO and in which there was an outcome, 60 per cent were resolved by the consumer either receiving all or part of what was claimed, or some other form of assistance.⁴¹⁷ Although these are impressive developments, it is questionable whether the industry as a whole has fully bought into the concept and whether the CGSO's membership will continue to increase exponentially over the years. For instance, between April 2016 and March 2017, 858 matters were dismissed due to lack of cooperation from the supplier.⁴¹⁸ This is a major concern as it indicates a lack of a will to cooperate within the industry. The Commission highlighted in its annual report that this concern will need to be dealt with by the Commission, the executive authority, and the CGSO.⁴¹⁹

⁴¹¹ Ibid at cl 11.7.4.

⁴¹² Ibid at cl 11.7.8. Koekemoer (2017) 40 *JCP* 419 at 431.

⁴¹³ Ibid.

⁴¹⁴ CGSO Annual Report 2016/7 at 7. See also Ruzicka "A Consumer ombud sees spike in gripes" *City Press* (1 October 2017) at 11. See generally the discussion by Koekemoer (2017) 40 *JCP* 419 at 429-430 as regards the 2015/2016 Annual Report.

⁴¹⁵ CGSO Annual Report 2016/7 at 7. See also Ruzicka *ibid*.

⁴¹⁶ CGSO Annual Report 2016/7 at 4. For the sake of completeness, it is noted that the ombudsman indicated that the CGSO had resolved more cases than it received because its staff was "on an all-out drive to reduce the backlog from the previous year that arose due to understaffing".

⁴¹⁷ CGSO Annual Report 2016/7 at 7.

⁴¹⁸ Commission Annual Report 2016/7 at 24.

⁴¹⁹ Ibid. During the Commission's seminar titled 'Common approach, understanding and interpretation on the Consumer Protection Act (CPA)' held on 22 and 23 February 2018 at the Premier Hotel, Pretoria, during a panel discussion anchored by

The CGSO is not a court and thus each case is determined on the basis of its own facts and merits. Accordingly, there is no system of precedent.⁴²⁰ This may be beneficial for the consumer in so far as disputes may be resolved more expeditiously, however, it may inhibit the development of a full jurisprudence on consumer protection law. Although it is required by the CGSO Code that the law be taken into account,⁴²¹ the final decision by the CGSO is guided by the principle of fairness.⁴²² Therefore, in theory, the CGSO would not merely reach an outcome that unduly favours the consumer or its funders, instead the provisions of the CPA, the CGSO Code, and other relevant guiding factors, would be taken into account when determining a fair outcome.⁴²³ The CGSO follows an informal process and thus no pleadings are filed and there are no arguments presented before the ombudsman by legal practitioners.⁴²⁴ This, by necessary implication, also means that the setting is less adversarial than a court process, and consumers do not have to attempt to wade through complex legal procedures to enforce their rights. Where the cases involve complex issues and require intense investigation, such matters are often referred to either the Commission or the Tribunal as they are better equipped by statute to handle such matters.⁴²⁵

The CGSO is entitled to deal with complaints that have been lodged by either natural persons or juristic persons.⁴²⁶ It also considers disputes that arise in terms of the Code between complainants and participants, or complaints that concern alleged contraventions of either the CPA or the CGSO Code.⁴²⁷ However, the CGSO may not hear complaints or disputes concerning consumers that are juristic persons and

Adv Neville Meville, this drawback was also discussed in context of the MIOA with dealerships not being willing to respond. See also discussion by Koekemoer (2017) 40 *JCP* 419 at 429 based on the CGSO's 2015/16 annual report.

⁴²⁰ CGSO Compendium of cases_20 April 2017 at 4 available on http://www.cgso.org.za/wp-content/uploads/2017/04/Compendium-of-cases_20_APRIL_2017.pdf?87ab66&87ab66 (accessed on: 20 April 2018). This was also mentioned above in the context of the disadvantages of the ombud system (see para 2.3.3 of chapter 2).

⁴²¹ The CGSO Code cl 8.5.

⁴²² See CGSO Compendium of cases_20 April 2017 at 6 available on http://www.cgso.org.za/wp-content/uploads/2017/04/Compendium-of-cases_20_APRIL_2017.pdf?87ab66&87ab66 (accessed on: 20 April 2018).

⁴²³ See generally CGSO Compendium of cases_20 April 2017 available on http://www.cgso.org.za/wp-content/uploads/2017/04/Compendium-of-cases_20_APRIL_2017.pdf?87ab66&87ab66 (accessed on: 20 April 2018).

⁴²⁴ *Ibid* at 6.

⁴²⁵ *Ibid*.

⁴²⁶ The CGSO Code cl 10.1.

⁴²⁷ *Ibid* cl 10.2.

do not fall within the threshold amounts as determined by the Minister from time to time in terms of section 6(1) of the CPA.⁴²⁸

3.6.2.2 Provincial authorities and consumer courts

A provincial consumer protection authority refers to a body that is established within the provincial sphere of government, designated to have the general authority to deal with consumer protection matters within that province by the responsible provincial Member of Executive Council (MEC).⁴²⁹ To the extent that provincial legislation establishing a provincial consumer protection authority has not been enacted, item 7 of Schedule 2 to the CPA provides that the Minister may, by notice in the *Government Gazette*, delegate part or all of the functions of the Commission to the relevant provincial MEC. These functions can then be exercised by that MEC within that province in accordance with the CPA.⁴³⁰ In terms of section 84 of the CPA, the provincial consumer authority has the power to: (i) issue compliance notices to any person carrying on business exclusively within its province on behalf of the Commission;⁴³¹ (ii) facilitate the mediation or conciliation of a dispute that arises in terms of the CPA – provided that it concerns people resident in, or carrying on business exclusively within, that province;⁴³² (iii) refer the dispute to a provincial consumer court within that province;⁴³³ or (iv) request the Commission to initiate a complaint in respect of any prohibited conduct or offence in terms of the Act that arises within that province.⁴³⁴ While provincial consumer affairs offices have been established throughout the country, it is unclear whether all of these offices are fully operational.⁴³⁵

⁴²⁸ In terms of cl 3.1.23 of the CGSO Code, a ‘juristic person’ is defined to have the meaning ascribed to it in s 1 of the CPA. The definition of a juristic person is discussed above in para 3.2 of this chapter (see also n 192 in this regard).

⁴²⁹ See the CPA s 1 regarding provincial consumer authorities. See also Mupangavanhu (2012) 15 *PELJ* 320 at 326.

⁴³⁰ Item 7 of Schedule 2 to the CPA. See Van Eeden & Barnard *Consumer Protection Law* 473.

⁴³¹ Section 84(a) of the CPA; Mupangavanhu (2012) 15 *PELJ* 320 at 326. Du Plessis (2010) 22 *SA Merc LJ* 517 at 520. Du Plessis also indicates that compliance notices issued in terms of s 84(a) have the same effect as those issued by the Consumer Commission.

⁴³² Section 84(b) of the CPA; Mupangavanhu (2012) 15 *PELJ* 320 at 326.

⁴³³ Section 84(c) of the CPA; Mupangavanhu *ibid*.

⁴³⁴ Section 84(d) of the CPA; Mupangavanhu *ibid*.

⁴³⁵ FSB: Provincial consumer affairs offices available at

<https://www.fsb.co.za/feedback/Documents/Provincial%20Consumer%20Affairs%20Offices.pdf> (accessed on: 20 April 2018).

In terms of the CPA, a consumer court refers to a body of that name or to a consumer tribunal established in terms of provincial legislation.⁴³⁶ The legislation enacted provincially relating to consumer courts is listed in the previous chapter.⁴³⁷ To date, it appears that there are consumer courts which are operational in Gauteng, Free State, Limpopo, Mpumalanga, Northern Cape, and Western Cape.⁴³⁸ As alluded to in the previous chapter, Gauteng's consumer court makes it the responsibility of the Office of the Consumer Protector to prosecute proceedings before it with the assistance of an attorney, advocate, or any person who has been approved by the responsible member where necessary.⁴³⁹ It is submitted that this eliminates the barrier that the need for legal representation often poses.⁴⁴⁰ Proof in proceedings before the consumer court is on a balance of probabilities.⁴⁴¹ However, the fact that, to date, operational consumer courts have not been established in all the provinces, and that information on the various consumer courts is not easily accessible on platforms such as the internet, means that many consumers are left without access to tangible redress.⁴⁴²

Where, pursuant to an investigation, the Commission refers a matter to a consumer court, such consumer court is required to conduct its proceedings in a manner consistent with the requirements applicable to hearings of the Tribunal.⁴⁴³ The consumer court may then make any order that the Tribunal could have made after hearing that matter.⁴⁴⁴ In such circumstances, the order made by the consumer court has the same force and effect as an order made by the Tribunal.⁴⁴⁵ Interestingly, Du Plessis submits that orders made by the consumer court in such instances may carry the same weight as those made by the Tribunal, with the

⁴³⁶ Section 1 of the CPA; Van Eeden & Barnard *Consumer Protection Law* 473.

⁴³⁷ See para 2.3.2.2 of Ch 2 of this thesis; see too n 93.

⁴³⁸ Van Heerden "Chapter 3: Protection of consumer's rights and consumers' voice" 68-2 at para 4. See Du Plessis (2008) 20 *SA Merc LJ* 74 at 75. See also Du Plessis (2010) 22 *SA Merc LJ* at 518.

⁴³⁹ See discussion under para 2.3.2.2(a) in Ch 2 above.

⁴⁴⁰ Van Heerden "Chapter 3: Protection of consumer's rights and consumers' voice" 69-12 at para 19. See Du Plessis (2008) 20 *SA Merc LJ* 74 at 75.

⁴⁴¹ Section 117 of the CPA.

⁴⁴² Van Heerden "Chapter 3: Protection of consumer's rights and consumers' voice" 69-12 at para 18.

⁴⁴³ The CPA s 73(5)(a).

⁴⁴⁴ *Ibid* at s 73(5)(b).

⁴⁴⁵ *Ibid* at s 73(6). See also Mupangavanhu (2012) 15 *PELJ* 320 at 327 and Du Plessis (2008) 20 *SA Merc LJ* 74 at 85.

implication that such consumer court judgments would have the status of High Court judgments, which may effectively create precedent in consumer litigation matters.⁴⁴⁶

3.6.2.2.1 Current provincial legislation

Two provinces – Limpopo and KwaZulu-Natal – have attempted to align their legislation with the CPA. What is immediately apparent is that these updated provincial statutes do not appear to be based on similar frameworks. In this regard, it is submitted that an alignment in provincial legislation (firstly with the CPA and thereafter with each of the other provinces) would be beneficial for consumers and business alike, as business-to-consumer transactions often cross provincial boundaries. The KwaZulu-Natal Consumer Protection Act (the KZN-CPA),⁴⁴⁷ is not as aligned with the CPA as the Limpopo Consumer Protection Act (Limpopo-CPA).⁴⁴⁸ For instance, the KZN-CPA still refers to unfair business practices,⁴⁴⁹ and it also oversimplifies the rights available to consumers.⁴⁵⁰ Accordingly, the focus of this discussion will be on the innovative enforcement mechanisms in place in terms of the Limpopo-CPA.

(a) Limpopo-CPA: Background

By way of background, the Limpopo-CPA provides that the terms it uses follow the definitions provided for in the CPA, unless otherwise defined or if the context indicates otherwise.⁴⁵¹ The objectives of the Limpopo-CPA are also referred to as those set out in the CPA, which avoids the possibility of overlooking or oversimplifying such objectives.⁴⁵² The office established under the previous Consumer Affairs Act, has been retained under the Limpopo-CPA but renamed the

⁴⁴⁶ Du Plessis *ibid* at 86 in a discussion on a similar provision in the Consumer Protection Bill. For the sake of completeness, it is noted that consumer courts are expressly excluded from the definition of 'court' as provided for in s 1 of the CPA.

⁴⁴⁷ 4 of 2013. This statute was assented to on 31 October 2013. However, at the time of submission, its commencement date had not been published in the *Provincial Gazette*.

⁴⁴⁸ 4 of 2015. This statute was assented to on 23 February 2016. However, at the time of submission, the commencement date of this statute had not been published in the *Provincial Gazette*.

⁴⁴⁹ See s 33 of the KZN CPA (negotiation of arrangement to resolve consumer disputes).

⁴⁵⁰ *Ibid* at s 23 of the KZN CPA (consumer rights).

⁴⁵¹ See s 1 of the Limpopo CPA (definitions).

⁴⁵² *Ibid* at s 2 (objects of the Act).

Office of the Consumer Protector.⁴⁵³ The Office of the Consumer Protector has wide investigative powers, similar to those provided under the Gauteng Consumer Affairs Act, and it is unnecessary to repeat these.⁴⁵⁴

(b) Limpopo-CPA: Consumer court

The Limpopo consumer court is established under Part A of Chapter 3 of the Limpopo-CPA.⁴⁵⁵ An appeal and review process is also provided for in section 35 of the Limpopo-CPA in terms of which a participant has the option of appealing to a full bench where the matter has been heard before a single member of the consumer court.⁴⁵⁶ The participant is also afforded a further right of appeal or review, as the case may be, to the High Court.⁴⁵⁷

(c) Limpopo-CPA: Redress

The consumer court in Limpopo may order that the details of the infringing party be entered into the adverse notations register;⁴⁵⁸ that the matter be referred for investigation to the office of the Consumer Protector; or that it be referred for dispute resolution or for any other purpose that is not inconsistent with the functions of the Consumer Protector's office.⁴⁵⁹ The consumer court may also issue an administrative fine as contemplated in the CPA.⁴⁶⁰ The register of adverse notations is an innovative mechanism introduced by the Limpopo-CPA, in terms of which the Consumer Protector is required to keep a detailed record of all persons who have been found to have engaged in prohibited conduct.⁴⁶¹ However, an order for listing on the register must have been issued by the consumer court.⁴⁶² It is submitted that

⁴⁵³ Ibid at s 3 (Office of the Consumer Protector). The functions of the office are set out in s 5 of the Limpopo CPA whilst the role of the Consumer Protector is set out in s 7.

⁴⁵⁴ Ibid Ch 2, Part C. See also discussions under para 2.3.2.2(a) in Ch 2 above.

⁴⁵⁵ Ibid s 18 (Limpopo consumer court) and s 19 (functions of the consumer court). The functions of the court in this respect are in line with the CPA and refer broadly to the adjudication of disputes in terms of the CPA and the NCA; hearings and consideration of allegations in respect of matters in terms of the CPA and the NCA; and any powers and duties set out for consumer courts under the CPA and the NCA. The NCA does not fall within the scope of this discussion, but in so far as the CPA is concerned, s 84 of the CPA is discussed above under para 3.6.2.2 of this chapter.

⁴⁵⁶ The Limpopo CPA s 35(1).

⁴⁵⁷ Ibid s 35(2) and (3).

⁴⁵⁸ Ibid s 36(2)(i).

⁴⁵⁹ Ibid s 36(2)(ii).

⁴⁶⁰ Ibid s 37.

⁴⁶¹ Ibid s 12(1).

⁴⁶² Ibid s 12(2).

this register has the potential to act as an effective deterrent, provided it is properly publicised and made accessible to consumers.

3.6.2.3 Other alternative dispute resolution agents

Section 70(1)(c) of the CPA is the enabling provision for persons or entities that provide ADR services in the form of conciliation, mediation, or arbitration, with the view to assisting consumers in the resolution of their disputes. Private ADR services are offered by established bodies, including, but not limited to, the Arbitration Foundation of South Africa,⁴⁶³ the Association of Arbitrators,⁴⁶⁴ the South African Association of Mediators,⁴⁶⁵ the ADR-Network,⁴⁶⁶ the Retail Motor Industry Organisation (RMI),⁴⁶⁷ and Tokiso Dispute Settlement.⁴⁶⁸ However, there are often cost implications associated with these private ADR forums. The Arbitration Foundation of South Africa, which provides a wide range of ADR services, will be examined in brief as an example of how costing could possibly hinder a consumer's access to redress, given that service providers in this space do not generally offer their services on a *pro bono* basis. Thereafter, the RMI, which touches on an area that affects most consumers – the motor vehicle industry – is discussed for a more holistic view.

By way of the background, the Arbitration Foundation of South Africa was established in 1996 and is regarded as a collaboration between organised business, the legal profession, and the accounting profession.⁴⁶⁹ Where parties agree in writing to arbitration through the Arbitration Foundation of South Africa, it should be borne in mind that certain standard rates are applicable to the rooms and associated amenities. At present, in the Johannesburg area, the cheapest room costs R2 700

⁴⁶³ See generally AFSA website available at <http://www.arbitration.co.za/pages/default.aspx> (accessed on: 20 April 2018).

⁴⁶⁴ See generally Association of Arbitrators website available at <http://www.arbitrators.co.za/about-us/> (accessed on: 20 April 2018).

⁴⁶⁵ See SAAM website available at <http://www.saam.org.za/> (accessed on: 20 April 2018).

⁴⁶⁶ See ADR-Network website available at <http://www.adr-networksa.co.za/> (accessed on: 20 April 2018).

⁴⁶⁷ See RMI website available at <https://www.rmi.org.za/> (accessed on: 20 April 2018).

⁴⁶⁸ See Tokiso dispute settlement website available at <https://tokiso.co.za/> (accessed on: 20 April 2018).

⁴⁶⁹ See AFSA arbitration and mediation page available at <http://www.arbitration.co.za/pages/about.aspx> (accessed on: 20 April 2018).

per day (VAT excluded).⁴⁷⁰ In addition to the costs of the facilities, the parties will also need to cover the cost of the arbitrator or mediator, as the case may be. From a consumer protection perspective, it is highly likely that the services of bodies such as the Arbitration Foundation of South Africa will simply not be affordable. This route may also be less attractive to consumers who have entered into transactions of a nominal value, or who do not wish to engage suppliers in an adversarial setting. However, there is certainly room to explore a synergy between private redress agencies (such as the Arbitration Foundation of South Africa) and the bodies operating within the consumer protection framework.

As mentioned above, the RMI impacts on the resolution of disputes concerning consumers within the motor industry sector.⁴⁷¹ A complaint form written in plain language is available on the RMI website, which should be beneficial to consumers.⁴⁷² The resolution of disputes before the RMI is not a legally prescribed process and, in addition, legal representation is not allowed.⁴⁷³ However, the RMI charges an administrative fee of R285, which appears by inference, to be payable by the consumer upon filing of the complaint together with the relevant supporting documents.⁴⁷⁴ Annual reports of the RMI are not available for purposes of assessing its effectiveness,⁴⁷⁵ and it is unclear what the impact of the accreditation of the MIOSA has been on this ADR agent to date. Koekemoer submits that the non-legal nature of the RMI's alternative dispute resolution process means the RMI does not have the power to enforce any settlement agreement that may have been reached between the consumer and the vehicle dealer.⁴⁷⁶ Koekemoer submits further that upon breach of the settlement agreement, the matter would need to be escalated to other adjudicating bodies within the consumer protection landscape, such as the Tribunal or the MIOSA. It is submitted in this regard, that the first step that ADR agents such as the RMI should take once they have reached a settlement agreement, is to recommend that the parties make the resolution a consent order as

⁴⁷⁰ See AFSA facilities and rates, available at http://www.arbitration.co.za/pages/Facilities_RatesTC.aspx (accessed on: 20 April 2018).

⁴⁷¹ See RMI website available at <https://www.rmi.org.za/learn-more-about-the-rmi/> (accessed on: 20 April 2018). See also Koekemoer (2014) 30 *JABR* 659 at 664.

⁴⁷² Koekemoer *ibid.*

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*

contemplated in section 70(3)(b) of the CPA.⁴⁷⁷ Once it has been made a consent order by the Tribunal, for instance, breach of the consent order would be an offence as contemplated in section 109 of the CPA, and the next step would be prosecution.

3.6.3 National Consumer Commission

3.6.3.1 Background

The Commission has been established in terms of section 85 of the CPA.⁴⁷⁸ It is an administrative body with jurisdiction throughout the Republic.⁴⁷⁹ The general functions of the Commission are set out in Part C of Chapter 5 of the CPA⁴⁸⁰ and include the development of codes of practice related to the Act,⁴⁸¹ the promotion of legislative reform,⁴⁸² the promotion of consumer protection within organs of state,⁴⁸³ research and public information,⁴⁸⁴ relations with other regulatory authorities,⁴⁸⁵ and advice and recommendations to the Minister.⁴⁸⁶

More relevant to this thesis are the enforcement functions of the Commission, which include the investigation of prohibited conduct,⁴⁸⁷ the promotion of informal dispute resolution,⁴⁸⁸ the receipt (and initiation) of complaints regarding prohibited conduct,⁴⁸⁹ monitoring the consumer market and the effectiveness of consumer groups,⁴⁹⁰ issuing and enforcing compliance notices,⁴⁹¹ negotiating and concluding undertakings and consent orders,⁴⁹² and referring various matters either to the Competition Commission, the Tribunal,⁴⁹³ or the National Prosecuting Authority,⁴⁹⁴

⁴⁷⁷ See the discussion on consent orders in para 3.6.3.5 below.

⁴⁷⁸ Van Heerden "Chapter 3: Protection of consumer's rights and consumers' voice" 68-3 at para 7.

⁴⁷⁸ Koekemoer (2017) 40 JCP 419 at 423.

⁴⁷⁹ Section 85(2)(a) of the CPA. See also Mupangavanhu (2012) 15 PELJ 320 at 322 and Magaqa (2015) 27 SA Merc LJ 32 at 35.

⁴⁸⁰ The CPA s 92.

⁴⁸¹ Ibid s 93.

⁴⁸² Ibid s 94.

⁴⁸³ Ibid s 95.

⁴⁸⁴ Ibid s 96.

⁴⁸⁵ Ibid s 97.

⁴⁸⁶ Ibid s 98.

⁴⁸⁷ Ibid s 99(d).

⁴⁸⁸ Ibid s 99(a).

⁴⁸⁹ Ibid s 99(b).

⁴⁹⁰ Ibid s 99(c).

⁴⁹¹ Ibid s 99(e).

⁴⁹² Ibid s 99(f).

⁴⁹³ Hereafter the Tribunal.

as the circumstances of the matter may require.⁴⁹⁵ In general terms, the Commission has an investigative, enforcement, and monitoring function.⁴⁹⁶

In terms of section 87 of the CPA, the Minister is required to appoint a suitably qualified and experienced person as Commissioner.⁴⁹⁷ The Commissioner is responsible for all matters regarding the functions of the Commission and her agreed term of office cannot exceed five years.⁴⁹⁸ Nevertheless, it is possible for a person to be re-appointed as Commissioner on the expiry of an agreed term of office.⁴⁹⁹ The Commissioner is the accounting authority of the Commission.⁵⁰⁰ The Minister also has the power to appoint a Deputy Commissioner to perform certain functions of the Commission in instances where the Commissioner is not able to perform her functions or where the office of the Commissioner is vacant.⁵⁰¹

The Commissioner also has the authority to appoint a suitable candidate as an inspector as contemplated in the CPA.⁵⁰² Such an inspector must be provided with a certificate confirming her appointment.⁵⁰³ An inspector is required to be in possession of this certificate when executing her duties and has the powers of a peace officer as contemplated in section 1 of the Criminal Procedure Act.⁵⁰⁴ A Commissioner may also appoint an investigator to undertake certain duties on behalf of the Commission (ie, research, audits, enquiries, etc).⁵⁰⁵

The integrity of the Commission is also protected by virtue of section 89 of the CPA, which prevents her or any employee of the Commission, from: (i) engaging in activities that may undermine the integrity of the Commission; (ii) participating in investigations, hearings, or decisions in which the person concerned has a direct

⁴⁹⁴ Hereafter the NPA.

⁴⁹⁵ Section 99(g) to (l) of the CPA.

⁴⁹⁶ See Mupangavanhu (2012) 15 *PELJ* 320 at 323 - 324. See also Van Heerden & Barnard (2011) 6 *JICLT* 131 at 133.

⁴⁹⁷ The CPA s 87(1).

⁴⁹⁸ Ibid s 87(1)(a) and (b).

⁴⁹⁹ Ibid s 87(3).

⁵⁰⁰ Ibid s 87(4).

⁵⁰¹ Ibid s 87(6).

⁵⁰² Ibid s 88(1)(a).

⁵⁰³ Ibid s 88(1)(b).

⁵⁰⁴ Ibid s 88(2).

⁵⁰⁵ Ibid s 88(3).

financial or personal interest; (iii) using confidential information obtained during the course of performing the official functions of the Commission, for private use or profit-making; or (iv) divulging such confidential information to third parties (unless so required for purposes of performing an official function).

The Commission has multiple funding-streams, including the funds it is allocated by the state, fees payable to it in terms of the CPA, monies accruing from any other sources, as well as income derived from its investments.⁵⁰⁶ Funding is an important aspect to consider given that it may have an impact on the perceived independence of the Commission as an institution. Related thereto is the Commission's accountability. In this regard, the Commission is required to report to the Minister on its activities at least once a year.⁵⁰⁷ The Minister is also required to conduct an audit review on the Commission in relation to the use of its powers and functions at least once every five years.⁵⁰⁸

3.6.3.2 Initiating a complaint to the Commission

Section 71 of the CPA provides that any person may file a complaint with the Commission in the prescribed manner and form, alleging that a person has acted in a manner inconsistent with the CPA.⁵⁰⁹ There is no fee prescribed for the initial lodging of a complaint with the Commission.⁵¹⁰ The Commission also has the discretion directly to initiate a complaint regarding any alleged prohibited conduct: (i) on its own motion,⁵¹¹ or (ii) when directed to do so by the Minister⁵¹² in terms of section 86(b),⁵¹³ or (iii) at the request of either a provincial consumer protection

⁵⁰⁶ Ibid s 90(1) and (2).

⁵⁰⁷ Ibid s 91(2).

⁵⁰⁸ Ibid s 91(1).

⁵⁰⁹ Ibid s 71(1). Although the cross referencing in s 71(1) was erroneous, the latest version of the CPA indicates that this has been corrected by the National Credit Amendment Act 19 of 2014 with effect from 13 March 2015. In this regard the amended section reads: "(1) Any person may file a complaint concerning a matter contemplated in section 69(c)(iv) with the Commission in the prescribed manner and form, alleging that a person has acted in a manner inconsistent with this Act."

⁵¹⁰ Koekemoer (2017) 40 JCP 419 at 423.

⁵¹¹ The CPA s 71(2). See also the Commission Annual Report 2016/7 at 20.

⁵¹² See n 254 above.

⁵¹³ The CPA s 71(2)(a). Section 86(b) of the CPA reads as follows:

The Minister may –

...

(b) at any time direct the Commission to investigate –
(i) an alleged contravention of this Act; or

authority, another regulatory authority, or an accredited consumer protection group.⁵¹⁴ The fact that the Commission may institute proceedings on its own motion (or when directed to do so by either the Minister⁵¹⁵ or a provincial consumer protection authority), indicates that the CPA has adopted a preventative control paradigm, as discussed in Chapter 2 above.⁵¹⁶

Theoretically, this is a step in the right direction as the Commission can be proactive and aggressive in its approach to giving effect to consumer protection rights. However, Woker raises some practical challenges in this regard.⁵¹⁷ The Commission faced difficulties when attempting to resolve all of the consumer complaints it received, and this was aggravated by the fact that its compliance notices were often challenged by suppliers before the Tribunal.⁵¹⁸ This led to the Commission changing its approach in 2012, with greater inclusion of other forums during the process of dispute resolution.⁵¹⁹ As such, the Commission currently only considers “endemic harmful business practices and trends” as well as policy issues, and no longer investigates individual complaints.⁵²⁰ The Commission has relied on section 99(a) of the CPA in this regard, which articulates its duty to use informal dispute resolution procedures for purposes of enforcing the CPA.⁵²¹ The Commission has thus assumed a role of merely monitoring the performance of the ADR forums.⁵²² Koekemoer highlights that as the main task of the Commission is the development of policy, the receipt of complaints assists the Commission in identifying the consumer issues that require investigation.⁵²³ However, Woker criticises the approach of the Commission and submits, with merit, that it has placed excessive reliance on section 99(a) while simply ignoring the remainder of section 99

(ii) any matter or circumstances with respect to the purposes of this Act, whether or not those circumstances appear at the time of the direction to amount to a possible contravention of this Act.”

⁵¹⁴ Section 71(2)(b) of the CPA. See generally the Commission Enforcement Guidelines at 12 - 14. See also Magaqa (2015) 27 SA Merc LJ 32 at 35.

⁵¹⁵ See n 254 above.

⁵¹⁶ See para 2.2.2 of Ch 2 above.

⁵¹⁷ Woker (2017) 29 SA Merc LJ 1 at 6-8.

⁵¹⁸ Ibid at 6.

⁵¹⁹ Ibid.

⁵²⁰ Ibid.

⁵²¹ Ibid at 7-8.

⁵²² Ibid at 8.

⁵²³ Koekemoer (2017) 40 JCP 419 at 425.

of the CPA.⁵²⁴ The current approach of the Commission is certainly not founded on its empowering provisions and may also unduly limit a consumer's right to access redress – and, in particular, the rights of indigent consumers who do not have the financial muscle to move from forum to forum.

Persons who ordinarily have standing in terms of section 4 of the CPA are entitled to lodge a complaint with the Commission.⁵²⁵ Such complaints may be lodged against individuals, juristic persons, partnerships, trusts, organs of state, and other entities that are in the business of supplying goods or services in the ordinary course of their businesses, provided that the transaction falls within the scope of application of section 5 of the CPA.⁵²⁶ Koekemoer points out that the process of lodging the initial complaint cannot be done online, which may result in a consumer having to spend more time physically lodging the complaint as the form must first be downloaded before it is submitted, whether in person, by post, or by email.⁵²⁷ Accordingly, Koekemoer submits that, on the whole, the process of lodging a complaint with the Commission appears not to be user-friendly.⁵²⁸ However, given the Commission's current approach, these provisions regarding standing before the Commission may have little or no effect in practice.

3.6.3.3 Investigations by the Commission

Once a complaint has been lodged with the Commission, the Commission's enforcement guidelines provide that complaints will be received by the Commission's contact centre and are then escalated to the Commission's complaints handling unit within three days of receipt.⁵²⁹ Such an escalation will only take place where the complaint has been properly filed.⁵³⁰ The complaints that are received by the Commission go through a screening phase which is intended to determine: (i) whether there is a *prima facie* case; (ii) whether the complaint should be

⁵²⁴ Woker (2017) 29 SA Merc LJ 1 at 14. See brief reference above to the full scope of the Commission's duties as set out under para 3.6.3.1 of this chapter.

⁵²⁵ See para 3.3 in this chapter. See also the Commission Enforcement Guidelines at 13-14.

⁵²⁶ See para 3.2 above.

⁵²⁷ Koekemoer (2017) 40 JCP 419 at 424.

⁵²⁸ Ibid at 426.

⁵²⁹ See Commission Enforcement Guidelines at 20.

⁵³⁰ Ibid.

investigated; (iii) any further action required to enable a more informed analysis of the possible breach; (iv) the Commission's target areas; (v) the available evidence; and (vi) enforcement criteria.⁵³¹

The Commission may issue a notice of non-referral to the complainant in the prescribed form, where: (i) the complaint appears to be frivolous or vexatious;⁵³² (ii) the facts are not a ground for a remedy under the CPA;⁵³³ or (iii) the complaint is prohibited from being referred to the Tribunal in terms of section 116 of the CPA.⁵³⁴ The guidelines provide that the turnaround time for non-referrals is three days, which short period is intended not to raise expectations that the matter will be investigated.⁵³⁵ The Commission's enforcement guidelines further provide that where a notice of non-referral is issued by the Commission, the complainant may still refer the matter directly to either the consumer court or the Tribunal.⁵³⁶

Alternatively, the Commission may refer the complaint to an ADR agent, a provincial consumer protection authority, or a consumer court for the purposes of assisting the parties in their attempt to resolve the dispute in terms of section 70,⁵³⁷ unless the

⁵³¹ Ibid at 30. See also the Commission Annual Report 2016/7 at 20.

⁵³² The CPA s 72(1)(a)(i).

⁵³³ Ibid at s 72(1)(a)(ii).

⁵³⁴ Ibid at s 72(1)(a)(iii) of the CPA. Section 116 provides for limitations of bringing action and reads as follows:

(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after -

(a) the act or omission that is the cause of the complaint; or

(b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

(2) A complaint in terms of this Act may not be referred to the Tribunal or to a consumer court in terms of this Act, against any person that is or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.

See also Koekemoer (2017) 40 JCP 419 at 423.

⁵³⁵ See the Commission Enforcement Guidelines at 21.

⁵³⁶ Ibid at 18.

⁵³⁷ For a discussion of s 70(1) of the CPA see para 3.6.2 above. For the sake of completeness, the dispute resolution process set out in section 70(2) - (4) of the CPA reads as follows:

(2) If an alternative dispute resolution agent concludes that there is no reasonable probability of the parties resolving their dispute through the process provided for, the agent may terminate the process by notice to the parties, whereafter the party who referred the matter to the agent may file a complaint with the Commission in accordance with section 71.

(3) If an alternative dispute resolution agent has resolved, or assisted parties in resolving their dispute, the agent may—

(a) record the resolution of that dispute in the form of an order, and

(b) if the parties to the dispute consent to that order, submit it to the Tribunal or the High Court to be made a consent order, in terms of its rules.

(4) With the consent of a complainant, a consent order confirmed in terms of subsection (3)(b) may include an award of damages to that complainant.

parties have previously and unsuccessfully attempted to resolve the dispute in that manner.⁵³⁸ The Commission may also refer the complaint for investigation to another regulatory authority which has jurisdiction over the matter,⁵³⁹ or, in any other case, direct an inspector to investigate the complaint as quickly as is practicable.⁵⁴⁰ Mupangavanhu submits that section 72(1)(b), read together with section 72(1)(d) of the CPA, implies that the Commission should encourage consumers to resolve their disputes through the ADR before approaching the Commission for relief.⁵⁴¹

Where an investigation ensues, the Commission has wide powers to support the investigations. These powers include the power to issue summons⁵⁴² and the authority to enter and search under warrant.⁵⁴³ In so far as the issuing of summons is concerned, Koekemoer highlights that the use of the word ‘may’ in respect of the method of service of a subpoena in terms of section 102(2)(b) of the CPA, indicates that the consumer has a discretion to use service of the subpoena akin to the process used for criminal cases in a magistrate’s court.⁵⁴⁴ Koekemoer is of the view that the reason for this is that the Commission Rules provide for alternative methods of delivery.⁵⁴⁵ However, it is unclear whether the Commission has the power to make a costs order where service is effected by a sheriff, which would allow a successful consumer to claim back the cost incurred in using the services of the sheriff from the supplier.⁵⁴⁶ Where there is a referral, the Commission’s guidelines provide that the complaints handling unit will establish the necessary referral protocols with the provinces, regulators, ombud-schemes, and ADR agents.⁵⁴⁷ In terms of these guidelines, referrals are also to be made within three days.⁵⁴⁸

⁵³⁸ The CPA s 72(1)(b).

⁵³⁹ Ibid s 72(1)(c).

⁵⁴⁰ Ibid s 72(1)(d).

⁵⁴¹ Mupangavanhu (2012) 15 *PELJ* 320 at 325.

⁵⁴² Section 102 of the CPA.

⁵⁴³ Section 103 of the CPA read with ss 104 and 105 thereof.

⁵⁴⁴ Koekemoer (2017) 40 *JCP* 419 at 424.

⁵⁴⁵ See rule 5 of the Commission Rules which provides for various methods of delivering documents. Koekemoer (2017) 40 *JCP* 419 at 424.

⁵⁴⁶ Ibid.

⁵⁴⁷ See the Commission Enforcement Guidelines at 21. During the Commission’s seminar titled ‘Common approach, understanding and interpretation on the Consumer Protection Act’ which was held at the Premier Hotel, Pretoria from 22 – 23 February 2018, a comment was raised by a member of the Commission during the presentation by Professor Corlia Van Heerden that there is a service level agreement in place with the ombud schemes in respect of the referral protocols.

⁵⁴⁸ See the Commission Enforcement Guidelines at 21.

Following an investigation by an inspector, the Commission may either issue a non-referral notice,⁵⁴⁹ refer the matter to the NPA where an offence in terms of this Act has been committed,⁵⁵⁰ or, where the Commission is of the view that a person has taken part in prohibited conduct, it may either: (i) refer the matter to the Equality Court, where appropriate; (ii) propose a draft consent order in terms of section 74;⁵⁵¹ (iii) make a referral to the consumer court or the Tribunal;⁵⁵² or issue a compliance notice in terms of section 100.⁵⁵³

3.6.3.4 Allocations by the Commission⁵⁵⁴

Where the Commission allocates a matter to be dealt with internally, the guidelines of the Commission provide that there should be certain internal dispute resolution mechanisms within the Commission. Firstly, there should be a negotiation/mediation phase which entails an analysis of factors such as the nature of the complaint, its complexity, and the harm that may be suffered by the consumer.⁵⁵⁵ The methods for mediation are by way of telephone, in writing, face-to-face, or extraordinary mediation measures where there are questions as to the independence of the mediators.⁵⁵⁶ The method used for mediation depends on factors such as the cooperation of the respondent, and the proximity of the complainant and the respondent.⁵⁵⁷

⁵⁴⁹ Section 73(1)(a) of the CPA.

⁵⁵⁰ *Ibid* at s 73(1)(b).

⁵⁵¹ See discussion on consent orders in para 3.6.3.5 (b) above.

⁵⁵² Section 73(2), in relevant part, reads as follows:

The Commission may refer the matter-

- (a) to the consumer court of the province in which the supplier has its principal place of business in the Republic, if-
 - (i) there is a consumer court in that province; and
 - (ii) the Commission believes that the issues raised by the complaint can be dealt with expeditiously and fully by such a referral; or
- (b) to the Tribunal.

⁵⁵³ Section 73(1)(c) of the CPA. See discussion on compliance notices in para 3.6.3.6 (c) above. See also Koekemoer (2017) 40 *JCP* 419 at 425.

⁵⁵⁴ During the Commission's seminar titled 'Common approach, understanding and interpretation on the Consumer Protection Act' which was held at the Premier Hotel, Pretoria from 22 – 23 February 2018, Deputy Commissioner Mabuza, in addressing a point that I had made during my presentation on models of the mediation and conciliation, indicated that the mediation and conciliation model provided for in the Commission Enforcement Guidelines has been abandoned by the Commission owing to the conflict in assuming the role of both mediator and prosecutor. Given that no official notice has been issued at the time of submission of this thesis, this aspect of the Commission's guidelines is noted for the sake of completeness.

⁵⁵⁵ See the Commission Enforcement Guidelines at 22.

⁵⁵⁶ *Ibid* at 22-27.

⁵⁵⁷ *Ibid*.

The mediation phase is followed by the finalisation phase which takes place once a settlement has been reached between the parties.⁵⁵⁸ The enforcement guidelines provide that where there is no agreement – for example, the suggested remedy is not agreed upon or the allegations are disputed – the official is entitled to refer the matter for investigation, or to a provincial tribunal, or to the Tribunal.⁵⁵⁹ Thereafter the official must update and close the file.⁵⁶⁰ The time prescribed for resolving complaints by way of mediation is twenty working days.⁵⁶¹

3.6.3.5 Consent orders

Where the Commission and the respondent agree to the proposed terms of an appropriate order, the Tribunal or a court is permitted, in terms of section 74(1) of the CPA, to confirm that agreement as a consent order without having to hear evidence. After the motion for a consent order has been heard, the Tribunal or court concerned must either: (i) make the order as agreed to and proposed by the parties; (ii) indicate any changes required before it will make the draft order an order; or (iii) refuse to make the order.⁵⁶² Where the complainant consents, an order that has been confirmed may include an award of damages to the complainant.⁵⁶³

3.6.3.6 Compliance notices

Section 100 of the CPA provides for the Commission to issue compliance notices to persons or associations whom the Commission believes, on reasonable grounds, have engaged in prohibited conduct.⁵⁶⁴ In the event that the Commission seeks to issue a compliance notice to a regulated entity, the Commission is required to consult with the relevant regulatory authority that was responsible for issuing a licence to that entity.⁵⁶⁵

⁵⁵⁸ Ibid at 29.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid.

⁵⁶¹ Ibid.

⁵⁶² The CPA s 74(2).

⁵⁶³ Ibid at s 74(3).

⁵⁶⁴ Ibid at s 100(1).

⁵⁶⁵ Ibid at s 100(2).

The compliance notice must set out the person or association to whom it applies, the relevant provision of the CPA that has not been complied with, the necessary details regarding the nature and extent of the non-compliance, any steps that must be taken and the relevant timeframes, and the penalty that may be imposed in accordance with the CPA if the required steps are not taken.⁵⁶⁶ A compliance notice issued in terms of this section remains in force until it is either: (i) set aside by the Tribunal, or a court, upon a review of a Tribunal decision concerning the notice; or (ii) the Commission issues the party concerned with a compliance certificate (once the requirements of the notice have been satisfied).⁵⁶⁷ In the event of failure to comply with a compliance notice, the Commission may either: (i) apply to the Tribunal for the imposition of an administrative fine; or (ii) refer the matter to the National Prosecuting Authority for prosecution as an offence as contemplated in section 110(2).⁵⁶⁸ Therefore, the overall purpose of the compliance notice is to ensure that parties who fall foul of the provisions of the CPA, are given the opportunity to take the relevant steps to rectify their actions before a penalty is imposed.

3.6.3.7 Relationship between consumer courts and the Tribunal

In the event that the Commission refers a matter to a consumer court, any party to that referral may apply to the Tribunal for an order that the matter be referred to the Tribunal.⁵⁶⁹ It is then within the discretion of the Tribunal to hear the matter if the balance of convenience or the interests of justice require it to do so.⁵⁷⁰

3.6.3.8 Effectiveness of the Commission

The guidelines published in respect of the Commission undoubtedly embody the 'core values' of the Commission which include respect, responsiveness, adherence to timelines, consistency, and confidentiality.⁵⁷¹ However, it is worth noting that Magaqa has made some meaningful observations regarding the efficacy of the Commission by assessing the Commission's reports to the parliamentary committee

⁵⁶⁶ Ibid at s 100(3) of the CPA.

⁵⁶⁷ Ibid at s 100(4) and (5) of the CPA.

⁵⁶⁸ Ibid at s 100(6). See generally the Commission Enforcement Guidelines at 10 - 11.

⁵⁶⁹ Ibid at s 73(3).

⁵⁷⁰ Ibid at s 73(4).

⁵⁷¹ Mupangavanhu (2012) 15 *PELJ* 320 at 324.

and the DTI during 2011 to 2014.⁵⁷² She observes that there was little progress in the Commission taking steps to empower consumers and suppliers in rural areas.⁵⁷³ The issue of funding was a challenge that was raised repeatedly by the Commission.⁵⁷⁴ Magaqa also points out some of the weaknesses of the Commission as highlighted by its employees in its April 2014 report.⁵⁷⁵ These include inadequate information and communications technology systems, inadequate human resources, inadequate internal and external communications, lack of clear processes, inaccessibility of the Commission to consumers, high work-load, low work output, low staff morale, differing interpretations of the CPA, poor reputation, and negative publicity.⁵⁷⁶ Importantly, Woker highlights that where the Commission fails to play a central role in the resolution of disputes, the result is that consumers remain in the position they were before the introduction of the CPA – stranded without an expeditious and effective resolution to their disputes.⁵⁷⁷

The above challenges observed regarding the Commission, can also be observed in the Tribunal's decisions where the Commission incorrectly issued compliance notices in relation to transactions and agreements that were concluded before the effective date of CPA; instances where the Commission demonstrated a level of negligence through refusing to investigate complaints on the ground that the agreement had been concluded before the effective date, while it had in fact been concluded after the effective date of the CPA; and times where the Commission had unlawfully issued compliance notices.⁵⁷⁸ Magaqa observes in this regard, that these concerns, which have been raised in judgments of the Tribunal, demonstrate that the Commission is not effectively fulfilling its mandate.⁵⁷⁹ Undoubtedly, this has a domino effect on consumers' realisation of rights. Where the enforcement body is not operating effectively – the rights remain an ideal.

⁵⁷² Magaqa (2015) 27 SA Merc LJ 32 at 41, 42, 44 where the author critically discusses the January 2012, March to October 2012 reports.

⁵⁷³ Ibid.

⁵⁷⁴ Ibid where Magaqa looks at the January 2012, March 2012, October 2012, and April 2013 reports. However, by March 2014, there seems to have been an increase in funding to the Commission and some serious concerns were seemingly raised as the funding appeared to have no real impact on the Commission, see Magaqa *ibid* at 45.

⁵⁷⁵ Ibid at 46.

⁵⁷⁶ Ibid at 46.

⁵⁷⁷ Woker (2017) 29 SA Merc LJ 1 at 11-12 and 16.

⁵⁷⁸ See Magaqa (2015) 27 SA Merc LJ 32 at 47-49, where the author discusses cases by the Tribunal that demonstrate how the Commission has not been operating efficiently.

⁵⁷⁹ Ibid at 49. See generally Woker (2017) 29 SA Merc LJ 1 at 1-16.

During the 2016/7 financial year, the Commission analysed a total of 7 070 complaints (which include 6 matters that were a duplication).⁵⁸⁰ This was an increase from the number of complaints received in the 2015/6 financial year, namely 6 800 matters in total.⁵⁸¹ This represents a four per cent increase in the number of complaints lodged with the Commission in the 2015/6 and 2016/7 financial years respectively.⁵⁸² The Commission's 2016/7 Annual Report indicates that an increasing number of consumers were expected to lodge their complaints with the accredited ombud schemes.⁵⁸³ There is thus a clear need to raise consumer awareness in respect of these ombud schemes.⁵⁸⁴

The top three categories of complaint lodged with the Commission during the 2016/7 financial year came from the ICT (37 per cent), retail (34 per cent), and motor vehicle (14 per cent) sectors.⁵⁸⁵ The Commission dealt with complaints concerning unconscionable conduct (47 per cent), defective goods (15 per cent), contract cancellation (21 per cent), incorrect billing (9 per cent), misrepresentation (3 per cent), poor service delivery (4 per cent), and unauthorised deductions (1 per cent).⁵⁸⁶

With regard to timeframes, the Commission's 2016/7 Annual Report indicated that 99 per cent of complaints were referred or issued with non-referral notices within an average of seventeen days from receipt (7 259 of 7 297).⁵⁸⁷ This may be attributed to a decrease in the number of officials used to refer matters which resulted in improved efficiency.⁵⁸⁸ In addition, 33 investigations were conducted and reports with recommendations were produced and approved by the Commissioner.⁵⁸⁹ This was up from 25 investigations and reports produced in the preceding financial year.

⁵⁸⁰ Commission Annual Report 2016/7 at 33.

⁵⁸¹ Ibid.

⁵⁸² Ibid.

⁵⁸³ Ibid. See also Koekemoer (2017) 40 *JCP* 419 at 424 in relation to the Commission Annual Report 2015/6, where she indicates that notwithstanding the establishment of the CGSO, there was no reduction in the number of first contact complaints made directly to the Commission.

⁵⁸⁴ Commission Annual Report 2016/7 at 33.

⁵⁸⁵ Ibid at 39.

⁵⁸⁶ Ibid at 38.

⁵⁸⁷ Ibid at 43.

⁵⁸⁸ Ibid.

⁵⁸⁹ Ibid at 46.

This was attributed to an increase in the number of complaints not resolved by way of ADR procedures, and which needed to be investigated in order to determine the best course of action.⁵⁹⁰

While in the 2015/6 financial year 57 inspections were conducted, approved, and finalised, a total of 36 inspections were conducted and reports with recommendations produced and approved by the Commissioner in the 2016/7 financial year.⁵⁹¹ Although this represents a decrease from the previous financial year, this number was above their targeted number of 22 inspections, and was attributable to the ministerial campaign on paraffin stoves as well as the Commission's price-display campaign (resulting in an increase in inspections that had already been planned for municipalities).⁵⁹² The Commission's plan to have an opt-out register has not yet been realised due to a delay in procurement as the tender for the transactional advisor had to be re-advertised after no bids were received in the first instance.⁵⁹³

3.6.4 National Consumer Tribunal

3.6.4.1 Background

The Tribunal was established in terms of section 26 of the NCA⁵⁹⁴ which provides that the Tribunal has jurisdiction throughout South Africa.⁵⁹⁵ The Tribunal is a juristic person and a tribunal of record that must exercise its functions in terms of the NCA or any other applicable legislation.⁵⁹⁶ The Tribunal is a regulatory body, whilst the Commission fulfils the role of an administrative 'watchdog'.⁵⁹⁷ Although established in terms of the NCA, the Tribunal is mandated in terms of section 4(2)(b)(i) of the CPA to ensure that the spirit and purpose of the CPA are promoted when

⁵⁹⁰ Ibid at 46.

⁵⁹¹ Ibid.

⁵⁹² Ibid.

⁵⁹³ Ibid at 48. The establishment of an opt-out registry in respect of unwanted communication, particularly with regard to direct marketing, is provided for in s 11(3) of the CPA.

⁵⁹⁴ See Koekemoer (2017) 40 *JCP* 419 at 426.

⁵⁹⁵ Section 26(1)(a) of the NCA. See also Magaqa (2015) 27 *SA Merc LJ* 32 at 51.

⁵⁹⁶ Section 26(1)(b)-(d) of the NCA.

⁵⁹⁷ Mupangavanhu (2012) 15 *PELJ* 320 at 325.

discharging its duties.⁵⁹⁸ Section 4(2)(b)(i) of the CPA goes further to indicate that the Tribunal is authorised to make innovative orders in order to protect, advance, and promote the realisation and full enjoyment of consumer rights.⁵⁹⁹

Most of the functions of the Tribunal as prescribed in its founding provision relate to the application of the NCA. However, as mentioned above, section 26(1)(d) of the NCA gives the Tribunal a wider function – to exercise its functions in accordance with the NCA or any other applicable legislation.⁶⁰⁰ This is where the functions of the Tribunal as prescribed in the CPA come into play. The type of applications emanating from the CPA that may be dealt with by the Tribunal, are set out further in the paragraphs below.⁶⁰¹

3.6.4.2 Composition

In so far as the composition of the Tribunal is concerned, it should comprise of ten people appointed by the President, on either a full- or part-time basis.⁶⁰² The Tribunal consists of ordinary members, a deputy chairperson, and a chairperson.⁶⁰³ The NCA prescribes that the members of the Tribunal “must represent a broad cross-section of the population of the Republic” and “comprise of persons with sufficient legal training and experience”.⁶⁰⁴ Section 28(2) of the NCA further prescribes that each member of the Tribunal must be a South African citizen ordinarily resident in South Africa, and must be committed to the aims of the NCA.⁶⁰⁵

⁵⁹⁸ See also *ibid* at 325.

⁵⁹⁹ See also *ibid* at 325-326.

⁶⁰⁰ See also s 27(d) of the NCA which provides that the Tribunal may exercise any other power conferred on it by law.

⁶⁰¹ See para 3.6.4.3 below.

⁶⁰² Section 26(2) of the NCA.

⁶⁰³ Section 30 of the NCA (Chairperson) and s 26(3) of the NCA (Establishment and constitution of tribunal).

⁶⁰⁴ Section 28(1) and (2)(b) of the NCA read together with ss 31(2)(a) and 28(2)(c) of that Act.

⁶⁰⁵ The purpose of the NCA is set out in s 3 thereof and reads as follows:

The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by –

- (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
- (b) ensuring consistent treatment of different credit products and different credit providers;
- (c) promoting responsibility in the credit market by –
 - (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
 - (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;

A tribunal member's term of office is five years with the option of re-election by the President.⁶⁰⁶ However, no Tribunal member may serve for more than two consecutive terms.⁶⁰⁷ The chairperson and ordinary members of the Tribunal may resign from office on one month's notice.⁶⁰⁸ Furthermore, on the recommendation of the Minister,⁶⁰⁹ the President is required to remove the chairperson or any member of the Tribunal from office where he or she is shown to be subject to the disqualifications set out in section 26(5) of the NCA,⁶¹⁰ or in the case of serious misconduct, permanent incapacity, or participation in activities that undermine the Tribunal's integrity.⁶¹¹

-
- (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
 - (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by –
 - (i) providing consumers with education about credit and consumer rights;
 - (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
 - (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
 - (f) improving consumer credit information and reporting and regulation of credit bureaux;
 - (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
 - (h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
 - (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

⁶⁰⁶ The NCA s 29(1) and (2).

⁶⁰⁷ Ibid at s 29(2).

⁶⁰⁸ Ibid at s 29(3) and (4) of the NCA.

⁶⁰⁹ See n 254 above.

⁶¹⁰ Section 26(5) of the NCA provides that –

- (5) A person may not be a member of the Tribunal if that person-
 - (a) is an office-bearer of any party, movement, organisation or body of a partisan political nature;
 - (b) personally or through a spouse, partner or associate-
 - (i) has or acquires a direct or indirect financial interest in a registrant; or
 - (ii) has or acquires an interest in a business or enterprise, which may conflict or interfere with the proper performance of the duties of a member of the Tribunal;
 - (c) is an unrehabilitated insolvent or becomes insolvent and the insolvency results in the sequestration of that person's estate;
 - (d) has ever been, or is, removed from an office of trust on account of a guilty finding in respect of a complaint of misconduct related to fraud or the misappropriation of money;
 - (e) is subject to an order of a competent court holding that person to be mentally unfit or disordered;
 - (f) within the previous 10 years has been, or is, convicted in the Republic or elsewhere of theft, fraud, forgery or uttering a forged document, perjury, an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), an offence under the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), or an offence involving dishonesty; or
 - (g) has been convicted of any other offence committed after the Constitution of the Republic of South Africa, 1996, took effect, and sentenced to imprisonment without the option of a fine.

⁶¹¹ The NCA s 29(5).

3.6.4.3 Applications before the Tribunal

Matters regulated by the CPA may be referred to the Tribunal by either the Commission or the complainant herself.⁶¹² In the latter case the leave of the Tribunal is required.⁶¹³ A referral to the Tribunal must be in the prescribed form and, where applicable, the relevant fee must be paid.⁶¹⁴

The Tribunal is required to conduct its hearings in accordance with the requirements of the CPA, and the applicable provisions of the NCA governing the proceedings of the Tribunal.⁶¹⁵ A provision worth noting in this respect is section 142 of the NCA, which regulates hearings that are before the Tribunal. In this respect, the Tribunal hearings must be conducted publicly, in an inquisitorial manner, expeditiously, informally and in line with natural justice principles.⁶¹⁶ The publicity element is, however, subject to certain exceptions ie: (i) the evidence to be presented constitutes confidential information that cannot be protected in any other way;⁶¹⁷ (ii) where privacy is required in order to properly conduct the hearing,⁶¹⁸ or (iii) for reasons that would be justifiable in terms of High Court civil proceedings.⁶¹⁹

The Tribunal is a specialised forum in that it adjudicates only matters concerning the NCA and the CPA.⁶²⁰ In this regard, section 31 of the NCA provides that it is the responsibility of the chairperson to manage the caseload of the Tribunal in terms of the NCA or any other legislation (this would include the CPA). As such, the chairperson is required to assign each application received by, or referred to, the Tribunal either: (i) to a member of the Tribunal to the extent required by, inter alia, section 75(5) of the CPA;⁶²¹ or (ii) to a panel of any three members of the Tribunal in

⁶¹² Section 75(1) of the CPA.

⁶¹³ Section 75(1) and (2) of the CPA. See Van Heerden “Chapter 3: Protection of consumer’s rights and consumers’ voice” 75-3 at para 2.

⁶¹⁴ Section 75(3) of the CPA, particularly in light of s 75(1) of the CPA. See also rule 5 of the Tribunal Rules. Koekemoer (2017) 40 *JCP* 419 at 426.

⁶¹⁵ Section 75(4)(a) of the CPA.

⁶¹⁶ Section 142(1)(a)-(d) of the NCA. These requirements for hearings before the Tribunal have the theoretical capacity to ensure accessibility to justice for consumers.

⁶¹⁷ Section 142(2)(a) of the NCA.

⁶¹⁸ Section 142(2)(b) of the NCA.

⁶¹⁹ Section 142(2)(c) of the NCA.

⁶²⁰ See Koekemoer (2017) 40 *JCP* 419 at 426.

⁶²¹ Section 75(5) of the CPA which provides as follows:

any other case.⁶²² In the latter case, the chairperson is required to ensure that at least one member of the panel has suitable experience and legal qualifications; and the chairperson must designate one of the panel members to preside over the proceedings of the panel.⁶²³ In the event that the panel is unable to complete the proceedings before it due to the fact that a member of the panel is either sick, dead, or has resigned or withdrawn from the matter, the chairperson is required to direct that the hearing proceed, subject to there still being a member of the panel with suitable legal qualifications.⁶²⁴ Alternatively, the chairperson must terminate the proceedings, constitute another panel (which may include the original panel members), and commence with fresh proceedings.⁶²⁵

Any decision by the panel must be in writing and include reasons therefor.⁶²⁶ The decision by a single member of the Tribunal, or the majority of members within a panel, is the decision of the Tribunal.⁶²⁷

The rules of the Tribunal provide that applications contained in Table 1A and Table 1B of Tribunal rules may be referred to the Tribunal for hearing in terms of the NCA and the CPA respectively.⁶²⁸ The matters that are eligible for referral to the Tribunal in terms of the NCA are not considered further as they fall outside of the scope of this thesis. In terms Table 1B of the Tribunal Rules, the following applications contemplated in the CPA may be referred to the Tribunal:

The Chairperson of the Tribunal may assign any of the following matters arising in terms of this Act to be heard by a single member of the Tribunal, in accordance with section 31(1)(a) of the National Credit Act:

- (a) an application in terms of section 73(3);
- (b) an application for leave as contemplated in subsection (1)(b);
- (c) an application in terms of subsection (2);
- (d) an application in terms of section 106; or
- (e) an application for an extension of time, to the extent that the Tribunal has authority to grant such an extension in terms of this Act.

See also section 142(3)(a)-(g) of the NCA which sets out matters that the Tribunal Chairperson must assign to a hearing presided over by a single member of the Tribunal, including consent orders, late filing applications, reviews of requests for additional information requests, to name but a few.

⁶²² The NCA s 31(2)(b).

⁶²³ Ibid at s Section 31(2) of the NCA.

⁶²⁴ Ibid at s 31(3)(a).

⁶²⁵ Ibid at s 31(3)(b).

⁶²⁶ Ibid at s 31(4). See also s142(2) of the NCA. In addition, section 142(5) of the NCA provides for the public and participants to be provided with reasonable access to records subject to any ruling that has been made to protect the confidentiality of the information in terms of section 142(2)(a).

⁶²⁷ Ibid at s 31(5).

⁶²⁸ Rule 3(1)(a) of the Tribunal Rules.

- (a) an application by a producer or an importer to review a notice issued by the Commission in terms of section 6(2);⁶²⁹
- (b) an application for a consent order after resolution of dispute by an ADR agent;⁶³⁰
- (c) an application for referral to the Tribunal by any party to a referral by the Commission in accordance with section 73(2)(a) of the CPA, including an application for leave that the matter be referred to the Tribunal;⁶³¹
- (d) a referral of complaint by the Commission;⁶³²
- (e) an application for a consent order;⁶³³
- (f) a referral to the Tribunal by a complainant who submitted a complaint to the Commission in terms of section 71(1) of the CPA, with application for leave to refer;⁶³⁴

⁶²⁹ See section 60(3) of the CPA. The section in Table 1B reads s 6(2) but from a reading of the CPA it appears as if this should be a reference to s 60(2) which provides that—

- (1) If the Commission has reasonable grounds to believe that any goods may be unsafe, or that there is a potential risk to the public from the continued use of or exposure to the goods, and the producer or importer of those goods has not taken any steps required by an applicable code contemplated in subsection (1), the Commission, by written notice, may require that producer to -
 - (a) conduct an investigation contemplated in subsection (1); or
 - (b) carry out a recall programme on any terms required by the Commission.

⁶³⁰ Section 70(3) of the CPA.

⁶³¹ See s 73(3) of the CPA. Section 73(2)(a) of the CPA provides that—

- (2) In the circumstances contemplated in subsection (1)(c)(iii), the Commission may refer the matter-
 - (a) to the consumer court of the province in which the supplier has its principal place of business in the Republic, if-
 - (i) there is a consumer court in that province; and
 - (ii) the Commission believes that the issues raised by the complaint can be dealt with expeditiously and fully by such a referral.

⁶³² The CPA s 73(2)(b).

⁶³³ Ibid s 74(1).

⁶³⁴ Ibid s 75(1)(b). Section 71(1) of the CPA provides that—

- (1) Upon initiating or receiving a complaint in terms of this Act, the Commission may
 - (a) issue a notice of non-referral to the complainant in the prescribed form, if the complaint-
 - (i) appears to be frivolous or vexatious;
 - (ii) does not allege any facts which, if true, would constitute grounds for a remedy under this Act; or
 - (iii) is prevented, in terms of section 116, from being referred to the Tribunal;
 - (b) refer the complaint to an alternative dispute resolution agent, a provincial consumer protection authority or a consumer court for the purposes of assisting the parties to attempt to resolve the dispute in terms of section 70, unless the parties have previously and unsuccessfully attempted to resolve the dispute in that manner;
 - (c) refer the complaint to another regulatory authority with jurisdiction over the matter for investigation; or
 - (d) direct an inspector to investigate the complaint as quickly as practicable, in any other case.

- (g) an application for referral to the Tribunal by a respondent when the matter has been referred to a consumer court by Commission in terms of section 75(1)(b), with application for leave to refer;⁶³⁵
- (h) an application to review the determination of the Registrar made in terms of section 18(4) of CPA (*sic*);⁶³⁶
- (i) an application by the Commission for imposition of administrative fine for failure to comply with compliance notice issued in terms of section 100(1);⁶³⁷
- (j) an application to review issuing of notice in terms of section 100 of the CPA;⁶³⁸
- (k) an application by Commission for extension of the time to retain books, documents or objects;⁶³⁹
- (l) a claim of confidentiality of information submitted and determination of such claim terms of section 106(3) of CPA;⁶⁴⁰ and
- (m) an application for interim relief.⁶⁴¹

The rules of the Tribunal provide further for the procedure to be followed when bringing a matter before the Tribunal. The rules provide for the access to and

⁶³⁵ Ibid s 75(2). Section 75(1)(b) provides as follows: “(1) If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to—(b) the Tribunal, with leave of the Tribunal.”

⁶³⁶ Ibid s 80(5) of the CPA. Although the section in Table 1B reads 18(4) it appears that this should be a reference to s 80(4) which reads as follows:

- (4) If during the time that a business name is registered to a person, the Registrar, on reasonable grounds, believes that the person has not been carrying on business under that name for a period of at least six months, the Registrar -
 - (a) by notice in the prescribed form, may require the person to whom the business name is registered to show cause in the prescribed manner and form why the registration should not be cancelled; and
 - (b) may cancel the registration by notice in the prescribed form if the person to whom the business name is registered fails to respond to the notice within the prescribed time, or fails to provide-
 - (i) satisfactory evidence that the person is conducting business under the registered business name; or
 - (ii) a reasonable explanation for not conducting business under that name as noted by the Registrar.

⁶³⁷ Ibid s 100(6). Section 100(1) of the CPA reads as follows: “(1) Subject to subsection (2) the Commission may issue a compliance notice in the prescribed form to a person or association of persons whom the Commission on reasonable grounds believes has engaged in prohibited conduct.”

⁶³⁸ Ibid s 101(1). Section 100 of the CPA provides generally for compliance notices.

⁶³⁹ Ibid s 102(3)(b).

⁶⁴⁰ Ibid s 106(1). Section 106(3) of the CPA provides as follows:

- (3) The Commission, Tribunal, inspector or investigator, as the case may be, must-
 - (a) consider any claim made in terms of subsection (1); and
 - (b) notify the claimant whether or not the information contemplated in subsection (1) will be treated as if it had been determined to be confidential.

⁶⁴¹ Ibid s 114(1).

function of the Tribunal,⁶⁴² the application procedure,⁶⁴³ the procedure to be followed during hearings,⁶⁴⁴ as well as general rules that apply to procedures before the Tribunal.⁶⁴⁵ The procedure applicable before the Tribunal is very similar to that which applies before the High Court.⁶⁴⁶ Furthermore, as is the case in a civil court, the onus of proof in a matter before the Tribunal is on a balance of probabilities.⁶⁴⁷ It is worth noting that the fee payable in respect of matters before the Tribunal, may pose as a barrier to accessing redress, particularly for indigent consumers.⁶⁴⁸

The Tribunal is permitted to make appropriate orders in terms that can ensure that practical effect is given to a consumer's right to access redress in terms of section 4(2)(b) of the CPA.⁶⁴⁹ These are wide remedial powers.

3.6.4.4 Effectiveness of the Tribunal

Section 112(1) of the CPA provides the Tribunal with the power to impose administrative penalties.⁶⁵⁰ An administrative fine imposed by the Tribunal in terms of the CPA, should not exceed the greater of either: (i) ten per cent of the respondent's annual turnover during the previous financial year; or (ii) R1 000 000.⁶⁵¹ However, the consumer will not be paid from the proceeds of this fine as the money is allocated to the National Revenue Fund.⁶⁵² Should the consumer wish to be compensated, she will need to approach the civil courts to determine damages.⁶⁵³ Quite significantly, Woker points out that the Tribunal's authority "to impose severe penalties on suppliers that ignore consumer rights is what gives the CPA its teeth".⁶⁵⁴

⁶⁴² Tribunal Rules Part B (Access to and functions of the Tribunal).

⁶⁴³ Ibid Part C (Applications).

⁶⁴⁴ Ibid Part D (Hearings).

⁶⁴⁵ Ibid Part E (General rules).

⁶⁴⁶ See generally the Uniform Rules of Court.

⁶⁴⁷ Section 117 of the CPA.

⁶⁴⁸ Rule 5 of the Tribunal Rules.

⁶⁴⁹ Magaqa (2015) 27 SA Merc LJ 32 at 56.

⁶⁵⁰ Koekemoer (2017) 40 JCP 419 at 428.

⁶⁵¹ Section 112(2) of the CPA; Koekemoer *ibid*.

⁶⁵² Section 112(5) of the CPA; Koekemoer *ibid*.

⁶⁵³ Section 115(2)(a) of the CPA; Koekemoer *ibid*.

⁶⁵⁴ See generally Woker (2017) 29 SA Merc LJ 1 at 15.

One of the major concerns in respect of the way in which the Tribunal functions is its assumption of legal knowledge, particularly with regard its procedural rules.⁶⁵⁵ There have been decisions before the Tribunal where applicants have appeared unrepresented and struggled to comply with the Tribunal Rules – eg, replying to papers and attending to the prescribed serving and filing requirements.⁶⁵⁶ Magaqa correctly submits that the Tribunal Rules are seemingly drafted on the flawed assumption that all consumers are in a position to comply with them.⁶⁵⁷ Given that many consumers may also be poor, uneducated, and illiterate, this is an unrealistic assumption and is also contrary to underlying the purpose of the CPA of providing cost-effective, speedy, and effective relief to vulnerable consumers.

As mentioned above, if one takes a look at the Tribunal Rules, they appear to be very similar to the High Court rules and an ordinary consumer would require a legal representative to be compliant. Nevertheless, Magaqa does point to a decision of the Tribunal which demonstrates a level of understanding and flexibility in respect of unrepresented consumers – the matter of *Phoffa v Peugeot Citroen South Africa Proprietary Limited and Others* – where the applicant incorrectly cited the respondent as ‘Peugeot South Africa’.⁶⁵⁸ When considering whether leave to appeal should be granted, the Tribunal found that: (i) there were no grounds produced by the applicant to establish her reasonable prospects of success;⁶⁵⁹ and (ii) that the relief sought by the applicant was both ‘impossible and unreasonable’.⁶⁶⁰ The respondent requested that an adverse costs order be awarded against the applicant.⁶⁶¹ However, the Tribunal found that “given that the applicant is unrepresented and the applicant appeared unable to distinguish between frivolous claims and legitimate

⁶⁵⁵ See Koekemoer (2017) 40 JCP 419 at 428 who indicates that the Tribunal Rules resemble aspects of a civil courts rules. During the Commission’s seminar titled ‘Common approach, understanding and interpretation on the Consumer Protection Act’ which was held at the Premier Hotel, Pretoria from 22 – 23 February 2018, during her presentation Professor Tanya Woker raised that there has been some criticism levelled against the Tribunal in terms of it being excessively procedural. However, she indicated that the Tribunal has no discretion in this respect as it is a creature of statute. In this regard, she indicated that it may be worthwhile to consider simplifying, or, if possible, removing the rules completely.

⁶⁵⁶ See discussion by Magaqa (2015) 27 SA Merc LJ 32 at 54 where she refers to Tribunal decisions such as *Ngcwabe v Fastway Couriers* [2014] ZANCT 27.

⁶⁵⁷ Ibid.

⁶⁵⁸ Ibid where reference is made to the matter of *Phoffa v Peugeot Citroen SA Proprietary Limited and Others* [2013] ZANCT 46 at para 5.

⁶⁵⁹ Ibid at para 31.

⁶⁶⁰ Ibid at para 31.

⁶⁶¹ Ibid at para 26.

ones, a cost order against the applicant would be inappropriate”.⁶⁶² This is not the only decision where such flexibility on the part of the Tribunal can be observed.

Recent decisions taken by the Tribunal, such as *Bandera Trading and Projects CC v Kia Motors South Africa (Pty) Ltd t/a The Glen*,⁶⁶³ and *Perumal v Big Boy Scooters (SA Motorcycles (Pty) Ltd)*,⁶⁶⁴ further demonstrate this approach by the Tribunal. The matter of *Bandera Trading and Projects* concerned a KIA motor vehicle with an engine that had packed up, resulting in the applicant wishing to return it in terms of sections 55 and 56 of the CPA.⁶⁶⁵ The applicant’s representatives were not legally trained.⁶⁶⁶ The Tribunal attempted to clarify various aspects of the application during the hearing in order to determine the facts and merit of the claim.⁶⁶⁷ However, the applicant’s representatives failed to provide the Tribunal with the clarity it required.⁶⁶⁸ The Tribunal was of the view that even though it was not a requirement for the applicants to be legally trained, they should at least have an understanding of their application and be in a position to provide the Tribunal with accurate and coherent information when requested to do so.⁶⁶⁹ Regardless of this view, the Tribunal went through the application and, despite their difficulty in comprehending it, analysed the merits of the claim.⁶⁷⁰ On the facts, the Tribunal found the right to return goods is not absolute and excludes instances where goods are used contrary to the specifications provided by the manufacturer.⁶⁷¹ In addition, it found that the claim had not been brought within six months of the vehicle having been purchased as required for the return of goods in terms of section 56 of the CPA.⁶⁷² Following this analysis, the Tribunal held that there was simply no reasonable prospect of the claim succeeding.⁶⁷³ What is important, however, is that the Tribunal attempted to assess whether there was any merit in the application, despite the fact that the application had not been well presented.

⁶⁶² Ibid.

⁶⁶³ [2017] ZANCT 50.

⁶⁶⁴ [2017] ZANCT 117.

⁶⁶⁵ *Bandera Trading and Projects CC v Kia Motors South Africa (Pty) Ltd t/a The Glen* [2017] ZANCT 50 at para 9.

⁶⁶⁶ Ibid at para 17.

⁶⁶⁷ Ibid.

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid.

⁶⁷⁰ Ibid at paras 38-43.

⁶⁷¹ Ibid at para 43(4).

⁶⁷² Ibid at para 43(5).

⁶⁷³ Ibid at para 43(7).

Big Boy Scooters (above) also shows a degree of flexibility on the part of the Tribunal. This matter concerned the purchase of a motorbike where the specifications did not match the claims advertised. In an effort to identify sections which were relevant to his claim, the applicant cited: section 41(1)(a) which deals with false, misleading, and deceptive representations;⁶⁷⁴ section 41(1)(c) which deals with a failure by the respondent to correct an apparent misapprehension by the consumer;⁶⁷⁵ section 54(1)(a) which deals with the consumer's right to demand quality service; and section 54(2)(b) which addresses the right to a refund in instances where there has been a failure by the supplier to provide quality services;⁶⁷⁶ section 55 which deals with the right of the consumer to safe, good quality goods, read with section 53(1)(a) (definition of defect), section 53(1)(b) (definition of failure), and section 53(1)(d) (definition of unsafe); and finally, section 56(2) which caters for the consumer's right to return goods that do not satisfy the requirements and standards set out in section 55 of the CPA.⁶⁷⁷

The Tribunal noted that the applicant made a concerted effort to apply his mind to possible contraventions of the CPA, irrespective of the fact that he was unrepresented.⁶⁷⁸ The Tribunal went further to *mero motu* identify sections in the CPA which also applied to the facts before it, namely, section 18 which provides that goods delivered to a consumer, that the consumer has agreed to purchase solely on the basis of their description, must in all material respects correspond to the description,⁶⁷⁹ section 20 of the CPA (read with s 19(5) of the CPA) which affords the consumer the right to reject goods because the consumer did not have the right to examine them;⁶⁸⁰ and section 4(2) of the CPA which provides the Tribunal with guidance with regard to its approach when considering cases in terms of the CPA

⁶⁷⁴ *Perumal v Big Boy Scooters (SA Motorcycles (Pty) Ltd)* [2017] ZANCT 117 at para 23(1).

⁶⁷⁵ *Ibid* at para 23(2).

⁶⁷⁶ *Ibid* at para 23(3).

⁶⁷⁷ *Ibid* at para 23(4).

⁶⁷⁸ *Ibid* at paras 31 and 36.

⁶⁷⁹ *Ibid* at para 32.

⁶⁸⁰ *Ibid* at para 33.

(ie, development of the common law, promoting the spirit of the Act, and making orders that give practical effect to consumer rights).⁶⁸¹

The MIOSA had made a ruling in respect of this matter requiring the respondent to replace the wheels of the bike at its own expense – with which the respondent failed to comply.⁶⁸² Accordingly, the Tribunal granted the applicant leave to appeal to the Tribunal.⁶⁸³ These two matters demonstrate how, in certain instances, the Tribunal is aware of the plight of applicants not legally represented or trained.⁶⁸⁴

Koekemoer submits that the Tribunal processes, even though they closely resemble a traditional court process, are relatively simple to understand and that it may be possible for consumers to represent themselves.⁶⁸⁵ However, there have unfortunately been instances where the lack of legal representation has been an impediment to a consumer's access to justice in that leave to appeal to the Tribunal has been refused on the basis of legal technicalities⁶⁸⁶ and jurisdiction,⁶⁸⁷ in respect of which legal representation may have been helpful to the consumers concerned.⁶⁸⁸ For a consistent approach, it may, therefore, be worthwhile for the Tribunal to have adequately-trained members who perform the function of representing consumers before the Tribunal.⁶⁸⁹

⁶⁸¹ Ibid at para 34.

⁶⁸² Ibid at para 37.

⁶⁸³ Ibid at para 40.

⁶⁸⁴ See also ibid at para 35.

⁶⁸⁵ Koekemoer (2017) 40 JCP 419 at 426.

⁶⁸⁶ *Tshwale obo True Harvest College v Faizan Properties (Pty) Ltd* [2017] ZANCT 45 and *Mtshali v Webb* [2017] ZANCT 120.

⁶⁸⁷ *Miya v MiWay Insurance Company Limited* [2017] ZANCT 93 and *Benay Sager and Others v Absa Bank Limited and Others* [2017] ZANCT 119.

⁶⁸⁸ During the Commission's seminar titled 'Common approach, understanding and interpretation on the Consumer Protection Act' which was held at the Premier Hotel, Pretoria from 22 – 23 February 2018, Woker mentioned during her presentation regarding 'arbitration / adjudication process(s): NCT and provincial consumer court', that there are often attorneys who defend claims and raise technical points in matters before the Tribunal, which is a real disadvantage to the consumer. See for instance *Mtshali v Webb* [2017] ZANCT 120 where leave to refer the matter directly to the Tribunal was refused on the basis that the wrong party was cited. In this regard the Tribunal noted at para 25:

It is obvious that Master Radiator Services should have been cited as a party. It is a pity that both parties or at the very least Master Radiator Services was not cited in the Application before the Tribunal and that this aspect was not picked up at assessment level by the Tribunal.

⁶⁸⁹ See the discussion under para 5.4.2(f) in Ch 5 below.

Koekemoer highlights that the Tribunal has established an expedited court roll that makes provision for at least two matters to be heard each week.⁶⁹⁰ In addition, the Tribunal has a special roll which provides for matters that relate to interim relief which ought to be heard as soon as possible.⁶⁹¹ A very commendable step taken by the Tribunal, is that its guides to referrals and applications on its website are available in all eleven official languages.⁶⁹² Furthermore, it is also important to note that the Tribunal's judgments are readily and timeously accessible on public databases.⁶⁹³

3.6.5 The courts

3.6.5.1 Ordinary courts

Ordinary courts have wide powers to order redress in terms of the CPA.⁶⁹⁴ In this regard, section 76(1) provides the courts with the power to:

- (a) order a supplier to alter or discontinue any conduct that is inconsistent with this Act;
- (b) make any order specifically contemplated in this Act; and
- (c) 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 this Act.⁶⁹⁵

These powers of redress are additional to any other order a court may make in terms of the CPA or any other law.⁶⁹⁶ The CPA does not exclude any right of the consumer or the supplier to recover interest or special damages where applicable; or to recover money paid if the consideration for its payment has failed.⁶⁹⁷ The exclusive jurisdiction of ordinary courts with regard to section 52, as discussed

⁶⁹⁰ Koekemoer (2017) 40 *JCP* 419 at 426.

⁶⁹¹ *Ibid.* See the discussion of s 114 of the CPA (interim orders) under para 3.6.5.1 of this chapter. Section 114 of the CPA applies equally to the Tribunal as to ordinary courts.

⁶⁹² Koekemoer *ibid* at 427. See Tribunal application and referral guidelines available at <http://www.thenct.org.za/filing-guidelines/application-and-referral/> (accessed on: 20 April 2018).

⁶⁹³ See generally Saflii website available at <http://www.saflii.org/za/cases/COMPTRI/> (accessed on: 20 April 2018).

⁶⁹⁴ This excludes consumer courts, see para 3.5 of this chapter (at n 263 above).

⁶⁹⁵ Section 76(1) of the CPA. See also Mupangavanhu (2012) 15 *PELJ* 320 at 331.

⁶⁹⁶ Section 76(1) of the CPA. See also Van Heerden & Barnard (2011) 6 *JICLT* 131 at 137.

⁶⁹⁷ Section 76(2) of the CPA. Van Heerden & Barnard *ibid*.

above,⁶⁹⁸ is a result a compromise reached with the Department of Justice and Constitutional Development, which was concerned at the jurisdiction of ordinary courts being ousted *in toto* by the creation of various tribunals under the CPA.⁶⁹⁹ However, as discussed above, this compromise does raise some difficulties for consumers with respect to the enforcement procedure prescribed by the CPA.⁷⁰⁰

The CPA also provides for the granting of interim relief by courts under section 114.⁷⁰¹ In this regard, a court may grant an order for interim relief where: (i) there is evidence that indicates that the allegations may be true; (ii) an interim order is reasonably necessary in order to prevent either serious, irreparable damage to that person, or to prevent the purposes of the CPA from being frustrated; (iii) the respondent has been afforded a reasonable opportunity to be heard, taking into account the urgency of the proceedings; and (iv) the balance of convenience favours the granting of such an order.⁷⁰² An interim order that is granted in terms of section 114 must be limited to the earlier of either the conclusion of a hearing into an application or a complaint; or the date that is six months after the date on which the interim order is issued.⁷⁰³ In the event that an interim order has been granted, and a hearing into that matter is not concluded within a period of six months from the date of the order, then, on good cause shown, the court may extend the interim order for a further period not exceeding six months.⁷⁰⁴

The ordinary court system is not designed to be user-friendly to a layperson. Koekemoer highlights that the adversarial nature of the proceedings also results in the proceedings being constantly viewed as a confrontation between the parties to the dispute.⁷⁰⁵ However, the small claims court – which forms part of the civil court system – is inquisitorial in nature with the presiding officer playing a more active role in attempting to resolve a dispute between parties.⁷⁰⁶ Furthermore, the Small Claims

⁶⁹⁸ See the discussion under para 3.5 of this chapter (see n 277 above).

⁶⁹⁹ Naudé (2010) 127 *SA Merc LJ* 515 at 525.

⁷⁰⁰ See the discussions under para 3.5 above and para 5.5 in Ch 5 below.

⁷⁰¹ Van Heerden & Barnard (2011) 6 *JICLT* 131 at 137.

⁷⁰² The CPA s 114(1).

⁷⁰³ *Ibid* at s 114(2).

⁷⁰⁴ *Ibid* at s 114(3).

⁷⁰⁵ Koekemoer (2017) 40 *JCP* 419 at 434.

⁷⁰⁶ *Ibid* at 435.

Court Act,⁷⁰⁷ provides the magistrate of the district within which the small claims court has a seat, with the power to appoint as many interpreters and legal assistants as she deems necessary.⁷⁰⁸ Although the practical effect of this provision is not clear in so far as consumer protection law is concerned, Koekemoer submits, with merit, that the provision is a positive mandate.⁷⁰⁹ However, it is worth noting that juristic persons have no right of recourse in the small claims court. Consequently, small businesses are still afforded better protection by the specialised consumer-protection framework created by the CPA.⁷¹⁰

3.6.5.2 Specialised courts

The Equality Court is a specialised court contemplated in Chapter 2, Part A of the CPA. As mentioned above, the Equality Court has exclusive jurisdiction over matters arising from this Part of the CPA.⁷¹¹ Accordingly, section 69 of the CPA will not find application in such instances.⁷¹² Where one seeks to lodge a complaint under Chapter 2, Part A of the CPA, the equality court may be approached directly or the matter may be referred to the Commission, which must then refer the matter to the Equality Court.⁷¹³ Importantly, Barnard and Kok highlight the significance behind having matters concerning a consumer's right to equality in the consumer market being adjudicated before the Equality Court, namely that in this respect the Equality Court is best suited to interpret alleged breaches.⁷¹⁴

In instances where the Equality Court must be approached pursuant to an infringement of a consumer's right to equality in the consumer market,⁷¹⁵ an accredited consumer group,⁷¹⁶ or anyone contemplated in section 20(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act (the PEPUDA),⁷¹⁷

⁷⁰⁷ 61 of 1984. See s 11 of the Small Claims Court Act.

⁷⁰⁸ Koekemoer (2017) 40 *JCP* 419 at 435.

⁷⁰⁹ *Ibid.*

⁷¹⁰ See s 7(1) of the Small Claims Court Act.

⁷¹¹ See this chapter at para 3.3.

⁷¹² Barnard & Kok (2015) 78 *THRHR* 1 at 2.

⁷¹³ Section 10(1) of the CPA. See also Barnard & Kok *ibid* at 4.

⁷¹⁴ Barnard & Kok *ibid* at 11.

⁷¹⁵ Part A of Ch 2 of the CPA.

⁷¹⁶ As discussed in para 3.4 of this chapter.

⁷¹⁷ 4 of 2000.

may approach the Equality Court.⁷¹⁸ *Locus standi* under section 20(1) of the PEPUDA echoes that of the CPA and includes the five categories found in section 4(1) of CPA as discussed above.⁷¹⁹ An additional category enjoying *locus standi* is incorporated in section 20(1)(f) of the PEPUDA, namely the South African Human Rights Commission,⁷²⁰ or the Commission for Gender Equality.⁷²¹

Barnard and Kok observe that the onus of proof set out in the CPA differs from that prescribed by the PEPUDA.⁷²² In this regard, the PEPUDA requires a complainant to make out a *prima facie* case of discrimination (ie, to demonstrate that the complainant was, *prima facie*, either burdened or disadvantaged as contemplated by the definition of discrimination in the PEPUDA).⁷²³ Thereafter the burden shifts to the respondent to show that the complainant was not so burdened or disadvantaged, and that such burden, disadvantage, or withholding of benefit was not on any of the prohibited grounds.⁷²⁴ On the other hand, section 10 of the CPA appears to create a presumption of unfairness by providing that, in respect of any differential treatment contemplated in proceedings under Part A, there is a presumption of unfair discrimination – unless it is established that the relevant conduct was fair.⁷²⁵ When analysing this lightened burden of proof, Barnard and Kok observe that

⁷¹⁸ Section 1 of the CPA defines ‘equality court’ as having the meaning ascribed thereto in the PEPUDA.

⁷¹⁹ See para 3.3 of this chapter. See s 20(2)(a)-(e) of the PEPUDA.

⁷²⁰ Section 1 of the PEPUDA defines the ‘South African Human Rights Commission’ as the South African Human Rights Commission (SAHRC) as referred to in s 184 of the Constitution. In this regard, s 184 of the Constitution sets out the functions of the SAHRC. It is worth noting that the SAHRC is a Chapter 9 institution in terms of the Constitution. These are state institutions established for the purpose of supporting our constitutional democracy.

⁷²¹ Section 1 of the PEPUDA defines that ‘Commission for Gender Equality’ as the Commission for Gender Equality (CGE) as referred to in s 187 of the Constitution. In this respect, s 187 of the Constitution provides for the functions of the CGE. The CGE is also a Chapter 9 institution in terms of the Constitution (ie, a state institution established for the purpose of supporting our constitutional democracy).

⁷²² Barnard & Kok (2015) 78 *THRHR* 1 at 17-19.

⁷²³ Section 13(1) of the PEPUDA. For the sake of completeness it is noted that s 1 of PEPUDA defines ‘discrimination’ to mean “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.”

See Barnard & Kok *ibid* at 15.

⁷²⁴ Section 13(1) of the PEPUDA. The ‘prohibited grounds’ as defined in section 1 of PEPUDA as follows,

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and
- (b) any other ground where discrimination based on that other 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).

See Barnard J & Kok *ibid* at 15.

⁷²⁵ See s 10(2)(a) of the CPA. See also discussion by Barnard & Kok *ibid* at 17.

discrimination as contemplated in the PEPUDA refers to “an act or omission causing harm to a complainant ‘based on’ a prohibited ground” whilst “section 10(2)(b)(ii) of the CPA refers to treatment that ‘appears to be based on’ a prohibited ground”.⁷²⁶ The authors submit that there is a discrepancy between the provisions of the PEPUDA and the CPA, which ought to be addressed in terms of section 5(2) of the PEPUDA.⁷²⁷ In terms of section 5(2), the PEPUDA prevails in the event of any consistency with another statute.⁷²⁸ Accordingly, the authors submit that the provisions of the PEPUDA must prevail and that its section 13 must be applied in preference to section 10(2) of the CPA.⁷²⁹ In terms of this approach, the complainant would first be required to make out a *prima facie* case of discrimination based on a prohibited ground, and thereafter, the burden would shift to the respondent who would be required to prove either that: (i) the discrimination had not occurred; or (ii) that the discrimination that took place was actually fair.⁷³⁰

The approach of the authors is practically sound in that it may be unreasonable to shift the burden of proof to the respondent purely on the basis of differential treatment. However, a different interpretational tool is prescribed by section 2(9)(b) of the CPA – that in the event of any inconsistencies, the provisions of the statute that affords the consumer greater protection will prevail. In this light, the provisions in the CPA that shift the onus fully to the respondent once there is differential treatment, would offer the consumer greater protection. Accordingly, on the interpretation prescribed by section 2(9)(b) of the CPA, the provisions of the CPA should prevail.

Barnard and Kok submit further that sections 9(1) to 9(3) of the CPA, which provide the respondent with reasonable grounds for differential treatment in specific circumstances, also appear to conflict with the provisions of the PEPUDA to the extent the provisions set out “defences in absolute terms” and thus do not provide for

⁷²⁶ Barnard J & Kok *ibid* at 18.

⁷²⁷ *Ibid*.

⁷²⁸ See s 5(2) of the PEPUDA. Barnard & Kok *ibid*.

⁷²⁹ Barnard & Kok *ibid*.

⁷³⁰ *Ibid*.

a contextual assessment based on the circumstances of the case.⁷³¹ In this respect the authors highlight that section 14 of the PEPUDA provides for a nuanced approach in respect of the circumstances of each case.⁷³² Once again, the authors submit that in terms of section 5(2) of the PEPUDA, section 14 of that statute ought to be applied. However, heed should also be taken of the provisions of section 9(4) which speak to an attempt by the legislature to not elevate the provisions of section 9(1) to 9(3) to absolute and rigid defences. In this respect, section 9(4) of the CPA provides that:

- (4) Nothing in this section is intended to limit the authority of a court to—
 - (a) assess the reasonableness of any conduct, to the extent contemplated in subsections (1)(b) or (c), (2) or (3), and determine whether any conduct not reasonably justified, as contemplated in those subsections, constitutes unfair discrimination within the meaning of the Constitution or the Promotion of Equality and Prevention of Unfair Discrimination Act; or
 - (b) determine whether any conduct contemplated in section 8 was fair in the circumstances of a particular transaction or the marketing of any particular goods or services, as the case may be.

It is therefore submitted that the current formulation of section 9(4) of the CPA can be interpreted in a manner that does not contradict section 14 of the PEPUDA and makes adequate provision for the court to allow a more nuanced approach.⁷³³

3.7 Offences and penalties under the CPA: A general summary

The realisation of rights by a consumer depends not only on the remedies available to a consumer, but also on the deterrents that are put into place by the consumer protection legal framework. It is consequently important to have a general understanding of the offences and penalties created by the CPA.

⁷³¹ Ibid at 19.

⁷³² Ibid.

⁷³³ See Ch 5 below.

3.7.1 Criminal liability

In terms of section 107 of the CPA, it is, subject to certain exceptions, considered an offence to disclose personal or confidential information in respect of any person's affairs, where such information is obtained during the course of performing functions in terms of the CPA, initiating a complaint, or participating in proceedings under the CPA.⁷³⁴ It is also an offence for a person to hinder the administration of justice as contemplated in the CPA.⁷³⁵ Importantly, particularly in light of giving direct effect to the provisions of the CPA, failure to comply with an order of the Tribunal is considered an offence.⁷³⁶ In respect of prohibited conduct, section 110 of the CPA provides as follows:

- (1) It is an offence for any person to alter, obscure, falsify, remove or omit a displayed price, labelling or trade description without authority.
- (2) It is an offence to fail to act in accordance with a compliance notice, but no person may be prosecuted for such an offence in respect of the compliance

⁷³⁴ Section 107(1) of the CPA. In respect of the exceptions, s 102 provides as follows:

- (2) Subsection (1) does not apply to information disclosed—
 - (a) for the purpose of the proper administration or enforcement of this Act;
 - (b) for the purpose of the administration of justice; or
 - (c) at the request of an inspector, regulatory authority or Tribunal member entitled to receive the information.

⁷³⁵ Section 108 of the CPA reads as follows:

- (1) It is an offence to hinder, oppose, obstruct or unduly influence any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by this Act.
- (2) A person commits an offence if that person, having been summoned—
 - (a) fails without sufficient cause to appear at the time and place specified or to remain in attendance until excused; or (b) attends as required, but—
 - (i) refuses to be sworn in or to make an affirmation; or
 - (ii) fails to produce a book, document or other item as ordered, if it is in the possession of, or under the control of, that person.
- (3) A person commits an offence if that person, having been sworn in or having made an affirmation—
 - (a) fails to answer any question fully and to the best of his or her ability, subject to section 102(5); or
 - (b) gives false evidence, knowing or believing it to be false.

⁷³⁶ Section 109(1) of the CPA. Further offences in respect of the Tribunal are set out in s 109(2) of the CPA as follows:

- (2) A person commits an offence if that person—
 - (a) does anything calculated to improperly influence the Tribunal or a regulator concerning any matter connected with an investigation;
 - (b) anticipates any findings of the Tribunal or a regulator concerning an investigation in a way that is calculated to influence the proceedings or findings;
 - (c) does anything in connection with an investigation that would have been contempt of court if the proceedings had occurred in a court of law;
 - (d) knowingly provides false information to a regulator;
 - (e) defames the Tribunal, or a member the Tribunal, in their respective official capacities;
 - (f) wilfully interrupts the proceedings of a hearing or misbehaves in the place where a hearing is being conducted;
 - (g) acts contrary to a warrant to enter and search; or
 - (h) without authority, but claiming to have authority in terms of section 103—
 - (i) enters or searches premises; or
 - (ii) attaches or removes an article or document.

notice if, as a result of the failure of that person to comply with that notice, the Commission has applied to the Tribunal for the imposition of an administrative fine.

Anyone who is convicted of an offence relating to a breach of confidence in terms of section 107(1) of the CPA, is liable to a fine or imprisonment (for a maximum period of 10 years), or to both a fine and imprisonment.⁷³⁷ In any other case, a convicted person will be liable to a fine or imprisonment (for a maximum period of 12 months), or to both a fine and imprisonment.⁷³⁸ It is worth noting that a magistrate's court has the jurisdiction to impose any of these penalties.⁷³⁹ Section 119(1) of the CPA also introduces statutory presumptions in respect of criminal proceedings. In this regard, in a criminal proceeding, "if it is proved that a false statement, entry or record or false information appears in or on a book, document, plan, drawing or computer storage medium, the person who kept that item may be presumed to have made the statement, entry, record or information" and "an order certified by the Chairperson of the Tribunal is *prima facie* proof of the contents of the order".⁷⁴⁰ Furthermore, in respect of admissibility of evidence, section 119(2) of the CPA provides that "[a] statement, entry, record or information in or on any book, document, plan, drawing or computer storage medium is admissible in evidence as an admission of the facts in or on it by the person who appears to have made, entered, recorded or stored it".

3.7.2 Administrative penalties and vicarious liability

Distinct from criminal liability, the Tribunal is authorised to impose an administrative fine in respect of prohibited or required conduct, which is not permitted to exceed the greater of either ten per cent of the respondent's annual turnover during the preceding financial year; or an amount of R1 000 000.⁷⁴¹ The CPA prescribes certain factors that must be considered by the Tribunal when determining the appropriate administrative fine, which are listed as follows:

- (a) the nature, duration, gravity and extent of the contravention;

⁷³⁷ The CPA s 111(1)(a).

⁷³⁸ *Ibid* at s 111(1)(b).

⁷³⁹ *Ibid* at s 111(2).

⁷⁴⁰ *Ibid* at s 119(1)(a) and (b).

⁷⁴¹ *Ibid* at s 112(1) and (2).

- (b) any loss or damage suffered as a result of the contravention;
- (c) the behaviour of the respondent;
- (d) the market circumstances in which the contravention took place;
- (e) the level of profit derived from the contravention;
- (f) the degree to which the respondent has co-operated with the Commission and the Tribunal; and
- (g) whether the respondent has previously been found in contravention of this Act.⁷⁴²

Administrative fines are payable to the National Revenue Fund referred to in section 213 of the Constitution.⁷⁴³ Lastly, section 113 of the CPA provides for the vicarious liability of principals or employers, in the form of joint and several liability, where an agent or employee is liable under the CPA while performing a duty.⁷⁴⁴ However, such vicarious liability does not extend to criminal liability.⁷⁴⁵

3.8 Observations on the CPA's enforcement regime

3.8.1 Preventative control paradigm

From the forums explored above, it appears as if the CPA has attempted to incorporate preventative control mechanisms in respect of the administration of redress to consumers, particularly with respect to consumer courts and the Commission.⁷⁴⁶ As mentioned in the previous chapter, the Gauteng Consumer Affairs Act provides a consumer protector with the power to institute general action with the view to prohibiting any business practice.⁷⁴⁷ The Gauteng Consumer Affairs Act thus vests a meaningful preventative power in the Consumer Protector, which is significant to the extent that it can assist in addressing unfair business practices from inception, and prevent them from spreading across the consumer market.⁷⁴⁸ In addition, as mentioned above in this chapter, the Commission may institute

⁷⁴² Ibid at s 112(3).

⁷⁴³ Ibid at s 112(4).

⁷⁴⁴ Ibid at s 113(1).

⁷⁴⁵ Ibid at s 113(2).

⁷⁴⁶ See discussion of the Gauteng consumer affairs court under para 2.3.2.2(a) in Ch 2 above, and discussion of the Commission in para 3.6.3.2 of this chapter.

⁷⁴⁷ Section 12(1)(a) and (b) of the Gauteng Consumer Affairs Act. Also see the discussion in Ch 2 under para 2.3.2.2(a).

⁷⁴⁸ See the discussion under para 2.3.2.2(a) in Ch 2 above.

proceedings of its own motion (or when directed to do so by either the Minister⁷⁴⁹ or a provincial consumer protection authority).⁷⁵⁰ Although challenges in this regard have been noted, this is a step in the right direction.

3.8.2 Limitations on the CPA actions

Firstly, section 115 of the CPA provides that an action cannot be instituted in a civil court for damages if the person who has suffered loss or damage as a result of prohibited conduct has consented to an award for damages in terms of a consent order.⁷⁵¹ Where the person is entitled to commence a civil action for damages, then such person is required to file a notice with the registrar or clerk of the court from the Tribunal, confirming: (i) whether the conduct concerned has been found to be prohibited conduct; (ii) the date of the Tribunal's finding; and (iii) the section on which the finding of the Tribunal is based.⁷⁵² To a certain degree, this provision may pose a limitation to a consumer's capacity to claim damages in civil courts, as the procedure prescribed in this section will need to be adhered to first (which implies the enforcement mechanism prescribed by s 69 must first be followed). This may potentially frustrate a consumer who would otherwise be able to claim damages speedily and simply, for example, through the small claims court process. Van Eeden and Barnard submit, with merit, that section 115(2) is not applicable to a claim for loss or damage that is regarded as harm in terms of section 61(5) of the CPA.⁷⁵³ The authors make this submission on the basis that section 61(1) of the CPA cannot be interpreted to formulate conduct that is considered prohibited conduct, which is required for the application of section 115(2).⁷⁵⁴

Secondly, section 116 of the CPA provides that complaints that are brought before the Tribunal and consumer courts should not be brought more than three years after

⁷⁴⁹ See n 254 above.

⁷⁵⁰ See the discussion under para 3.6.3.2 of this chapter.

⁷⁵¹ The CPA s 115(2)(a).

⁷⁵² Ibid at 115(2)(b).

⁷⁵³ Van Eeden & Barnard *Consumer Protection Law* 388. See s 61(5) of the CPA which provides that harm includes the death, illness, or injury of a natural person, loss or damage to any property, and any economic loss that may result from these.

⁷⁵⁴ Van Eeden & Barnard *ibid*. See s 61(1) of the CPA which provides for the liability of a producer, importer, distributor, or retailer for any harm caused by goods resulting, wholly or in part, from the supply of unsafe goods, product failure, defect, or hazards in respect of any goods, as well as insufficient instructions or warnings provided to consumers with respect to hazardous goods, regardless of whether harm resulted from negligence.

either the cause of the complaint arose, or the conduct or continuing practice ceased.⁷⁵⁵ This section also prohibits a complaint from being referred to the Tribunal or a consumer court against a person who is, or has been, a respondent under another section in the CPA relating to substantially similar conduct.⁷⁵⁶ The purpose of section 116 is to provide legal certainty by making provision for the prescription of a claim, on the one hand, and statutorily confirming the *res judicata* principle, on the other hand.⁷⁵⁷

In so far as prescription is concerned, section 116 makes it clear that there is a limitation on the time within which a claim can be brought before the Tribunal – which is important for purposes of preventing indolent consumers from instituting claims long after the prohibited practice arose and thus creating legal certainty.⁷⁵⁸ However, the formulation of this section is not without criticism. In the first instance, Van Heerden submits, with merit, that the section does not provide for any qualifications to the proposed three-year limitation period.⁷⁵⁹ This is unlike the Prescription Act⁷⁶⁰ which would apply to proceedings before the ordinary courts. In this regard, the Prescription Act caters for a more nuanced approach to prescription and provides that prescription will only begin to run once the claimant has knowledge of the fact that she has a claim (ie, she knows who she can lodge a claim against as well as the basis for lodging such a claim).⁷⁶¹ Furthermore, provision is made in the Prescription Act for certain events that may either delay or interrupt the running of prescription.⁷⁶² The current wording of section 116 of the CPA does not provide any exceptions to the running of prescription, which, having regard to the procedure prescribed by section 69 of the CPA, may make it challenging for the claim to be

⁷⁵⁵ The CPPA s 116(1).

⁷⁵⁶ Ibid s 116(2).

⁷⁵⁷ Van Heerden “Chapter 6: Enforcement of Act” 116-1 – 116-3. It is worth noting that *res judicata* in the context of civil procedure, refers to an objection that can be raised to the effect that the claim by the plaintiff has already been dealt with in a final judgment delivered by a competent court based on an action between the same parties, regarding the same subject matter, and based on the same cause of action. See Peté et al *Civil Procedure* 609.

⁷⁵⁸ See generally Van Heerden *ibid* at 116-1 – 116-2..

⁷⁵⁹ *Ibid* at 116-2 at para 3.

⁷⁶⁰ Act 57 of 1975.

⁷⁶¹ See s 12(3) of the Prescription Act and Van Heerden “Chapter 6: Enforcement of Act” 116-2 at para 3.

⁷⁶² See ss 13 – 15 of the Prescription Act. See also Van Heerden *ibid*.

brought before the Tribunal within the prescribed timeframe. In essence, this may unjustifiably impede on a consumer’s ability to access redress.⁷⁶³

The Tribunal has addressed the matter of prescription in two recent matters – *Motswai v House and Home* and *Ngoza v Roque Quality Cars*.⁷⁶⁴ In the *Motswai* matter, prescription was one of the points raised by the respondent *in limine*. The Tribunal applied a wide interpretation to section 116 and did not strictly look at the date on which the application was made to the Tribunal, but rather at the date on which the complaint was first lodged with the Commission.⁷⁶⁵ Unfortunately, the consumer in this instance was still out of time and application for direct referral was refused. However, the principle remains that the Tribunal preferred a wider interpretation of section 116 to the benefit of the consumer, which is in line with the requirements of section 4(3) of the CPA.⁷⁶⁶ Importantly, the Tribunal in *Motswai* remarked *obiter* that it is important to ensure that consumers are adequately advised by all of the institutions involved in the dispute-resolution process; and further that the consumer may have been referred to the consumer courts instead, which might not have had limitations similar to those put into place by the CPA.⁷⁶⁷

Similarly, in the *Ngoza* matter, prescription was also raised as a defence by the respondent.⁷⁶⁸ However, the Tribunal took into account the fact that immediate action had been taken by the consumer in respect of the claim, and that the respondent had failed to comply with the ruling of the MIOSA.⁷⁶⁹ The Tribunal held that “by lodging a complaint with the MIOSA ... prescription was interrupted during the time that the complaint was being dealt with by the MIOSA.”⁷⁷⁰ The Tribunal, in this instance, also expressly referred to the provisions of section 4(3) of the CPA with

⁷⁶³ See Van Heerden *ibid* at 116-1 – 116-2.

⁷⁶⁴ *Motswai v House and Home* [2017] ZANCT 57 (preceded by *Motswai v House and Home* [2016] ZANCT 20, which granted the applicant leave to refer the matter directly to the Tribunal) and *Ngoza v Roque Quality Cars* [2017] ZANCT 104.

⁷⁶⁵ *Motswai v House and Home* [2017] ZANCT 57 at para 45.

⁷⁶⁶ Section 4(3) of the CPA reads as follows:

If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must 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).

⁷⁶⁷ *Motswai v House and Home* [2017] ZANCT 57 at para 51.

⁷⁶⁸ *Ngoza v Roque Quality Cars* [2017] ZANCT 104 at para 33.

⁷⁶⁹ *Ibid*.

⁷⁷⁰ *Ibid*.

regard to the duty to interpret the CPA in a manner most beneficial to the consumer.⁷⁷¹ Although the interpretation by the Tribunal to date has been aligned with the interest of the consumers, it would be beneficial to incorporate a legislative amendment that provides a more nuanced approach to prescription.⁷⁷²

3.8.3 Interplay between CPA and pre-existing statutes⁷⁷³

3.8.3.1 National legislation

Some of the prevalent pre-CPA statutes that affected consumers at a national level included the Business Names Act, the Consumer Affairs Act, the Price Control Act, the Sales and Service Matters Act, the Trade Practices Act, the FCDA, and the Merchandise Marks Act. The latter two statutes have not been repealed by the CPA and are discussed briefly below.

(a) Foodstuffs Cosmetics and Disinfectants Act

The FCDA is discussed in detail above,⁷⁷⁴ and has not been directly amended by the CPA. It also appears to be an industry regulation statute more than a consumer protection statute. Nevertheless, there are slight overlaps between the FCDA and the CPA. The purpose of the FCDA is to “control the sale, manufacture, importation and exportation of foodstuffs, cosmetics and disinfectants; and to provide for matters connected therewith”.⁷⁷⁵ In this regard, sale is defined in this statute to include to “offer, advertise, keep, display, transmit, consign, convey or deliver for sale, or to exchange, or to dispose of to any person in any manner whether for a consideration or otherwise”. The definitions provided for in the FCDA for foodstuff,⁷⁷⁶ cosmetics⁷⁷⁷

⁷⁷¹ Ibid at para 25.

⁷⁷² See the discussion under para 5.4.2(b) of Ch 5 below.

⁷⁷³ For the sake of completeness, it is noted that there is certain overlap between the CPA and current legislation such as the NCA. However this overlap does not fall within the scope of this thesis. For a more detailed discussion in this respect see generally Melville & Palmer (2010) 22 *SA Merc LJ* 272; Otto, Van Heerden & Barnard (2014) 26 *SA Merc LJ* 247; and Stoop (2014) 77 *THRHR* 135.

⁷⁷⁴ See the discussion under para 2.3.2.1 of Ch 2 above.

⁷⁷⁵ See Preamble to the FCDA.

⁷⁷⁶ Section 1 of the FCDA provides that a ‘foodstuff’ refers to “any article or substance (except a medicine as defined in the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965)) ordinarily eaten or drunk by a person or purporting to be suitable, or manufactured or sold, for human consumption, and includes any part or ingredient of any such article or

and disinfectants⁷⁷⁸ all fall within the definition of ‘goods’ in the CPA.⁷⁷⁹ Therefore, where there is a transaction that involves foodstuffs, cosmetics, and disinfectants, there may be an inevitable interplay between the statutes. Inspectors and analysts in terms of the FCDA, may be appointed by the Director-General of the Department of Health in order to assist with giving effect to the provisions of this statute.⁷⁸⁰

The criminal justice system is the mechanism used to enforce the provisions of the FCDA, as was the case with other consumer-related statutes prior to the CPA – for example, the Consumer Affairs Act.⁷⁸¹ However, the interplay between the FCDA and the CPA seems to work quite well given that the offences addressed in the FCDA relate primarily to giving inspectors and analysts the opportunity to perform their duties.⁷⁸² On the other hand, the CPA can afford the consumer remedies in business-to-consumer transactions relating foodstuffs, cosmetics, and disinfectants that fall within the definition of ‘goods’ as defined in the CPA, and where there has been an infringement of the consumer rights. The interplay between these Acts thus does not seem to create parallel systems of enforcement and, therefore, there should not be any uncertainty insofar as the enforcement of consumer rights is concerned.

(b) Merchandise Marks Act

Unlike the FCDA, the Merchandise Marks Act, appears to have been amended quite substantially by the CPA. The purpose of the Merchandise Marks Act is to provide for the marking of merchandise and coverings in which merchandise is sold.⁷⁸³ It

substance, or any substance used or intended or destined to be used as a part or ingredient of any such article or substance”.

⁷⁷⁷ Section 1 of the FCDA provides that a ‘cosmetic’ refers to “any article, preparation or substance (except a medicine as defined in the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965)) intended to be rubbed, poured, sprinkled or sprayed on or otherwise applied to the human body, including the epidermis, hair, teeth, mucous membranes of the oral cavity, lips and external genital organs, for purposes of cleansing, perfuming, correcting body odours, conditioning, beautifying, protecting, promoting attractiveness or improving or altering the appearance, and includes any part or ingredient of any such article or substance.”

⁷⁷⁸ Section 1 of the FCDA provides that a ‘disinfectant’ refers to “any article or substance used or applied or intended to be used or applied as a germicide, preservative or antiseptic, or as a deodorant or cleansing material which is not a cosmetic”.

⁷⁷⁹ See discussion under para 3.2 of this chapter.

⁷⁸⁰ See ss 10 and 12 of the FCDA.

⁷⁸¹ See ss 18 and 19 of the FCDA.

⁷⁸² See para 2.3.2.1 in Ch 2 above.

⁷⁸³ Preamble to the Merchandise Marks Act 17 of 1941.

also regulates the use of certain words and emblems that relate to the business.⁷⁸⁴ It appears that the remaining provisions of the Merchandise Marks Act have not been incorporated into the CPA because, broadly speaking, they address the use emblems, signs, or marks of a convention country,⁷⁸⁵ and this falls outside the scope of the CPA and this thesis.⁷⁸⁶ Therefore, the provisions of the Merchandise Marks Act would not necessarily result in a parallel enforcement regime when considered in light of the structures created by the CPA.⁷⁸⁷

3.8.3.2 Provincial legislation

The interplay between the Gauteng Consumer Affairs Act and the provincial mechanisms in the CPA warrants further consideration. As discussed in the previous chapter, the definition of a ‘consumer’ under the Gauteng Consumer Affairs Act is limited, particularly to the extent that it does not extend its protection to small juristic persons. This would mean that small juristic persons in Gauteng cannot approach the provincial consumer affairs offices to lodge complaints. Instead, such a consumer may, as a point of departure, need to approach the relevant industry ombud or an ombud with jurisdiction, before lodging its complaint with the Commission. This indicates that the CPA has stepped in to provide protection to an important sector of the economy – the small, medium, and micro-enterprises market – which would otherwise not be afforded ‘consumer’ protections.

Importantly, section 83 of the CPA makes provision for the cooperative exercise of concurrent jurisdiction. In this regard, the CPA provides, in line with section 41(2) of the Constitution, that the Minister⁷⁸⁸ must consult with the responsible member of any relevant provincial Executive Council in order to: (i) “co-ordinate and harmonise the functions to be performed by the Commission and one or more provincial consumer protection authorities”; and (ii) “facilitate the settlement of any dispute between the Commission and one or more provincial consumer protection

⁷⁸⁴ Ibid.

⁷⁸⁵ Ibid s 1 defines a convention country as a country (or group of countries) that are declared as such in terms of s 63 of the Trade Marks Act 194 of 1993. See Declaration of Convention Countries.

⁷⁸⁶ Although this does not fall within the scope of this thesis, it is noted for the sake of completeness that s 24 of the CPA provides comprehensive protection to consumers in so far as product labelling is concerned.

⁷⁸⁷ See the discussion in para 3.8.3.1 of this chapter.

⁷⁸⁸ See n 254 above.

authorities, concerning the functions to be performed by them relating to consumer protection”.⁷⁸⁹

It is very significant that the CPA was enacted within the paradigm of the Constitution as the supreme law of South Africa. The CPA not only contains similar provisions to the Constitution on aspects such as standing,⁷⁹⁰ but, as mentioned in the previous chapter, there are also parts of the CPA that protect certain rights enshrined in the Constitution.⁷⁹¹ There is thus a real risk that the provisions of the CPA may not always fit with the provisions of old provincial statutes that have not been aligned with the Constitution. A case in point is section 8(5) of the Gauteng Consumer Affairs Act, which provides as follows:

A person who has been summoned to appear in terms of this section shall not be entitled to refuse to answer any question or to produce any book, document or object on the ground that he or she would thereby be exposed to a criminal charge: Provided that, to the extent that such answer, book, document or article does expose the person concerned to a criminal charge, no evidence thereof shall be admissible in any criminal proceedings against that person, except where that person stands trial on a charge contemplated in subsection 4(c) to (e), or in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

This provision appears to impose a limitation on the right of an accused person in terms of section 35(3)(j) of the Constitution which provides that “every accused person has a right to a fair trial, which includes the right ... not to be compelled to give self-incriminating evidence”. Given that criminal sanctions may be imposed in certain instances under the Consumer Affairs Act, persons who fall foul of its provisions and are taken to trial, may well be considered as accused persons as contemplated in section 35 of the Constitution. Although section 8(5) of the Gauteng Consumer Affairs Act generally carves out the use of potentially self-incriminating evidence in criminal proceedings, it expressly provides that this self-incriminating evidence may be used in the proceedings contemplated in section 8(4)(c) to (e) of

⁷⁸⁹ Section 83(1) of the CPA.

⁷⁹⁰ See para 3.3 of this chapter.

⁷⁹¹ See para 2.2.3 in Ch 2 above.

the Gauteng Consumer Affairs Act, or in terms of section 319(3) of the Criminal Procedure Act.⁷⁹²

The relevant subsections of the Gauteng Consumer Affairs Act read as follows:

- (4) A person shall be guilty of an offence if he or she, have been summoned in terms of this section (*sic*)—
 - (c) refuses to answer, or to answer fully and satisfactorily to the best of his or her knowledge and belief, any question lawfully put to him or her;
 - (d) fails to produce any book, document or object in his or her possession or custody or under his or her control, which he or she was required to produce; or
 - (e) makes a false statement to the Consumer Protector or other person in the service of the office designated by the Consumer Protector, knowing such statement to be false or not knowing or believing it to be true.

As such, where a person stands trial for one of the above offences, and any “answer, book, document or article” adduced happens to expose that person to a criminal charge, then the evidence may be used against that person in the criminal proceedings. This is clearly contrary to the section 35(3)(j) of the Constitution and may be susceptible to a declaration of constitutional invalidity if challenged. It may be worthwhile for the provincial legislature to consider amending this provision to bring it in line with the Constitution and avoid unnecessary litigation on this point.

Furthermore, section 319(3) of the Criminal Procedure Act 56 of 1955 (titled: Charges for giving false evidence), provides for conviction for committing the crime of perjury. In context of section 8(5) of the Gauteng Consumer Affairs Act, this may, once again be contrary to the provisions of section 35(3)(j) of the Constitution and it may be worthwhile for the provincial legislature to revisit this provision when revising the Gauteng provincial legislation.

⁷⁹² 56 of 1995.

Although certain of the provincial legislatures have revised their provincial legislation, or are in the process of doing so, the Gauteng provincial legislature does not appear to have taken any steps in this respect to date.⁷⁹³

3.9 Conclusion

There has been considerable development in the South African consumer protection landscape since the introduction of the CPA. The CPA has attempted to streamline the enforcement provisions relating to consumer protection laws. Various consumer protection bodies have been co-opted and established by the CPA in an attempt to bring about effective access to redress for consumers. However, it is clear from the discussion above that there are challenges that must be addressed in order to ensure that consumers gain better access to redress. The absence of a clear hierarchy may also lead to abuse of the system by consumers through forum-shopping.⁷⁹⁴ Accordingly, the successes and shortcomings of the CPA's enforcement mechanisms will be further assessed in Chapter 5 of this thesis once the consumer protection enforcement procedures in foreign jurisdictions have been considered in greater detail. Accordingly, in the next chapter a comparative analysis that assesses the enforcement structures with regard to consumer protection law in India and the UK is set out.

⁷⁹³ See para 2.3.2.2 of Ch 2 above (see n 93) and see generally Koekemoer (2017) 40 *JCP* 419 at 435-436 in respect of recent developments in the provinces.

⁷⁹⁴ Koekemoer (2014) 40 *JABR* 659 at 669. See discussion regarding the absence of a clear hierarchy in para 3.5 of this chapter. During the Commission's seminar titled 'Common approach, understanding and interpretation on the Consumer Protection Act (CPA)' held on 22 and 23 February 2018 at the Premier Hotel, Pretoria, during a panel discussion anchored by Adv Neville Meville, a provincial representative expressed the problem of forum shopping with the consumer initiating multiple complaints in multiple forums resulting in a waste of resources. The representative also mentioned that a clear hierarchy would be a solution to forum shopping.

CHAPTER 4

ENFORCEMENT OF CONSUMER RIGHTS IN FOREIGN JURISDICTIONS: A COMPARATIVE ANALYSIS

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4.1 Introduction

Section 2(2) of the CPA makes it clear that the South African legislature intended applicable foreign and international law to be taken into account for purposes of the interpretation and the application of the CPA.⁷⁹⁵ It is therefore prudent, for purposes of this thesis, to look at consumer law enforcement regimes that have developed in both developed and developing foreign jurisdictions in order to assess how South African consumer law enforcement mechanisms can be improved so as best to give effect to the aims of the CPA.⁷⁹⁶

This comparative analysis will focus on India and the UK. In the first instance, India was selected for this comparative analysis because: (i) like South Africa, it is a developing country; (ii) it is one of the few developing countries with a longstanding and seemingly comprehensive consumer protection law system; and (iii) like the South African consumer law dispensation, Indian consumer law has been influenced by English law.⁷⁹⁷ However, India is unique to the extent that it has adapted the English law to suit the Indian consumer law landscape.⁷⁹⁸ On the other hand, the UK was selected as: (i) English law has had a substantial influence on mercantile and company law in South Africa, including the current South African Consumer Protection Act; and (ii) the UK is a developed country with a consumer law enforcement regime which appears to be effective.⁷⁹⁹ For these reasons, India and the UK shall be the subject of this comparative analysis.

4.2 India

4.2.1 Introduction

Consumer protection law in India has a rich Indian cultural heritage.⁸⁰⁰ Although the indigenous Indian legal system was infiltrated by British laws, the “fabric of modern

⁷⁹⁵ See also s 233 of the Constitution.

⁷⁹⁶ See s 3 of the CPA.

⁷⁹⁷ Prasad (2008) 11/3 *Journal of Texas Consumer Law* at 134.

⁷⁹⁸ *Ibid.*

⁷⁹⁹ See Scott “Influence of the CPA on promotional activities” 43.

⁸⁰⁰ Prasad (2008) 11/3 *Journal of Texas Consumer Law* 132.

Indian Law...is unmistakably Indian in its outlook and operation and consumer protection is not an exception to this perception".⁸⁰¹ Rachagan submits that consumer law is seen by consumerists, as well as lawmakers in developing countries, including India, as a mechanism to bring development to groups in their country that are disadvantaged and require special focus to promote their development.⁸⁰² Indeed, a well-protected consumer would be able to participate more meaningfully in a country's economic activities, which would inevitably lead to the development and economic growth of a country.

At the outset, it is necessary to set out the nature of the legal system applicable in India in order to facilitate the comparative analysis to follow.

4.2.2 Ancient India

In ancient India, the *veda* were regarded as the supreme source of codes which contained the law or *dharma*.⁸⁰³ The King was considered as the 'fountain-head' of justice, as well as the Lord of the *dharma*, and he had the authority to administer justice within his kingdom.⁸⁰⁴ The ancient Indian legal system recognised a system of appeal and precedent in respect of judicial administration.⁸⁰⁵ In this regard, the decision of the higher court superseded that of the court below, while the decision of the King was supreme.⁸⁰⁶ The King's Court was presided over by the King who was advised by the Brahmins,⁸⁰⁷ the Chief Justice, and other judges, ministers, elders, and representatives of the trading community.⁸⁰⁸ Below the King's Court, was the Court of the Chief Justice, consisting of the Chief Justice himself and a board of

⁸⁰¹ Ibid at 134.

⁸⁰² Rachagan "Development and consumer law" at 56.

⁸⁰³ Shrivastava RK "UPDATE: A Guide to India's Research and Legal System" (2014) 3 available at http://www.nyulawglobal.org/globalex/India_Legal_Research1.html (accessed on: 20 April 2018). See Kumar *Essays on legal systems in India* 9, where the author indicates that in essence 'dharma' refers to religion and social law. See also Prasad (2008) 11/3 *Journal of Texas Consumer Law* 132. See also Singh *The Law of Consumer Protection in India* 43.

⁸⁰⁴ Aggarwal *Jurisprudence in India* 11-12.

⁸⁰⁵ Kumar *Essays on Legal Systems in India* 13.

⁸⁰⁶ Ibid at 12-13, Kumar further submits that In this regard, the King's Court was the highest court of appeal as well as the court of first instance in highly important matters.

⁸⁰⁷ Ibid at 8, Kumar further indicates that in accordance with the caste system applicable in ancient India, Brahmins were considered as the 'most superior castes' and all the Hindu scholars and priests came from this caste. The caste system applicable in ancient India was considered to be one of the most rigid social systems ever to be developed in the world. In terms of this system, persons were born into four social groups and very rigid rules and laws were applicable to each caste.

⁸⁰⁸ Ibid at 12.

judges.⁸⁰⁹ At times, the judges would constitute separate tribunals with a specified territorial jurisdiction.⁸¹⁰

During the ancient period, the four broad types of criminal offence that existed in relation to consumer law, were: (i) the adulteration of foodstuff; (ii) charging excessive prices; (iii) fabrication of weights and measures; and (iv) the sale of forbidden articles.⁸¹¹ In respect of these offences, the necessary measures and penalties were recommended by statute in prominent texts of that period such as the *Manusmriti*, Kautilya's *Arthashastra*, *Yajnavalkyasmri*, *Naradasmrti*, *Brihaspatismriti*, and *Katyayanasmriti*.⁸¹²

4.2.3 British India

After the colonisation of India by Britain which began in 1600 AD, Queen Elizabeth I granted a Charter in favour of the East India Company affording it certain powers and privileges in respect of the enjoyment of exclusive trading rights in countries beyond the Cape of Good Hope (which territory included India).⁸¹³ The East India Company later developed into a powerful company which sought to acquire land and expand its territorial jurisdiction step-by-step.⁸¹⁴ During the eighteenth century, the 1726 Charter was issued by King George I which brought about significant changes in the towns of Calcutta, Bombay and Madras (which were also referred to as the three Presidency Towns).⁸¹⁵ This Charter is said to not only be important with respect to the introduction of uniform courts in the three Presidency Towns; but Bhansali submits that the Charter also acted as a link between the English and Indian legal systems.⁸¹⁶ In essence, the Charter introduced the English common law and

⁸⁰⁹ Ibid at 12. Kumar submits that all the judges were from the three upper castes, preferably the Brahmins.

⁸¹⁰ Ibid. The author refers to Brihaspati who indicates that there were four kinds of tribunals in existence namely, a stationary tribunal, a movable tribunal, courts under royal signet in the absence of the King and commissions under the King's presidency.

⁸¹¹ Singh *The Law of Consumer Protection in India* 44.

⁸¹² Ibid.

⁸¹³ Bhansali *Legal System in India* 2.

⁸¹⁴ Ibid at 3.

⁸¹⁵ Ibid at 5. Shrivastava RK "UPDATE: A Guide to India's Research and Legal System" (2014) 3 available at http://www.nyulawglobal.org/globalex/India_Legal_Research1.html (accessed on: 20 April 2018)

⁸¹⁶ Bhansali Ibid at 5.

statutes into the legal system of India.⁸¹⁷ Various courts were established during the British colonial period, such as the Mayor's Court which presided over civil matters regarding people living in the Presidency Towns and factories, with appeals possible to the court of the Governor and Council and, thereafter, to the King-in-Council.⁸¹⁸ A Supreme Court was established in Calcutta in 1773, and later, in the 1800s, Supreme Courts were established in Madras and Bombay.⁸¹⁹ Furthermore, a court structure known as the Adalat system, which applied Mohammedan and Hindu laws, was introduced in some of the Indian provinces in line with the Judicial Plan of 1772.⁸²⁰ Nonetheless, the Supreme Courts as well as the Sadar Courts (which had been established under the Adalat system) were abolished and, initially, three high courts were established in their place.⁸²¹

A Federal Court was established in 1937 under the Government of India Act, 1935, with jurisdiction to decide on central and provincial matters.⁸²² Matters from the High Courts could be appealed to the Federal Court in instances where a case involved the interpretation of the Constitution of India.⁸²³ A system of appeals was subsequently introduced from India to the Privy Council.⁸²⁴ Therefore, appeals could be made from the Federal Court to the Privy Council.⁸²⁵ In respect of all High Court matters that did not go to the Federal Court, an appeal could be made to the Privy Council.⁸²⁶ Although the Privy Council was not bound by its previous decisions, Bhansali submits that the common law of England was introduced into the Indian legal system through the Privy Council.⁸²⁷

⁸¹⁷ Ibid at 6. Bhansali submits further that Mayor's Court (as discussed below) was declared the court of record and granted testamentary jurisdiction. The Mayor's Court was directed to make decisions in accordance with the principles of 'justice and right', which were the founding principles of English law.

⁸¹⁸ Ibid at 5-10.

⁸¹⁹ Ibid at 7 and 9.

⁸²⁰ Ibid at 10-3.

⁸²¹ Ibid as 13-14 where it is stated that each High Court consisted of a Chief Justice and a maximum of fifteen judges as determined by Her Majesty.

⁸²² Ibid at 14.

⁸²³ The Indian Constitution, as modified as at 1 December 2007. Bhansali *ibid*.

⁸²⁴ Shrivastava RK "UPDATE: A Guide to India's Research and Legal System" (2014) 3 available at http://www.nyulawglobal.org/globalex/India_Legal_Research1.html (accessed on: 20 April 2018).

⁸²⁵ Bhansali *Legal System in India* 14.

⁸²⁶ *Ibid*.

⁸²⁷ *Ibid*.

India was declared a separate and independent state following the promulgation of the Indian Independence Act, 1947.⁸²⁸ Subsequently, in September 1949, the jurisdiction of the Privy Council was abolished in respect of appeals from India; and on 26 January 1950 a single Supreme Court was established in place of the Federal Court.⁸²⁹ Nonetheless, three hundred years of British rule in India (whether direct or indirect) had a substantial impact on many Indian institutions.⁸³⁰

It is noted that during the colonial era, the overall economic policies of the government were more focused on the promotion and protection of British interests than on those of the native Indian population.⁸³¹ There were certain legislative enactments which Singh submits were in the general public interest, although still not necessarily in the interest of ordinary consumers.⁸³² These included the Indian Penal Code of 1860,⁸³³ the Dangerous Drugs Act of 1930,⁸³⁴ the Sale of Goods Act of 1930, and the Sale of Drugs and Cosmetics Act of 1940.⁸³⁵

4.2.4 India as a constitutional democracy

Present-day India is referred to in the Indian Constitution as a sovereign, socialist, secular, democratic republic.⁸³⁶ In order to set out a proper context, each term used to describe India is discussed briefly below.⁸³⁷

In the first instance, from an international law perspective, the arbitrator in the *Island Palmas* case (Netherlands/USA) made some general remarks in respect of sovereignty in relation to territory.⁸³⁸ Sovereignty with regard to the relations between states, refers to independence, which is essentially the right to exercise the

⁸²⁸ Kumar *Essays on Legal Systems in India* 1.

⁸²⁹ Bhansali *Legal System in India* 14.

⁸³⁰ Kumar *Essays on Legal Systems in India* 1.

⁸³¹ Singh *Law of Consumer Protection in India* 49.

⁸³² *Ibid* at 50.

⁸³³ 42 of 1860.

⁸³⁴ 2 of 1930.

⁸³⁵ 3 of 1930. Singh *Law of Consumer Protection in India* 50.

⁸³⁶ Preamble of the Indian Constitution.

⁸³⁷ See s 1 of the Constitution (South Africa).

⁸³⁸ *Island of Palmas* case (Netherlands, USA) 831 at 838.

functions of a state within such territory, to the exclusion of other states.⁸³⁹ It is nonetheless important to note that an essential element of sovereignty is that it must be continuous – it cannot merely exist at a particular moment.⁸⁴⁰ Secondly, insofar as India is considered to be a *socialist* state, socialism refers to a theory of social organisation in terms of which the land, transport systems, primary industries, and natural resources of a country should be owned or controlled by the whole population.⁸⁴¹ In this regard, the description in the Indian Constitution of the country being, inter alia, socialist, is indicative of the social and political theory of governance followed in India. Thirdly, a state is classified as a *secular* state where there is a separation between religion and the state which prohibits the state from endorsing any particular religion.⁸⁴² Fourthly, a *democratic* state refers to a country which follows a form of governance in terms of which the people of such country may vote for representatives to govern the state on their behalf.⁸⁴³ A democratic state is also premised on the principle of equality.⁸⁴⁴ Lastly, a *republic* is defined as “a state in which power is housed in the people and elected representatives and which has a president rather than a monarch”.⁸⁴⁵

Furthermore, the constitutional structure prescribed by the Indian Constitution is such that the executive, legislative, and judicial arms of state are separate (in the union and within each respective state), which is discussed in brief below.⁸⁴⁶

4.2.4.1 The executive

The union executive is headed by the President who is elected as the head of state by an electoral college (which consists of members of the union and state legislatures) for a five-year term.⁸⁴⁷ However, Kumar submits that the true power

⁸³⁹ Ibid.

⁸⁴⁰ Ibid at 839.

⁸⁴¹ Soanes & Hawker (eds) *Compact Oxford English Dictionary* 984.

⁸⁴² Ibid at 932.

⁸⁴³ Ibid at 263.

⁸⁴⁴ Ibid at 263.

⁸⁴⁵ Ibid at 873.

⁸⁴⁶ Kumar *Essays on Legal Systems in India* 2.

⁸⁴⁷ Ibid at 3. Kumar submits that India follows the Westminster system of government in terms of which the country is headed by a president as opposed to an 'hereditary monarch'. He also indicates at 2, that the Indian Constitution provides for a 'quasi-federal nation' made up of a union of states. A federal government is “a national government that exercises some degree of control over smaller political units that have surrendered some degree of power in exchange for the right

rests with the Union Council of Ministers (being the cabinet) which is headed by the Prime Minister.⁸⁴⁸ This submission is made on the basis that the President is normally bound to act in accordance with the advice of the Union Council of Ministers.⁸⁴⁹ The union government is divided into a number of departments each headed by a minister. The structure of the respective states is similar that of the union to the extent that the Governor is the head of each state, and the executive power of the state rests with the Governor who is appointed by the President (on the advice of the Union Council of Ministers) for a term of five years.⁸⁵⁰

4.2.4.2 The judiciary

At union level, the judiciary consists of the Supreme Court of India which is the highest court of appeal in India.⁸⁵¹ In this regard, the Supreme Court has jurisdiction to hear appeals from the High Courts and review matters from subordinate tribunals.⁸⁵² The Supreme Court comprises of the Chief Justice and such number of puisne (ordinary) judges as legislated for by the union legislature.⁸⁵³ Similarly, the state judiciary is made up of the High Courts in each state, and each High Court is headed by a Chief Justice and a number of puisne judges.⁸⁵⁴ In this regard, the High Court hears matters from both subordinate courts and tribunals (which include the consumer forums).⁸⁵⁵ Furthermore, it is noted that specialised tribunals, which

to participate in national political matters". (See Garner (ed) *Black's Law Dictionary* 810-811.) A unitary government refers to a government that is "of or relating to a system of government that effects a union that fuses the governmental organs, without any division between regional components and the national components of a central government". (See Garner *ibid* at 1766.) The Indian structure of government has elements of both.

⁸⁴⁸ Kumar *Essays on legal systems in India* 3. Kumar points out that although the Prime Minister is usually the leader of the political party which holds the majority in the House of People, in the past, the Prime Minister has been the leader of a coalition of political parties which hold a 'thin majority' in the House of People.

⁸⁴⁹ *Ibid* at 3. In this regard, art 74 of the Indian Constitution provides as follows:

(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:

[Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.]

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

⁸⁵⁰ Kumar *ibid* at 4. According to Kumar, the governor acts on the advice of the State Council of Ministers which is headed by the State Chief Minister.

⁸⁵¹ *Ibid* at 5.

⁸⁵² *Ibid*.

⁸⁵³ *Ibid*.

⁸⁵⁴ *Ibid*. Puisne judges are defined as being junior judges. See Garner (ed) *Black's Law Dictionary* 969.

⁸⁵⁵ Kumar *ibid* 5-6.

include the consumer forums, fall within the jurisdiction of the High Court within whose territory they operate.⁸⁵⁶ The main language used in the Supreme Court and the High Courts is English, although it is submitted by Kumar that the use of Hindi is “rapidly gaining ground” within the judicial space.⁸⁵⁷ There does not appear to be a court system that operates at local level, although there are courts for small claims, which are relevant particularly for consumer-orientated claims.⁸⁵⁸

4.2.4.3 The legislature

The union legislature may make laws (enact central laws) which are applicable to the whole or any part of the territory of India; whilst the legislature of each state may make laws (enact state laws) which apply to the whole or any part of the state.⁸⁵⁹ The legislative powers of the union, on the one hand, and the states, on the other hand, are apportioned in Schedule 7 to the Indian Constitution (with any residual powers being held by the union).⁸⁶⁰ In this regard, it is noted that the union has the exclusive power to make laws with respect to matters set out in List I of Schedule 7, ie, the ‘Union List’.⁸⁶¹ Furthermore, the respective state legislatures have the exclusive power to make laws related to matters set out in List II of Schedule 7, ie, the ‘State List’.⁸⁶² List III of Schedule 7 sets out matters which fall under the concurrent jurisdiction of the union and state legislatures, ie, the ‘Concurrent List’.⁸⁶³ Although consumer protection law is not expressly set out in Schedule 7, matters that would ordinarily fall within the scope of consumer protection law are set out in

⁸⁵⁶ Ibid at 5.

⁸⁵⁷ Ibid at 6.

⁸⁵⁸ See the establishment of Permanent Lokh Adalats which can be established by notification by either the central authority or the state authority in terms of s 22B of the Legal Service Authorities Act of 1987. Lokh Adalats are established to exercise jurisdiction on matters relating to public utility services below the value of ten rupees (see s 22C of the Legal Service Authorities Act of 1987). Public utility services are defined in s 22A(b) of the Legal Service Authorities Act of 1987 to include transport services; postal, telegraph, or telephone services; the public supply of power, light, or water; public conservancy and sanitation; hospital or dispensary services; or insurance services (as well as any other service that may, by notice, be declared a public utility service by central or state government). See also discussion on the whether the Permanent Lokh Adalat can usurp the jurisdiction of consumer forums in Gupta *Commentaries on the CPA* at 33-34.

⁸⁵⁹ Section 245(1) of the Indian Constitution.

⁸⁶⁰ Section 248(1) of the Indian Constitution. It is noted for the sake of completeness that s 246(4) of the Indian Constitution provides that Parliament, being the Union legislature, has the authority to make laws with respect to any part of the Indian territory not included in a state, notwithstanding that such a matter falls into the State List (List II of Schedule 7 to the Indian Constitution). In this regard, the territory covered by each of the states of India is set out in the First Schedule to the Indian Constitution. See also Kumar *Essays on Legal Systems in India* 4.

⁸⁶¹ The Indian Constitution s 246(1).

⁸⁶² Ibid at s 246(3).

⁸⁶³ Ibid at s 246(2).

List III (Concurrent List) of Schedule 7 to the Indian Constitution.⁸⁶⁴ This is similar to the concurrent jurisdiction that exists in terms of the South African Constitution.⁸⁶⁵

The Sale of Goods Act was the exclusive source of consumer protection law in India for a period of approximately 55 years.⁸⁶⁶ However, Nabi et al submit that the Sale of Goods Act was premised on the principle of *caveat emptor* (ie, buyer beware) and, accordingly, buyers were expected to be knowledgeable and well-informed.⁸⁶⁷ Although the application of this principle may have been adequate around a century ago, the advent of organised manufacturing, which came with the industrial revolution, placed buyers and sellers on an unequal footing.⁸⁶⁸ Accordingly, the Consumer Protection Act⁸⁶⁹ supplemented the remedies already provided for by the Sale of Goods Act.⁸⁷⁰

In addition to the Sale of Goods Act and the Indian CPA, read together with the Consumer Protection Rules, 1987 (Indian CPA Rules), the Contract Act,⁸⁷¹ the Essential Commodities Act,⁸⁷² the Agricultural Produce (Grading and Marking) Act,⁸⁷³ the Prevention of Food Adulteration Act,⁸⁷⁴ the Standard of Weights and Measures Act,⁸⁷⁵ the Trade Marks Act,⁸⁷⁶ the Competition Act,⁸⁷⁷ and the Bureau of

⁸⁶⁴ The following matters fall under this concurrent list under Schedule 7: (i) Entry 1, which provides for Criminal Law, which is inclusive of all matters included in the Indian Penal Code as at the commencement of the Indian Constitution (but excluding offences against laws in relation to any matters which are specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power; (ii) entry 2, which provides for Criminal Procedure, which includes all matters contained in the Code of Criminal Procedure at the commencement of the Indian Constitution; (iii) Entry 7, which provides for Contracts which include partnerships, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land; (iv) Entry 13, which provides for civil procedure, including all matters included in the Code of Civil Procedure at the commencement of the Indian Constitution, inclusive of limitation and arbitration; (v) Entry 18, which provides for adulteration of foodstuffs and other goods; (vi) entry 33 which covers trade and commerce in, and the production, supply and distribution of the products of certain industries, foodstuffs, including edible oil seeds and oils, raw cotton, whether ginned or unginned, and cotton seed and (iv) raw jute; and entry 46 which covers jurisdiction and powers of all courts except the Supreme Court, with respect any of the matters on the List.

⁸⁶⁵ See the discussion under para 2.3.3 in Ch 2 above.

⁸⁶⁶ Prasad (2008) 11/3 *Journal of Texas Consumer Law* 132 at 134.

⁸⁶⁷ Nabi et al *Consumer Rights and Protection* 173.

⁸⁶⁸ *Ibid.*

⁸⁶⁹ 68 of 1986. Hereafter 'the Indian CPA'.

⁸⁷⁰ Prasad (2008) 11/3 *Journal of Texas Consumer Law* 132 at 134.

⁸⁷¹ 9 of 1872.

⁸⁷² 10 of 1955.

⁸⁷³ 1 of 1937.

⁸⁷⁴ 37 of 1954.

⁸⁷⁵ 60 of 1976.

⁸⁷⁶ 47 of 1999.

Indian Standards Act,⁸⁷⁸ are all statutes which inform the Indian consumer protection dispensation. This comparative study will focus on the Indian CPA and other applicable statutes will be discussed only insofar as they relate to the Indian CPA.

The framework of the Indian CPA was set out in the resolution of 9 April 1985 passed by the General Assembly of the United Nations, namely, the Consumer Protection Resolution No 39/248 – a resolution to which India is a signatory.⁸⁷⁹ This resolution, upon which the Indian CPA is based, aims to provide better protection for the interests of consumers through the establishment of informal complaint procedures and advisory services.⁸⁸⁰ India has implemented this resolution through the establishment of consumer councils and agencies to resolve consumer disputes.⁸⁸¹ The influence of the resolutions passed by the General Assembly of the United Nations in the Indian CPA is evident from the provisions of this Act as discussed in greater detail below.

4.2.5 Indian CPA

The Indian CPA is a piece of post-independence, socio-economic legislation enacted in the interest of protecting consumers.⁸⁸² The underlying intention of the Indian CPA is to provide for an informal justice mechanism which is less time consuming and more affordable.⁸⁸³ In this regard, Barowalia submits that the Indian CPA is “a milestone in the history of socio-economic legislation” in so far as the promotion and protection of the rights of consumers are concerned, as it makes provision for an inexpensive and speedy system of consumer redress.⁸⁸⁴ The Indian CPA thus relaxes the traditional requirements for standing, and allows, inter alia, consumers as

⁸⁷⁷ 12 of 2002.

⁸⁷⁸ 63 of 1986. See Dayal U “Laws and legislations to protect the interest of consumers in India” available at <http://www.yourarticlelibrary.com/consumers/laws-and-legislations-to-protect-the-interest-of-consumers-in-india/8782/> (accessed on: 20 April 2018).

⁸⁷⁹ See Nabi et al *Consumer rights and protection* 173; Majundar *Consumer Protection in India* 63-64; Gupta *Commentaries on the CPA* at 1181; Wadhwa & Rajah *Law of Consumer Protection* at 5; and Singh *The Law of Consumer Protection in India* 59.

⁸⁸⁰ See para 29 under the guidelines provided for in Consumer Protection Resolution No 39 /248. See also Wadhwa & Rajah *Law of Consumer Protection* 1993.

⁸⁸¹ See discussion below under para 4.2.5.3 and 4.2.5.4 of this chapter

⁸⁸² Singh *The Law of Consumer Protection in India* 63.

⁸⁸³ Prasad (2008) 11/3 *Journal of Texas Consumer Law* 132 at 134. See also Singh *Ibid*.

⁸⁸⁴ Barowalia *Commentary on the CPA* 552.

well as consumer groups to proceed under the Indian CPA.⁸⁸⁵ Notably, the Indian CPA has been recognised in India as the 'poor man's legislation' because it affords consumers easy access to justice.⁸⁸⁶ In an effort to ensure that expedient access to justice is made available to consumers, plain language is used in the Indian CPA and the relevant procedures are set out in simple terms.⁸⁸⁷

4.2.5.1 Field of application and rights under the Indian CPA

The Indian CPA provides that the statute extends to the whole of India (excluding the state of Jammu and Kashmir).⁸⁸⁸ A separate statute – the Jammu and Kashmir Consumer Protection Act – was adopted on 19 August 1987 by the Jammu and Kashmir Assembly.⁸⁸⁹ This is based on the privilege enjoyed by the state of Jammu and Kashmir under article 370 of the Indian Constitution.⁸⁹⁰ Furthermore, save as may be expressly provided by the central government by notification, the Indian CPA applies to all goods and services in the territory in which the statute finds application.⁸⁹¹ The consumer rights protected by the Indian CPA, namely, the right of the consumer to: (i) be protected from the marketing of goods and services which are hazardous to life and property; (ii) be informed of the quality, quantity, purity, standard, and price of the goods and services in order to ensure that consumers are protected from unfair trade practices; (iii) have access to goods and services at competitive prices; (iv) be heard and be assured that their interests will receive due consideration; (v) stop unfair trade practices, restrictive trade practices, and exploitation of consumers; (vi) education; and (vii) simple and expedient resolution of consumer disputes.⁸⁹² Accordingly, Singh submits in this regard that the consumer rights recognised globally have been incorporated into the Indian CPA.⁸⁹³ It is noted in this regard that generic consumer rights are protected by section 6 of the Indian CPA, and the statute does not introduce new consumer rights on a substantive level.

⁸⁸⁵ See discussion below in para 4.2.5.2 on definition of 'complainant'. See also Prasad (2008) 11/3 *Journal of Texas Consumer Law* 132 at 135.

⁸⁸⁶ *Ibid* at 134.

⁸⁸⁷ Singh *Law of Consumer Protection in India* 63-64.

⁸⁸⁸ Section 1(2) of the Indian CPA. See also Nabi et al *Consumer Rights and Protection* 176.

⁸⁸⁹ Act XVI of 1987. See Majumdar *Consumer Protection in India* 1285-1296. See also Nabi *ibid*.

⁸⁹⁰ Section 370 of the Indian Constitution.

⁸⁹¹ Section 1(4) of the Indian CPA.

⁸⁹² Section 6 of the Indian CPA. Nabi et al *Consumer Rights and Protection* 174.

⁸⁹³ Singh *Law of Consumer Protection in India* 66.

Nabi et al submit, in this regard, that the Indian CPA merely applies extant laws in areas of criminal and civil law, and does not itself enact any substantive laws.⁸⁹⁴

4.2.5.2 Important definitions

The definition of a consumer in any consumer protection statute is crucial as it speaks to the extent of protection afforded such persons by the statute.⁸⁹⁵ In this regard, section 2(d) of the Indian CPA defines a 'consumer' as

any person who,

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
- (ii) hires or [avails of] any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires [or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.⁸⁹⁶

As is evident from section 2(d) above, in terms of the Indian CPA, anybody who uses goods or benefits from services with the approval of the buyer or the person who hired such services (ie, a rightful user), is considered to be a 'consumer'.⁸⁹⁷ It has been submitted that the definition of a consumer as contemplated in the Indian CPA

⁸⁹⁴ Nabi et al *Consumer Rights and Protection* 232.

⁸⁹⁵ Rachagan "Development and consumer law" at 54.

⁸⁹⁶ See also Nabi et al *Consumer Rights and Protection* 179–180. For the sake of completeness, it is worth noting that a 'person' is defined in the Indian CPA to include

- (i) a firm whether registered or not;
- (ii) a Hindu undivided family;
- (iii) a co-operative society;
- (iv) every other association of persons whether registered under the Societies Registration Act, 1860 (21 of 1860) or not.

It is thus clear that the scope of protection of the Indian CPA extends to juristic persons. However, the exclusion as regards a commercial purpose suggests that small businesses that enter into consumer contracts in the ordinary course of their business may not be protected by the Indian CPA.

⁸⁹⁷ Sahani *Consumer Protection* 47. See also Singh *Law of Consumer Protection in India* 77.

avoids existing controversies and technicalities present in Indian law, such as the requirement of privity of contract – this is in light of the fact that a third party who is not necessarily the buyer of the goods or user of the services, may be a consumer as contemplated in the Indian CPA.⁸⁹⁸

The explanatory note to the Indian CPA provides that in respect of section 2(d)(ii), ‘commercial purpose’ does not include the use of goods bought and used by a consumer exclusively for the purpose of earning her livelihood by means of self-employment.⁸⁹⁹ In this regard, Rachagan submits that the definition of consumer in the Indian CPA thus covers the numerous petty traders, trishaw pullers, auto-rickshaw drivers, subsistence farmers, and pastoralists.⁹⁰⁰ In addition, to the extent that the definition of a consumer includes a person who purchases goods or services in accordance with ‘any system of deferred payment’, Singh points out that in most instances, ownership has not already passed to the purchaser until such deferred payments have been made.⁹⁰¹ Accordingly, it is submitted that the intention the Indian legislature is to protect and provide redress for the indigent persons within the population who may regularly make use of deferred payments for everyday purchases of goods and services. This is covered by the NCA in South Africa and so falls outside the scope of this thesis.

Furthermore, a ‘complainant’ is defined in the Indian CPA to include the following persons who make a complaint: (i) a consumer to whom goods or services have been provided (or will be provided as per agreement between the parties); (ii) any recognised voluntary consumer association registered under the Companies Act, 1956, or under any other law in force from time to time; (iii) the central government or state government; or (iv) one or more consumers, where there are numerous consumers having the same interest (this would include class-action matters).⁹⁰²

⁸⁹⁸ Singh *ibid* at 78 indicates in this regard that privity of contract is limited in India by way of the Indian Contract Act 9 of 1872.

⁸⁹⁹ See also Rachagan “Development and consumer law” at 54-55.

⁹⁰⁰ Rachagan *ibid* at 55.

⁹⁰¹ Singh *Law of Consumer Protection in India* 78.

⁹⁰² Section 2(b) of the Indian CPA. See Nabi et al *Consumer Rights and Protection* 175. At 181, Nabi et al submit that a voluntary association need not be registered with any authority. See also Majumdar *Consumer Protection in India* 60-61 and Barowalia *Commentary on the CPA* 17.

Section 2(c) of the Indian CPA defines a 'complaint' as any type of allegation made in writing by a complainant, with the view to obtaining any relief provided by or under the Act, that: (i) an unfair trade practice has been adopted by any trader; (ii) the goods bought by her or agreed to be hired by her have one or more defects; (iii) the services hired or used, or agreed to be hired or used by her are in any way defective; (iv) a trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods; and (v) goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of any law for the time being in force requiring traders to display information in regard to the contents, manner, and effect of such goods.⁹⁰³

A 'consumer dispute' is defined as a dispute in which the person against whom a complaint has been filed denies or disputes the allegations in the complaint.⁹⁰⁴ Nabi et al submit that where a person against whom a complaint has been filed agrees thereto, there is no actual consumer dispute.⁹⁰⁵ Interestingly, the authors note in this regard that section 12(1), which addresses the filing of a complaint, does not expressly refer to a 'consumer dispute'.⁹⁰⁶ Accordingly, the authors submit that the definition of a consumer dispute, as provided for in the Indian CPA, does not appear to be relevant.⁹⁰⁷

'Goods', in terms of the Indian CPA, means "goods as defined in the Sale of Goods Act, 1930".⁹⁰⁸ In section 2(7) of the Sale of Goods Act, 1930, 'goods' are defined as "every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under contract of

⁹⁰³ See also Nabi et al *Consumer Rights and Protection* 177. Nabi submits that hazardous services (or services which are likely to be hazardous) to the life and safety of the public are included within the scope of a complaint as contemplated in the Indian CPA.

⁹⁰⁴ Section 2(e) of the Indian CPA. See Nabi et al *ibid* at 178.

⁹⁰⁵ Nabi et al *ibid*.

⁹⁰⁶ *Ibid*.

⁹⁰⁷ *Ibid*.

⁹⁰⁸ Section 2(i) of the Indian CPA. See Singh *Law of Consumer Protection in India* 71.

sale”.⁹⁰⁹ In this regard, Nabi et al submit that intangible things such as patents, copyright, trademarks, gas, and electricity would constitute goods as contemplated in the Indian CPA.⁹¹⁰

The Indian CPA defines ‘services’ as services of any description “made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of services free of charge or under a contract of personal service”.⁹¹¹ A service in terms of the Indian CPA must be a regular commercial transaction as any services rendered free of charge do not fall within the definition of a ‘service’.⁹¹² Singh submits in this regard that the definition provided is comprehensive and indicates that, save for the exclusions above, services of any description are included within the ambit of the CPA.⁹¹³

Lastly, the Indian CPA defines a ‘trader’, in relation to any goods, as “a person who sells or distributes any goods for sale and includes the manufacturer thereof, and where such goods are sold or distributed in package form, includes the packer thereof”. In this regard, a ‘manufacturer’ means “a person who: (i) makes or manufactures any goods or parts thereof; or (ii) does not make or manufacture any goods but assembles parts thereof made or manufactured by others and claims the end-product to be goods manufactured by himself; or (iii) puts or causes to be put his own mark on any goods made or manufactured by any other manufacturer and claims such goods to be goods made or manufactured by himself.”⁹¹⁴

⁹⁰⁹ Section 2(7) of the Sale of Goods Act, 1930. Sahani *Consumer Protection* 63.

⁹¹⁰ Nabi et al *Consumer Rights and Protection* 177–178.

⁹¹¹ Section 2(o) of the Indian CPA. (Inserted by the Consumer Protection (Amendment) Act, 1993, with effect from 18 June 1993).

⁹¹² Sahani *Consumer Protection* 65.

⁹¹³ Singh *Law of Consumer Protection in India* 72.

⁹¹⁴ See ss 12, 13 and 14 of the Indian CPA.

The explanatory note in respect of section 2(1)(j) of the Indian CPA provides that “where a manufacturer despatches any goods or part thereof to any branch office maintained by him, such branch office shall not be deemed to be the manufacturer even though the parts so despatched to it are assembled at such branch office and are sold or distributed from such branch office”.⁹¹⁵ It is submitted that the wide definitions of ‘trader’ and ‘manufacturer’ have the effect of increasing the scope of liability insofar as defective goods are concerned.

4.2.5.3 Consumer Protection Councils

The provisions relevant to the consumer protection councils are provided for in Chapter II of the Indian CPA. In this regard, there is a Central Consumer Protection Council (also known as the Central Council), State Consumer Protection Councils (also known as the State Councils), and District Consumer Protection Councils (also known as District Councils).⁹¹⁶ One of the rationales behind the creation of the consumer councils – one at central level and many at state and district level – was to advise and assist consumers in respect of their rights and their enforcement.⁹¹⁷ However, Nabi et al submit that having a single Central Council and one State Council in each of the states, is ‘grossly insufficient’ to carry out the purpose for which these councils were constituted.⁹¹⁸ Nonetheless, each council is headed by a president who must be from a legal background, and comprises of other members who are selected from society and should have experience which relates to economics, commercial law, accounting, industry, public affairs, or administration.⁹¹⁹

In so far as composition is concerned, section 4(2) of the Indian CPA prescribes that the Central Council must consist of: (i) the Minister in charge of consumer affairs in central government, who must act as the chairman of the council; and (ii) other official and non-official members who shall represent “such interests as

⁹¹⁵ See explanatory note below s 12(1)(j) of the Indian CPA.

⁹¹⁶ Sections 4 to 8B of the Indian CPA. It is noted that s 8B was included in the CPA by way of the Consumer Protection (Amendment) Act, 2002. Sahani *Consumer Protection* 13-16.

⁹¹⁷ Sahani *ibid* at 74; and Nabi *et al Consumer Rights and Protection* 176. See ss 6 and 8 of Indian CPA.

⁹¹⁸ Nabi *et al ibid* at 230.

⁹¹⁹ *Ibid* at 175 indicate that such persons should be graduates and above the age of 35.

prescribed”.⁹²⁰ The Central Council is required, at minimum, to hold one meeting per annum.⁹²¹ In accordance with rule 3 of the Indian CPA Rules, read together with section 4 of the Indian CPA, central government has been authorised to make rules in respect of the composition of the Central Council. Accordingly, central government has prescribed that the Central Council will consist of a maximum of 150 members, which shall include:

- (a) the Minister in charge of consumer affairs in the central government, as chairman of the Central Council;
- (b) either the Minister of State or the Deputy-Minister who is in charge of consumer affairs at central government level, as vice-chairman of the Central Council;
- (c) the Minister of Consumer Affairs in the states;
- (d) an administrator to represent Union Territory;
- (e) two members of Parliament – one from the Lok Sabha and one from the Rajya Sabha;
- (f) a maximum of five representatives of the central government departments as well as autonomous organisations that are concerned with consumer interests;
- (g) The registrar of National Consumer Disputes Redressal Commission in New Delhi;
- (h) a maximum of six representatives of the consumer organisations from amongst the Indian members of the international organisation (Consumer International) as nominated by central government;
- (i) a maximum of five persons with proven expertise and experience who are capable of representing consumer interests (drawn from women, farmers, trade and industry, and consumer activists and organisations);
- (j) the secretaries of consumer affairs at state government, to be nominated by Central Council; and

⁹²⁰ See Sahani *Consumer Protection* 14.

⁹²¹ Ibid. See s 5(1) of the Indian CPA.

- (k) the Secretary in the Consumer Affairs at central government, as the member-secretary of the Central Council.⁹²²

The first Central Council, consisting of 116 members, was constituted by the government of India in accordance with a notice issued on 1 June 1987.⁹²³ The term of the Central Council is three years.⁹²⁴ Furthermore, the Central Council is required to hold at least one meeting every year.⁹²⁵ It is worth noting that the resolutions passed by the Central Council are recommendatory in nature.⁹²⁶

The main object of the Central Council is the protection and the promotion of consumer rights, which include, inter alia, the right of consumers to: (i) be protected from “the marketing of goods and services which are hazardous to life and property”;⁹²⁷ (ii) be informed regarding “the quality, quantity, potency, purity, standard and price of goods and services” in order to protect the consumer against unfair trade practices;⁹²⁸ (iii) be assured (where possible) access to a variety of goods at competitive prices;⁹²⁹ (iv) be heard and the right to be assured that consumers’ interests will receive due consideration at the appropriate forums;⁹³⁰ (v) seek redress against unfair or restrictive trade practices or unscrupulous consumer exploitation;⁹³¹ and (vi) the right to consumer education.⁹³² However, Nabi et al submit that the consumer protection councils at central and state level have not been able to achieve any of the objectives set for them in terms of the Indian CPA.⁹³³

⁹²² Rule 3 of the Indian CPA Rules (as amended by the Consumer Protection (third amendment) Rules, 2011, as from 22 September 2011). See Majumdar *Consumer Protection in India 1950–1951*. See also Sahani *Consumer Protection* 76-77 and Wadhwa & Rajah *Law of Consumer Protection* 1575.

⁹²³ Barowalia *Commentary on the CPA* 541.

⁹²⁴ See rule 3(2) of the Indian CPA Rules. See Majumdar *ibid* at 1951. See also Sahani *Consumer Protection* 77 and Barowalia *Commentary on the CPA* 542.

⁹²⁵ Section 5(1) of the Indian CPA. See Majumdar *ibid* at 9. See also Sahani *ibid* at 77 and Barowalia *ibid* at 542.

⁹²⁶ Sahani *ibid* at 78.

⁹²⁷ Section 6(a) of the Indian CPA. See Sahani *ibid* at 14.

⁹²⁸ Section 6(b) of the Indian CPA. See Sahani *ibid*.

⁹²⁹ Section 6(c) of the Indian CPA. See Sahani *ibid*.

⁹³⁰ Section 6(d) of the Indian CPA. See Sahani *ibid*.

⁹³¹ Section 6(e) of the Indian CPA. See Sahani *ibid*.

⁹³² Section 6(f) of the Indian CPA. See Sahani *ibid*.

⁹³³ Nabi et al *Consumer Rights and Protection* 231.

Section 7 of the Indian CPA provides that the members of the State Councils shall consist of: (i) the Minister in charge of consumer affairs within state government who must act as chairman of the State Council; (ii) official and non-official members prescribed by state government; and (iii) not more than ten official and non-official members, nominated by the central government.⁹³⁴ Furthermore, the Indian CPA provides that each State Council must hold a minimum of two meetings per annum.⁹³⁵ The main object of the State Council is to protect the rights of consumers within the states.⁹³⁶ Section 8 of the Indian CPA provides that the State Councils have the same objects as the Central Council, which are set out in section 6(a) to (f) of the Indian CPA.⁹³⁷

Furthermore, provision is made for a District Consumer Protection Council (District Council), in terms of section 8A of the Indian CPA, which must consist of the District Collector (as chairman of the District Council)⁹³⁸ and other official or non-official members as may be prescribed by state government.⁹³⁹ The District Council is required to have a minimum of two meetings a year.⁹⁴⁰ In addition, the District Council has the object of promoting and protecting the rights of consumers within the district as set out in section 6(a) to (f).⁹⁴¹

4.2.5.4 Consumer dispute redress agencies

India has a “three-tier consumer dispute redress machinery” in place that is set out in Chapter 3 of the Indian CPA and makes provision for consumer dispute redress agencies. These are: a Consumer Dispute Redressal Forum – known as the ‘District Forum’, in each district of India;⁹⁴² (ii) the Consumer Disputes Redressal

⁹³⁴ Section 7(2) of the Indian CPA. See Sahani *Consumer Protection* 15.

⁹³⁵ Section 7(3) of the Indian CPA. See Sahani *ibid*.

⁹³⁶ Section 8 of the Indian CPA. See Sahani *ibid*.

⁹³⁷ These objectives are discussed in the paragraph immediately above.

⁹³⁸ Section 8A(2)(a) of the Indian CPA. See Majumdar *Consumer Protection in India* 10.

⁹³⁹ Section 8A(2)(b) of the Indian CPA. See Majumdar *ibid* and Sahani *Consumer Protection* 15.

⁹⁴⁰ Section 8A(3) of the Indian CPA. See Majumdar *ibid* and Sahani *ibid*.

⁹⁴¹ These objectives are discussed in the paragraphs above. Section 8B of the Indian CPA. See Majumdar *ibid*; Sahani *ibid* at 16; and Barowalia *Commentary on the CPA* 551.

⁹⁴² See Nabi et al *Consumer Rights and Protection* 191. The authors submit that district forums are established by notification by the state government, in each district of the state. Furthermore, the authors highlight in this regard that there may be more than one district forum within a particular district.

Commission – known as the ‘State Commission’;⁹⁴³ and (iii) the National Consumer Disputes Redressal Commission – known as the ‘National Commission’ and situated in New Delhi.⁹⁴⁴

4.2.5.5 Composition of the consumer dispute redress agencies

In terms of section 10 of the Indian CPA, a District Forum shall consist of an individual who is, has been, or is qualified to be a district judge, and who acts as the president of the District Forum, and two other members.⁹⁴⁵ Members of the District Forum hold office either for a five year term, or up to the age of 65 years (whichever is earlier).⁹⁴⁶

4.2.5.6 Jurisdiction of consumer dispute redress agencies

The various jurisdictional requirements in respect of the consumer dispute redress agencies is set out in table 1.1 below.

⁹⁴³ See Nabi et al *Consumer Rights and Protection* 191. The authors submit that state commissions are established by notification by the state government.

⁹⁴⁴ Section 9 of the Indian CPA. See Majumdar *Consumer Protection in India* 10; Nabi et al *Consumer Rights and Protection* 174; Sahani *Consumer Protection* 16; and Barowalia *Commentary on the CPA* 552.

⁹⁴⁵ Section 10(1) of the Indian CPA. See Nabi et al *Consumer Rights and Protection* 191.

⁹⁴⁶ Section 10(2) of Indian CPA. See Nabi et al *ibid* at 192.

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Jurisdictional requirement	District Forum	State Commission	National Commission
Pecuniary value of the goods or services plus the compensation claimed	Less than ₹20 lakh ⁹⁴⁷ (approx. R373,266.17) ⁹⁴⁸	Between ₹20 lakh and ₹100 lakh ⁹⁴⁹ (approx. R373,266.17 and R1,866,330.83) ⁹⁵⁰	More than ₹100 lakh ⁹⁵¹ (approx. R1,866,330.83) ⁹⁵²
Territorial	<p>(i) The defendant must voluntarily reside, carry on business, or have a branch office, or personally work for gain, in the area;</p> <p>(ii) where there are multiple defendants, each such defendant either resides or carries on business within the area of the District Forum;</p> <p>(iii) where there are multiple defendants, more than one such defendant must either reside or do business within the jurisdiction of the District Forum and the other parties who do not reside or do business within the area of the District Forum must consent to the jurisdiction of the District Forum; or</p> <p>(iv) the cause of action must arise in that</p>	<p>Set out in section 20 of the Civil Procedure Code which provides that other suits are to be instituted where the defendants reside or where the cause of action arises. In this regard, every suit shall be instituted in court within the local limits of whose jurisdiction –</p> <p>(i) the defendant, or each of the defendants, actually or voluntarily resides, carries on business, or personally works for gain;</p> <p>(ii) any one of the defendant, where there is more than one defendant, actually or voluntarily resides, carries on business, or personally works for gain (at the time of the commencement of the suit) – provided that leave is granted by the court or the defendants who do not fall within the</p>	<p>The whole of India falls under the jurisdiction of the National Commission (except for the states of Jammu and Kashmir). Nonetheless, the cause must arise in India.</p>

⁹⁴⁷ Nabi et al ibid at 174. It is worth noting that a 'lakh' is an Indian denomination used to denote 100 000, see Oxford Dictionaries available at <http://www.oxforddictionaries.com/definition/english/lakh> (accessed on: 20 April 2018). For contextual purposes, ₹ is the symbol that is used for the Indian rupee.

⁹⁴⁸ See currency converter available at <https://finance.yahoo.com/currency-converter/> (accessed on: 20 April 2018).

⁹⁴⁹ Nabi et al *Consumer Rights and Protection* 174.

⁹⁵⁰ See currency converter <https://finance.yahoo.com/currency-converter/> (accessed on: 20 April 2018).

⁹⁵¹ Nabi et al *Consumer Rights and Protection* 174.

⁹⁵² See currency converter <https://finance.yahoo.com/currency-converter/> (accessed on: 20 April 2018).

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	jurisdiction either wholly or in part within the area.	jurisdiction of the court; and (iii) the cause of action arises wholly or in part. ⁹⁵³	
Appeal and revisional	No appeal or revisional jurisdiction	Appeals permitted from the District Forums within 30 days of the order being awarded (which appeal period may be extended by 15 days).	Appeals permitted from the State Commission, within 30 days of the order being awarded by the State Commission (which appeal period may be extended by 15 days). Appeals of decisions by the National Commission to the Supreme Court are possible within a period of 30 days (or within such time period as may be permitted by the Supreme Court). ⁹⁵⁴

Table 1.1⁹⁵⁵

A penalty of up to ₹10 000 or imprisonment for up to three years may be imposed upon persons who fail to comply with orders by the redress agencies.⁹⁵⁶

Nabi et al conducted an empirical study of the cases filed in the various consumer forums.⁹⁵⁷ In this regard, certain information was collated by the authors concerning functioning and non-functioning District Forums and State Commissions as at 1 August 2014.⁹⁵⁸ With regard to District Forums, it was recorded that from a total of 644 forums, 618 were functional, whilst 26 were not.⁹⁵⁹ Nabi et al submit that this reflects gross negligence in the administration of consumer protection mechanisms.⁹⁶⁰ Furthermore, it is noted that 86,9 per cent of the total cases before the National Commission were disposed of, whilst in respect of the various state

⁹⁵³ Section 20 of the Code of Civil Procedure, 1908, available at <http://www.wipo.int/edocs/lexdocs/laws/en/in/in056en.pdf> (accessed on: 19 May 2016).

⁹⁵⁴ See also Nabi et al *Consumer Rights and Protection* 174.

⁹⁵⁵ Sahani *Consumer Protection* 85 - 90.

⁹⁵⁶ Nabi et al *Consumer Rights and Protection in India* (2015) 175.

⁹⁵⁷ Ibid at 213.

⁹⁵⁸ Ibid.

⁹⁵⁹ Ibid.

⁹⁶⁰ Ibid.

commissions this number was 85,88 per cent, and in respect of the District Forums, 92,27 per cent of the cases were disposed of.⁹⁶¹ It appears as if the disposal of matters at district level is higher, which could be seen as positive in that it could alleviate the pressure on the National and State Commissions.

Nabi et al do, however, point out that that the above statistics are not satisfactory in the context of the total Indian population in excess of more 1,2 billion people, the number of cases filed under the CPA in each of the respective forums since their inception (a total of 4 177 711 cases) indicates the lack of awareness among the population regarding the speedy and inexpensive justice available under the Indian CPA.⁹⁶² The authors submit that there is an inadequate number of consumer dispute redress agencies to achieve the objectives envisaged by the Indian CPA, and submit further that the redress agencies under the Indian CPA only cater for the needs of the urban consumers, without taking the needs of rural consumers into account.⁹⁶³

4.2.5.7 Powers of consumer dispute redress agencies

In terms of section 14 of the Indian CPA, once a District Forum has taken the steps to consider a complaint as contemplated in section 13,⁹⁶⁴ it may make the following orders:

- (a) order that the defect which has been pointed out by the relevant laboratory be removed;
- (b) order that the goods be replaced with new goods of a similar description (which shall be free from any defect);
- (c) order that the price or charges paid by the complainant be returned to such complainant;

⁹⁶¹ Ibid at 215 -216. The figures in respect of the disposal of complaints at each of these fora were also gathered as at 1 August 2014.

⁹⁶² Ibid at 216.

⁹⁶³ Ibid at 231.

⁹⁶⁴ Discussed in para 2.2.3 of this chapter.

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- (d) order that an amount (as may be awarded by the forum) be paid to the consumer as compensation for any loss or injury suffered by such consumer as a result of the negligence of the opposite party;
- (e) order the removal of the effects or deficiencies in the services in question;
- (f) order that the unfair trade practice be discontinued, or restricted, or order that such trade practice is not repeated;
- (g) order that such hazardous goods not be offered for sale;
- (h) order the withdrawal of the hazardous goods from being offered for sale; and
- (i) order adequate costs in respect of the parties.⁹⁶⁵

The disadvantage of having prescribed remedies, as per section 14 of the Indian CPA above, is that the power of the various consumer dispute redress agencies is limited to the relief provided in terms of this section, and accordingly, these consumer bodies do not have the power to grant relief they deem appropriate.⁹⁶⁶ This differs from the wide remedial powers given to consumer bodies in South Africa, for example, the Tribunal.⁹⁶⁷

Furthermore, it is noted that in terms of section 13(4) of the Indian CPA, the District Forums, State Commissions, and National Commission have the same powers as those vested in the civil courts under the Code of Civil Procedure, 1908, with regard to: (i) summoning and enforcing the attendance of a defendant or witness and examining the witness under oath; (ii) discovery and the production of documents and other material objects which can be produced as evidence; (iii) receiving evidence on affidavit; (iv) requisitioning reports in respect of tests or analyses from a laboratory or other relevant source; (v) issuing any commission for the examination of a witness; and (vi) any other matter that may be prescribed by the central or state government in terms of the relevant rules.⁹⁶⁸ It is noted that proceedings before these consumer redress agencies are regarded as judicial proceedings within the

⁹⁶⁵ Section 14(1) read with ss 18 and 22 of the Indian CPA.

⁹⁶⁶ Nabi et al *Consumer Rights and Protection* 231.

⁹⁶⁷ See discussion under para 3.6.4.3 in Ch 3 above.

⁹⁶⁸ Section 13(4) must be read together with ss 18 and 22 of the Indian CPA. See Nabi et al *Consumer Rights and Protection* 189.

meaning of the Indian Penal Code.⁹⁶⁹ Furthermore, the consumer redress agencies are regarded as civil courts for purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure.⁹⁷⁰

The consumer dispute redress agencies have concurrent jurisdiction with the ordinary and other courts insofar as consumer matters are concerned.⁹⁷¹

4.2.5.8 Complaint procedure

A complaint may be filed in writing by a complainant as contemplated in the Indian CPA, and should include allegations regarding the defect in respect of the goods or deficiency in respect of the services, as well as the loss suffered as a result of such defect.⁹⁷² A fee is payable upon the filing of a complaint, which must be filed within two years from the date on which the cause of action arose.⁹⁷³ An extension of this prescription period is possible in instances where sufficient cause is shown.⁹⁷⁴ In instances where the complainant lodges a frivolous complaint, she may be subject to a penalty of up to ₹10 000.⁹⁷⁵ The purpose of the penalty provision is to discourage the filing of frivolous claims by complainants, or claims that are intended to harass another person.⁹⁷⁶

In respect of each of the consumer dispute redress agencies, where a dispute relates to goods, the complaint filed is to be referred to the opposing party who is expected to reply to the allegations contained in the complaint within 30 days.⁹⁷⁷ Depending on whether the complainant disputes or denies the claim, the further procedures as set out in section 13(c) to (g) of the Indian CPA providing different

⁹⁶⁹ Section 13(5) read together with ss 18 and 22 of the Indian CPA. *Nabi* *ibid* at 175.

⁹⁷⁰ *Ibid*.

⁹⁷¹ *Singh Law of Consumer Protection in India* 64, where it is submitted by the author that the law in terms of the Indian CPA is in addition to and not in derogation of any other law in force..

⁹⁷² Section 12 of the Indian CPA, as amended by the Consumer Protection (Amendment) Act, 1993.

⁹⁷³ *Nabi et al Consumer Rights and Protection* 175.

⁹⁷⁴ *Ibid*.

⁹⁷⁵ *Ibid* at 188.

⁹⁷⁶ *Ibid* at 188–189.

⁹⁷⁷ Section 13(1)(a) and s 13(2)(a) of the Indian CPA.

mechanisms in terms of which the District Forum is required to deal with the dispute, apply.⁹⁷⁸ The relevant mechanisms as set out in the Indian CPA are as follows:

- (c) where the complaint (*sic*) alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, the District Forum shall obtain a sample of the goods from the complainant, seal it and authenticate it in the manner prescribed and refer the sample so sealed to the appropriate laboratory along with a direction that such laboratory make an analysis or test, whichever may be necessary, with a view to finding out whether such goods suffer from any defect alleged in the complaint or from any other defect and to report its findings thereon to the District Forum within a period of forty-five days of the receipt of the reference or within such extended period as may be granted by the District Forum;
- (d) before any sample of the goods is referred to any appropriate laboratory under clause (c), the District Forum may require the complainant to deposit to the credit of the Forum such fees as may be specified, for payment to the appropriate laboratory for carrying out the necessary analysis or test in relation to the goods in question;
- (e) the District Forum shall remit the amount deposited to its credit under clause (d) to the appropriate laboratory to enable it to carry out the analysis or test mentioned in clause (c) and on receipt of the report from the appropriate laboratory, the District Forum shall forward a copy of the report along with such remarks as the District Forum may feel appropriate to the opposite party;
- (f) if any of the parties disputes the correctness of the findings of the appropriate laboratory, or disputes the correctness of the methods of analysis or test adopted by the appropriate laboratory, the District Forum shall require the opposite party or the complainant to submit in writing his objections in regard to the report made by the appropriate laboratory;
- (g) The District Forum shall thereafter give a reasonable opportunity to the complainant as well as the opposite party of being heard as to the correctness or otherwise of the report made by the appropriate laboratory and also as to the objection made in relation thereto under clause (f) and issue an appropriate order under section 14.⁹⁷⁹

⁹⁷⁸ Section 13(1)(b) of the Indian CPA. For the sake of completeness, a 'District Forum' is defined in s 2(1)(h) of the Indian CPA to refer to a Consumer Dispute Redressal Forum that has been established in terms of s 9(a) of the Indian CPA.

⁹⁷⁹ Section 13(c) to (g) of the Indian CPA. Section 14 is titled 'Findings of the District Forum' and reads as follows:

- 14. (1) If, after the proceeding conducted under section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to [do] one or more of the following things, namely:—
 - (a) to remove the defect pointed out by the appropriate laboratory from the goods in question;
 - (b) to replace the goods with new goods of similar description which shall be free from any defect;

Where the dispute relates to services or goods in respect of which the procedure set out above cannot be followed, the dispute shall be referred by the District Forum to the opposite party, directing such party to provide her version of events within a 30-day period (or an extended period not exceeding 15 days as granted by the District Forum).⁹⁸⁰ Where the allegations in the complaint are denied or disputed, or where such party fails to represent her case within the prescribed period, the District Forum is required to settle the dispute either: (i) based on the evidence that has been presented by the complainant and the opposite party (where there is a denial by the opposing party); or (ii) based on the complainant's evidence (where the opposing party fails to take steps to represent her case).⁹⁸¹ Interestingly, section 13(3) of the Indian CPA provides that proceedings which comply with subsections (1) and (2) shall not be called into question in any court on the basis of non-compliance with the principles of natural justice.

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- (c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
 - (d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer, due to the negligence of the opposite party suffered by the consumer, due to the negligence of the opposite party;
 - (e) to remove the effects or deficiencies in the services in question;
 - (f) to discontinue the unfair trade practice or the restrict trade practice or not to repeat them;
 - (g) not to offer the hazardous goods for sale;
 - (h) to withdraw the hazardous goods from being offered for sale;
 - (i) To provide for adequate costs to parties.

(2) Every proceeding referred to in sub-section (1) shall be conducted by the President of the District Forum and at least one member thereof sitting together:

Provided that where the member, for any reason, is unable to conduct the proceeding till it is completed, the President and the other member shall conduct such proceeding *de novo*.

(2A) Every order made by the District Forum under sub-section (1) shall be signed by its President and the member or members who conducted the proceeding:

Provided that where the proceeding is conducted by the President and one member and they differ on any point or points, they shall state the point or points on which they differ and refer the same to the other member for hearing on such point or points and the opinion of the majority shall be the order of the District Forum.

(3) Subject to the foregoing provisions, the procedure relating to the conduct of the meetings of the District Forum, its sittings and other matter shall be such as may be prescribed by the State Government.

For a detailed discussion of s 12 of the Indian CPA see Wadhwa & Rajah *Law of Consumer Protection* 1243-1247; Gupta *Commentaries on the CPA* 1181; and Majumdar *Consumer Protection in India* 1152- 1211.

⁹⁸⁰ Section 13(2)(a) of the Indian CPA.

⁹⁸¹ *Ibid* at s 13(2)(b).

Although it was anticipated that these forums would dispose of matters expeditiously, Nabi et al submit that the disposal of cases by the consumer dispute redress agencies, seldom occurs within the timeframe of 90 to 150 days as prescribed by the Indian CPA.⁹⁸² Considering the procedure set out above in respect of laboratory testing and allowing both sides an opportunity to consider and even dispute the findings of the laboratory tests, the delays in resolving consumer disputes highlighted by the authors are hardly surprising. Although the fee payable to the District Forum may be necessary for funding purposes, it may also be barrier to an indigent member of society accessing redress. Nevertheless, the fee may serve to minimise frivolous and vexatious disputes lodged merely to delay the finalisation of the complaint. This calls for a delicate balancing exercise.

The procedure for lodging a complaint before a National Commission or State Commission is the same as that in the District Forum (with the necessary modifications).⁹⁸³

4.2.5.9 Proposed amendments

Amendments to the Indian CPA were proposed during the course of 2015 by the Department of Consumer Affairs. Major amendments to the Indian CPA include the proposed establishment of an executive agency, which is to be known as the Central Consumer Protection Authority, to prevent the exploitation of consumers and the violation of their rights.⁹⁸⁴ Furthermore, the agency is to be aimed at the promotion, protection, and enforcement of the rights of consumers.⁹⁸⁵ The specific objectives behind this body relate to: (i) protecting consumers in respect of the marketing of goods which are hazardous or unsafe; (ii) the prevention of unfair trade practices;

⁹⁸² Nabi et al *Consumer Rights and Protection* 231.

⁹⁸³ See ss 18 and 22 of the Indian CPA. For a general discussion of the procedure and additional powers applicable before the State Commission, see Gupta *Commentaries on the CPA* 1156-1158; Wadhwa & Rajah *Law of Consumer Protection* 1315; and Majumdar *Consumer Protection in India* 1629- 1633. For a general discussion of the power and procedure that is applicable before the National Court see Gupta *ibid* at 1183-1189; Wadhwa & Rajah *ibid* at 1340-1342; and Majumdar *ibid* at 1821-1828. However, these forums do not merely accept claims brought before them, and where they are of the view that the claim has been exaggerated in order to access a particular forum, they request that the claim be revised. See generally Majumdar *ibid* at 1200- 1201 (para 61) and Gupta *ibid* at 1181.

⁹⁸⁴ Proposed amendments to the Indian CPA s 9.

⁹⁸⁵ *Ibid*.

and (iii) protecting consumers from misleading / deceptive advertising.⁹⁸⁶ The proposed amendments also set out the powers, functions, and system for filing complaints.

Although the existing forums at district, state and national level all continue to exist, further proposals have been made to improve their functionality – especially in situations where positions are vacant.⁹⁸⁷ The proposals also aim to facilitate the speedy disposal of cases in order to assist with the reduction in redundant posts.⁹⁸⁸ This includes, inter alia, the remuneration of presidents and members of the forums in order to attract more efficient and competent candidates to the available posts, ultimately resulting in an improved administration of justice.⁹⁸⁹

4.2.5.10 Non-legal measures

The suggestion has also been made that certain non-legal measures should be used to address issues around consumer protection.⁹⁹⁰ This suggestion is based on the notion that consumer protection law is multidimensional and, accordingly, issues surrounding it are best approached from various angles.⁹⁹¹ These non-legal measures should be implemented in conjunction with the existing legal framework.⁹⁹² Some of the suggestions which Singh makes in this regard, include: (i) consumer education;⁹⁹³ (ii) lobbying and consumer advocacy;⁹⁹⁴ (iii) consumer boycotts;⁹⁹⁵ (iv) international coordination;⁹⁹⁶ and (v) business self-regulation.⁹⁹⁷

⁹⁸⁶ Ibid at s 11.

⁹⁸⁷ Ibid at s 20.

⁹⁸⁸ Ibid.

⁹⁸⁹ Ibid.

⁹⁹⁰ Singh *Law of Consumer Protection in India* 331.

⁹⁹¹ Ibid.

⁹⁹² Ibid.

⁹⁹³ Ibid at 332. Singh emphasises the importance of consumer education, especially in developing countries where the majority of the population may be living in rural areas or subject to traditional or cultural factors which influence their consumption patterns. Consumer education is also emphasised by the United Nations in its 'Guidelines for Consumer Protection' with the aim of ensuring that consumers are more critical and able to make informed decisions. State agencies, consumer organisations, consumer advocates, and the media all have a role to play in consumer protections (ibid at 333 – 354). See also list of voluntary consumer organisations in Majumdar *Consumer Protection in India* 2670-2735. See also Barowalia *Commentary on the CPA* 15, where Barowalia also agrees that a campaign should be steered and facilitated through: (i) governmental agencies; (ii) voluntary organisations; and (iii) the media, aimed at creating awareness, solidarity, social awareness and responsibility, ecological awareness and responsibility, as well as an active consumer movement.

⁹⁹⁴ Singh *Law of Consumer Protection in India* 354 - 358, submits that the use of lobbying and consumer advocacy has proved successful as a non-legal mechanism in countries such as the UK and the United States of America. In this regard, lobbying can be used to influence the decisions of policy-makers, legislators, and administrative officers.

4.2.6 Conclusion

In summary, the Indian CPA provides for two types of structure by which to resolve consumer grievances and disputes: (i) three-tier consumer protection councils, which are intended to serve in an advisory capacity to consumers at large at a district, state and central level; and (ii) three-tier consumer dispute redress agencies also at district, state and national level, which are more focused on the resolution of consumer disputes.⁹⁹⁸

However, there are a number of material shortcomings in the Indian CPA. In the first instance, most consumers in a developing country such as India, are unaware of their rights and the nature of the damage which they suffer.⁹⁹⁹ Authors have suggested in this regard that, in order to enhance the efficacy of the Indian CPA, mass education and mass awareness campaigns should be launched informing of the rights and remedies available under the Indian CPA.¹⁰⁰⁰ Furthermore, submissions have been made that in order to improve the success of the consumer protection movement in India, government, business houses, voluntary organisations, and consumers must all get involved in order to ensure that there is a combination of consumer education and an effort from government – at both state and central level – to build a strong consumer protection movement.¹⁰⁰¹

Another material deficiency in the Indian consumer protection system is the reality that a number of posts in the consumer bodies remain vacant for extended periods.¹⁰⁰² In this regard, it is the duty of government to make these appointments, and a delay in fulfilling this duty results in a delay in justice to consumers who require

⁹⁹⁵ Ibid at 358-364, where Singh submits that boycotts may be used as a deterrent in respect of exploitation as well as a means of informing and/or warning the public regarding the quality of a particular brand or product.

⁹⁹⁶ Ibid at 364-372 where Singh submits that international coordination can be used to effect changes in consumer related matters. Organisations such as the United Nations and the International Organisation of Consumer Unions would have a significant role to play in this regard.

⁹⁹⁷ Ibid at 332.

⁹⁹⁸ Nabi et al *Consumer Rights and Protection* 227.

⁹⁹⁹ Ibid at 230.

¹⁰⁰⁰ Majundar *Consumer Protection in India* 67-68; Barowalia *Commentary on the CPA* 15; and Singh *The Law of Consumer Protection in India* 331-322.

¹⁰⁰¹ Nabi et al *Consumer Rights and Protection* 230. See Barowalia *ibid*. See also Singh *ibid* at 332.

¹⁰⁰² Nabi *ibid*.

access to redress.¹⁰⁰³ In addition, the submission is made that the remuneration offered to persons who are appointed to the respective consumer bodies, is disproportionate to the level of work expected of them.¹⁰⁰⁴

Accordingly, there appears to be a difference between “theoretical exposition and practical realisation” with regard to the provisions of the Indian CPA.¹⁰⁰⁵ It is clear that the enactment of legislation ought to be supported by the political will of the state to implement that legislation, as well as the appropriate infrastructure to enforce it.¹⁰⁰⁶ The Indian CPA has seemingly put in place a consumer redress system with the potential tangibly to improve access to redress for consumers in India. In reality, however, the challenges that affect most developing countries, such as poverty, lack of education, illiteracy, lack of appropriate infrastructure, and lack of political will, appear to be hindering the efficacy of consumer bodies in India.

4.3 United Kingdom

4.3.1 Introduction

The UK’s consumer protection dispensation is a combination of private law, administrative law, and regulatory and criminal law rules. It has been informed by, inter alia, a number of European Union Directives which regulate various aspects of consumer protection.¹⁰⁰⁷ However, a high degree of convergence does not exist in the enforcement models of the member states of the European Union (the EU), and “the patterns of enforcement remain diffuse[d]”, regardless of the substantial harmonisation in the substantive rules within the EU.¹⁰⁰⁸ Scott indicates that this lack of convergence suggests that national cultures influence the enforcement mechanisms adopted by member states.¹⁰⁰⁹ This demonstrates the reality that consumer law enforcement mechanisms within a jurisdiction are often

¹⁰⁰³ Ibid at 231.

¹⁰⁰⁴ Ibid.

¹⁰⁰⁵ Singh *Law of Consumer Protection in India* 66.

¹⁰⁰⁶ Ibid at 374.

¹⁰⁰⁷ See generally the discussion on the EU directives in Van Heerden & Barnard (2011) 6 *JICLT* 131. Twigg-Flesner “Some thoughts on consumer law reform – Consolidation, codification, or a restatement?” at 6.

¹⁰⁰⁸ Scott “Enforcing consumer protection laws” at 538.

¹⁰⁰⁹ Ibid.

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culture-specific and are not solely informed by the idea of what appears to be international or regional best practice.¹⁰¹⁰ The UK joined the EU on 1 January 1973.¹⁰¹¹ The membership of the UK in this supra-national organisation led to its being required to sacrifice its power in certain areas.¹⁰¹² This is because the EU enacts laws – such as regulations, directives, and decisions – that have an effect, at times even a direct effect, on the domestic laws of members, including the UK.¹⁰¹³ As such, certain rights and responsibilities that originated from the EU are enforceable in the English courts.¹⁰¹⁴ A number of EU directives have been instrumental in the area of consumer protection law. These directives include the Consumer Sales Directive 99/44/EC,¹⁰¹⁵ the Unfair Terms Directive 93/13/EEC,¹⁰¹⁶ the Consumer Rights Directive 2011/83/EU (CRD),¹⁰¹⁷ as well as a number of regulations enacted by the European Parliament and Council.¹⁰¹⁸ These directives are discussed where relevant in this chapter.

Pursuant to the referendum held in June 2016, which will eventually result in the UK's exit from the EU – more commonly known as 'Brexit' – the UK may well in the near future reconsider its consumer protection law regime that has been heavily influenced by EU laws.¹⁰¹⁹ This notwithstanding, the law as it currently stands in the UK is discussed below. For comparative purposes, it is important to understand the

¹⁰¹⁰ Ibid at 537.

¹⁰¹¹ See European Union member countries available at https://europa.eu/european-union/about-eu/countries/member-countries/unitedkingdom_en (accessed on: 20 April 2018).

¹⁰¹² Leyland *Constitution of the United Kingdom* 22.

¹⁰¹³ Some of important directives in the context of consumer protection law include: Directive on misleading advertising (84/450/EEC); Directive on doorstep selling (85/557/EEC); Directive on package travelling (90/314/EEC); Directive on unfair contract terms (93/13/EEC); Directive on timeshares (94/47/EC); Directive on distance selling (97/7/EC); Directive on sales of consumer Goods and Guarantees (99/44/EC); Directive on injunctions (98/27/EC); Directive on price indications (98/6/EC); Directive on sales of consumer goods and guarantees (99/44/EF); Directive on general product safety (01/95/EC); Directive on distance selling (02/65/EEC); Directive on unfair commercial practices (05/29/EC); and Directive on consumer rights (11/83/EU). Leyland *ibid* at 22 and 28-29.

¹⁰¹⁴ Leyland *ibid* 28 -29. For the sake of completeness, it is noted that directives prescribe the legal standards in a particular area of law that must then be transposed into national legislation, whilst regulations are binding on all member states. In this regard, see Whittaker "Consumer Contracts" 894 and Twigg-Flesner "Some thoughts on consumer law reform – Consolidation, codification, or a restatement?" 6.

¹⁰¹⁵ See n 1013. See also Consumer Sales Directive 99/44/EC. See generally Rott (2016) 53 *CMLR* 509.

¹⁰¹⁶ See n 1013. See also Unfair Terms Directive 93/13/EEC.

¹⁰¹⁷ See n 1013. See also Consumer Rights Directive 2011/83/EU.

¹⁰¹⁸ See n 1013. See generally Gilker (2017) 37 *Legal Studies* 78.

¹⁰¹⁹ Gilker *ibid*; Report by the Market Research and Trend Analysis Consumer and Corporate regulation Division of the Department of Trade and Industry titled "Consumer protection enforcement: a review of enforcement approached, tools and initiatives in eight countries" 1 - 23. See El-Gendi (2017) 8 *QMLJ* 95. See generally Gilker *ibid*. See also European Union member countries available at https://europa.eu/european-union/about-eu/countries/member-countries/unitedkingdom_en (accessed on: 20 April 2018).

legal history of the UK, as well as its constitutional structure. This is discussed briefly, followed by critical evaluation of the current consumer protection regime in the UK.

4.3.2 United Kingdom legal history

Initially, absolute authority was exercised by the monarch in the UK.¹⁰²⁰ However, the experience of the UK with the monarchy was tumultuous with a number of instances in which the monarch sought to exercise absolute power – not infrequently to the detriment of the general population.¹⁰²¹ Ultimately, this abuse of power resulted in the Bill of Rights of 1689 (later enacted as the Parliament Recognition Act, 1689), which provided for the role of the monarch, together with limitations on his or her power.¹⁰²² More specifically, the statute dictated, inter alia, the regular meetings of the freely elected government, the rights and privileges of parliament, and the right of parliament to regulate its own proceedings without the interference of the monarch or the courts.¹⁰²³

The effect of the Parliament Recognition Act, 1689, was that ultimate sovereignty vested in the monarch through parliament, and not solely in the monarch.¹⁰²⁴ In its initial phase, parliament only represented ‘elite’ groups and focused, in the main, on the protection of property rights.¹⁰²⁵ Universal suffrage for men (and women over the age of 30 years) was attained in 1918; and women subsequently achieved equal voting rights in 1928.¹⁰²⁶

¹⁰²⁰ Leyland *Constitution of the United Kingdom* 14.

¹⁰²¹ Ibid at 14-17.

¹⁰²² Ibid at 17. See also Yardley *Introduction to British Constitutional Law* 35.

¹⁰²³ Leyland *ibid*.

¹⁰²⁴ Ibid.

¹⁰²⁵ Ibid at 18.

¹⁰²⁶ Ibid.

4.3.3 Structure of the UK legal system

4.3.3.1 Constitutional background

The UK currently comprises of England, Wales, Scotland and Northern Ireland.¹⁰²⁷ Regardless of the fact that these territories make up the UK, the body of rules that apply in each territory do differ at times.¹⁰²⁸ Nonetheless, all the laws applicable within the UK are subject to the laws enacted by parliament.¹⁰²⁹ Ordinarily, the constitution of a country should contain “the fundamental structure and organisation of that country”.¹⁰³⁰ However, the constitution of the UK is uncodified.¹⁰³¹ Consequently, its ‘constitution’ is pieced together from legislation, common law, and constitutional conventions, without a single constitutional text enjoying a special status.¹⁰³² Statutes regarded as of constitutional significance – ie, those which emphasise or limit the ambit of what may constitute a fundamental constitutional right – include the Petition of Rights Act, 1628, and the Bill of Rights Act, 1689.¹⁰³³ The UK’s uncodified constitution has been adopted piece-meal over a long period.¹⁰³⁴ Unlike the South African Constitution which was enacted with the history of apartheid and the theme of reconciliation and democracy in mind, the UK does not have a single written constitution which was drafted to achieve a specific goal.¹⁰³⁵ Authors have suggested that the absence of a codified and entrenched constitution makes the UK’s constitutional framework more flexible (as it can be amended merely through ordinary legislation requiring no special majorities).¹⁰³⁶ Despite the lack of a single guiding document, Leyland avers that the UK nevertheless displays constitutional features.¹⁰³⁷ In this regard, the author submits that ordinary laws are

¹⁰²⁷ Ibid at 19-22, where the author sets out the historical background to the current composition of the UK. See also Yardley *Introduction to British Constitutional Law* 7.

¹⁰²⁸ Yardley *ibid*.

¹⁰²⁹ Ibid at 7-8 and 10. Yardley indicates that parliament has refrained from exercising its jurisdiction in certain areas of the UK such as the Channel Islands, the Isle of Man, and even, in certain instances, over Northern Ireland.

¹⁰³⁰ Ibid at 4.

¹⁰³¹ Leyland *Constitution of the United Kingdom* 2. See also Yardley *ibid* at 4.

¹⁰³² See Leyland *ibid* at 14.

¹⁰³³ Ibid at 26. Leyland submits that further statutes in this regard include the Act of Union with Scotland of 1707, the Act of Union with Ireland of 1800, the Parliament Act of 1911, the Representation of People Act of 1969, Scotland Act of 1998, Government of Wales Act of 1998, Northern Ireland Act of 1998, and the Human Rights Act of 1998 (notably, this statute resulted in the incorporation of the European Court of Human Rights directly into English law and effectively provided the UK with a Bill of Rights).

¹⁰³⁴ Ibid at 3.

¹⁰³⁵ Ibid.

¹⁰³⁶ Ibid at 2. See also Yardley *Introduction to British constitutional law* 5.

¹⁰³⁷ Leyland *ibid* at 11. Leyland states that constitutionalism refers to the “adherence to the rules and to the spirit of the rules” in an effort to avoid decisions which are arbitrary and to ensure that the rules are observed by the persons who are in power.

relied upon in the UK in order to have a liberal democratic system in place.¹⁰³⁸ A 'liberal democracy' refers to a system of governance in terms of which power and legitimacy are achieved by way of the indirect consent of the population.¹⁰³⁹ To this end, the population elects representatives to parliament, and the majority of these members vote for the laws, with the intention that their votes will represent the will of the majority.¹⁰⁴⁰ Even in context of a liberal democracy, however, it is important to ensure that the interests of minorities are adequately protected and to "prevent the tyranny of the majority from prevailing".¹⁰⁴¹

4.3.3.2 Parliament, the executive, and the court system

The UK parliament sits in Westminster, ordinarily for a five year term, and comprises of: (i) the monarch; (ii) the House of Lords; and (iii) the House of Commons.¹⁰⁴² Although the latter two houses are regarded as constituting the UK parliament, the monarch is still important as no legislation may be enacted without its participation.¹⁰⁴³ There are currently more than 1 000 people who are entitled to sit in the House of Lords, but most do not exercise this right.¹⁰⁴⁴ Two thirds of the House of Lords is made up of elected members; whilst one third of the members are nominated.¹⁰⁴⁵ The House of Commons is the representative assembly, which comprises of members who are all elected by way of universal adult suffrage into a parliamentary constituency in the UK.¹⁰⁴⁶

Pursuant to the enactment of the Parliamentary Recognition Act, 1689, parliament, and therefore statutes of parliament, have been considered as the highest sources of law by the courts.¹⁰⁴⁷ The British monarch has become an increasingly symbolic institution since the twentieth century.¹⁰⁴⁸ Accordingly, even though the government

¹⁰³⁸ Ibid at 4.

¹⁰³⁹ Ibid.

¹⁰⁴⁰ Ibid.

¹⁰⁴¹ Ibid.

¹⁰⁴² Yardley *Introduction to British Constitutional Law* 7 and 10 where it is noted that the term of parliament may be extended by statute. Leyland *ibid* at 19.

¹⁰⁴³ Yardley *ibid* at 10 - 11.

¹⁰⁴⁴ Ibid at 11.

¹⁰⁴⁵ Ibid at 14.

¹⁰⁴⁶ Ibid.

¹⁰⁴⁷ Ibid at 26.

¹⁰⁴⁸ Ibid at 37.

of the UK conducts its business in the name of the crown, important decisions are actually taken at ministerial level.¹⁰⁴⁹

As is the case in South Africa, the UK has an hierarchical court system. There are, in essence, four levels of courts in the English court hierarchy. At the lowest level are the county and the magistrates' courts; then follows the High Court and the Crown Court; followed by the Court of Appeal; and, finally, the Supreme Court as the apex court.¹⁰⁵⁰ While the magistrates' courts and the Crown Court hear criminal matters, the county court and High Court hear civil matters. Furthermore, the Crown Court, the High Court, the Court of Appeal, and the Supreme Court may all hear matters on appeal.¹⁰⁵¹ Of relevance, particularly with regard to the area of consumer protection law, is the Queen's Bench Division, which falls within the group of courts that make up the High Court.¹⁰⁵² The Queen's Bench handles matters concerning contract, tort, et cetera, and comprises a commercial court and an admiralty court.¹⁰⁵³

4.3.4 Consumer Rights Act, 2015

4.3.4.1 Introduction and background

Before the enactment of the Consumer Rights Act, 2015 (the CRA), various statutes in the UK regulated various aspects of consumer protection law separately. The most obvious statute is the Consumer Protection Act, 1973 (the UK-CPA), the Sale of Goods Act, 1979, the Enterprise Act, 2002, as well as the relevant regulations and directives.¹⁰⁵⁴ The piecemeal development of consumer protection laws, coupled with the continuing influence from EU consumer law, have resulted in the consumer protection space becoming quite complex and in need of reform.¹⁰⁵⁵ Accordingly, the CRA was laid before parliament on 28 August 2015 and came into operation on

¹⁰⁴⁹ Ibid.

¹⁰⁵⁰ Jones *Introduction to Business Law* 18.

¹⁰⁵¹ Ibid at 18-19. The appellate jurisdiction of the House of Lords was abolished by the Constitutional Reform Act, 2005.

¹⁰⁵² UK court structure available at <http://new.justcite.com/kb/editorial-policies/terms/uk-court-structure/> (accessed on: 20 April 2018).

¹⁰⁵³ Ibid.

¹⁰⁵⁴ See n 1013 above.

¹⁰⁵⁵ Twigg-Flesner "Some thoughts on consumer law reform – consolidation, codification, or a restatement?" 1.

1 October 2015.¹⁰⁵⁶ Although the CRA amends certain provisions of the UK-CPA (amongst many other statutes),¹⁰⁵⁷ the UK-CPA has not been repealed in its entirety.¹⁰⁵⁸ The amendments to the UK-CPA appear to be an attempt by the legislature to ensure that the existing consumer protection legislative framework is aligned with the ‘umbrella’ legislation – the CRA. This is in line with the legislature’s intention of using the CRA to establish a coherent regulatory framework for consumers, and to protect their interests by creating a ‘one-stop-shop’ in so far as consumer protection and consumer agreements are concerned.¹⁰⁵⁹ The CRA is consequently the focus of this discussion, and other relevant laws will be discussed only to the extent necessary.

The Preamble to the CRA provides that the purpose of the statute is to, inter alia: (i) amend the laws pertaining to the rights of consumers and protection of their interests; (ii) provide for investigatory powers for purposes of enforcing the regulation of traders; and (iii) provide for private actions in the area of competition law and with regard to the Competition Appeal Tribunal.¹⁰⁶⁰ This critical discussion of the CRA focuses on the enforcement mechanisms in place to give effect to the rights and remedies under this statute.

Cartwright submits that the CRA has made substantial changes to enforcement measures available to consumers within the area of consumer protection law.¹⁰⁶¹ In this regard, the author specifically refers to the impact of the CRA on consumer contract law, particularly regarding the sale of goods, supply of services, and digital

¹⁰⁵⁶ See CRA (Commencement No 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015. See also Gilker (2017) 37 *Legal Studies* 78. Report by the Market Research and Trend Analysis Consumer and Corporate regulation Division of the DTI “Consumer protection enforcement: A review of enforcement approached, tools and initiatives in eight countries” at 21.

¹⁰⁵⁷ See Schedule 6 to the CRA.

¹⁰⁵⁸ See paras 37-46 of Schedule 6 to the CRA (Investigating powers: Consequential amendments). Schedule 6 to the CRA makes certain amendments to various statutes applicable in the UK, including the UK-CPA, 1987. In this regard, a number of additions and omissions to specific sections in the UK-CPA are made by paras 37 to 46 of the CPA. For instance, s 27 of the CPA is amended to refer to Schedule 5 to the CRA regarding the investigatory powers available to certain persons. There are further amendments to the UK-CPA through paras 42 to 46, which relate to the enforcement of that Act such as provisions relating to: the powers of customs officers to detain goods, the obstruction of authorised officers, appeals against the detention of goods, compensation for seizure and detention and the service of documents.

¹⁰⁵⁹ Preamble to the CRA. See El-Gendi (2017) 8 *QMLJ* 94. See also the Explanatory Notes to the CRA.

¹⁰⁶⁰ Preamble to the Consumer Rights Act. For purposes of this discourse, the competition-law element of the CRA is not discussed further as, in the South African context, this area is a separate area of law.

¹⁰⁶¹ Cartwright (2016) 75 *Cambridge Law Journal* 271-300.

content, as well as unfair contract terms.¹⁰⁶² In addition, Cartwright highlights how the CRA has made significant changes to the regulatory aspects of consumer protection law by creating enhanced consumer measures (ECMs).¹⁰⁶³ The ECMs introduced by the CRA fall into three categories: redress; compliance; or choice measures.¹⁰⁶⁴ It is worth noting, however, that redress for the consumers in terms of the ECMs is dependent on the infringement concerned harming the collective interest of consumers.¹⁰⁶⁵

For purposes of this discourse, the following Parts of the CRA are critically analysed: Part 1 (Goods, services, and digital content); Part 2 (unfair terms); and Part 3 (miscellaneous and general).¹⁰⁶⁶

4.3.4.2 Consumer Rights Act: General scope of application

The CRA applies to consumer contracts concluded from 1 October 2015, in terms of which a trader supplies goods, digital content, or services to a consumer.¹⁰⁶⁷ In general, the CRA does not apply to: contracts made between two or more

¹⁰⁶² Ibid at 272.

¹⁰⁶³ Ibid. See also the discussion by Cartwright on why reforms in the form of ECMs were necessary with regard to the shortcomings of regulatory offences as well as shortcomings of civil enforcement and Part 8 of the Enterprise Act, 2002, *ibid* at 273-279. See also Hodges (2015) 5 *ERPL* 829 at 854-855.

¹⁰⁶⁴ “219A Definition of enhanced consumer measures

(1) In this Part, enhanced consumer measures are measures (not excluded by subsection (5)) falling within—
(a) the redress category described in subsection (2),
(b) the compliance category described in subsection (3), or
(c) the choice category described in subsection (4).

(2) The measures in the redress category are—

(a) measures offering compensation or other redress to consumers who have suffered loss as a result of the conduct which has given rise to the enforcement order or undertaking,
(b) where the conduct referred to in paragraph (a) relates to a contract, measures offering such consumers the option to terminate (but not vary) that contract,
(c) where such consumers cannot be identified, or cannot be identified without disproportionate cost to the subject of the enforcement order or undertaking, measures intended to be in the collective interests of consumers.

(3) The measures in the compliance category are measures intended to prevent or reduce the risk of the occurrence or repetition of the conduct to which the enforcement order or undertaking relates (including measures with that purpose which may have the effect of improving compliance with consumer law more generally).

(4) The measures in the choice category are measures intended to enable consumers to choose more effectively between persons supplying or seeking to supply goods or services.”

See also Hodges *ibid* at 855.

¹⁰⁶⁵ Whittaker (2017) 133 *LQR* 69.

¹⁰⁶⁶ See ss 77 – 80 of the Consumer Rights Act.

¹⁰⁶⁷ Jones *Introduction to Business Law (supp)* 1.

businesses; contracts between private buyers and sellers; contracts where a person who is not a trader sells or supplies goods to a business; or where a contract was entered into before 1 October 2015.¹⁰⁶⁸ Where the CRA does not apply to sales, the Sale of Goods Act, 1979 (as amended), may apply.¹⁰⁶⁹ There are certain key definitions that are critical to fully understanding the scope of application of the CRA. In this regard, the definitions of the terms ‘trader’, ‘consumer’, ‘goods’, and ‘digital content’ are discussed below.

Firstly, the term ‘consumer’ refers to “an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession”.¹⁰⁷⁰ In the event that a trader claims that an individual is not a consumer (ie, not acting wholly or mainly outside her craft), the burden is on the trader to prove this.¹⁰⁷¹ As mentioned above,¹⁰⁷² this is arguably the most important definition in any consumer-orientated legislation.¹⁰⁷³ It is worth noting that the explanatory notes indicate that an ‘individual’ is, for purposes of this Act, a natural person.¹⁰⁷⁴ Although it appears, *prima facie*, that the intention of the legislature is that the CRA should apply to consumers acting outside the scope of their business or profession, this distinction is somewhat blurred.¹⁰⁷⁵ El-Gendi provides the example of a consumer who purchases a printer for her home, but intends to use it for tasks that are mainly work-related.¹⁰⁷⁶ The author submits that in such instances, despite the person’s intention, the CRA would not afford her its protection.¹⁰⁷⁷ The consumer in question would need to find protection in other applicable legislation, such as the Sale of Goods Act.¹⁰⁷⁸ Although the factors are not entirely clear, it appears that the

¹⁰⁶⁸ Ibid. See also Ovey (2015) 8 *IBFL* 1.

¹⁰⁶⁹ Jones *ibid*. A noteworthy difference between the CRA and the Sale of Goods Act is that, in terms of the latter, implied terms may be excluded.

¹⁰⁷⁰ Section 2(3) of the Consumer Rights Act. It is worth noting that insofar as goods are concerned, a person is not considered to be a consumer in relation to a sales contract where: (i) the goods are second-hand goods which are sold at a public auction; and (ii) the individual has the opportunity of attending the sale in person. Where a trader claims that an individual was not in fact acting for purposes wholly or mainly outside that individual’s trade, business, craft, or profession, the trader must prove this. See s 2(4) of the Consumer Rights Act; s 2(3) of the CRA. See also El-Gendi (2017) 8 *QMLJ* 83.

¹⁰⁷¹ Whittaker “Consumer Contracts” 1219-1120.

¹⁰⁷² See discussion of the definition of the term ‘consumer’ in para 3.2.

¹⁰⁷³ Gilker (2017) 37 *Legal Studies* 82.

¹⁰⁷⁴ Explanatory notes to the CRA at para 36. See also Gilker *Ibid* at 83.

¹⁰⁷⁵ El-Gendi (2017) 8 *QMLJ* 83-84.

¹⁰⁷⁶ *Ibid* at 84.

¹⁰⁷⁷ *Ibid*.

¹⁰⁷⁸ Explanatory notes to CRA at para 36.

purpose of the product is an important factor in determining whether the purchaser is a consumer as contemplated in the CRA.¹⁰⁷⁹ Unless the goods are purchased using the bank account of a juristic person, it is difficult to envisage how, in such an example, the purpose for which goods are purchased can be proved. It may well be that the definition as it stands is unduly restrictive. El-Gendi submits that the wording of acting ‘wholly or mainly’ outside of her employment, is wider than the requirement in the Unfair Terms in Consumer Contracts Regulations, which merely requires that the individual is working outside the trade or business.¹⁰⁸⁰ In this respect, El-Gendi submits that the CRA has “broadened the scope and lessened the criteria of who shall be deemed a consumer”, so ensuring greater protection to more people.¹⁰⁸¹ It is noted that this definition also does not cover small business which would potentially be purchasers in transactions with large entities such as wholesalers and suppliers. In a developing country such as South Africa, so restrictive a definition would not be beneficial to economic development.¹⁰⁸²

Secondly, a ‘trader’ is defined as “a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf”.¹⁰⁸³ In terms of the CRA, a ‘person’ includes a juristic person.¹⁰⁸⁴ As such, government departments, as well as local and public authorities, would also fall under the definition of a trader.¹⁰⁸⁵ Non-profit organisations may also fall within the scope of this term.¹⁰⁸⁶ El-Gendi reiterates his concern as regards the importance of the environment in which particular goods are being used.¹⁰⁸⁷ Interestingly, Gilken points out that the definition of a trader as contained in the CRA reflects article 4(2)

¹⁰⁷⁹ El-Gendi (2017) 8 *QMLJ* 84.

¹⁰⁸⁰ *Ibid.*

¹⁰⁸¹ *Ibid.*

¹⁰⁸² It is noted that the UK-CPA, 1987, defined consumer in s 20(6) of that Act only in relation to Part III thereof (ie, Misleading Price Indications). However, the definition under s 20(6) of the UK-CPA still excluded any person acting in relation to any business. The term ‘person’ is not defined in that Act and, therefore, does not appear to have been restricted to natural persons as is the case under the CRA. There may, therefore, be room to argue that the UK- CPA may apply to juristic persons who are not acting in relation to their core business.

¹⁰⁸³ Section 2(2) of the CRA. See Whittaker “Consumer Contracts” 1220.

¹⁰⁸⁴ Section 2(2). See Explanatory notes to the CRA at para 35.

¹⁰⁸⁵ Explanatory notes *ibid.*

¹⁰⁸⁶ *Ibid.*

¹⁰⁸⁷ El-Gendi (2017) 8 *QMLJ* 84.

of the CRD.¹⁰⁸⁸ From this, Gilker submits that the legislature opted for simplicity and an approach that is in line with a ‘maximum-harmonisation’ directive.¹⁰⁸⁹

Thirdly, it is interesting to note that the term ‘service’ is not defined in the CRA. The reason proffered for this in the explanatory notes is that the term was not defined in the Sale of Goods Act.¹⁰⁹⁰ This is not a satisfactory explanation as an open definition suggests that every service as understood in ordinary parlance, would potentially fall within the scope of the CRA. Nevertheless, it appears as if the narrow definitions that the CRA provides for a consumer and trader respectively, would assist in limiting the scope of application of this undefined term.

Fourthly, ‘digital content’ is defined as “data which is supplied and produced in a digital form”.¹⁰⁹¹ This definition mirrors that in the CRD.¹⁰⁹² The explanatory notes make it clear that it is possible for digital content to be supplied on tangible medium such as on a DVD, computer, e-book, or music download.¹⁰⁹³

Lastly, ‘goods’ are defined as “any tangible moveable item but that includes water, gas and electricity if and only if they are put up for supply in a limited volume or set quantity”.¹⁰⁹⁴ The definition of goods also derives from the CRD, namely its article 2(3).¹⁰⁹⁵ Examples of the utilities contemplated by this definition are a gas cylinder, a bottle of water, or a battery.¹⁰⁹⁶

¹⁰⁸⁸ Gilker (2017) 37 *Legal Studies* 82, the author sets out the provisions of article 2(2) of the CRD as follows: “‘Trader’ means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive.”

¹⁰⁸⁹ *Ibid* at 82.

¹⁰⁹⁰ Explanatory notes to the CRA at para 34. See Gilker *ibid* at 78.

¹⁰⁹¹ For purposes of Part 1, ‘digital content’ is defined, see s 2(9) of Consumer Rights Act.

¹⁰⁹² Explanatory notes to the CRA para 39. See art 2(11) of the Consumer Rights Directive 2011/83/EU.

¹⁰⁹³ Explanatory notes *ibid*.

¹⁰⁹⁴ Section 2(8) of CRA.

¹⁰⁹⁵ Explanatory notes to the CRA para 38. See art 2(3) of the Consumer Rights Directive.

¹⁰⁹⁶ Explanatory notes *ibid*.

From this brief analysis of the key definitions in the CRA, it appears that the CRA does not extend its protection to juristic persons as: (i) a consumer must be an individual; and (ii) a consumer may not be acting within her trade or profession.

In the South African context, the absence of protection for juristic persons (particularly small juristic persons) would not satisfy or be conducive to meaningful economic participation by such entities. What follows is a brief analysis of each Part of the CRA, followed by a critical discussion of the enforcement mechanisms in place under the CRA.

4.3.4.3 Part 1: Consumer contract for goods, digital content, and services¹⁰⁹⁷

(a) Field of application

Part 1 of the CRA applies in instances where there is an agreement between a trader and a consumer (whether written, oral, or implied from the conduct of the parties) for the supply of goods, digital content or services by the trader.¹⁰⁹⁸ Such an agreement must have been concluded on or after 1 October 2015.¹⁰⁹⁹ Furthermore, Part 1 of the CRA applies to a contract for the supply of goods,¹¹⁰⁰ digital content,¹¹⁰¹ and services.¹¹⁰² From an enforcement perspective, the CRA generally applies the enforcement measures that are provided for purposes of controlling unfair contracts. Each of the contracts regulated by the CRA is discussed in brief immediately below.

(b) Goods under Chapter 2 of Part 1

As mentioned above, section 2 of the CRA provides that goods are “any tangible movable item...”.¹¹⁰³ Chapter 2 of the CRA is only applicable to sales contracts;¹¹⁰⁴

¹⁰⁹⁷ See generally Twigg-Flesner “Some thoughts on consumer law reform – Consolidation, codification, or a restatement?” in Gullifer & Vogenauer (eds) *English and European Perspectives* 11-12

¹⁰⁹⁸ Sections 1(1) and 1(2) of the CRA.

¹⁰⁹⁹ Jones *Introduction to Business Law (supp)* 2. Whittaker “Consumer Contracts” at 1219.

¹¹⁰⁰ Section 1(3)(a) of the CRA. See Chapter 2 of Part 1 of the CRA.

¹¹⁰¹ Section 1(3)(b) of the CRA. See Chapter 3 of Part 1 of the CRA.

¹¹⁰² Section 1(3)(c) of the CRA. See Chapter 4 of Part 1 of the CRA. See generally Whittaker (2017) 133 *LQR* 47 at 48-49.

¹¹⁰³ Jones *Introduction to Business Law (supp)* 5

¹¹⁰⁴ Section 5 of the CRA. In so far as the transfer of the ownership of goods is concerned, s 4(2) of the CRA cross-references certain provisions of the Sale of Goods Act which relate to contracts of sale.

contracts for hire of goods;¹¹⁰⁵ hire-purchase agreements;¹¹⁰⁶ and the transfer of goods.¹¹⁰⁷ Certain implied terms apply to sales contracts and, in accordance with section 31 of the CRA, cannot be excluded.¹¹⁰⁸ These implied terms should be considered together with the Supply of Goods (Implied Terms) Act, 1973, (as amended by the CRA).¹¹⁰⁹ In terms of section 3(3), the CRA does not apply to the supply of coins to be used as currency; sales in execution; mortgage, pledge, charge, or other security; contracts made by deed and for which the only consideration is the presumed consideration that is imported by the deed (this is with regard to contracts of this nature in England, Wales, and Northern Ireland); and a gratuitous contract (this is in respect of Scotland).

In the event that a trader sells goods without a title, the consumer has the right to reject the goods.¹¹¹⁰ Otherwise breach of any of the other implied terms gives the consumer the right to: (i) reject in terms of sections 20 and 21 of the CRA;¹¹¹¹ (ii) repair and replace in terms of section 23 of the CRA;¹¹¹² and (iii) a price reduction or final right of rejection in terms of section 24 of the CRA.¹¹¹³ Section 19 addresses the consumer's right to enforce in general terms under this Chapter.

(c) Digital content under Chapter 3 of Part 1

As indicated above, digital content is defined in section 2(9) of the CRA as data supplied and produced in a digital form. The supply of digital content is subject to

¹¹⁰⁵ Section 6 of the CRA. Section 6(1) provides that a contract is not for the hire of goods if it is a hire-purchase agreement. In this regard, s 7 provides that contract is a hire-purchase agreement if it meets the conditions in ss (2) and (3). Furthermore, s 7(4) provides that a contract is not a hire-purchase if it is a conditional sales contract.

¹¹⁰⁶ Section 7 of the CRA.

¹¹⁰⁷ Section 8 of the CRA.

¹¹⁰⁸ These terms include the right: of the trader to supply the goods (s 17); that in contracts to supply goods by description the goods will match the description (s 11); that pre-contractual information is required under the CCR to be part of the contract (s 12); that the quality of the goods supplied is satisfactory (s 9); that the goods supplied are reasonably fit for purpose (s 10); that where goods are supplied by reference to a sample the goods will match the sample (s 13); and that where goods are supplied by reference to a model, the goods will match the model seen or examined (s 14). The CRA has further rules about remedies under goods contracts, specifically in relation to: (i) delivery of wrong quantity (s 25); the instalment of deliveries (s 26); and the consignment or payment into court, in Scotland (s 27). Section 27 refers to instances where the trader has instituted payment and the consumer has not taken the steps she could have taken – then the consumer must provide security.

¹¹⁰⁹ See s 60 of the CRA, read together with Schedule 1 thereof.

¹¹¹⁰ Jones *Introduction to Business Law (supp)* 9.

¹¹¹¹ *Ibid* at 9-10. See generally Whittaker "Consumer Contracts" 1240.

¹¹¹² Jones *ibid* at 10-11. See generally Whittaker *ibid* at 1242.

¹¹¹³ Jones *ibid* at 11. See generally Whittaker *ibid* at 1243-1244.

implied terms that cannot be restricted.¹¹¹⁴ Section 33(1) of the CRA covers the supply of digital content at a price. Furthermore, section 33(2) of the CRA also applies to contracts where a trader supplies digital content to a consumer, in the event that: (i) it is supplied free as part of goods, services, or other digital content for which the consumer has paid; and (ii) such digital content is not generally available unless a price has been paid for it or for other digital content or goods and services. The scope of application of Chapter 3 of the CRA can be extended in accordance with the provisions of section 33(5) of the CRA, which makes such extension possible through an order by the Secretary of State, if the Secretary of State is satisfied that such an extension is appropriate on the basis of the significant detriment caused to consumers under the type of contract relating to such an order. In so far as digital content is concerned, the consumer has the right to repair and replace in terms of section 43;¹¹¹⁵ or the right to a price reduction in term of section 44 of the CRA.¹¹¹⁶ Section 46 of the CRA also makes provision for a right to repair or to be compensated for the damages to the consumer's device or other digital content that arise from the trader not having exercised reasonable care and skill.¹¹¹⁷

(d) Services under Chapter 4 of Part 1

As mentioned above, services are not included under the key definitions of Part 1 of the CRA.¹¹¹⁸ Nevertheless, Chapter 4 of the CRA applies to the supply of services to a consumer.¹¹¹⁹ The scope of application of Chapter 4 does not include employment or apprenticeship,¹¹²⁰ and in Scotland, it does not apply to gratuitous contracts.¹¹²¹ As with goods and digital-content contracts, there are also certain implied terms that come into play when rendering services under the CRA.¹¹²² In terms of section 48(5) of the CRA, the Secretary of State may, by an order issued in

¹¹¹⁴ In this regard, the implied terms for the supply of digital content are that: the trader to has the right to supply the digital content (s 41); the digital content will match any description given to it (s 36); the quality of the digital content is satisfactory (s 34); and the digital content supplied is reasonably fit for purpose (s 35).

¹¹¹⁵ Jones *Introduction to Business Law (supp)* 9-10 and Whittaker "Consumer Contracts" 1271-1272.

¹¹¹⁶ Jones *ibid* at 10-11 and Whittaker *ibid* at 1271-1273.

¹¹¹⁷ Whittaker *ibid* at 1271-1275.

¹¹¹⁸ Jones *Introduction to business law (supp)* 14

¹¹¹⁹ The Consumer Rights Act s 48(1).

¹¹²⁰ *Ibid* s 48(2).

¹¹²¹ *Ibid* s 48(3).

¹¹²² The implied terms that apply to the supply of services include: that the service is performed with reasonable care and skill (s 49); information about the trader or service is binding (s 50); reasonable price and reasonable time (ss 51 and 52).

terms of a statutory instrument, provide that service does not apply in respect of the service described in the order. In so far as the rendering of services is concerned, the consumer has the right to repeat performance in terms of section 55 of the CRA;¹¹²³ as well as the right to a price reduction in terms of section 56 of the CRA.¹¹²⁴

(e) Court's powers under Chapter 5 of the CRA

Under Part 1 of the CRA, Chapter 5 (General and Supplementary Provisions) includes section 58, which sets out the powers of the court. In this regard, section 58(1) of the CRA provides that where a consumer seeks to enforce the remedies available to her in terms of the CRA, in particular her rights to repair of the goods or to repeat services,¹¹²⁵ the court may make an order requiring specific performance (known in Scotland as 'specific implement') by a trader of any obligations imposed on the trader to either repair the goods or digital content, or to repeat the services. In addition, section 58(3) of the CRA provides that (if the consumer claims to exercise a right under the relevant remedy provisions¹¹²⁶ but the court decides that those provisions have the effect that the exercise of another right is appropriate) the court may proceed as if the consumer has exercised that right.¹¹²⁷ The provisions of section 58(3) are significant as the CRA essentially gives the courts wide powers (ie, allows the court to proceed as if the consumer had relied on the correct right). It also imposes a more inquisitorial duty on the court as it cannot rely solely on what is presented before it. This is a significant provision as the ordinary consumer is most likely to not be well-versed in the rights and remedies available to her under the CRA.

¹¹²³ Jones *Introduction to Business Law (supp)* 15.

¹¹²⁴ *Ibid.*

¹¹²⁵ In terms of s 19(3) or (4), s 42(2), or s 54(3) of the CRA.

¹¹²⁶ Section 58(8) provides that the 'relevant remedies provisions' are:

(a) In terms of Chap 2 (goods): sections 23 (right to repair and replace) and 24 (right to price reduction or final right to reject);

(b) In terms of Chap 3 (digital content): sections 43 (Right repair and replace) and 44 (right to price reduction); and

(c) In terms of Chap 4 (services): sections 55 (right to repeat performance) and 56 (right to price reduction).

¹¹²⁷ Section 58(4) of the CRA.

Section 58 of the CRA goes further and allows a court to make an order where a consumer has claimed to exercise her final right to reject – in which instance the court may order any reduction in the amount to be reimbursed, based on the consumer's use of the goods since delivery, subject to the relevant limitations on such reduction in terms of section 24(9) and (10) of the CRA.¹¹²⁸ This is an important provision from a trader's commercial perspective, and speaks to a sense of fairness and equity in the CRA's enforcement mechanisms. The court also has the power to make a relevant order with respect to damages, price payments, and as it otherwise considers just.¹¹²⁹

Section 58 of the CRA affords the court two additional powers in instances where any of the remedies above are sought, namely, the power to make an order for specific performance, as well as the power to proceed as if the consumer had instituted proceedings under that remedy – whichever the court considers more appropriate.¹¹³⁰ The CRA expressly does not preclude a consumer from pursuing other remedies available to her for breach of an implied term or any requirement stated in the contract, as well as in respect of the non-conformity of goods.¹¹³¹

4.3.4.4 Part 2: Unfair terms

Among the most commendable developments within the consumer protection regime in the UK, are the preventative control measures in respect of unfair contract terms.¹¹³² In this regard, the UK operates from a preventative control paradigm which came into being with the implementation of the 1993 EC Directive on Unfair Terms in Consumer Contracts.¹¹³³ This Directive was implemented in the UK through the Unfair Terms in Consumer Contracts Regulations.¹¹³⁴ The CRA provisions are analysed below.

¹¹²⁸ Section 58(5) and (6) of the CRA.

¹¹²⁹ Section 58(7) of the CRA.

¹¹³⁰ See s 58 of the CRA. See also Whittaker "Consumer Contracts" 1244, 1273, and 1287.

¹¹³¹ Section 19(9) of the CRA. See Whittaker *ibid* 1245-1246 and 1274-1275.

¹¹³² Naudé (2010) 127 *SALJ* 515 at 519.

¹¹³³ Unfair Terms Directive 93/13/EEC. See also Naudé *ibid*.

¹¹³⁴ *Ibid*. Naudé refers here to the 1994 version of the regulations. El-Gendi (2017) 8 *QMLJ* 83 where the author refers to the recent regulations. For a more detailed discussion of the Unfair Terms in Consumer Contracts Regulations see generally, MacDonald *Exemption clauses* 187-281; Jones *Introduction to Business Law* 180-183; O'Sullivan *Law of Contract*

(a) Field of application

Part 2 of the CRA (which deals with unfair terms) applies to all contracts between traders and consumers, ie, any 'consumer contract'.¹¹³⁵ It also applies to a notice to the extent that it: (i) relates to rights or obligations between a trader and consumer; or (ii) purports to exclude or restrict a trader's liability.¹¹³⁶ In this regard, a 'notice' includes an announcement (whether in writing or not), and any other communication or purported communication.¹¹³⁷ It is immaterial whether a notice in fact comes to the attention of a consumer, provided that it can be reasonably assumed that it is intended to be seen or heard by a consumer.¹¹³⁸ However, its application does not extend to a contract of employment or apprenticeship, and it does not apply to notices relating to rights, obligations, or liabilities between an employer and employee.¹¹³⁹

In terms of this Part, contract terms and notices are required to be fair.¹¹⁴⁰ A term is considered unfair if it results in a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.¹¹⁴¹ In the same vein, a notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.¹¹⁴² An unfair term in a consumer contract or a notice is not binding on a

209-217; Stone & Devenney *Text, Cases, and Materials* 304-324; and McKendrick *Text, Cases, and Materials* 456 and 458-474.

¹¹³⁵ Section 61(2) and (3) of the of the CRA. For the sake of completeness it is noted that the terms 'consumer', 'goods', and 'trader' have the same meaning under this Part as they do under Part 1 of the CRA, see s 76(2) of the CRA.

¹¹³⁶ The CRA s 61(4).

¹¹³⁷ *Ibid* s 61(8).

¹¹³⁸ *Ibid* s 61 (6).

¹¹³⁹ *Ibid* s 61(2) and (5).

¹¹⁴⁰ *Ibid* s 62.

¹¹⁴¹ *Ibid* s 62(4). Section 62(5) provides that whether a term is fair is to be determined:

- (a) Taking into account the nature of the subject matter of the contract, and
- (b) By reference to all the circumstances existing when the term was agreed and to all the other terms of the contract on which it depends.

This is the same wording as used in art 3 of the EC Directive on Unfair Terms in Consumer Contracts (93/13/EEC). For a discussion see Howells & Wilhelmsson *Consumer Law* 90.

¹¹⁴² Section 62(6) of the CRA. Section 62(7): whether a notice is fair is to be determined:

- (a) Taking into account the nature of the *subject matter* of the notice, and
- (b) By reference to all the *circumstances* existing when rights or obligations to which it relates arose, and to the terms of any contract on which it depends.

consumer.¹¹⁴³ Interestingly, the non-binding nature of a term or a notice does not prevent the consumer from relying on the term or notice if she chooses to do so.¹¹⁴⁴ This position undeniably tips the scales in favour of the consumer – which is reasonable given the power imbalances that often exist between consumers and traders. A more detailed analysis of the provisions relating to unfair terms does not fall within the scope of this discourse.¹¹⁴⁵ However, the enforcement of the protection from exposure to unfair contract terms and unfair notices, is explored further below.¹¹⁴⁶

(b) The duty to consider the fairness of the term

The CRA imposes a duty on the court to consider the fairness of the term.¹¹⁴⁷ In this regard, the section provides that where proceedings relating to a term of a consumer contract are before a court,¹¹⁴⁸ the court must consider the fairness of the contract even where none of the parties has raised it as an issue.¹¹⁴⁹ This provision makes it clear that the court must consider whether the term is fair even if none of the parties to the proceedings has raised the issue or has indicated an intention to raise it.¹¹⁵⁰ However, the court can only consider the fairness of the term once it has sufficient legal material to enable it to do so.¹¹⁵¹

It is clear that Part 2 of the CRA, through section 71, imposes an inquisitorial duty on the courts. In this regard, Whittaker submits that this provision was inserted as a result of a number of cases in which the European Court of Justice held that

¹¹⁴³ Section 62(1) and (2) of the CRA. Nevertheless, in terms of s 67 of the CRA, the rest of the contract continues to have effect to the extent that it is practically possible.

¹¹⁴⁴ Section 62(3) of the CRA.

¹¹⁴⁵ For a more detailed discussion of unfair contract terms see Guest “The Term of the Contract” para 14-125; Willet *Fairness in Consumer Contracts* 1-411; MacDonald *Exemption Clauses* 187-281; Jones *Introduction to Business Law* 175-183; O’Sullivan *Law of Contract* 193-219; Stone & Devenney *Text, Cases, and Materials* 321-354; McKendrick *Text, Cases, and Materials* 147-440, 456, and 458-474; Rott “Unfair contract terms” 287-313; Akaman *Concept of Abuse* 176-177; Lawson *Exclusion Clauses* 249-328; Nebbia *Unfair Contract Terms* 23-68, MacDonald *Koffman & MacDonald’s Law of Contract* 211-248; Howells & Weatherill *Consumer Protection Law* 261-294; and Willet *Fairness in Consumer Contracts* 411-457.

¹¹⁴⁶ See para 4.3.4.4(c) of this chapter.

¹¹⁴⁷ The CRA s 71.

¹¹⁴⁸ *Ibid* at s 71(1).

¹¹⁴⁹ *Ibid* at s 71(2).

¹¹⁵⁰ *Ibid*.

¹¹⁵¹ *Ibid* at s 71(3).

national courts have both a power and a duty to raise of their own motion the question of unfairness of a term in a consumer contract falling within the Unfair Terms in Consumer Contracts Directive, as long as the national court 'has available to it the legal and factual elements necessary for that task'.¹¹⁵²

The rationale is that it is necessary to ensure that a consumer is fully protected, bearing in mind that there is a very real risk that the consumer is unaware of her rights or how to enforce them.¹¹⁵³ It is submitted that a possible limitation on the court's inquisitorial duty is that it must have enough information before it in order to enable it consider the fairness of the term.¹¹⁵⁴ It appears that there is no further duty on courts to request additional information where such information is not before it.¹¹⁵⁵ Unless effective mechanisms are put in place to ensure that the relevant information is before the court to begin with, the imposition of such a duty may well be meaningless.

(c) Enforcement of Part 2

Before the implementation of the CRA, unfair contract terms were enforced through multiple laws, including the 1999 Regulations, Part 8 of the Enterprise Act, and the Consumer Protection from Unfair Trading Regulations, 2008.¹¹⁵⁶ Schedule 3 to the CRA currently sets out the enforcement of the law on unfair contract terms and notices.¹¹⁵⁷ Paragraph 1 of this Schedule applies to terms (and proposed terms) in

¹¹⁵² Whittaker "Consumer contracts" 901, and Whittaker "Consumer contracts" 401.

¹¹⁵³ See Whittaker "Consumer contracts" 901-902 and 1166-1168, where the author provides examples of how the European Court has adopted this approach in the context of various directives. This sentiment is echoed in the Explanatory notes to the CRA para 340.

¹¹⁵⁴ See generally Whittaker *ibid* 1167-1168 where Whittaker refers to the fact that the limitation of the court's duty appears to reflect the approach that was adopted by the European Union Court of Justice. However, after assessing other subsections of s 71 in light of decisions of the Court of Justice, Whittaker cautions against national legislation seeking to give effect to the Court of Justice's case law because it is 'complex' and 'still developing'.

¹¹⁵⁵ See Explanatory notes to the CRA para 341. This paragraph states, in relevant part, as follows: "in fulfilling this duty, the courts would not have to look at the fairness of the term if they do not have adequate information to do so, as was emphasised by the Court of Justice in Case C-243/08 *Pannon* (2009) ECR I-4713 (at para.35)".

¹¹⁵⁶ Whittaker "Consumer contracts" 1185-1186. To illustrate the previous enforcement structure, Whittaker states as follows: "[T]he use by a trader of unfair terms in its dealings with consumers could attract the preventative measures provided by the 1999 Regulations, an "enforcement order" under Pt 8 of the Enterprise Act 2002 and/or criminal sanction as an 'unfair commercial practice' (where the latter's special conditions are satisfied)." For a more detailed discussion on the Consumer Protection from Unfair Trading Regulations, 2008, see Shears (2016) 27 *EBLR* 177 and Devenney (2016) 2 *EuCML* 100.

¹¹⁵⁷ See also see Whittaker *ibid* 1186.

consumer contracts; a term which a third party recommends for use in a consumer contract; and a consumer notice.¹¹⁵⁸

Schedule 3 to the CRA confers functions on the Competition and Markets Authority (the CMA) and other regulators in relation to the enforcement of this Part.¹¹⁵⁹ The investigatory powers of these regulators are set out in Schedule 5.¹¹⁶⁰ In addition, Schedule 5 to the CRA provides enforcers listed in Schedule 3, which are also public authorities, with the power to require, inter alia, the production of information.¹¹⁶¹ For the sake of completeness, it is worth noting that the following persons are regulators under the CRA:¹¹⁶²

- (a) the CMA;
- (b) the Department of Enterprise, Trade and Investment in Northern Ireland;
- (c) a local weights and measures authority in Great Britain;
- (d) the Financial Conduct Authority;
- (e) the Office of Communications;
- (f) the Information Commissioner;
- (g) the Gas and Electricity Markets Authority;
- (h) the Water Services Regulation Authority;
- (i) the Office of Rail Regulation;
- (j) the Northern Ireland Authority for Utility Regulation; or
- (k) the Consumers' Association.

The CMA coordinates the other regulators.¹¹⁶³ All of the regulators are authorised to investigate any contraventions in terms of this Part, and to apply for injunctions (interdicts) in order to prevent the use of certain terms that the regulators consider unfair, void, or lacking in transparency.¹¹⁶⁴ The provisions of Schedule 3 indicate

¹¹⁵⁸ Paragraph 3(4) of Schedule 3 to the CRA provides that a term is to be treated as if it were a term of a contract.

¹¹⁵⁹ Section 70(1) of the CRA. See Whittaker "Consumer contracts" 1186. Whittaker highlights further that the current enforcement bodies were known as 'qualifying bodies under the 1999 Unfair Terms in Consumer Contracts Regulations.

¹¹⁶⁰ The CRA s 70(2).

¹¹⁶¹ See Part 3 of Schedule 5 to the CRA

¹¹⁶² See para 8 of Schedule 3 to the CRA.

¹¹⁶³ Explanatory notes to the CRA para 334.

¹¹⁶⁴ Paragraph 3(1) of Schedule 3 to the CRA. Explanatory notes to the CRA para 334. See Whittaker "Consumer contracts" 1186.

that the regulators have a pro-active and preventative power in this respect, as they are permitted to apply for an interdict or injunction regardless of whether or not a complaint was received in relation to the term or notice concerned.¹¹⁶⁵ Hodges submits that the effectiveness of enforcers hinges on three aspects: (i) the requirement that mass compensation be made (for instance, through a court order); (ii) the fact that the enforcers can be deployed as “one tool among others that comprise the comprehensive toolbox of a public regulatory authority’s enforcement armoury”; and (iii) a combination of reputational and private techniques can be used in order to enhance effectiveness.¹¹⁶⁶

Courts may exercise their discretion in respect of the persons against whom and the conditions on which the injunctions are granted.¹¹⁶⁷ Whittaker points to some difficulties that stem from extension of the preventative measures in terms of the CRA, and the impact of ‘full harmonisation’ under the Unfair Commercial Practices Directive, 2005. However this does not change the mechanisms applicable in the UK at the time of writing and so does not fall within the scope of this thesis.¹¹⁶⁸

Having an array of regulators indicates that the UK is aware that the sectors in which consumers transact are diverse. It is therefore important that each consumer has a regulator who can address sector-specific enquiries. In a recent report, the South African DTI also observed that collaborative partnerships of enforcers within the UK’s consumer protection regime consisted of “sector specific authorities, national departments, consumer groups and business groups”.¹¹⁶⁹ The DTI noted in this regard that such collaborations allow for a synergy of skills and resources from various sectors, which collectively provides a pool of knowledge that is not ordinarily accessible or available in a single sector.¹¹⁷⁰

¹¹⁶⁵ Paragraph 3(6) of Schedule 3 to the CRA.

¹¹⁶⁶ See also Hodges (2015) 5 *ERPL* 829 at 871.

¹¹⁶⁷ See Whittaker “Consumer contracts” 1187.

¹¹⁶⁸ For full discussion see Whittaker *ibid* 1188-1189 and 1192-1193.

¹¹⁶⁹ Report by the Market Research and Trend Analysis Consumer and Corporate Regulation Division of the DTI titled: ‘Consumer protection enforcement: a review of enforcement approached, tools and initiatives in eight countries’ (2017) at 22.

¹¹⁷⁰ *Ibid* at 23.

(d) Lodging a complaint

In so far as the enforcement procedure is concerned, paragraph 2 of Schedule 3 to the CRA provides that a complaint may be lodged with a regulator which will then consider the 'relevant complaint'. If a regulator is not the CMA, then the CMA must be notified of the intention to consider the complaint. If after considering the complaint, the regulator decides not to make an application under paragraph 3, the regulator must provide the person who made the complaint with reasons for that decision.

Before applying for an injunction or interdict¹¹⁷¹ – if the regulator is not the CMA – the CMA must be notified of the intention to make the application.¹¹⁷² The regulator must then wait fourteen days after notifying the CMA before making the application, or it may apply before the expiry of this period by agreement with the CMA.¹¹⁷³ On an application for an injunction, the court may grant the injunction on such conditions and against such of the respondents or defendants as it considers appropriate.¹¹⁷⁴ An injunction may include provision on: (i) a term or notice to which the application relates; or (ii) any term of a consumer contract, or any consumer notice of a similar kind or with a similar effect.¹¹⁷⁵ It is not a defence to an application to show that a term to which the application relates is not, or could not be, an enforceable term.¹¹⁷⁶ The CMA must be notified of: (i) the outcome of the application; and (ii) the conditions on which, and the persons against whom, it has been granted.¹¹⁷⁷

A regulator may also accept an undertaking from a person against whom it has applied, or thinks it is entitled to apply, for an injunction or interdict.¹¹⁷⁸ The undertaking may provide that the person will comply with the conditions agreed to

¹¹⁷¹ Paragraph 3(6) of Schedule 3 of the Consumer Rights Act provides that regardless of whether or not a complaint is received it is possible to apply for an injunction or interdict (in Scotland) against a person if the regulator thinks that: (i) the person is using a term or notice to which this schedule applied and the term/notice falls into paragraph 3(2). In terms of para 4(3) it will fall under para 3(2) if it is unfair to any extent. Paragraph 3(2) has a specific list as well and the regulator may apply for an injunction or interdict whether or not it has received a complaint about the term or notice.

¹¹⁷² Schedule 3 to the CRA para 4(1).

¹¹⁷³ Ibid at para 4(2).

¹¹⁷⁴ Ibid at para 5(1) and (2).

¹¹⁷⁵ Ibid at para 5(3).

¹¹⁷⁶ Ibid at para 5(4).

¹¹⁷⁷ Ibid at para 5(5).

¹¹⁷⁸ Ibid at para 6(1).

between such person and the regulator as to the use of terms or notices, or terms or notices of a kind specified in the undertaking.¹¹⁷⁹ If a regulator other than the CMA accepts the undertaking, it must notify the CMA of: (i) the conditions on which the undertaking has been accepted; and (ii) the person who gave it.¹¹⁸⁰

Regardless of this enforcement framework, a consumer retains the right to pursue private action through the courts or through the public bodies contemplated in Part 8 of the Enterprise Act.¹¹⁸¹

(e) Publication

A very important aspect of the enforcement model under the CRA is the publication component. The CRA provides that the CMA must arrange for the publication of details pertaining to: (i) any application it makes for an injunction or interdict under paragraph 3 of Schedule 3 to the CRA; (ii) any injunction or interdict under Schedule 3 to the CRA; and (iii) any undertaking under Schedule 3.¹¹⁸² Schedule 3 to the CRA thus provides the CMA with the authority to collate and make public any information about actions that have been taken in respect of particular terms and notices.¹¹⁸³ This is important for purposes of providing traders with a ‘precedent’ from which they may work. This Schedule further makes provision for the CMA to issue guidance or advice in respect of Part 2 of the CRA where necessary.¹¹⁸⁴

Furthermore, paragraph 7(2) of Schedule 3 to the CRA provides that the CMA must respond to a request regarding whether a term or notice, or one of a similar kind or with a similar effect, is or has been the subject of an injunction or interdict. In instances where the term or notice, or one of a similar kind or with a similar effect, is or has been the subject of an injunction or interdict under Schedule 3 to the CRA, the CMA must give the person making the request a copy of the relevant injunction or

¹¹⁷⁹ Ibid at para 6(2).

¹¹⁸⁰ Ibid at para 6(3).

¹¹⁸¹ Explanatory notes to the CRA para 336.

¹¹⁸² Paragraph 7 of Schedule 3 to the CRA.

¹¹⁸³ See para 7 of the Schedule to the Consumer Rights Act; Explanatory notes to the CRA para 335.

¹¹⁸⁴ Ibid.

interdict;¹¹⁸⁵ and where a similar notice or term has been the subject of an undertaking, the CMA must give person making the request: (i) details of the undertaking; and (ii) if the person giving the undertaking has agreed to amend the term or notice, a copy of that amendment.¹¹⁸⁶ The CMA may arrange for the publication of advice and information about the provisions of this Part.¹¹⁸⁷ Once again, the publication feature acts as a preventative measure for traders dealing with the same or similar terms.

4.3.4.5 Part 3: Miscellaneous and general

(a) Scope of application

Part 3 of the CRA (titled 'Miscellaneous and General') makes provision for miscellaneous and general matters, and addresses the general enforcement of the CRA; enforcement in respect of competition law; as well as other miscellaneous provisions not addressed in Parts 1 and 2 of the CRA. Chapter 1 of this Part makes provision for general enforcement. It gives effect to Schedules 5 and 6, which provide for investigatory powers in terms of the CRA.¹¹⁸⁸ It also makes specific amendments to the weights and measures legislation;¹¹⁸⁹ the Enterprise Act;¹¹⁹⁰ and the Communications Act.¹¹⁹¹ The provisions relating to competition law, as provided for in Chapter 2 of Part 3, are not discussed further for purposes of this thesis as South African consumer protection law is regulated separately from competition law.¹¹⁹² As such, an analysis of the competition law provisions in the CRA would not add value for purposes of this comparative study.

¹¹⁸⁵ Schedule 3 to the CRA para 7(3).

¹¹⁸⁶ Ibid at para 7(4).

¹¹⁸⁷ Ibid at para 7(5).

¹¹⁸⁸ The CRA s 77.

¹¹⁸⁹ Ibid at s 78(1). This is specifically with reference to the Weights and Measures (Packaged Goods) Regulations 2006 (S.I. 2006/659). The amendments are specifically with regard to the legislation insofar as they relate to unwrapped bread.

¹¹⁹⁰ Ibid at s 79. This amendment provides for enhanced consumer measures and other enforcement. It highlights which provisions in the CRA amend the enforcement provisions of the CRA – this is specifically with reference to Schedule 7 to the CRA. It also indicates that it only affects conduct that occurs after the commencement of s 79 of the CRA.

¹¹⁹¹ Ibid at s 80. In this regard, the CRA makes certain amendments to provisions that relate to enforcement in the Communications Act.

¹¹⁹² Ibid at Chapter 2 of Part 3.

(b) General investigatory powers of enforcers

Schedule 5 to the CRA sets out the general investigatory powers of the four types of enforcer envisaged by this Act: domestic enforcers;¹¹⁹³ EU enforcers;¹¹⁹⁴ public designated enforcers;¹¹⁹⁵ and unfair contract-term enforcers.¹¹⁹⁶ The CRA provides that enforcers have the power to appoint officers authorised to exercise powers under Schedule 5.¹¹⁹⁷ Different powers are vested in the various enforcers in terms of the CRA.¹¹⁹⁸ In order to give effect to its enforcement provisions, the CRA contains supplementary provisions that make it an offence: (i) to obstruct an officer or enforcer from exercising her powers under this Part; and (ii) for a person to purport to act as an officer.¹¹⁹⁹ However, the powers extended to enforcers are not without limitation. For instance, where goods and documents have been seized, the person from whom they were seized (or her representative), is permitted to apply to have access to these articles (although this may, for example, be under the supervision of an officer).¹²⁰⁰

(c) Penalties and enhanced consumer measures under the CRA

In addition to the offences mentioned above with regard to obstructing the duties of an investigation officer,¹²⁰¹ there are other breaches and offences created by the CRA that may result in the imposition of a penalty, or may constitute an offence. For instance, it is considered a breach for a letting agent to neglect its duty to publicise fees on its website.¹²⁰² In this regard, it is the duty of every local weights and measures authority in England and Wales to enforce the provisions of this Chapter in its area.¹²⁰³ In the event of such a breach by a letting agent, a financial penalty may be imposed on the agent concerned, which penalty is in the discretion of the authority imposing it, but may not exceed UK£ 5 000).¹²⁰⁴ Furthermore, Chapter 5 of

¹¹⁹³ Ibid at para 3 of Schedule 5.

¹¹⁹⁴ Ibid at para 4 of Schedule 5.

¹¹⁹⁵ Ibid at para 5 of Schedule 5.

¹¹⁹⁶ Ibid at para 6 of Schedule 5.

¹¹⁹⁷ Ibid at para 7 of Schedule 5.

¹¹⁹⁸ Ibid at Parts 3 and 4 of Schedule 5.

¹¹⁹⁹ See paras 36 and 37 of Schedule 5.

¹²⁰⁰ Ibid at para 38 of Schedule 5.

¹²⁰¹ See para 4.3.4.5(b) above.

¹²⁰² Chapter 3 of Part 3 of the CRA. See also s 87(2) of the CRA.

¹²⁰³ The CRA s 87(1).

¹²⁰⁴ Ibid s 87(3) and (7).

Part 3 provides that secondary ticketing (reselling of tickets) is an offence if it falls within the scope of section 91 of the CRA.¹²⁰⁵ There are certain penalties imposed on those found guilty of secondary ticketing in terms of Schedule 10 to the CRA; however, section 93(9) of the CRA limits these penalties to a maximum of UK£ 5 000. In both instances, it appears that the penalties are imposed by the regulators concerned, and do not need be administered by the traditional court system.

A unique creation of the CRA is the introduction of enhanced consumer measures, namely, redress, compliance, and choice measures.

Before the implementation of the CRA in 2015, the predominant enforcement mode in the UK was by way of financial penalties imposed following an application by an agency to the criminal courts.¹²⁰⁶ Although this strategy was generally regarded as effective, Scott submits that greater use should be made of administrative financial penalties.¹²⁰⁷ In this regard, Scott highlights that the weakness in the enforcement model that worked through the criminal courts, was that the penalties imposed were too low to act as deterrents.¹²⁰⁸ To a limited extent, Cartwright agrees that regulatory offences are inadequate as effective deterrents to consumers, and adds to that they: (i) may result in bad publicity that may be disproportionate to the offence; (ii) are often resource-intensive; (iii) may lead to a compliance deficit; and (iv) do not place enough focus on the consumer.¹²⁰⁹

Although formal action – which includes prosecution – is available under the CRA, Cartwright is of the view that there are obstacles placed in the way of formal action by the CRA which make the risk of formal action against traders less of a threat.¹²¹⁰ He observes how the UK consumer protection law regime has always been a

¹²⁰⁵ Ibid s 92(6). Reference to an ‘offence’ is considered an offence in any part of the UK. In this regard, s 91 provides for the prohibition of cancellation or blacklisting by event organisers and “applies where a person (‘the seller’) re-sells, or offers for re-sale, a ticket for a recreational, sporting or cultural event in the UK through a secondary ticketing facility”. In this regard, s 92(2) of the CRA places a duty on the operator to disclose instances where an offence has been committed.

¹²⁰⁶ Scott “Enforcing Consumer Protection Laws” 551.

¹²⁰⁷ Ibid.

¹²⁰⁸ Ibid.

¹²⁰⁹ Cartwright (2016) 75 *Cambridge Law Journal* 271 at 273 and 274-276.

¹²¹⁰ Ibid at 299.

combination of public and private law;¹²¹¹ and is of the view that in order for the regime under the CRA to be effective, it requires that prosecution be used alongside the enhanced consumer measures established under the CRA.¹²¹²

(d) Changes to existing legislation

Most of the legislation addressing transactions between businesses and consumers has now been amended by the CRA.¹²¹³ In this respect, the Supply of Goods (Implied Terms) Act, 1973; the Sale of Goods Act, 1979; the Supply of Goods and Services Act, 1982; and the Unfair Contract Terms Act, 1977, have all been amended by the CRA.¹²¹⁴ Furthermore, the CRA has resulted in the total repeal of the Sale and Supply of Goods to Consumers Regulations, 2002, as well as the Unfair Contract Terms in Consumer Contracts Regulations, 1999, which both implemented EU directives.¹²¹⁵

4.3.5 Remedies under the Sale of Goods Act

As mentioned above, where a person is not a 'consumer' as defined in the CRA, the Sale of Goods Act would find application.¹²¹⁶ The Sale of Goods Act provided additional rights specifically to buyers in consumer cases under Part 5 thereof. However, this Part has been omitted by Schedule 1 to the CRA and those rights are not discussed further in this thesis.¹²¹⁷ Nevertheless, there are a number of other matters that are still regulated by the Sale of Goods Act including, but not limited to, an agreement to sell at a certain valuation,¹²¹⁸ the general duties of buyers and sellers,¹²¹⁹ and the action of the seller for the price.¹²²⁰ Whittaker correctly submits that, save for a few exceptions, the majority of the issues still regulated by the Sale

¹²¹¹ Ibid at 271.

¹²¹² Ibid at 299.

¹²¹³ Ovey (2015) 8 *JIBFL* 1 at 2.

¹²¹⁴ Ibid at 2-3.

¹²¹⁵ Ibid at 3.

¹²¹⁶ See para 4.3.4.2 of this chapter. The Sale of Goods Act uses the terms 'buyer' and 'seller' and defines them in s 61 as having the meanings attributed to them in ordinary parlance

¹²¹⁷ See Whittaker "Consumer contracts" 1201-1211 for further discussion on these rights.

¹²¹⁸ Section 9 of the Sale of Goods Act. See the discussion of these rights in Whittaker *ibid* at 1216.

¹²¹⁹ Section 27 of the Sale of Goods Act; Whittaker *ibid*.

¹²²⁰ Section 49 of the Sale of Goods Act; Whittaker *ibid*.

of Goods Act are unlikely to arise in context of a consumer contract.¹²²¹ Accordingly, this statute is not discussed in further detail.

4.3.6 Remedies under the Consumer Protection Regulations

By way of background, the Consumer Protection from Unfair Trade Regulations, 2008 (the CPUTR) were implemented in the UK in order to give effect to the EU Unfair Commercial Practices Directive.¹²²² The CPUTR apply to any conduct by a business that is connected directly with the supply, sale, or promotion of a product in relation to a consumer at any stage in the commercial transaction.¹²²³ Before their amendment by the Consumer Protection Amendment Regulations, 2014, the CPUTR relied on the imposition of criminal and administrative penalties for any contravention of their provisions.¹²²⁴ However, the 2014 amendments introduced private redress remedies which make it possible for an aggrieved consumer to ‘unwind’ a transaction,¹²²⁵ request a discount,¹²²⁶ or claim damages,¹²²⁷ where she has been subject to an unfair commercial trade practice.¹²²⁸ The introduction of these private redress remedies was aimed at addressing situations where the CPUTR provide enforcement bodies with rights of action without extending such a right to aggrieved consumers.¹²²⁹ Devenney rightfully submits that the introduction of the private redress remedies by the 2014 amendments, should have been incorporated in the CRA.¹²³⁰ This certainly would have been helpful for purposes of truly making the CRA a ‘one-stop shop’ with respect to consumer matters.

¹²²¹ Whittaker *ibid*.

¹²²² Devenney (2016) 2 *EuCML* at 100; and Shears (2016) 27 *EBLR* 177.

¹²²³ Shears *ibid* at 178 and Devenney *ibid* at 100.

¹²²⁴ Devenney *ibid*.

¹²²⁵ The CPUTR (as amended) reg 27E(1). For the sake of clarity, ‘unwinding’ a contract in terms of this regulation results in the contract being reversed, thus releasing the parties from any obligations under the contract.

¹²²⁶ *Ibid* at reg 27L(1).

¹²²⁷ *Ibid*.

¹²²⁸ Devenney (2016) 2 *EuCML* 100 at 101-102 and Shears (2016) 27 *EBLR* 177 at 187.

¹²²⁹ Shears *ibid* at 186.

¹²³⁰ Devenney (2016) 2 *EuCML* 100 at 103. Twigg-Flesner expressed the same sentiment in respect of the Consumer Rights Bill, see Twigg-Flesner “Some thoughts on consumer law reform – Consolidation, codification, or a restatement?” 13.

4.3.7 Other consumer law redress mechanisms¹²³¹

4.3.7.1 Market Surveillance Authorities

In addition to the entities classified as regulators under the CRA, there are other consumer protection measures in place within the UK aimed at providing consumers with adequate protection. For instance, the market surveillance system in the UK, which has its origins in the European Regulation concerning accreditation and market surveillance,¹²³² is coordinated by the Department for Business, Energy and Industrial Strategy (the BEIS), and comprises of autonomous enforcement bodies within local, national, and regional government, as well as industry-specific sectors.¹²³³ In this regard, the market surveillance authorities have the legislative authority to deal with statutory contraventions.¹²³⁴ Their legislative powers stem mainly from the CRA, the UK-CPA, and the Health and Safety at Work Act, 1974.¹²³⁵ The duty of these authorities is to follow up on complaints of alleged non-compliance.¹²³⁶ It appears that businesses are aware of the policies of the market surveillance authorities and their sanctions for non-compliance¹²³⁷ – which is important for the effectiveness of any enforcement body.

¹²³¹ For the sake of completeness it is noted that the Office of Fair Trade established in terms of the Fair Trade Act of 1973 used to be responsible for protecting consumer interests throughout the UK, however it has now been closed and its responsibilities have been given to other organisations including the CMA. See UK government website available at <https://www.gov.uk/government/organisations/office-of-fair-trading> (accessed on: 20 April 2018), and PFCAs website available at <http://www.pfca.org.uk/financial-claims/organisations/office-of-fair-trading.html> (accessed on: 20 April 2018).

¹²³² European Regulation concerning Accreditation and Market Surveillance (765/2008).

¹²³³ See Report by the Market Research and Trend Analysis Consumer and Corporate Regulation Division of the DTI titled: 'Consumer protection enforcement: a review of enforcement approached, tools and initiatives in eight countries' at 22. HSE website available at <http://www.hse.gov.uk/work-equipment-machinery/market-surveillance.htm> (accessed on: 20 April 2018). See also EC website available at http://ec.europa.eu/growth/single-market/goods/building-blocks/market-surveillance/organisation_en (accessed on: 20 April 2018); EC national markets surveillance programme 2016 available at <http://ec.europa.eu/DocsRoom/documents/9046/attachments/3/translations/en/renditions/native> (accessed on: 20 April 2018); and DBEIS on Market Surveillance in the United Kingdom (2016) available at https://convent.de/content/uploads/2016/11/Griffiths_Market_Surveillance.pdf (accessed on: 20 April 2018).

¹²³⁴ Report by the Market Research and Trend Analysis Consumer and Corporate Regulation Division of the DTI titled: 'Consumer protection enforcement: a review of enforcement approached, tools and initiatives in eight countries' at 22.

¹²³⁵ See DBEIS on Market Surveillance in the United Kingdom (2016) available at https://convent.de/content/uploads/2016/11/Griffiths_Market_Surveillance.pdf (accessed on: 20 April 2018).

¹²³⁶ Report by the Market Research and Trend Analysis Consumer and Corporate Regulation Division of the Department of Trade and Industry titled: 'Consumer protection enforcement: a review of enforcement approached, tools and initiatives in eight countries' at 22.

¹²³⁷ Ibid.

4.3.7.2 UK group litigation order

In the UK, group litigation orders can be brought in England and Wales, whereby each individual who has suffered harm essentially brings a case in her own name and, thereafter, similar cases are grouped together either by the individuals involved themselves, or by the court officers who may seek to join the cases for case management purposes.¹²³⁸ Therefore, the point of departure in group litigation matters is that an individual claim must be brought, and once a certain threshold has been met in respect of common facts and issues of law, such claims can be joined together (irrespective of whether or not the claims were all brought in the same court).¹²³⁹ The UK Group Litigation Order has been used in product-law cases, specifically in relation to pharmaceuticals with the obvious advantage of cost savings in respect of issues such as expert evidence.¹²⁴⁰ There are, nevertheless, litigation risks associated with bringing a claim, even collectively, before a court.

4.3.7.3 European Union consumer redress mechanisms

There are also consumer redress mechanisms within the EU region designed to assist consumers by saving them the time and expense of having to bring legal action through the traditional court systems.¹²⁴¹ As laudable an intention as it is, the desired result is not always achieved in practice as will be seen below. A few of the consumer redress mechanisms available in the EU and which apply to the UK, are included in the discussion below.

In respect of cross-border transactions within Europe, a number of online ADR forums operate in the EU region and provide consumers with access to redress for goods purchased within the region.¹²⁴² An example is the European Consumer Centres Network (the ECC-Net), which is an EU network supported by the European

¹²³⁸ Annex to Memo /08/741, Green Paper on Consumer Collective Redress – Questions and Answers – the national different systems in place (country fiches), report available at http://ec.europa.eu/consumers/edress_cons/collective_redress_en.htm (accessed on : 31 January 2016). See also Bremen “Collective redress mechanisms in European consumer law” 73.

¹²³⁹ Bremen *ibid.*

¹²⁴⁰ *Ibid* at 85.

¹²⁴¹ Report by the Market Research and Trend Analysis Consumer and Corporate Regulation Division of the DTI titled: ‘Consumer protection enforcement: a review of enforcement approached, tools and initiatives in eight countries’ at 23.

¹²⁴² *Ibid.*

Commission and member states.¹²⁴³ It performs the function of assisting in cross-border consumer matters by providing consumers with practical and legal advice, and directing them to the appropriate dispute resolution mechanisms.¹²⁴⁴ In addition, the European Small Claims Procedure Regulation (the ESCP) is also an effective forum for consumers in the EU.¹²⁴⁵ Howells submits that the UK leads in accepting small claims.¹²⁴⁶ Although it is not limited to consumer disputes, it is helpful in broadening access to redress amongst consumers.¹²⁴⁷ However, the ESCP is limited to cross-border cases, ie, where the consumer is domiciled in one member state and the trader is domiciled in another.¹²⁴⁸ Van Heerden and Barnard submit that the ESCP is not sufficiently utilised for two reasons. In the first instance, procedures in this forum are conducted orally and thus the consumer is required to make arrangements to travel to the seat of the court.¹²⁴⁹ In the second instance, the rule that applies in respect of costs in ESCPs is that the loser is required to pay, and this is a substantial economic risk for a consumer who seeks to use the ESCPs in order to enforce her claim.¹²⁵⁰

4.3.8 Concluding remarks on the United Kingdom consumer protection landscape

It is evident from the CRA that the UK legislature attempted to simplify the field of consumer protection law by providing a single 'source book' for consumer contracts. El-Gendi is of the view that the CRA does this quite well.¹²⁵¹ However, Twigg-Flesner correctly points out that the CRA does not implement the Consumer Rights Directive or successfully consolidate consumer rights into a single statute.¹²⁵² Based

¹²⁴³ Van Heerden & Barnard (2011) 6 *JICLT* 131 at 138.

¹²⁴⁴ *Ibid* at 138.

¹²⁴⁵ *Ibid* at 140.

¹²⁴⁶ See Howells "Consumer law enforcement and access to justice" 235-248.

¹²⁴⁷ Van Heerden & Barnard (2011) 6 *JICLT* 131 at 140.

¹²⁴⁸ *Ibid*.

¹²⁴⁹ *Ibid*.

¹²⁵⁰ *Ibid*.

¹²⁵¹ El-Gendi (2017) 8 *QMLJ* 94.

¹²⁵² Twigg-Flesner C "Does the Codification of Consumer Law Improve the Ability of Consumers to Enforce Their Rights? – A UK-Perspective" (22 June 2015) at 3 available at SSRN: <https://ssrn.com/abstract=2686688> (accessed on: 20 April 2018). See generally the discussion on the weaknesses of the Consumer Rights Bill by Twigg-Flesner "Some thoughts on consumer law reform – Consolidation, codification, or a restatement?" 10-14. See also Devenney (2016) 2 *EuCML* 100 at 102 where the author submits that the 2014 amendments to the Consumer Protection from Unfair Trading Regulations, which afford consumers the private redress remedies of either unwinding a contract, being afforded a discount, or being awarded damages, should have been included in the CRA.

on the critical discussion under the UK component of this chapter,¹²⁵³ it is submitted that the CRA does not achieve the purpose of consolidating consumer rights.¹²⁵⁴ For instance, it does not repeal statutes such as the UK-CPA, the Sale of Goods Act, or the Enterprise Act, but merely amends and cross-references these and other statutes.

An important factor to take into account is the significance of cooperative government in the context of consumer protection (with the added support of the private sector).¹²⁵⁵ From the public sector perspective, the South African DTI has observed from the UK model that enforcement of legislation in the area of consumer protection should happen at the level of local government – while national government provides the necessary funding.¹²⁵⁶ The DTI highlights that participation in the ADR schemes in the UK is not compulsory, although traders that sell directly to consumers must direct those consumers to certified ADR schemes.¹²⁵⁷

Of course, education and awareness of the available redress mechanisms is essential to their effectiveness. To this extent, there are established consumer groups in the UK such as Which?, Advice Citizen, and the National Federation of Consumer Groups.¹²⁵⁸ There are also local authority consumer-protection departments which assist in this regard.¹²⁵⁹ In addition, organisations in the UK such as the CPP Knowledge Hub, work with certain stakeholders to support consumers.¹²⁶⁰ The DTI observes that there are over 1,2 million consumers who use Advice Citizen's hotline each year – which permits the enforcement agencies to pick up on matters that may present a threat to consumers.¹²⁶¹

¹²⁵³ See para 4.3 and its subparagraphs as set out in this chapter.

¹²⁵⁴ See also Whittaker (2017) 133 *LQR* 47 at 71.

¹²⁵⁵ Report by the Market Research and Trend Analysis Consumer and Corporate Regulation Division of the DTI titled: 'Consumer protection enforcement: a review of enforcement approached, tools and initiatives in eight countries' at 22.

¹²⁵⁶ *Ibid* at 23.

¹²⁵⁷ *Ibid*.

¹²⁵⁸ *Ibid* at 20.

¹²⁵⁹ *Ibid* at 21.

¹²⁶⁰ *Ibid*.

¹²⁶¹ *Ibid* at 5.

In so far as ultimately enforcing any rights contained in the CRA, the CRA itself does not introduce a specialised framework as is the case in both South Africa and India.¹²⁶² It is submitted that it may be somewhat daunting for a consumer to attempt to navigate the provisions of the CRA independently. However, Twigg-Flesner reminds us that, in the UK context, the intention is not necessarily for consumer protection laws to be accessible and user-friendly to consumers and businesses, but that they are directed mainly at those who are required to advise and guide consumers and businesses, respectively, who may not always have the necessary legal expertise.¹²⁶³ One of the suggestions by Beale to which Twigg-Flesner alludes, is the use of information technology to include hyperlinks in legislation. It is submitted that this would make the CRA more user-friendly given all the cross-references included therein. This is a common feature on South African legal databases such as Netlaw. However, it could be used more effectively by making hyperlinked versions of legislation accessible to the general public. Given the substantial influence of EU laws on the UK's consumer-law landscape, it remains to be seen what 'Brexit' will mean for consumer law in the UK.¹²⁶⁴

4.4 Conclusion from comparative study

Although the consumer-protection law models in the UK and India are very different, there are valuable lessons to be extracted from both foreign jurisdictions.

In so far as India is concerned, a commendable aspect of its enforcement framework is that it is specialised, simple, accessible, and operates at local, district, and national level. The jurisdictional requirements for each of the dispute redress agencies make the route of redress to be followed by a consumer clear. By way of example, should Ms Dlamini wish to return a defective washing machine that she bought and used during her stay in New Delhi, as a point of departure, she could approach either the district, state, or central council which could then advise her on what right of recourse is open to her. Depending on the jurisdictional components of

¹²⁶² See Jonson P interview conducted by Laver N regarding "Consumer Rights Act 2015 – remedies and enforcement of rights" dated 6 May 2015 available at <http://blogs.lexisnexis.co.uk/fs/consumer-rights-act-2015-remedies-and-enforcement-of-rights/> (accessed on: 28 March 2018).

¹²⁶³ Twigg-Flesner "Some thoughts on consumer law reform – Consolidation, codification, or a restatement?" 4.

¹²⁶⁴ See El-Gendi (2017) 8 *QMLJ* 95. See generally Gilker (2017) 37 *Legal Studies* 78.

her claim, she could then approach the district forum, the state commission, or the national commission, with a view to enforcing her claim. In the event that she is dissatisfied with the finding of a lower forum, she may appeal to the next forum. In theory, her appeal could even reach India's Supreme Court. This aspect of clarity in respect of the enforcement of consumer rights is certainly lacking in the South African context.

However, as with most developing countries, poverty, lack of education, illiteracy, lack of appropriate infrastructure, and lack of political will, appear to be hindering the efficacy of the consumer bodies in India. Some of these barriers are certainly also at play in the South African context of consumer law enforcement.¹²⁶⁵

With respect to the UK, the inquisitorial role and duty placed on the court in terms of section 58(3) of the CRA (where a consumer claims to exercise a right under the relevant remedy provisions) is commendable.¹²⁶⁶ In terms of this section, should the court decide that those provisions have the effect that the exercise of another right would be more appropriate, the court may proceed as if the consumer has exercised that right.¹²⁶⁷ This is an aspect that is worth considering in the South African context given the difficulties that consumers often face when putting their cases before forums such as the Tribunal.¹²⁶⁸ In addition, the provision in Schedule 3 to the CRA which gives the CMA the authority to collate and make public any information about actions that have been taken in respect of particular terms and notices, is important and well worth considering in the South African context. It is submitted that the establishment of such a database has the potential to serve as a valuable preventative measure.

Although the UK has various bodies that assist in the enforcement of consumer rights, ultimately the realisation of those rights will take place in the ordinary courts.

¹²⁶⁵ See discussions above in Ch 3 on the effectiveness of the CGSO (para 3.6.2.1.1(f)), the Commission (para 3.6.3.8), and the Tribunal (para 3.6.4.4).

¹²⁶⁶ See discussion under para 4.3.4.3(e) of this chapter.

¹²⁶⁷ *Ibid.*

¹²⁶⁸ See discussion under para 3.6.4.4 in Ch 3 above.

Therefore, Ms Ngubane, a Cambridge University postgraduate student who buys a textbook from a bookstore in London that is missing certain pages, would have remedies available to her in terms of the CRA – for example, returning the book and requesting a refund. Should the bookstore give her difficulties, it would then be ideal for her to approach the county court on a small claims track, as the value of her claim would not justify her approaching the High Court.¹²⁶⁹ However, in the event that Ms Ngubane had decided to reside permanently in London, and subsequently purchased a motor vehicle that turned out to be defective, she may, given the value of car, elect to approach the High Court but would then require the assistance of legal counsel to properly navigate the court processes.

The lack of a specialised consumer law enforcement system in the UK may result in consumers being less inclined to pursue claims of a nominal value within the court structure, even on a small claims track, as they may end up spending more time and resources (including very basic resources such as petrol and airtime) on trying to get the matter to court, than the value of the goods, service, or related claim would justify.

Against the backdrop of the discussion in this chapter, the successes and shortcomings of South Africa's consumer protection law enforcement framework is now considered.

¹²⁶⁹ See also Twigg-Flesner "Some thoughts on consumer law reform – consolidation, codification, or a restatement?" at 9.

CHAPTER 5

CONSUMER PROTECTION ENFORCEMENT REGIME IN SOUTH AFRICA: SUCCESSES, SHORTCOMINGS, AND RECOMMENDATIONS

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5.1 Introduction

An important aspect raised by Twigg-Flesner in relation to the realisation of consumer rights, is that legislative amendments do not mean that the legislation will be more useful for consumers.¹²⁷⁰ He aptly puts this as follows:

Lawyers and legal scholars might prefer consolidation and codification, but it is unlikely to matter greatly to consumers. Rather, what is needed is a strategy which will ensure that, once consumers have identified a problem, they are encouraged (i) to take action by seeking redress and (ii) to do so by taking out their rights as consumers, irrespective of what a trader might have promised as part of their store policies.

What consumers therefore need to know about the law is that they have certain rights, and that there is somewhere where they can find out, when needed, what the relevant rights are, against whom these can be relied upon, how this can be done and, if necessary, what mechanisms there are for utilising their rights.¹²⁷¹

What follows in this chapter is an analysis of the successes and the shortcomings of the current consumer protection regime and suggested solutions on how best to improve access to redress for the consumer.

5.2 The ombud system

From the ombud system that was assessed in detail Chapter 3 above, namely the CGSO, it is evident that there are a number of characteristics that can be viewed as successful and which should be maintained. These are the non-adversarial nature of the process, the protection that is extended to small juristic persons who fall within the prescribed threshold, as well as the expedient and cost-effective resolution of disputes.¹²⁷² The non-adversarial nature of proceedings before an ombud such as the CGSO, may also assist in maintaining harmonious business relations between the parties. These are some of the benefits that should be used to encourage participants to register with the CGSO. Likewise, there are benefits to using ombud forums that can be highlighted to consumers, primarily that: (i) ombud forums ensure that consumer complaints are resolved speedily; and (ii) consumers are not in a

¹²⁷⁰ Twigg-Flesner C “Does the Codification of Consumer Law Improve the Ability of Consumers to Enforce Their Rights? – A UK-Perspective” (22 June 2015) at 16 available at SSRN: <https://ssrn.com/abstract=2686688> (accessed on: 20 April 2018).

¹²⁷¹ Ibid.

¹²⁷² See para 2.3.3 in Ch 2 and generally para 3.6.2.1.1.

position where they are required to work through complex legal procedures in order to enforce their rights.

Lack of cooperation by respondents is, however, a major drawback to the full realisation of consumer rights at CGSO level. In this regard, better effect should be given to section 82(8) of the CPA which prohibits the breach of industry codes by suppliers.¹²⁷³ The Preamble to the CGSO Code expressly provides that a breach of the Code is considered a breach of section 82(8) of the CPA.¹²⁷⁴ Therefore, the respondents' attention should be drawn to this provision when dealing with institutions such as the CGSO; and once there is lack of cooperation, the matter should be referred either to the provincial consumer protection authority or to the Commission in order for a compliance notice to be issued.¹²⁷⁵

In line with the proposed enforcement hierarchy elaborated below,¹²⁷⁶ it would be preferable for the CGSO to approach a relevant provincial consumer protection authority for the issuing of a compliance notice. Approaching the relevant provincial consumer protection authority would also reduce the load of first instance matters that are brought directly to the Commission. Failure to adhere to the compliance notice is an offence in terms of section 110(2) of the CPA and should be prosecuted accordingly. It is therefore unnecessary to enact or amend legislation on this aspect. More energy should be focused on giving effect to existing provisions.

It has been highlighted, however, that there is a general reluctance to focus on consumer law matters in the already burdened criminal justice system.¹²⁷⁷ Accordingly, it may be worth establishing a specialised unit within the NPA that will focus solely on consumer-related offences. It may also be worthwhile for a section in each magistrate's court to be allocated to hear matters relating to consumer

¹²⁷³ Koekemoer (2017) 40 *JCP* 419 at 431.

¹²⁷⁴ See Preamble to the CGSO Code.

¹²⁷⁵ In this respect, s 84(a) of the CPA empowers the provincial consumer protection authorities to issue compliance notices. See discussion above under para 3.6.2.2 in Ch 3.

¹²⁷⁶ See discussion above under para 5.5 in this chapter.

¹²⁷⁷ See discussion above under para 2.3.2.1(c) in Ch 2 (see n 90).

offences.¹²⁷⁸ Should the necessary resources not be dedicated to the establishment of such a unit, the offences created by the CPA will remain ineffective due to strained resources.

In addition, ombuds such as the CGSO should encourage parties before them to have agreements made into consent orders in terms of section 70(3) of the CPA and subsequently confirmed by the Tribunal. To give better effect to this option, there should be a memorandum of understanding (MOU) in place between the CGSO and the Tribunal setting out a referral protocol that makes it possible for the CGSO ombudsman to refer the parties to the chairperson of the Tribunal who can then direct the matter appropriately. This referral process should take place in the shortest possible time and, ideally, should not take more than two weeks to settle. A breach of a consent order that has been confirmed by the Tribunal is an offence in terms of section 109 of the CPA, and would attract the necessary penalties in terms of section 111 of the CPA.

The last substantive aspect with regard to the CGSO relates to the finding in the CGSO's compendium of cases that complex legal matters should be referred to the Tribunal or the Commission as they are better equipped by statute to handle such matters.¹²⁷⁹ From a statutory competence perspective, it is submitted that the provincial consumer protection authorities also have the relevant statutory backing to conduct investigations.¹²⁸⁰ What they may be lacking at present is resources. However, it is suggested that the provincial consumer protection authorities be tasked with the determination as to whether a particular matter is too complex for them to investigate. Should it be so, there should be an MOU with a referral protocol that permits the provincial consumer protection authority to escalate the matter to the Commission for investigation.

As regards form, there is also an error that ought, for the sake of legal certainty, to be corrected in the CGSO Code. In this regard, the CGSO Code makes reference to

¹²⁷⁸ In the same way that every division of the High Court is deemed to be an Equality Court in terms of s 16 of the PEPUDA.

¹²⁷⁹ See discussion under para 3.6.2.1.1(f) of Ch 3 above.

¹²⁸⁰ See discussion above under para 2.3.2.2(a) in Ch 3 above.

clause 11.2.7.6 in clause 11.3.1, which appears to be a cross-referencing error, as the former clause refers to the CGSO's discretion to treat a complaint concerning a vulnerable consumer, as if the consumer concerned has already approached the participant.¹²⁸¹ Accordingly, it would be helpful for the CGSO to update its code and refer to the correct clause, which appears to be clause 11.2.7.3 of the CGSO Code. This clause makes reference to referring the matter to the participant to give it an opportunity to resolve the matter. This fits well into the current wording of clause 11.3.1 as it addresses to the referral of a matter to a participant for resolution.

5.3 The provincial system

5.3.1 Successes at provincial level

The first commendable characteristic in the provincial consumer protection dispensation currently applicable in Gauteng, is the preventative and pro-active mechanisms in place, namely: (i) the power of the Gauteng provincial consumer protection office to institute an investigation of its own accord; and (ii) the Consumer Protector's power to institute a general action once an investigation has been completed, with the view to prohibiting any business practice or a business practice relating to a particular commodity or investment.¹²⁸²

In the second instance, the publication aspect in respect of orders prohibiting unfair business practices in a wide range of media, including the *Government Gazette*, newspapers, magazines, radio, or television is important not only for consumer awareness, but also to act as a deterrent for businesses who may potentially be adversely affected by negative publicity. From a consumer awareness perspective, the wide range of media is important as it is unlikely that many consumers actively follow notifications in the *Government* or *Provincial Gazettes*.

Another important innovation introduced by the Limpopo CPA is the register of adverse notations in which the Consumer Protector is required to maintain a detailed record of all persons who have been found to have engaged in prohibited

¹²⁸¹ See discussion above under para 3.6.2.1.1 in Ch 3 above (see n 381).

¹²⁸² See discussion under para 2.3.2.2(a) of Ch 2 above.

conduct.¹²⁸³ This register also has the potential to act as an effective deterrent; however, it is recommended that it is not kept as an internal document of the office of the Consumer Protector to be publicised only in annual reports. Instead, it may be worthwhile for the register to be made available on the website of each provincial consumer protection authority and updated on a regular basis so as to act as an effective deterrent.

5.3.2 Shortcomings at provincial level

There is, nevertheless, considerable room for improvement in so far as the provincial system of consumer protection enforcement is concerned. A major concern is the fact that the provincial legislation is either: (i) based on outdated legislation; or (ii) not fully compatible with the CPA, the Constitution, and other provincial statutes.¹²⁸⁴ In this respect it is recommended that a primary framework be established by a full sitting of the National Council of Provinces, which can then be rolled out to each province and amended only in so far as is necessary in the context of a particular province. This would ensure that there is a minimum harmonisation framework, thus establishing a standard for the enforcement of provincial consumer protection legislation.

An important shortcoming, highlighted by Du Plessis, relates to the enforcement and execution of orders made by the consumer courts.¹²⁸⁵ In this regard, Du Plessis indicates that there have been instances where orders granted by the consumer courts have been ignored and contempt of court criminal proceedings still did not lead to the aggrieved consumer being duly compensated.¹²⁸⁶ From this observation, Du Plessis suggests that: (i) it is necessary for the provincial legislation to be amended in order to provide for enforcement and execution of orders by the consumer court; (ii) the NPA should work together with the Consumer Protector's

¹²⁸³ Section 12(1) of the Limpopo CPA.

¹²⁸⁴ An illustrative example in this respect is s 25 of the Gauteng Consumer Affairs Act, which provides parties with an option to appeal to a specialised court established in terms of the national Consumer Affairs Act 71 of 1988. Accordingly, when the relevant revisions are made, appeals should lie to the relevant bodies established by the CPA. Another example discussed above relates to the aspect of producing self-incriminating evidence contrary to s 35(3)(j) of the Constitution. Careful consideration should also be given to such provisions when the provincial legislative scheme is revised.

¹²⁸⁵ See generally Du Plessis (2010) 22 *SA Merc LJ* 517.

¹²⁸⁶ *Ibid* at 521-523 with reference to the matter of *Rakgadi Nyusawa v Patwell Funderals CC (represented by PL Mhlongo)* G CC 240/13/06/06 and *S v PL Mhlongo* (Benoni) CAS 154/01/08.

office as regards the prosecution of certain matters – such as contempt of court orders resulting from consumer proceedings; and (iii) compensation can be awarded to aggrieved consumers as contemplated in section 300 of the Criminal Procedure Act.¹²⁸⁷ These are certainly solutions that should be borne in mind when reviewing the provincial consumer protection legislation.

It is also critical that functional consumer courts and provincial consumer protection offices be established in each of the nine provinces.

5.4 The national system

5.4.1 Successes at a national level

One of the commendable features of the current CPA, is the scope of protection it extends to small businesses which fall within the definition of a consumer.¹²⁸⁸ From the above comparative study, it is clear that: (i) in India, although the Indian CPA extends its protection to juristic persons, it does not protect them in so far as they are acting for a commercial purpose;¹²⁸⁹ and (ii) the UK-CRA's protection does not extend to juristic persons at all, and it expressly excludes those acting wholly or mainly within their crafts/businesses.¹²⁹⁰ At a provincial level, the pre-existing consumer protection legislation also did not extend its protection to juristic persons. Indeed, such unduly restrictive definitions would not be beneficial for economic development in South Africa where small businesses enter into transactions with large entities such as wholesalers and suppliers in the ordinary course of their businesses. It cannot be taken for granted that small businesses which fall within the definition of a consumer, as defined in the CPA, would have equal or any bargaining power in such transactions as they are often not as well-resourced as large corporates. The protection of juristic persons which fall within the prescribed threshold, is undoubtedly beneficial in a developing economy like ours. Nevertheless, the threshold itself should be revised periodically to ensure that all the

¹²⁸⁷ Ibid at 523.

¹²⁸⁸ See discussion in para 3.2 of Ch 3 above.

¹²⁸⁹ See discussion in para 4.2.5.1 of Ch 4 above.

¹²⁹⁰ See discussion in para 4.3.4.2 of Ch 4 above.

small juristic persons which are intended to benefit from its protection, are still covered by the CPA.¹²⁹¹

In addition, the codification and consolidation of consumer protection legislation through the CPA is also commendable, as it makes a sound attempt to capture aspects of consumer transactions that were regulated in terms of various statutes into a single Act of parliament. That said, the first attempt does need to be improved so as to give better effect to the realisation of consumer rights. The aspects requiring improvement are discussed below.

5.4.2 Shortcomings at a national level

(a) Absence of consumer protection groups

A group of organisations that appear to be missing from the consumer protection law enforcement 'food chain' are the consumer protection groups, and accredited consumer protection groups in particular. As mentioned above, there are many aspects on which accredited consumer protection groups may provide the Commission with support, and this is a partnership that does not appear to have taken off in any meaningful respect. It is suggested that awareness be created, particularly within the legal fraternity, regarding the role of accredited consumer protection groups, and that lawyers be incentivised to form such groups. Public-private partnerships of this nature would surely assist in the administration of redress under the CPA.

(b) Prescription

As mentioned above, although the Tribunal has accorded a wide interpretation to the prescription provisions in the CPA, it would be beneficial for the interruption of

¹²⁹¹ See Schedule to the National Small Business Act, 1996, which sets out the various thresholds for micro, very small, small, and medium businesses in each industry. In this regard, a number of business which are categorised as small in terms of the National Small Business Act are above the R2 million threshold and would thus not be protected. It would be for the Minister to revise this threshold from time to time in order to ensure that the necessary entities are covered.

prescription to be included in section 116 of the CPA.¹²⁹² In this regard, the following amendments are suggested:¹²⁹³

116. Limitations of bringing action
- (1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after—
- (a) the act or omission that is the cause of the complaint; or
 - (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

Provided that the consumer was aware, or ought reasonably to have been aware, of the claim available in terms of this section 116.

- (1A) The three year period contemplated in subsection (1) shall be interrupted by referral of a complaint to an alternate dispute resolution agent.
- (2) A complaint in terms of this Act may not be referred to the Tribunal or to a consumer court in terms of this Act, against any person that is or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.

(c) The equality provisions

The inconsistencies between the CPA and the PEPUDA were discussed in Chapter 3 above in considerable detail.¹²⁹⁴ Accordingly, the following legislative amendments are proposed:¹²⁹⁵

10. Equality court jurisdiction over this Part

- (1) In respect of an alleged contravention of this Part, an accredited consumer protection group, or any person contemplated in section 20(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, may either—
- (a) institute proceedings before an equality court in terms of Chapter 4 of that Act; or
 - (b) file a complaint with the Commission, which must refer the complaint to the equality court, if the complaint appears to be valid.

¹²⁹² See discussion under para 3.8.2 of Ch 3 above.

¹²⁹³ General explanatory note: Words in square brackets indicate omissions from existing enactments and words underlined with a solid line indicate insertions in existing enactments.

¹²⁹⁴ See discussion under para 3.6.5.2 in Ch 3 above.

¹²⁹⁵ General explanatory note: Words in square brackets indicate omissions from existing enactments and words underlined with a solid line indicate insertions in existing enactments.

- (2) In any proceedings contemplated in this Part—
- (a) where the consumer *prima facie* establishes that the **[there is a presumption that any]** differential treatment contemplated in section 8 is unfair discrimination, the burden of proof shall shift to the supplier to **[unless it is established]** establish 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]** is 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.

(d) Unused or absent definitions

As mentioned in Chapter 3 above, the term ‘used goods’ is not found anywhere in the CPA, other than in section 1 where the term is defined.¹²⁹⁶ It is submitted that it is very important to ensure that second-hand goods fall within the scope of goods subject to the provisions of the CPA, particularly for purposes of protecting the most vulnerable in society. Accordingly, it is proposed that section 1 of the CPA be amended as follows:¹²⁹⁷

‘goods’ or ‘used goods’ includes—

- (a) anything marketed for human consumption;
- (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
- (c) any literature, music, photograph, motion picture, game, information, data software, code or other intangible product written or encoded on any medium or a licence to use any such intangible product;

¹²⁹⁶ See para 3.2 in Ch 3 above.

¹²⁹⁷ General explanatory note: Words in square brackets indicate omissions from existing enactments and words underlined with a solid line indicate insertions in existing enactments.

- (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section; and
- (e) gas, water and electricity.

As has also been indicated above, the absence of a definition for the term 'ordinary course of business' may lead to legal uncertainty.¹²⁹⁸ The interpretation applied by the Tribunal in *Doyle* is logical in that 'ordinary course of business' should denote some level of regularity in the business being conducted.¹²⁹⁹ However, until it has been legislated, the possibility always exists that the interpretation may be set aside. This is certainly an aspect that is necessary to clarify for purposes of establishing the intended scope of application of the CPA. It is thus recommended that the following definition be inserted into the CPA:¹³⁰⁰

'ordinary course of business' means the transactions intrinsically linked to a business, taking into account the following factors:

- (i) Whether the person has a registered business;
- (ii) The nature of the business that the person engages in;
- (iii) The nature of the goods or services normally provided or rendered by the person;
- (iv) The frequency with which the goods or services are provided or rendered by the person; and
- (v) Whether the person advertises or markets the goods or services concerned.

(e) Corrections

As mentioned in Chapter 3 above, reference in the first row of Table 1B of the Tribunal Rules to section 6(2) appears to be incorrect. The more appropriate section in this respect would be section 60(2) regarding the written notice that may be provided to a producer in respect of unsafe goods.¹³⁰¹

¹²⁹⁸ See para 3.2 in Ch 3 above.

¹²⁹⁹ See para 3.2 in Ch 3 above. This interpretation appears also to apply to services as contemplated in the Indian Constitution. See discussion above under para 4.2.5.2 in Ch 4 above.

¹³⁰⁰ General explanatory note: Words in square brackets indicate omissions from existing enactments and words underlined with a solid line indicate insertions in existing enactments.

¹³⁰¹ See para 3.6.4.3 in Ch 3 above (see n 629).

(f) Proceedings before the Tribunal

Given the current challenge facing the Tribunal, namely, where attorneys raise technical points to defend their clients against vulnerable unrepresented consumers who come before the Tribunal, it may be worthwhile for the Tribunal to consider appointing members to perform a representative function for consumers at the expense of the state. It is submitted that it may be unrealistic to expect that the Tribunal Rules be avoided completely as, from a legal and procedural fairness perspective, they facilitate information-sharing between the parties and the Tribunal, which would undoubtedly also assist the Tribunal in penning its judgments as a Tribunal of record.

Alternatively, in order to ensure that the interests of consumers are adequately protected, the following discretionary power (similar to that afforded to courts under s 58 of the CRA) could be included in the NCA under the powers of the Tribunal:¹³⁰²

144. Powers of member presiding at hearing

- (1) The member of the Tribunal presiding at a hearing may—
- (a) direct or summon any person to appear at any specified time and place;
 - (b) question any person under oath or affirmation;
 - (c) summon or order any person—
 - (i) to produce any book, document or item necessary for the purposes of the hearing; or
 - (ii) to perform any other act in relation to this Act; and
 - (e) give directions prohibiting or restricting the publication of any evidence given to the Tribunal.
- (2) In any proceedings in which a remedy contemplated in the Consumer Protection Act 68 of 2008 is sought, the members of the Tribunal may, if the consumer claims to exercise a right under provision(s) of the Consumer Protection Act 68 of 2008, but the Tribunal decides that those provisions have the effect that exercise of another right is appropriate, proceed as if the consumer had exercised that other right.

¹³⁰² General explanatory note: Words in square brackets indicate omissions from existing enactments and words underlined with a solid line indicate insertions in existing enactments.

It is submitted that the above power afforded to Tribunal members ought to be discretionary, as there may be circumstances in which its exercise may be inappropriate. It would also guard against the potential abuse of the Tribunal process by consumers. However, having the power expressly set out in the NCA is important given that the Tribunal is a creature of statute.

It may further be beneficial for a similar provision to be introduced in the CPA with respect to the Commission. It is recommended that this discretionary power be included in the CPA under Part B of Chapter 6 (Powers in support of investigation) as follows:¹³⁰³

106A: General discretionary power of the Commission

(1) In respect of any complaint received by the Commission, the Commission may, if the consumer claims to exercise a right under provision(s) of the Act, but the Commission decides that those provisions have the effect that exercise of another right is appropriate, proceed as if the consumer had exercised that other right.

Given the hierarchy proposed below, it is recommended that a similar discretionary power be included in provincial legislation relating to the consumer courts.

5.5 Absence of a clear hierarchy and suggested solution

As discussed in Chapter 3 above,¹³⁰⁴ the procedure prescribed for the enforcement of consumer rights is not clear-cut and has caused frustration to consumers as well as some of the bodies tasked with the enforcement of consumer rights. Furthermore, due to an overload in matters before it, the Commission is currently only considering “endemic harmful business practices and trends” and policy issues,

¹³⁰³ General explanatory note: Words in square brackets indicate omissions from existing enactments and words underlined with a solid line indicate insertions in existing enactments.

¹³⁰⁴ See para 3.2 in Ch 3 above.

meaning that individual complaints are no longer subject to investigation by the Commission.¹³⁰⁵

The lack of a clear process for the enforcement of consumer rights will have a negative impact on the realisation of consumer rights. From the comparative analysis above, the position in India is that a complainant seeking to lodge a complaint may, as a point of departure, approach the appropriate consumer protection council for advice on a right of recourse, and will also be guided by the jurisdictional requirements as to whether she will approach the district forum or the state and national commission.¹³⁰⁶ On the other hand, in the UK the consumer will approach the relevant enforcers, which ultimately approach an ordinary court in order to enforce the claim.¹³⁰⁷ It is submitted that the Indian system is preferable to that of the UK, given that it provides for a specialised consumer law enforcement system. However, imposing a three-tiered consumer protection enforcement system would require a total overhaul of the South African consumer protection law framework, which is unwarranted.

It is submitted that a more efficient system can be established by effectively utilising the mechanisms that have already been put in place by the CPA and the NCA. In this regard, the first port of call in all consumer-related matters should be the provincial consumer protection authority. This would, of necessity, require that the provincial consumer legislation be aligned fully with the current CPA, and that all of the rights available in the CPA be incorporated into the provincial statutes. It would also require that the necessary resources be invested by the state to ensure that functional consumer courts are established in each of the nine provinces, as well as the relevant consumer protection office that should work hand in hand with a consumer court.

At the outset, a distinction should be made, in this respect, between a provincial consumer protection office and a consumer court (both which would fall under the

¹³⁰⁵ Woker (2017) 29 *SA Merc LJ* 1 at 6.

¹³⁰⁶ See para 4.2.5.6 in Ch 4 above.

¹³⁰⁷ See para 4.3.4.4(d) and generally para 4.3.4.5 in Ch 4 above.

umbrella of a provincial consumer protection authority but serve different functions). In this regard, once a complaint has been lodged with the provincial consumer protection office, the office should screen the matter and refer it either to an ombud with jurisdiction, an industry ombud, or any other ADR forum. This referral process should take place within three days of the complaint being lodged with the provincial consumer protection office. The logic is that the provincial consumer protection office will be able to assess which sector would be best suited to handle the complaint as expediently as possible, taking into account the expertise and resources required to consider the complaint. Should there be no entity well suited to handle the complaint, the provincial consumer protection office must then handle the matter internally. In the event that any of the bodies to which the matter has been referred are unable to resolve the dispute within fifteen business days, the consumer, or the body to whom the matter has been referred, may refer the matter back to the provincial consumer protection office, which must then investigate and either resolve the matter, or refer it to the consumer court for prosecution. Ideally, consumer-related matters should be resolved by the provincial consumer protection office within 30 business days of the second engagement with the consumer. In instances where a provincial consumer protection office needs to be capacitated, private redress agencies should be engaged as service providers to render the necessary support services. This would also mean that the operational costs of the provincial consumer protection authority will then only be increased periodically in accordance with the workload at any given time.

It should be borne in mind that the provincial consumer protection authority has the power, in terms of the CPA, to, inter alia, issue a compliance notice on behalf of the Commission;¹³⁰⁸ and thus any failure to comply with the compliance notice can be dealt with as a breach in terms of the CPA. Bearing in mind Du Plessis's valid submission that orders made by the consumer court could carry the same weight as those made by the Tribunal (and the implication that such consumer court judgments have the status of High Court judgments), the consumer courts should, in such instances, have the power to execute on their orders.¹³⁰⁹

¹³⁰⁸ See section 84(a) of the CPA.

¹³⁰⁹ See n446 under para 3.6.2.2. in Ch 3 above.

An aspect that may well be worth borrowing from the Indian system of consumer protection law enforcement is the appeal process. Accordingly, an aggrieved party should be able to lodge an appeal with the Commission.¹³¹⁰ The Commission should then conduct further investigations into the matter and decide whether or not to refer the matter to the Tribunal. This process should ideally not take longer than fifteen business days. The matter should then be heard by the Tribunal. Where the appeal is heard by a single member of the Tribunal, it should be possible for a further appeal to be made to a full bench of members, and thereafter, the final judgment may be handed down by the Tribunal.

Using the provincial consumer protection authorities as the primary point for lodging a complaint will reduce the traffic of the matters that come directly to the Commission, and by the time that they reach the Commission for investigation, or the Tribunal for hearing, there would have been attempts to resolve the dispute through ADR. It may also be worthwhile to consider adopting the UK's central record-keeping mechanism. In this respect the CMA is the body in the UK that is notified of all actions taken by any of the enforcers (and it also keeps records of action it takes itself). In this respect, the Commission may maintain such a record-keeping function, which would align well with its monitoring function as set out under section 99 of the CPA. All the records accumulated in each financial year may then be published in the annual report of the Commission.

It is submitted that the matters that are reserved for the exclusive jurisdiction of the ordinary courts – primarily as a result of the compromise reached with the DTI – may not be in the interest of consumers, and may, in certain instances, be exclusionary for indigent consumers. In addition, the prerequisites for persons who sit as

¹³¹⁰ It is noted, for the sake of completeness, that although the Commission is currently only hearing endemic matters, this should not be the case. Section 99(b) of the CPA provides that part of the Commission's enforcement function is to receive complaints that concern prohibited conduct or offences committed under the Act, and to address these complaints in terms of Part B of Chapter 3 (which provides for: (i) an investigation process; and (ii) procedures for handling the outcome of the investigation ie. by way of referral or non-referral notices, proposed consent orders, or compliance notices as discussed in para 3.6.3.2 in Ch 3 above). Accordingly, it is submitted the proposed appeal procedure is in line with the statutorily enshrined enforcement function of the Commission.

members of the Tribunal or consumer courts, ensure that such persons have the relevant legal expertise to assess matters relating to unfair terms.¹³¹¹ It is therefore recommended that the exclusive jurisdiction of the ordinary courts be reversed when amendments to the CPA are considered. Detailed legislative amendments in this respect are not considered as they are not central to the enforcement mechanisms available to consumers under the CPA.

Having regard to the above discussion, it is recommended that section 69 should be amended as follows:¹³¹²

69. Enforcement of rights by consumer

(1) A person contemplated in section 4(1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by **[(a) Referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute];** referring the matter to the relevant provincial consumer protection authority.

[(b)] (2) The provincial consumer protection shall then refer the matter—

(a) **[referring the matter]** to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud; or

[(c) if the matter does not concern a supplier contemplated in paragraph (b)—]

[(i)] (b) **[referring the matter]** to the applicable industry ombud, accredited in terms of section 82(6), if the supplier is subject to any such ombud; or

[(ii) **applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;]**

[(iii)] (c) [referring the matter] to another alternative dispute resolution agent contemplated in section 70. **[Or]**

(3) Should the resolution of the dispute remain unsuccessful within 15 business days of referral as contemplated in subsections (2)(a), (b) or (c), then the provincial consumer authority shall refer the matter to the consumer court for hearing subject to the law establishing or governing that consumer court.¹³¹³

¹³¹¹ See prerequisites as discussed under para 2.3.2.2(a) in Ch 2 above and under para 3.6.4.2 in Ch 3 above.

¹³¹² General explanatory note: Words in square brackets indicate omissions from existing enactments and words underlined with a solid line indicate insertions in existing enactments.

¹³¹³ The laws establishing and governing the consumer court should be similar to those applicable to the initiation of a complaint as contemplated in s 71 of the CPA.

(4) Should either or both of the parties to the dispute be unsatisfied with the outcome of the matter as decided by the consumer court, the aggrieved party may—

(a) appeal to the Commission in terms of section 71 of the Act; or

(b) directly appeal to the Tribunal, where such a direct referral is permitted by this Act.

(5) Notwithstanding the above, the parties may approach the Tribunal directly, if such a direct referral is permitted by this Act.

[(iv) filing a complaint with the Commission in accordance with section 71; or]

[(v) (6) The consumer may only approach [approaching] a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.

A necessary amendment flowing from the suggested hierarchy for the enforcement of consumer rights, is an amendment of section 84 of the CPA. In this respect, it is suggested that the operation of a business should not be restricted exclusively to that province as this would make it unnecessarily difficult for consumers to approach the provincial consumer protection authorities where, for instance, a supplier has branches across the Republic and is thus not conducting its business ‘exclusively’ within a particular province. Where an entity is conducting its business in multiple provinces, the consumer courts should make provision in their orders for the head office to be made aware of any judgment issued by a consumer court in any given province, and it will then need to issue the relevant communication to its branches to prevent repeated offences by the same entity. The amended section would therefore read as follows:¹³¹⁴

84. Provincial consumer protection authorities

A provincial consumer protection authority has jurisdiction within its province to—

- (a) issue compliance notices in terms of this Act on behalf of the Commission to any person carrying on business **[exclusively]** within that province.

¹³¹⁴ General explanatory note: Words in square brackets indicate omissions from existing enactments and words underlined with a solid line indicate insertions in existing enactments.

One of the biggest frustrations facing consumers is being sent from forum to forum and having to re-lodge their complaint each time.¹³¹⁵ Based on the above recommended enforcement procedure, it may be appropriate for section 70(2) of the CPA to be amended in order to cater for referrals directly to the next forum – eg, if the consumer wishes the matter to proceed from the GSCO to the provincial consumer authority, the matter will be referred by the CGSO to the provincial consumer authority so avoiding the necessity of the consumer having to re-lodge her complaint. An MOU may set out the exact logistics in this regard. Accordingly, the following legislative recommendation is made:¹³¹⁶

70. Alternative dispute resolution

- (1) Subject to the procedure set out in section 69, [A] a consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent who may be—
- (a) an ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
 - (b) an industry ombud accredited in terms of section 82(6), if the supplier is subject to the jurisdiction of any such ombud;
 - (c) a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud; or
 - (d) applying **[to the consumer court of]** to the provincial consumer protection authority [province] with jurisdiction over the matter **[, if there is such a consumer court,]** subject to the law establishing or governing that **[consumer court]** provincial consumer protection authority.
- (2) If an alternative dispute resolution agent concludes that there is no reasonable probability of the parties resolving their dispute through the process provided for, the agent may terminate the process by notice to the parties, whereafter the agent may, with the consent of the party who referred the matter to the agent [may file a complaint with the Commission in accordance with section 71], lodge or re-lodge the complaint with the provincial consumer protection authority and the matter shall resume in terms of section 69(3) of this Act.
- (2A) An aggrieved party, may follow the appeal procedure set out in section 69(4) of this Act.

¹³¹⁵ This was also raised as a concern by Magauta Mphahlele from the CGSO during the panel discussion and it was suggested that it should be possible for the ADR agents to make a direct referral to either the Commission or the Tribunal.

¹³¹⁶ General explanatory note: Words in square brackets indicate omissions from existing enactments and words underlined with a solid line indicate insertions in existing enactments.

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- (3) If an alternative dispute resolution agent has resolved, or assisted parties in resolving their dispute, the agent may-
 - (a) record the resolution of that dispute in the form of an order, and
 - (b) if the parties to the dispute consent to that order, submit it to the Tribunal or the High Court to be made a consent order, in terms of its rules.
- (4) With the consent of a complainant, a consent order confirmed in terms of subsection (3)(b) may include an award of damages to that complainant.

The following amendments would then be necessary to section 71 of the CPA:¹³¹⁷

71. Initiating complaint or appealing to the Commission

- (1) Any person may **[file a complaint]** appeal to the Commission concerning a matter contemplated in **[section 69(c)(iv)]** 69(4)(a) with the Commission in the prescribed manner and form, alleging that a person has acted in a manner inconsistent with this Act.
- (2) The Commission may directly initiate a complaint concerning any alleged prohibited conduct on its own motion, or—
 - (a) when directed to do so by the Minister in terms of section 86(b); or
 - (b) on the request of—
 - (i) a provincial consumer protection authority;
 - (ii) another regulatory authority; or
 - (iii) an accredited consumer protection group.

Of necessity, the definition of complainant in section 1 would require an amendment in order to fall within the proposed structure.¹³¹⁸

'complainant' means—

- (a) a person who has referred a matter to the relevant forum as contemplated in section 69; or
- [(a)](b)** a person who has filed **[a complaint]** an appeal with the Commission in terms of section 71; or
- (b) the Commission in respect of a complaint that it has initiated, either directly or at the—
 - (i) direction of the Minister in terms of section 86(b); or

¹³¹⁷ General explanatory note: Words in square brackets indicate omissions from existing enactments and words underlined with a solid line indicate insertions in existing enactments.

¹³¹⁸ General explanatory note: Words in square brackets indicate omissions from existing enactments and words underlined with a solid line indicate insertions in existing enactments.

- (ii) request of a provincial consumer protection authority or other regulatory authority, as the case may be.

5.6 Consumer awareness

Consumer awareness is arguably the most important aspect of consumer protection law as consumers need to know what rights they have at their disposal and the process of enforcement must be easy to follow. As a first step, it is submitted that more matters relating to consumer protection law should be made available in the public space. The use of publications is a mechanism that is used by the CMA in the UK, as well as the provincial consumer protection authority in Gauteng, and, it is submitted, this mechanism can also be used to create greater awareness and provide guidance to businesses and consumers alike, on their rights and avenues for redress.¹³¹⁹ The global move towards digitisation also means that there should be greater use of social media platforms, such as twitter, to communicate orders that have been made by institutions such as the Commission and the Tribunal.¹³²⁰ It is important for such forums to be present in public spaces and not to be restricted to their websites and legal databases so that justice can also be 'seen to be done'.

In addition, all consumer protection forums (including the provincial consumer protection authorities and the ombuds) should have user-friendly and accessible websites. These online platforms should include digital functions on which consumer complaints can be lodged and monitored. The online functions should also make it easy for data to be collated and used for the development and improvement of the consumer protection dispensation. The data collated may, for instance, be used to determine, inter alia, whether it is necessary to establish further branches of the provincial consumer protection authority in various regions of the province in order to improve accessibility to consumers. Similarly, resources should be invested in the

¹³¹⁹ See discussion under para 2.3.2.2(a) in Ch 2 above and para 4.3.4.4(e) in Ch 4 above.

¹³²⁰ It is worth noting that judgment summaries and pending summaries of hearings are frequently posted on twitter by the Constitutional Court of South Africa, the highest court in South Africa. See ConcourtSA twitter page available at <https://twitter.com/concourtsa?lang=en> (accessed on: 20 April 2018). The Competition Commission also makes use of social media platforms such as twitter, see Commission twitter page available at https://twitter.com/CompComSA?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (accessed on: 20 April 2018). This also holds true for the Competition Tribunal, see Tribunal twitter page available at <https://twitter.com/comptrib?lang=en> (accessed on: 20 April 2018).

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establishment and maintenance of all infrastructures necessary give effect to the realisation of their rights by consumers.

Finally, there should also be a move by the Commission towards encouraging the formation of consumer protection organisations, which will then be able to assist with consumer education and creating awareness in society regarding consumer rights and the enforcement mechanisms in place. This is crucial for purposes of taking forward the consumer protection agenda. Consumer protection organisations do not appear to have taken off in South Africa, but this may be linked to the perceived absence of an operating system in which consumer issues can be addressed.

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6 Conclusion

The new consumer protection dispensation in South Africa has brought commendable changes for the benefit of consumers. However, seven years from its commencement date, the true realisation of consumer rights is still a work in progress that requires both an investment of resources by the state and political will. Whilst the basket of rights available offer consumers a great amount of protection in theory, in practice, the redress available to consumers is not yet as effective as it could be due to the lack of resources and the current lack of clarity on the enforcement procedure.

In this thesis the existing consumer protection law enforcement framework in South Africa, both before and after the enactment of the CPA, has been critically discussed, followed by an in-depth comparative analysis with the consumer protection law enforcement frameworks in place in India and the United Kingdom, which was particularly helpful in highlighting the successes and shortcomings of the current consumer protection legislation in South Africa and putting forward recommendations as to how the framework can be improved. It is clear from the above discussion that, at this stage, sufficient steps have not been taken to give life to South Africa's consumer protection laws. This has worked to the detriment of those the CPA intends to protect – the consumers.

The hypothesis at the outset of this thesis, namely that the CPA does in fact afford consumers adequate rights that are in line with internationally accepted consumer protection standards, but that redress mechanisms available to consumers are not particularly clear under the CPA, was correct. Consumer access to justice is

inhibited as consumers are, firstly, not aware of their rights, and, secondly, are not aware of how to enforce their rights.

The only way in which this can be addressed, is through the establishment of a clear hierarchy to be followed in enforcing consumer rights and ensuring that there is sufficient cooperation and collaborative efforts. This is particularly important bearing in mind that section 83 of the CPA requires that the exercise of concurrent jurisdiction take place in a co-operative manner which requires that that provincial and national bodies work hand-in-hand. It is also crucial that legislation at provincial and national levels 'speak to each other'.

The consumer protection dispensation needs to be revised at an ombud, provincial, and national level in order to make it clear to consumers what their avenues of redress are. Furthermore, funding should be allocated by the state to the various entities that fall within the consumer protection 'food chain', including accredited industry ombuds and accredited consumer protection groups. Lastly, consumer awareness and consumer education must be prioritised so as to ensure that justice is 'seen to be done' and faith is restored in the effectiveness of the consumer protection system.

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